IN THE ARBITRATION UNDER CHAPTER ELEVEN

OF THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

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

Thursday, April 18, 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 10:43 a.m. before:

JUDGE FLORENTINO P. FELICIANO, President

PROFESSOR ARMAND DE MESTRAL

MS. CAROLYN B. LAMM

UCHEORA ONWUAMAEGBU, Secretary of the
Tribunal

APPEARANCES:

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1 P R O C E E D I N G S
2 PRESIDENT FELICIANO: Good morning. We
3 thank you for being with us again today. I hope we
4 don't have to go beyond today. I am going to ask
5 Ms. Lamm to initiate this process by raising the
6 first questions.
7 MS. LAMM: Okay. We have many questions
8 for both sides, and we do want to hear both sides'
9 responses on the questions, and we are raising them
10 not because anyone has reached any conclusions, but
11 in thinking through kind of the decision tree of
12 where we have to go on certain issues, these have
13 just become areas that we want to make sure we have
14 the parties' contentions fully in mind.
15 On procurement and the definition of
16 "procurement" in Chapter Ten, the exclusion for
17 grants and aid, we are still struggling with the
18 implications of that, and we understand the U.S.
19 argument that it's really just a provision of
20 scope. But we're struggling with the meaning of
21 that for other chapters. And if, in fact, grants

1 are excluded from the definition of procurement
2 under Chapter Ten, what are the implications of
3 that if we were to--you know, assuming arguendo you
4 use that approach to procurement in Chapter Eleven,
5 does that mean they are nonetheless included under
6 the Chapter Eleven disciplines when you're
7 analyzing it? And one indication that we've seen
8 is looking on page 695, Annex IV, the United
9 States--and, actually, all of the countries, if you
10 look at the schedules--all of the countries do
11 exclude certain foreign aid programs. And the
12 question is: If these things are not covered, why
13 was there an exclusion if all grants or aids or
14 whatever are not covered?
15 And this isn't to say that we've reached
16 any conclusions at all, but we were just troubled
17 about this issue and thought we would like to hear
18 from both parties with respect to that issue.
19 MR. KIRBY: Just a point of clarification,
20 and I still haven't found the provision because the
21 page reference is not--

1 MS. LAMM: Oh, I'm sorry. It's Annex IV.
2 It's the last paragraph in Annex IV.
3 MR. KIRBY: Of the United--
4 MS. LAMM: Right.
5 MR. KIRBY: But it's in everybody's
6 schedule.
7 MS. LAMM: Yes.
8 MR. KIRBY: But before we get to that
9 question--and this is just a procedural question,
10 and it's not meant to indicate anything at all but
11 just to inform me as to how we're going to proceed
12 during the day. Is the general round of questions
13 going to be addressed to the claimant first and
14 then to the United States? Or are we going to--
15 MS. LAMM: No, not necessarily, because
16 we--some questions arise because of certain
17 parties' contentions. So what we'll do is ask them
18 first, and then, of course, we want to hear from
19 the other party. And this one, it's really the
20 U.S.' contention that's at the bottom of it, so I
21 assume we would hear--we'd like to hear from them

1 first. I mean, they can have a few minutes to
2 discuss it if they want, and then we'll hear from
3 you.
4 MR. LEGUM: With the Tribunal's
5 permission, it would be useful for us to discuss
6 this for a couple of minutes.
7 MS. LAMM: Sure.
8 MR. KIRBY: Were you looking to me to
9 answer the question first? Because I can begin to
10 answer the question while my friends are--
11 MS. LAMM: Sure, if you're ready, if you--except
12 you don't want to discuss it. You want to
13 listen to what he has to say. Take a few minutes.
14 [Pause.]
15 MR. CLODFELTER: We're ready, when Mr.
16 Kirby's ready and when you are ready?
17 MS. LAMM: Are you ready?
18 MR. KIRBY: Yes, I am. And I will get to
19 the question of how do we insert that reservation
20 taken by Canada during the process. And I think
21 what your question goes to is how do we establish

1 what the difference is between what's in Chapter
2 Ten versus what's in Chapter Eleven and where do we
3 draw the distinction and have the chapters drawn a
4 distinction that is relevant to the inquiry.
5 I think the starting point for that--and I
6 think the starting point for everything before this
7 Tribunal--is the text of the agreement. We've
8 heard lots on Vienna Convention, et cetera, et
9 cetera. The text is what has to govern as a first
10 issue.
11 Chapter Eleven begins by saying that the
12 chapter--I'm sorry. Chapter Ten begins by saying
13 that the chapter applies to "measures adopted or
14 maintained by a party relating to procurement." It
15 doesn't say it applies to procurement. It applies
16 to measures relating to procurement.
17 I would say that one of the first issues--there's
18 lots of issue that arise from that. One of
19 the first issues for the drafters then was to say,
20 well, how can we deal with this, because there are
21 many measures relating to procurement that may be

1 not procurement. And what's happening in Chapter
2 Ten, Chapter Ten is more--much more of a
3 procurement process chapter rather than a general
4 chapter. The focus in just about every article
5 relates, obviously, to non-discrimination. But
6 there's a heavy emphasis on how the procedure will
7 work in terms of procurement.
8 You'll recall yesterday--I draw your
9 attention to an article which says you can have a
10 bid challenge to the procurement process, which is,
11 for the purpose of bid challenge, when the entity
12 indicates its requirement in a notice and that
13 starts off, that kicks off the process. So you can
14 complain about the notice and you can complain
15 about everything up to there until the final
16 contract. So there's necessarily an element of
17 process in there which doesn't quite fit handily
18 with the first expression, this chapter relates to
19 measures relating to procurement. What did the
20 drafters do? The drafters extracted from any
21 possibility that all measures--government

1 assistance would be considered a measure relating
2 to procurement by simply taking out government
3 assistance from that chapter. Procurement does not
4 include government assistance.
5 Where is government assistance, all forms
6 of government assistance? Clearly, time and again,
7 government assistance and, we would submit,
8 conditions attached to government assistance are
9 clearly found in Chapter Eleven, and the drafters
10 of Chapter Eleven spent a good deal of time and
11 thought into what that means.
12 Now, if you could turn to Article 1106 to
13 show what they've been doing in Article 1106,
14 Article 1106--and we're interested in 1106(1) and
15 (3) and 1106(1) paragraphs (b) and (c) and
16 1106(3)(a) and (b).
17 1106(1) is the imposition or the
18 enforcement of domestic content requirements; just
19 in general it's prohibited on the investor.
20 1106(3) states that you cannot impose a condition
21 on the receipt or continued receipt of an advantage

1 on domestic content requirements. So domestic
2 content requirements are dealt with twice in 1106,
3 in 1106(1) and 1106(3). You can't impose them, you
4 can't enforce them, and you can't condition the
5 receipt or continued receipt of an advantage.
6 The expression "the continued receipt of
7 an advantage" means an advantage given by the
8 government. We contend that that expression
9 "advantage" clearly can include grants and other
10 forms of government assistance. I don't think
11 there's any debate on that, that any form of
12 government assistance would be properly considered
13 to be an advantage for the recipient.
14 In doing that--so clearly government
15 assistance is included in (3) where it says you
16 cannot condition the receipt of an advantage. And
17 what we are talking about in this case is
18 conditioning the receipt of an advantage.
19 Now, how do the parties deal with the
20 issue now of government procurement vis-a-vis
21 conditioning the receipt of an advantage? They

1 deal with that issue in Article 1108. Now they
2 have to try to carve out from this because why do
3 they need to deal with government procurement when
4 we're only talking about conditioning the receipt
5 of an advantage.
6 Well, the language "conditioning the
7 receipt of an advantage" is fairly broad. It's
8 conceivable--in fact, I would say it's quite
9 reasonable to argue the right to do business with
10 the government is an advantage, that mere right to
11 do business with the government. Conceivably,
12 therefore, getting to do business, selling to the
13 government is an advantage. So the negotiators
14 want to ensure that they take out from that because
15 it's already dealt with in Chapter Ten, that
16 procurement issue, how did they do it. They do it
17 in Article 1108(7) and Article 1108(8). And this
18 is where I think the clarity of the line is
19 apparent.
20 1108(7) is an exclusion which excludes
21 from national treatment and from 1103, most favored

1 nation treatment, two things. It excludes
2 procurement by a party, and it also excludes
3 subsidies or grants provided by a party.
4 So what does that operate on? That
5 doesn't operate on 1106. That operates only on
6 1102, 1103, and 1107. And just parenthetically you
7 will recall that our position on the 1102 issue is
8 that that national treatment exclusion works only
9 to one level, that you can't continue to push it
10 down through the economy.
11 But, clearly, 1108(7) does not deal with
12 the issues raised in 1106. For the exclusions in
13 1106--but it does tell you that the drafters of the
14 chapter distinguished between procurement on the
15 one hand and grants on the other hand. They're not
16 the same thing.
17 Now, when we turn to the exclusion in
18 respect of 1106, where again we've seen
19 conditioning the receipt of an advantage, that is,
20 conditions relating to grants, we see that
21 conditions relating to grants have not been

1 excluded under 1108(8). All that's excluded is
2 government procurement.
3 If we want to ask--and my friends I think
4 are trying to say that within that scope of
5 procurement, you've got this bag of conditions,
6 which, if they operate from--you know, attached to
7 a grant, or yesterday it was said just in a pure
8 statute itself, i.e., the Federal Government could
9 order all state governments to discriminate. In
10 either case, it would be covered by a procurement
11 exemption. Why? Because it is--it's a procurement
12 activity.
13 In the article that talks about conditions
14 relating to the receipt of advantage, Article
15 1106(3), the article that talks about conditions
16 attached to financial assistance, the governments,
17 the negotiators choose not to exclude grants from
18 that discipline, and we assume they included--they
19 intended to include it.
20 So to get to the U.S. position on this,
21 one has to ignore the previous paragraph, which

1 says that procurement by a party and grants are two
2 different things. That's clear from the language.
3 In the language which deals with an
4 obligation not to condition an advantage on
5 domestic content requirements, grants are not
6 excluded, only procurement by a party.
7 PRESIDENT FELICIANO: Mr. Kirby, from that
8 you infer that 1106--the requirements of 1106 would
9 be applicable in respect of grants of assistance?
10 MR. KIRBY: Exactly, because the receipt
11 of an advantage is broad enough to cover both--I
12 think it indisputably covers grants. That's an
13 advantage. And it covers conditioning the receipt
14 of a grant an advantage on domestic content
15 requirements. That's what 1106 covers.
16 MR. KIRBY: It strikes me as being a
17 little odd that the result of your position, what
18 you have just stated, is that a government cannot
19 restrict the granting of its largess to its own
20 people in its own territory.
21 MR. KIRBY: Oh, but it can. It can,

1 absolutely. Under 1102, which is the national
2 treatment standard, grants are exempted, under
3 1102. 1106 doesn't say you cannot discriminate in
4 the giving of your largess. That's not what it
5 says. What it says is that you may discriminate
6 because Article 1107--1108(7) excludes national
7 treatment, excludes from national treatment grants.
8 So it does not say you cannot discriminate when you
9 give your largess to whoever you want. You can
10 discriminate. 1106 says while we permit you to
11 discriminate when you give the money, you cannot
12 condition that grant on further discrimination.
13 PRESIDENT FELICIANO: I'm sorry. Would
14 you start again?
15 MR. KIRBY: All right. Two different
16 things. Can a government give money and
17 discriminate in violation of national treatment?
18 Yes, absolutely. Why? Because 1108(7) excludes
19 from national treatment grants and subsidies.
20 Okay. So we have the right to discriminate when we
21 give money away. Quite normal.

1 The next question: When we give money
2 away, can we subject that grant to a requirement
3 that the recipient himself discriminates? That's
4 what 1106 deals with. 1106 deals with the
5 imposition of conditions, conditioning the receipt
6 or continued receipt of an advantage on the
7 imposition of domestic preference requirements.
8 So pure discrimination at the level of the
9 grants, that's permitted. 1108(7) specifically
10 exempts grants and subsidies. Question: Can the
11 government do what it claims it can do in this
12 case, which is to--I'm sorry.
13 PRESIDENT FELICIANO: 1108(7) refers only
14 to three articles: 1102, 1103, and 1107.
15 MR. KIRBY: That's correct.
16 PRESIDENT FELICIANO: It does not refer to
17 1106.
18 MR. KIRBY: Exactly. That's my point.
19 PRESIDENT FELICIANO: Yes.
20 MR. KIRBY: Okay. My point is--now,
21 clearly the parties recognized the need for

1 governments or the desire for governments to
2 discriminate when they give away money. That's not
3 the issue before this court. The issue before this
4 court is whether in giving away the money they can
5 force the recipient of that money to itself
6 discriminate. That's the issue. You understand
7 the--
8 PRESIDENT FELICIANO: Well, what we're
9 trying to do is trying to explore the proposition
10 that because a state--because grants of assistance
11 are excluded from the scope or coverage or the
12 ambit of procurement under Chapter Ten, do the--are
13 those grants of assistance, are they subject to the
14 disciplines of Chapter Eleven? And if you say yes,
15 to what extent? That's the general inquiry that we
16 are trying to explore.
17 MR. KIRBY: Okay. And that's what I'm
18 trying to--it's been a long week, and the brain is
19 functioning a little more slowly than it did on
20 Monday morning. But let--I think one of the ways
21 one could do it is to identify a provision of

1 Chapter Eleven which conceivably might describe the
2 situation that's occurring in this case, then see
3 how has that obligation been treated in terms of
4 exclusions.
5 Now, I think that we can identify in 1106--I think
6 that we can identify in Article 1106(3)
7 the type of behavior which is precisely the type of
8 behavior which is at issue here. 1106(3) talks
9 about conditioning the receipt of an advantage on
10 domestic content requirements. The advantage in
11 this case is Federal funding. The conditioning is
12 an obligation to buy domestic. I think we're
13 squarely within Article 1106(3).
14 Now, is the precise behavior which is
15 clearly within 1106(3) excluded? We need to turn
16 to 1108. 1108 excludes--and 1108(7) clearly
17 excludes subsidies and grants, but it doesn't
18 exclude subsidies and grants from the obligation in
19 1106(3), the obligation which describes the
20 behavior that's occurring in this case. 1108(8)
21 does not exclude subsidies and grants but only

1 excludes procurement by a party.

2 Question: Is the condition that's imposed

3 in the grant procurement by a party? First, you

4 look at the previous section, 1108(7), which

5 distinguished between procurement by a party and

6 grants. Okay? Then we say, well, is it plausible

7 to interpret procurement by a party as meaning the

8 condition that is inserted into the grant? And I'm

9 saying given the use of the language in the earlier

10 one, it's not, and not in particular in this

11 particular case because Article 1108--Article 1106

12 specifically talks to the conditioning of grants.

13 In other words, in order to take the

14 benefit of the exclusion for procurement, you would

15 have to take the condition which is contained in

16 the grant and put it into procurement in order to

17 escape the obligation which says specifically you

18 cannot condition grants.

19 So does the obligation of--does Chapter

20 Eleven deal with conditions respecting domestic

21 content contained in grants? Absolutely, the text

1 is abundantly clear. That's exactly what it's
2 designed to prohibit.
3 Now, to get to the--why would they draft
4 the annex, or did you want to--
5 PRESIDENT FELICIANO: Go ahead.
6 MR. KIRBY: Okay. Why would they draft
7 the annex? And I'll preface this by saying that
8 this is not the most considered--we've had a few
9 minutes to look at it, but one thing that might
10 illustrate--okay. Let's just stick to the text.
11 The text begins with the expression "for greater
12 certainty." And this relates to an Article 1103
13 most favored nation requirement.
14 What does this confirm? It confirms that
15 grants are involved in Chapter Eleven, which I
16 don't think anybody disputes. And it confirms that
17 the parties want a particular category of grants
18 not to be subject to discipline, international
19 grants not to be subject to the discipline of MFN
20 in respect of investors. It's for greater
21 certainty. The expression "belts and braces," I

1 think somebody once told me, which is not what
2 lawyers tend to do when they're drafting statutes,
3 but it does appear in a few examples in NAFTA where
4 people wanted to be absolutely certain. They
5 simply say, well, whatever you decide in respect of
6 Chapter Eleven as a whole, absolutely--in case you
7 make a mistake there, we want you to be absolutely
8 certain you can't touch this particular provision.
9 And I don't think it goes much further than that.
10 MS. LAMM: But it does deal with grants.
11 MR. KIRBY: Which Chapter Eleven does deal
12 with.
13 MS. LAMM: No, I--
14 MR. KIRBY: I'm sorry.
15 MS. LAMM: I'm sorry. I was still on your
16 last statement, which was Annex IV, the exclusion,
17 for greater certainty.
18 MR. KIRBY: Oh, okay. So what it's doing
19 is Article 1103, we already have an exclusion in
20 Article 11--
21 MS. LAMM: 1108(7) right.

1 MR. KIRBY: 1108(7) for subsidies and
2 grants.
3 MS. LAMM: Right.
4 MR. KIRBY: And then the--
5 MS. LAMM: Right.
6 MR. KIRBY: --nervous negotiators said
7 maybe that's not clear enough, let's nail it home;
8 so we will say "for greater certainty," just in
9 case anybody--somehow can't--or will try to
10 characterize that--a tied aid program, for example,
11 as something other than a subsidy or a grant. I
12 think that's all that that says.
13 Thank you.
14 PRESIDENT FELICIANO: Please?
15 MR. CLODFELTER: Mr. President, we'd like
16 to beg the Tribunal's indulgence for a couple of
17 more minutes, if that would be all right. Thank
18 you.
19 [Pause.]
20 MR. ONWUAMAEGBU: I'd like to remind
21 everyone to please remember to speak into the mic.

1 I've been advised that we might end up with a lot
2 of gaps in the transcript for today because there
3 will be a lot of turning on and off of mics. So if
4 you can please remember to turn on your mics and
5 speak into the mics. Thanks.
6 MR. CLODFELTER: Mr. President, Ms.
7 Menaker will answer the question directly and then
8 Mr. Legum will follow up with some additional
9 comments in response to Mr. Kirby's comments and
10 some elaboration.
11 MS. MENAKER: Mr. President, Members of
12 the Tribunal, I just want to make a few comments in
13 response. First is just want to reiterate the
14 point that we've made a few times over the last few
15 days, and that is what's at issue here is not a
16 grant. What's at issue here is the condition
17 requiring domestic content, and as Mr. Kirby noted,
18 discrimination in the giving of grants is exempt
19 from national treatment and most favored nation
20 requirements. So as, Mr. President, you noted
21 also, when the United States gives away its money,

1 it can discriminate. It can choose to whom it
2 wishes to give its money, and we agree with
3 claimant's counsel that Annex 4 merely puts for
4 greater certainty, it is a belts and suspenders
5 provision. It basically states that when we give
6 away our money for programs like the Caribbean
7 Basin Initiative, as mentioned here on particular,
8 that that is not going to be a violation of the
9 national treatment and most favored nation
10 treatment obligations. That doesn't mean that we
11 similarly need to give the same amount of money to
12 another foreign investor or foreign investment
13 program.
14 But we disagree with claimant's analysis
15 of the Article 1108(7)(b) exemption for grants, and
16 particularly claimant's contention that what is at
17 issue here was--and I think he stated that what was
18 at issue here was the giving of a grant and the
19 conditioning of an advantage on that grant. Here
20 ADF did not receive a grant from the Federal
21 Government. The grant is irrelevant to the issue

1 here. What's at issue here is the domestic content
2 restriction. ADF was now the recipient of the
3 grant. The Commonwealth of Virginia received the
4 grant. What the provision pertaining to grants is
5 there for is, for example, if the United States
6 were to offer a tax incentive to accompany and say,
7 "We will give a tax incentive to any company that
8 agrees that it will only use U.S. materials when it
9 builds cars, that's the conditioning of an
10 advantage on receipt of a grant. That's not what
11 occurred here. The United States did not give
12 money to ADF and then condition the grant of that
13 money on ADF's using domestic content. The United
14 States gave money to the United States, to the
15 Commonwealth of Virginia. That grant is irrelevant
16 here. That's not at issue. The only thing at
17 issue is the imposition of the domestic content
18 requirement, and that, we contend, is procurement.
19 The procurement is the only part that's at issue
20 here and that clearly falls within procurement by a
21 party's exception.

1 So I hope that answer the Tribunal's
2 question on the grant issue and on Annex 4. And
3 now I just would ask Mr. Legum to just expand upon
4 a few of the additional points that ADF's counsel
5 made in response to the Tribunal's question.
6 PRESIDENT FELICIANO: Mr. Legum.
7 MR. LEGUM: I just wanted to respond quite
8 briefly to the arguments that we just heard
9 concerning Article 1106 subparagraph (3).
10 I would begin by calling the Tribunal's
11 attention to subparagraph (5) of Article 1106.
12 That provision reads: "Paragraphs (1) and (3) do
13 not apply to any requirement other than the
14 requirements set out in those paragraphs."
15 Now, one would normally anticipate that in
16 fact requirements addressed by a given paragraph
17 don't apply--that the paragraphs don't apply to any
18 requirements except for the ones addressed. This
19 provision, I submit, indicates the intent of the
20 drafters that these paragraphs be interpreted very
21 carefully and very narrowly, according to their

1 terms.

2 I would also draw the Tribunal's attention

3 to Note 41 to the NAFTA, which appears on page 393

4 of the CCH book, and I'm sorry that I don't have

5 the page references for other publications. That

6 note reads: "Article 1106 does not preclude

7 enforcement of any commitment, undertaking or

8 requirement between private parties." Again, an

9 indication from the drafters that one should read

10 Article 1106 quite strictly in accordance with its

11 terms.

12 Now, let's take a look at Article 1106

13 subparagraph (3), which ADF referred to. "No party

14 may condition the receipt or condition continued

15 receipt of an advantage in connection with an

16 investment in its territory of an investor of a

17 party or in compliance with"--and for our purposes

18 here we can say domestic content requirements.

19 What was the advantage that ADF received

20 here according to it? According to Mr. Kirby, the

21 advantage that ADF received here was doing business

1 with the United States. That's the advantage that
2 ADF received. What is doing business with the
3 United States? It's called procurement by a party.
4 It's government procurement. Now, as for ADF's
5 contention that this paragraph is relevant because
6 there's a grant in the picture somewhere, and Ms.
7 Menaker just noted, there was a grant here. It was
8 a grant from the Federal Government to the state
9 government. It was a grant from one pocket of the
10 United States of America to another pocket of the
11 United States of America. ADF received no monies
12 from any government entity actually. It received
13 monies only from Shirley Contracting, and it
14 certainly didn't receive any Federal funds.
15 So we would submit that this argument that
16 somehow the exclusion of a grant from Article--Chapter Ten
17 via Article 1001(5)(a) is relevant
18 here, is a red herring.
19 Unless the Tribunal has any questions, I
20 will turn off my microphone.
21 MS. LAMM: Just a little follow up. The

1 question that we started with was the interplay
2 between Chapter Ten and Chapter Eleven, which you
3 have discussed often. And if in the scope
4 definition for procurement in Chapter Ten grants
5 and other forms of aid are excluded, what does that
6 say about Chapter Eleven if anything? And I guess
7 on the basis of what you have just said, you don't
8 believe they're covered in Chapter 11 or you do?
9 MR. LEGUM: What's covered? I'm sorry.
10 MS. LAMM: Grants and other forms of aid.
11 MR. LEGUM: Certainly grants and aid are
12 as a general proposition covered.
13 MS. LAMM: Okay, all right.
14 MR. LEGUM: That's what Article 1106 has
15 in mind. It's not necessarily intergovernmental
16 assistance that's covered.
17 MS. LAMM: Right.
18 MR. LEGUM: And that's what Article
19 1001(5)(a), intergovernmental assistance, really
20 much more than it does government assistance to any
21 person. Again, the text that is, the controlling

1 text here, the dispositive text here is procurement
2 by a party. "Party" includes all of the
3 governmental units in the United States of America.
4 For purposes of that exception, it doesn't matter
5 whether the United States took money out of one of
6 its pockets and put it in another pocket before
7 handing it over to Shirley Contracting. If you
8 think about it in terms of a single governmental
9 entity or a single governmental level, it
10 highlights the absurdity of the direction that ADF
11 is suggesting.
12 The Federal Treasury could be viewed as
13 granting money to other departments of the U.S.
14 Federal Government. Does that mean that if you
15 have a domestic content restriction attached to a
16 U.S. Treasury appropriation, that somehow it's not
17 procurement by the Federal Government? Of course
18 it's not. Doesn't matter where the money comes
19 from. That's what 1001(5)(a) says. What we're
20 dealing with here is, as Mr. Kirby put it, ADF
21 doing business with the United States. That's

1 procurement.

2 MS. LAMM: Okay.

3 PRESIDENT FELICIANO: I just wanted to

4 inquire, Mr. Legum, is there some general

5 proposition or theory that explains why in

6 1001(5)(a) you have this list of things which do

7 not fall within procurement, which are excluded

8 from procurement? What's the general objective of

9 (5)(a) then?

10 MR. LEGUM: To again borrow an expression

11 that Mr. Kirby used this morning, belts and braces.

12 I think as we saw, one might be able to suspect or

13 devise some kind of theory under subparagraph (4)

14 of Article 1001, that federally funded state or

15 local procurement was an attempt to get around the

16 provisions of the chapter. What 1001(5)(a) did was

17 to make clear, for purposes of Chapter Ten, where

18 it does matter which level of government is

19 engaging in the procurement, to make clear that the

20 exchange of money or other government assistance

21 between different governmental levels or different

1 governmental entities is not covered by the
2 chapter, and therefore, one can't build an argument
3 that by funding a project, even providing
4 substantial funding for a project, a party has
5 structured a procurement contract in order to avoid
6 the obligations of this chapter.
7 PRESIDENT FELICIANO: And just to confirm
8 my understanding of what you just said, all these
9 things and activities which are excluded from the
10 coverage of procurement, are in principle subject
11 to the disciplines of the other chapters of NAFTA.
12 Am I correct? That's what I understood Mr. Kirby
13 to say. I just wanted to infer my understanding
14 that you have agreed with that, subject to the
15 specific provisions of 1108.
16 MR. LEGUM: For example, yes. There may
17 be other exclusions as well, but I think as a
18 general proposition, one can assume that government
19 measures has to be a measure, I believe, for the
20 application of most if not all of the NAFTA
21 chapters. Government measures are covered unless

1 specifically excluded.
2 PRESIDENT FELICIANO: Thank you.
3 MS. LAMM: And, Mr. Kirby, just so we're
4 clear, you aren't raising any claims under Chapter
5 Ten, you're only raising claims under Chapter
6 Eleven?
7 MR. KIRBY: No, we're not raising any
8 claims for a violation under Chapter Ten. Our
9 claims are limited to Chapter Eleven. Thank you.
10 MS. LAMM: All right. Next we'll turn to
11 1102(2). And the first question is for Mr. Kirby,
12 although we will turn back to the U.S., obviously,
13 for comment.
14 Yesterday we heard from Mr. Clodfelter and
15 Ms. Menaker under 1102(2), that the focus of our
16 analysis must be the investment of the investor, so
17 you really look at how in that context the investor
18 is being treated. And I'm just wondering how the
19 investment of the investor is being treated as a
20 class in comparison under 1102 to other investors
21 from the United States? And I'm wondering, do you

1 agree with that as kind of the analytical construct
2 here, that we're looking at the investment of the
3 investors, and you're comparing other--you're
4 comparing the investor and what's being done to the
5 investor, so to speak?
6 MR. KIRBY: Thank you, Ms. Lamm. I have
7 had some difficulty understanding precisely what
8 the nature of the U.S. argument was in this
9 respect, without it being simply that Article 1102
10 has to be read as being identical with Article
11 1102(1). That is, Article 1102(2) and 1102(1) are
12 essentially doing the same thing. They're not.
13 They're doing two different things, and once again,
14 if you go back to the text, each party shall accord
15 to investments of investors of another party.
16 Treatment has to be accorded to the investments,
17 not to the investors, to the investments of
18 investors of another party. Treatment that is no
19 less favorable than it accords in like
20 circumstances to investments of its own investors,
21 not the investors, to the investments. That's what

1 the treatment--that's where you're going to measure
2 compliance with the national treatment standard.
3 Why? Because in paragraph (1) you're measuring
4 compliance at the level of the investor. Paragraph
5 (2) means that it's not simply the investor that
6 you must treat as favorably as you treat your
7 national investors. You must also treat all of the
8 investors investments, all of the investments, as
9 favorably as you would treat investments of
10 national investors in the same way.
11 Where do we claim that there's a
12 violation? The investments of ADF in steel--and
13 this is not to say that we don't have any other
14 claims that we have set out, but the one that I
15 think that highlights it the most with the greatest
16 degree of clarity is that we are being said--first
17 we establish an investment. The investment is
18 steel. No question, as far as I'm concerned, and I
19 don't think the U.S. is denying that property is an
20 investment. That may not be the traditional nature
21 of investment. I mean when we think about

1 investment traditionally, we think about building
2 factories and we think of owning land and various
3 things. That's not what we're dealing with here,
4 because the definition of investment is broad
5 enough, deliberately so, to cover a wide range of
6 investments and clearly covers the steel. So steel
7 is our investment.
8 We have steel with 1 percent U.S. content.
9 And somebody else has--so we ask, can we do
10 business with the U.S., and they say, "No, you
11 can't because of that 1 percent content." That's
12 discrimination on the basis of the--we are not
13 getting the same level of treatment that the
14 investments of U.S. steel fabricators get. What is
15 the investment of U.S. steel fabricators? It is
16 the steel that they have fabricated. Our
17 investment is the steel that we have fabricated.
18 Our investment cannot be placed in the highway.
19 Their investment can be placed in the highway.
20 That's the discrimination. Clear, no question. If
21 it is not 100 percent U.S. origin it does not

1 qualify. They're devaluing our investment.
2 I think, Ms. Lamm, that it was in an
3 exchange with Mr. Clodfelter that you had said the
4 him, if I understand how you are reading it, you
5 would need to insert some words, and he said,
6 "yes." And I think that there is no reasonable
7 interpretation that you can put on that paragraph
8 without inserting words into the paragraph to give
9 it the meaning that the U.S. would like it to have.
10 But the words that you need to insist--to insert in
11 the paragraph are words that brings the meaning up
12 to what 1102(1) says in any event. That's not a
13 reasonable interpretation of the paragraph. I
14 think that the text of the paragraph is clear. And
15 as Judge Feliciano pointed out, if you take out the
16 word "investments" and change the word for "steel."
17 Our steel is treated differently because it is not
18 100 percent U.S. origin steel.
19 MS. LAMM: But it's not treated
20 differently because you're a Canadian investor or a
21 foreign investor. It's treated differently because

1 it's different steel. And so is there a like
2 circumstance issue?
3 MR. KIRBY: That's another issue. In
4 terms of, you know, did the fact that the investor
5 was in Canada have an impact? And we'd say if you
6 were digging deep into a de factor argument, yes,
7 that's an impact. But let me put that aside for a
8 second and just focus on this one issue that you
9 had, is there a like circumstance issue.
10 The investment of ADF, steel with let's
11 say 1 percent U.S. content sitting in the United
12 States and steel with 100 percent U.S. content
13 sitting in the United States. Our steel won't
14 qualify. A steel fabricator's 100 percent origin
15 steel will qualify.
16 Is there a like circumstances test? I
17 think the like circumstances is basically the steel
18 produced by steel fabricators. The investments
19 that steel fabricators have in the United States,
20 and that generally is fabricated steel. It's raw
21 steel in inventory, and it's fabricated steel

1 coming out of the factory. The only--just let me
2 complete the thought. The only like circumstances
3 test that would allow the U.S. argument to be
4 compelling is to say "We treat all U.S. origin
5 steel correctly in the same way, and we treat all
6 non-U.S. origin steel in the same way. That's an
7 interpretation which forces you to basically
8 interpret in order to avoid the obligation which
9 doesn't bear analysis. In other words, the like
10 circumstances is not is all U.S. steel treated
11 alike? The like circumstances is, is all the steel
12 ready for sale to the, for example, Springfield
13 project, is all that steel treated alike? And if
14 it is not, if there is discrimination against non-U.S.
15 steel, that's a violation of national
16 treatment in respect of the investment of the
17 investor.
18 MS. LAMM: So your argument is essentially
19 on like circumstances, that it's a like product
20 argument? If it's a like product, that's how you
21 compare it, because you--you don't do what the U.S.

1 essentially does and say that there's actually a
2 subset of products, and one is--has different
3 content, and you compare--it doesn't matter who the
4 investor is, because remember it's saying the
5 investment of the investor. It doesn't matter who
6 the investor is. If you take a subset of like
7 product and that subset is U.S. steel with Canadian
8 content, that subset no matter who holds it, if
9 it's a U.S. citizen, if it's a Canadian citizen, no
10 matter who, it's going to be treated the same.
11 So in part it's the question of what is
12 like circumstance, is it like product or a subset
13 of like product?
14 MR. KIRBY: I think you're casting light
15 on the--you're making it a little bit clear in my
16 mind now what the issue might be. The requirement
17 is to give national treatment to investments,
18 investments of investors. That's your starting
19 point for determination of like product. Are the
20 investments of ADF steel treated at least as
21 favorably as the investments of U.S. steel

1 fabricators? We would say no. They get one step
2 further.
3 Now, a U.S. steel fabricator has non-U.S.
4 steel that it wants to sell. That analysis is then
5 to cross over de jure discriminatory nature of the
6 provision which is clearly on its face
7 discriminating. And then say, well, let's make the
8 assumption. Let's carry on the analysis. I would
9 say the next step in the analysis is then to see
10 what the impact of the de facto application of that
11 measure is and the impact is of course that U.S.
12 steel fabricators would still be benefiting,
13 because if they're in business to fabricate steel,
14 in the United States that's what they're doing, and
15 who would be the ones who would have the
16 disproportionate burden of supporting that? It
17 would be Canadian steel fabricators. But just to
18 conduct the analysis on the basis of we're going to
19 compare all steel containing a proportion of--containing a
20 percentage of Canadian content, we're
21 going to compare that steel held by Canadians and

1 that steel held by United States, and there's no
2 debate, it would all be disqualified. That's not
3 the issue because it simply ignores to
4 discrimination. It doesn't test the
5 discrimination. By making that kind of analysis
6 you've already assumed what the answer is. So the
7 like circumstances for us is the like circumstances
8 of the investment, which is basically the same
9 economic sector, whatever formulation you want to
10 use, but basically it's the steel is ready for
11 insertion into the highway program.
12 MS. LAMM: And if Canadian fabrication
13 services are in fact less expensive than U.S.
14 fabrication services, why wouldn't U.S. investors
15 have an equal interest with a Canadian investor in
16 getting their steel fabricated in Canada and
17 selling it to the U.S.? They can make more on
18 their contracts. So why is that not an appropriate
19 comparison? It doesn't--I mean you're saying it
20 assumes the discrimination, but U.S. steel
21 producers would have the same incentive as a

1 Canadian steel producer to use those Canadian
2 fabrication services.
3 MR. KIRBY: One, the basic assumption--and
4 I'll take it as an assumption, but just on a
5 factual basis I don't think that we can make that
6 assumption. But let's assume that to be the case,
7 that somehow there's an advantage. The analysis
8 that you have to undertake is first of all, what's
9 this measure designed to? This measure, there's no
10 question, nobody is arguing, is designed to assist
11 the U.S. industry, U.S. steel producers at the
12 expense--or rather to assist them at the expense of
13 the rest of the world. It's not designed to do
14 anything but that. That's the entire rationale
15 behind the whole measure.
16 Could the fact that the U.S. steel
17 fabricators might obtain an advantage by going to
18 Canada, should that influence the discussion of how
19 are we going to draw the boundaries around a like
20 circumstances test. The hypothetical, given the
21 rest of the landscape, given the facts, again is

1 designed to get you back to a position where
2 because you have defined it in terms of are we
3 treating all steel with some Canadian origin the
4 same, and are we treating all U.S. 100 percent
5 origin steel the same? In fact, the analysis
6 assumes the answer. If you get into that kind of
7 analysis and say let's assume that the U.S.
8 fabricators really want to send their steel to
9 Canada, get it fabricated and bring it back, and
10 they're suffering a burden at least as bad as the
11 burden suffered by ADF, it flies in the face of the
12 reality that that's not what they're doing, that's
13 not what they want to do. They want protection in
14 their home market. They have factories here. They
15 want to load their factories, and they will do so
16 by ensuring that politicians can continue to ensure
17 that these kinds of measures are enforced.
18 MS. LAMM: Yesterday we did hear--I think
19 it was yesterday--from Mr. Clodfelter that the
20 value of the fabrication services in the U.S. was
21 70 to 80 percent of the product--

1 MR. KIRBY: And we denied it.
2 MS. LAMM: And you said it was 20 to 25
3 percent of the value. Now, I don't know--that was
4 a 60 percent spread, but that would induce me as a
5 steel fabricator to take my steel to Canada.
6 MR. KIRBY: I hadn't thought about it in
7 that way as being sort of a price comparison. I
8 thought we were having a difference on what
9 normally would fabrication cost on basically the
10 same steel?
11 If the facts were to disclose that U.S.
12 origin steel, the fabrication cost because the U.S.
13 fabricators are so inefficient that it's adding 70
14 or 80 percent of the cost to the steel, whereas
15 Canadian fabricators are so efficient, that they're
16 adding only 20 percent, I don't think that that's--I think
17 we're having a debate not as to whether
18 that situation, there's a 60 percent spread between
19 the cost, I think we're having a debate over what's
20 fabrication?
21 PRESIDENT FELICIANO: Forgive me for

1 butting in at this point. What we are really
2 groping for is the substance of your claim of less
3 favorable treatment. That's where we're going, Mr.
4 Kirby.
5 MR. KIRBY: Let me say it in 30 seconds.
6 PRESIDENT FELICIANO: Well, I know what
7 you have said before. What we are trying to find
8 out is how you respond to the arguments made by the
9 United States and how exactly it impacts on you,
10 remembering that--we can accept the notion of de
11 facto versus de jure discrimination or less
12 favorable treatment. But you have to show us
13 exactly where the treatment accorded to either your
14 investment, meaning the steel, including the steel
15 that you had in the United States, and your
16 company, ADF International and U.S.-origin steel
17 owned by a U.S. company located in the United
18 States. You know, you gave us those three points.
19 You said you are required to subcontract to U.S.--
20 MR. KIRBY: Fabricators.
21 PRESIDENT FELICIANO: Fabricators. I'm no

1 economist, but that seems to me not necessarily a
2 less favorable result. It depends upon the costs.
3 That's where this element of cost comes in.
4 MR. KIRBY: I draw the Tribunal's
5 attention to the affidavits which have been filed--
6 PROFESSOR DE MESTRAL: Just to reinforce
7 that point, particularly if we are in the realm of
8 de facto discrimination, it would seem the range of
9 factual evidence to explain and to elucidate the
10 claim becomes even more important. One can imagine
11 a de facto claim that can be proven simply on the
12 basis of a description of a certain circumstance,
13 but generally something more is useful--much more
14 is useful.
15 MR. KIRBY: Let me draw the Tribunal's
16 attention, as I said earlier, to the affidavits of
17 evidence that have been filed, particularly the
18 affidavits of Mr. Paschini and Mr. Vandevelde.
19 They describe--Mr. Labelle's affidavit describes
20 simply some of the procedural issues. But the
21 story with respect to Springfield--and my friends

1 have said that there is no evidence in respect of
2 the others. That evidence will be put forward at
3 the damage claim. But to establish de facto
4 discrimination in this case, the story is as
5 follows:
6 ADF International signs a subcontract with
7 Shirley to participate in the wonderful highway
8 interchange that we saw in the slides, a
9 significant contract to supply the fabricated steel
10 for the bridges and the off ramps and--there's a
11 lot of work.
12 ADF goes off and begins to start
13 purchasing U.S.-origin steel to supply on that
14 contract with the intention of taking the U.S.-origin steel,
15 bringing it to Canada where it has
16 two facilities, and fabricating that steel in
17 accordance with the shop plans, and then bringing
18 the steel back and erecting it on the job site.
19 It was told that it could not do so, that
20 all the fabrication of that steel would need to be
21 done in the United States by U.S. steel

1 fabricators.

2 Now, I'll ignore the fact that we went
3 through various meetings trying to convince the
4 authorities that we had the right to do it. We
5 were denied a waiver, et cetera, et cetera, the
6 point being that the first Act, Section 165, came
7 down through the system to refuse us the
8 opportunity of transforming that steel in Canada in
9 accordance with the contract. What did Mr.
10 Paschini do, and his group? Mr. Paschini organized
11 the company to continue to perform the contract,
12 but in doing so had to engage an extra five
13 subcontractors. Instead of bringing the steel into
14 its plant in Terrebonne, in Quebec, the steel was
15 held for the most part in the United States and
16 then shipped off to five different contractors.

17 If you ship to five contractors instead of
18 one plant, you have transportation problems. He
19 describes the transportation problems. You have--whenever
20 you fabricate steel, you have wastage. If
21 you can--the most inventory you have in one place,

1 the less wastage you will have. It's like cutting
2 cloth, because you can use the bits and pieces that
3 are left over. So there was a lot of wastage, and
4 there was a multiplication of transportation costs,
5 plus instead of doing it in-house, he had to hire
6 steel fabricators to do it for him. So he had, you
7 know, labor issues, et cetera.
8 Eventually, all of the steel was delivered
9 to the site and was erected, but the process of
10 being able to complete the contract on time under
11 the conditions set by the Buy America legislation
12 cost the company an awful lot of money.
13 Now, is that de facto discrimination? The
14 reason why he needed to go through this process was
15 because he was refused permission to use his
16 facility in Canada to fabricate the steel.
17 Now, I well understand that NAFTA doesn't
18 reach into Canada. However, what NAFTA does do is
19 to say, for example, if you want to create an
20 investment in the United States, the establishment
21 of an investment, you're free to do so and we can't

1 impose domestic content requirements to inhibit you
2 from doing so. Establishment of--the delivery of
3 the fabricated steel into the United States was an
4 integral part of establishing that investment in
5 the United States. We intended to complete our
6 contract to provide fabricated steel to our co-contracting
7 party.
8 We couldn't do that. We couldn't--if the
9 steel is an investment, we could not establish that
10 investment the way we wanted to do it in the United
11 States. We were prohibited.
12 In essence, what happened with respect--if
13 you take one level up and you start looking at the
14 more traditional type investments in terms of the
15 companies themselves, we say that you can establish
16 a claim for de facto investment on the basis of--the impact
17 of the legislation is basically to cut
18 ADF International, the subsidiary, to cut ADF
19 International off from the corporate group.
20 In other words, U.S. steel fabricators--providing
21 they stay in the U.S., but generally U.S.

1 steel fabricators are located in the United States.
2 U.S. steel fabricators can use their facilities in
3 whichever way they deem appropriate in order to
4 produce the finished product. We couldn't. We
5 couldn't go to--we couldn't use the entire
6 production facilities available to ADF. We had to
7 be content with what was available to ADF
8 International. And there wasn't enough available.
9 We think that that demonstrates once again
10 discrimination against the subsidiary in terms of
11 its ability to manage, operate, and--
12 PRESIDENT FELICIANO: Excuse me. I would
13 request you to please focus upon the issue raised.
14 I would still want to know exactly how less
15 favorable treatment was accorded to the investment
16 involved, steel, presenting from the question of
17 like circumstances, whether that includes like
18 products, you know, what was meant by like products
19 in this context. It's the--
20 MR. KIRBY: Okay--
21 PRESIDENT FELICIANO: --less favorable

1 treatment. That's what I--it's a little bit
2 impalpable, as far as I can see.
3 MR. KIRBY: In terms of at the level of
4 the steel or are we still at the level of the
5 investment itself?
6 PRESIDENT FELICIANO: Whatever.
7 MS. LAMM: 1102(2). The investment.
8 MR. KIRBY: The investment. Okay. I'm
9 sorry.
10 The level of the steel, I think we've
11 dealt with that issue in terms of the like
12 circumstances case. We consider that like
13 circumstances has to be established at the basis of
14 the steel with which we were competing, the
15 business for which we were competing and who were
16 our competitors. Our competitors, our U.S.
17 competitors, the steel fabricators in the U.S. who
18 were bidding on the Shirley contract against us,
19 who were seeking to use steel in that particular
20 piece of work. Who are they? What is that steel?
21 That steel is U.S.-origin steel.

1 So, for example, the output of the five
2 subcontractors, U.S.-origin steel fabricated in the
3 U.S., that's steel in like circumstances to our
4 own. It's steel that's available and competing
5 with ADF's output for that particular job.
6 PRESIDENT FELICIANO: Does less favorable
7 treatment relate to the economics of a particular
8 transaction? Are you saying that because the cost
9 of--that you couldn't bring the steel back to
10 Canada and there perhaps more efficiently and for
11 less cost done the same job that you had to
12 subcontract out to U.S. fabricators in the U.S.?
13 Is that what--
14 MR. KIRBY: I think I understand the
15 difficulty that you're having, and distinguish--
16 PRESIDENT FELICIANO: Yesterday Professor
17 de Mestral drew attention to the notion of less
18 favorable treatment as that term is used in Article
19 3(4) of the General Agreement on Tariffs and Trade
20 and WTO. There the principal reference is to
21 equality of competitive opportunity. I'm not

1 saying that that is necessarily the interpretation
2 to be given to the words "less favorable
3 treatment," but it certainly is a plausible reading
4 that would be given to Article 1102 here. So,
5 please, can you address it from that point of view?
6 MR. KIRBY: I'll do my best, and I
7 apologize for assuming sometimes that I've said
8 things or said them in a particular way. Sometimes
9 you assume more than you actually say. And I think
10 it's important to distinguish between the factors
11 that make up less favorable treatment than the
12 consequences of that less favorable treatment. And
13 the consequences of the less favorable treatment
14 are the damages, but the less favorable treatment
15 itself is the bottom-line exclusion from the
16 market. That's the less favorable treatment.
17 We could not participate in the market for
18 fabrication of steel in highway projects. We were
19 excluded. That's the less favorable treatment
20 because--
21 PRESIDENT FELICIANO: But if you had set

1 up facilities as you had in Florida, if those
2 facilities had been of such dimension and capacity,
3 you would have been able to do it in Florida.
4 MR. KIRBY: That relates to the notion
5 that you're not treated any less favorably than any
6 other steel fabricator. In other words, all steel
7 fabricators were working under--
8 PRESIDENT FELICIANO: But a facility--
9 MR. KIRBY: --the same compunction. What
10 we're saying is that--and this is now stepping up
11 from the level of the steel. Let's just deal with
12 the level of the steel so that we can get that out
13 of the way.
14 That argument at the level of the steel is
15 that--would be that anybody with steel containing
16 Canadian content would be equally treated, would be
17 excluded from the market. That's not the test at
18 the level of the steel.
19 At the level of the steel, it's--what's
20 the like circumstances? It's any steel investment,
21 any steel ready to go into the particular highway

1 project. That's the like circumstances test at the
2 level of the steel, not steel with Canadian content
3 versus steel with U.S. content. We simply reject
4 the notion that you can distinguish between steel
5 with U.S. content versus steel with Canadian
6 content at the level of the investment, because if
7 you do that distinction, if you make that
8 distinction, you basically take the content out of
9 national treatment. That's not the purpose.
10 That's the question of the steel.
11 Now, moving up, ADF International as a
12 factory, a steel fabricator in the United States,
13 and other steel fabricators in the United States,
14 the less favorable treatment is that steel
15 fabricators generally in the United States have the
16 facilities that can engage in the kind of work.
17 It's their home base. This is where the steel
18 fabricating industry that is subject to the
19 measure, that is, in fact, being protected by the
20 measure, the United States is the home base of that
21 industry. By enacting a measure to protect that

1 home base, in other words, to protect the
2 collection of U.S. steel fabricators, and then that
3 measure operating on them means that in ADF we are
4 faced simply with the choice. We now no longer can
5 use the family of--the ADF family to produce the
6 steel.
7 We're given the choice of if you want to
8 participate in the market, you either expand your
9 facilities or--and this is what's happened with
10 companies like Bombardier--or you jump over the
11 wall and you establish your facilities in the
12 United States.
13 PRESIDENT FELICIANO: Which you have done
14 in this--
15 MR. KIRBY: We jumped--
16 PRESIDENT FELICIANO: Which you did in--
17 MR. KIRBY: No, the facility in Florida is
18 not capable of doing this kind of work.
19 PRESIDENT FELICIANO: But that's--
20 MR. KIRBY: We have established--we
21 haven't established facilities in the United States

1 in response to--ADF International was not
2 established in response to the highway program.
3 What I'm saying is to participate in the highway
4 program or, to put it more narrowly, to have
5 participated in Springfield, we would have needed
6 to establish a facility significantly larger than
7 the ADF International facility.
8 So we had a choice that was not faced by
9 the U.S. facilities who were bidding against us in
10 the contract. Our choice was do something with
11 your facilities, increase your investment, come
12 here, build a new plant, buy a U.S. investor, but
13 basically don't expect to be able to enjoy the same
14 freedom as U.S. steel fabricators to compete in the
15 market, unless you become a U.S. steel fabricator.
16 MS. LAMM: Okay. That's it?
17 MR. KIRBY: Yes.
18 MS. LAMM: All right. I don't know who's
19 going to respond on the U.S. side.
20 [Pause.]
21 MS. LAMM: Maybe while they are caucusing

1 I can just ask--follow up with one more thing. You
2 have these other three contracts that you've
3 alleged, and this isn't to indicate that we're
4 going to consider or not consider them.
5 MR. KIRBY: But it's an issue that's been
6 raised by my friends.
7 MS. LAMM: Right. I am just wondering
8 about those contracts. We have no facts on those
9 contracts. Are they all Federal highway contacts
10 with various states?
11 MR. KIRBY: I think the frame of reference
12 for that goes back to paragraph--I believe it is 62
13 of the Notice of--
14 MS. LAMM: Right, right. No, I understand
15 that.
16 MR. KIRBY: All of these contracts are on
17 all fours with Springfield Interchange, Federal
18 Highway contracts where the same regulations is
19 applied, the same laws. If they were not Federal
20 Highway contracts, if they were not contracts
21 governed by the measure in question, I would agree

1 with my friend--

2 MS. LAMM: Right, right.

3 MR. KIRBY: --that, you know, we haven't

4 brought a claim in respect of those. We brought a

5 claim in respect of the application of a Federal

6 Highway contract throughout the--you know, whether

7 it's applied in Wyoming or whether it's applied in

8 New York or in Virginia, it's the same thing.

9 That's our--

10 MS. LAMM: And, chronologically, where do

11 they fall? Were they at or about the same time?

12 Were they subsequent to the--

13 MR. KIRBY: Subsequent.

14 MS. LAMM: Subsequent?

15 MR. KIRBY: They were later contracts.

16 MS. LAMM: Now, on all of those, did you

17 disclose you were going to use foreign fabrication

18 services and you were still permitted to compete?

19 MR. KIRBY: No. In all of those, we

20 subcontracted the work

21 MS. LAMM: Yes.

1 MR. KIRBY: In fact, there was one
2 interesting one--I think it was Brooklyn-Queens--where there
3 were two bridges, one which was a state
4 bridge and one which was a Federal bridge. We
5 could do the work for the state bridge in Canada.
6 We did the work for the U.S. bridge in the United
7 States, the Federal bridge, the one that was
8 federally funded.
9 MS. LAMM: Federally funded, you could do
10 the one in Canada?
11 MR. KIRBY: No. Federally funded, we had
12 to do it in the United States. State-funded,
13 without Federal funds, we could do it in Canada.
14 MS. LAMM: Oh, state-funded, without
15 Federal funds.
16 MR. KIRBY: So were they federally--they're all
17 Federal Highway projects. They were
18 subsequent to the Springfield Interchange. But the
19 reason why we haven't loaded the details is because
20 that's a damage issue, as far as we're concerned.
21 The measure that's at issue here is the application

1 of the Federal Highway, and we're in a liability
2 phase.
3 MS. LAMM: Right, right. So on all of
4 those, what were the problems for you as the
5 investor getting the services that you needed in
6 the United States? Obviously all except the
7 federally funded one--or the State-funded one, you
8 had to use U.S. fabrication services to do the
9 work.
10 MR. KIRBY: That's correct. None of the
11 fabrication work for any of those contracts were
12 done in Canada.
13 MS. LAMM: And the less favorable
14 treatment for all of these contracts is the same as
15 you've described, that you had to go to U.S.
16 fabricators?
17 MR. KIRBY: Yes, but I believe that the
18 company may have become a little more efficient in
19 handling that sort of off-site work. Certainly at
20 Springfield, it was a learning curve, and it was a
21 learning curve within a fairly short period of

1 time. But I believe that they became more
2 experienced at dealing with those things, and then
3 managed to--you know, the cost is going down as
4 they become expert at basically subcontracting work
5 to continue to participate in the market.
6 MS. LAMM: And were there any problems, I
7 mean, were there any--did you--were you denied
8 access to any--were there problems in doing this?
9 You've been able to get the services? You said now
10 that you've become efficient, you know, you've got
11 the cost down.
12 MR. KIRBY: Well, now that we've become
13 efficient at using our competitors to do work that
14 we really ought to be doing--but that's not a long-term
15 viable solution for the company.
16 MS. LAMM: Right.
17 MR. KIRBY: Have we become better at doing
18 it? With time, one becomes better at everything,
19 one hopes. But I also have to underline that I see
20 these at a high, high level. I don't see the nuts
21 and bolts of some of these contracts.

1 MS. LAMM: Okay.
2 MR. KIRBY: So as we spend time talking
3 about it, I get more and more nervous.
4 MS. LAMM: Okay.
5 MR. CLODFELTER: Mr. President and
6 Members, let me just begin perhaps on that last
7 point. The very fact that all these questions have
8 to be asked just underscores the basic obvious fact
9 that there's absolutely no evidence in the record--let me
10 read to you the sum total of all of the
11 evidence in the record on these other projects,
12 which are the basis for its other claims.
13 There's paragraph 54 of Mr. Paschini's
14 affidavit. "Subsequent to the Springfield
15 Interchange Project, ADF Group has also worked on
16 several other Federal aid highway projects where
17 the application of the Buy America measures have
18 resulted in additional costs. These projects are
19 the Lorten Road Bridge in Virginia, the Brooklyn-Queens
20 Expressway Bridge in New York, and the
21 Queens Bridge in New York."

1 Two sentences in an affidavit, that's the
2 entire proffer of proof that the U.S. Government is
3 liable for the application of this measure on
4 projects other than the Springfield Interchange.
5 The real issue is that ADF has made no
6 effort to prove that it has been discriminated
7 against because it is a Canadian investor or
8 because its investments are owned by Canadians.
9 And I think Mr. Kirby is trying to insert words
10 into my mouth by suggesting that I was suggesting
11 that we had to insert words into the NAFTA. My
12 point wasn't--my point was exactly the opposite.
13 You don't have to insert any words in the NAFTA.
14 You can just apply the words of Article 1102(2).
15 1102(1), which refers to investors, says
16 you can't discriminate against an investor in the
17 listed activities just because that investor is
18 Canadian. 1102(2) says you can't discriminate
19 against an investment in the listed activities just
20 because the investors--that is, the owner of that
21 investment--is Canadian.

1 These are different provisions, and
2 contrary to what Mr. Kirby said earlier today, the
3 U.S. Government position is not that 1102(1) and
4 1102(2) are the same. They obviously apply, in one
5 instance, to investors; in the other, to
6 investments. But the comparison factor in each
7 case is the same, the nationality of the investor.
8 1102(2) does not say that you can't
9 discriminate against an investment on the basis of
10 the national origin of the investment. And that's
11 what Mr. Kirby attempts to insert into the terms of
12 1102(2).
13 Of course, what he's really trying to do
14 is induce you to make a comparison of two investors
15 who are not in like circumstances.
16 An 1102 violation cannot be based upon a
17 comparison between an American investor holding
18 U.S. steel and a Canadian investor holding Canadian
19 steel. Those two investors are not in like
20 circumstances. Nor can a violation be made out
21 because an American investment--a steel company

1 holds American steel and a Canadian investment,
2 here ADF International, hold Canadian steel. There
3 is no 1102 violation there because there's no
4 discrimination based upon the nationality--no
5 discrimination shown based upon the nationality of
6 the investor.
7 This is not the result of words that I
8 want to insert in Chapter Eleven. This is the
9 result of the words that are there.
10 Therefore, when Ms. Lamm asked Mr. Kirby
11 that you're not saying that you're being
12 discriminated against because you're Canadian, and
13 he said in an initial answer, "That's correct,"
14 that's an admission that this case has to be
15 dismissed.
16 Now, he quickly qualified that, perhaps
17 because he saw the problem with that answer. To
18 say that, of course, if you wanted to look deeply
19 into the question of impact, maybe something could
20 be said. Well, and then there were--then the
21 President asked some questions to try to get ADF to

1 be clear about impacts it may have suffered as an
2 investor that would be different from an American
3 investor's impacts.
4 Now, we saw from the difficulty that Mr.
5 Kirby had in describing that that it might be very
6 difficult to show any different impacts. An
7 American steel company, say the same size as ADF,
8 same facilities, would have exactly the same
9 choices to make as--I'm sorry, ADF International,
10 exactly the same choices to make that ADF
11 International faced under this contract. They
12 might well have wanted to fabricate steel in
13 Canadian plants because of the cost differential.
14 But they were denied that right to do so no less
15 than was ADF International. There was no
16 discrimination based upon the nationality of ADF
17 International's owners compared to the owners of
18 the American company.
19 It's our position you don't have to go any
20 further in terms of looking for a basis for a claim
21 of de facto discrimination. First of all, ADF has

1 not even proffered a test for such a notion under
2 1102.
3 It certainly has not proffered any
4 authority for the conclusion that different
5 treatment can be measured by differential impacts.
6 And of course, even more conclusively, ADF has
7 presented not a bit of evidence that would allow
8 this to be--you know, to make such a comparison.
9 I will conclude my remarks with that, and
10 just turn the floor over to Ms. Menaker to add some
11 additional comments.
12 I think we can just entertain additional
13 follow-up questions if you have any. But let me
14 just note, Mr. Legum reminds me of the conclusion
15 of the Tribunal in Azinian who said it's not the
16 purpose of NAFTA to compensate companies for every
17 business disappointment they face. We're sorry
18 that ADF International faced some business
19 disappointments here, but it did not involve a
20 violation by the United States of its NAFTA
21 obligations.

1 MS. LAMM: So as I understand what you're
2 saying and as I understood what you said yesterday,
3 it wasn't including any new words in 1022, it was
4 just looking at the words "investments of the
5 investor of another Party." So those words are
6 there, and you can't extract the "investment" word
7 from "of the investor." And so your position is
8 that you have to compare the investment as held by
9 a Canadian investor to an investment as held by an
10 American investor and see what disparities if any
11 there are with respect to the treatment that
12 investment is receiving.
13 MR. CLODFELTER: That's correct. The
14 comparison clearly is out of 1102(2), investments
15 of investors of another party versus investments in
16 like circumstances of its own investors. So that's
17 the comparison, investments of investors of another
18 party versus investments, like circumstances, of
19 its own investors. That's the comparison.
20 And those terms are, by the way, defined
21 terms together. If you look at the definitional

1 Section C of Chapter Eleven, you'll see that the
2 definition is for investor of a party.
3 MS. LAMM: And that's in--
4 MR. CLODFELTER: And investment of an
5 investor of a party as well.
6 MS. LAMM: 201?
7 MR. LEGUM: Article 1139.
8 MS. LAMM: Okay, I'm sorry. And for like
9 circumstances it is not necessarily a comparison on
10 a like product basis so you'd have all fabricated
11 steel. Rather, your contention would be that it's
12 the subset of steel produced in the U.S.?
13 MR. CLODFELTER: Well, since the
14 comparison is between the ownership of the
15 investment, investors of another party versus your
16 own investors, you have to control for the
17 investment. You have to look at if this investment
18 were owned by an investor of your party, would you
19 be treating that investment differently? So in
20 fact, the investment is the same. You'd have to
21 attribute the same investment to investors from the

1 two countries to see whether or not one investor is
2 being treated better than the other or one
3 investment is being treated better than the other.
4 So if we're looking at the steel, we have to look
5 at whether or not an America company that owned the
6 same steel would be treated differently. That's
7 the comparison that's called for in 1102(2).
8 Ms. Menaker will add a point.
9 MS. MENAKER: I just want to add a point
10 to elaborate on that, which would be the--what
11 would be the outcome of accepting ADF's argument on
12 this point which we've said time and again it would
13 turn 1102 in national treatment, which is supposed
14 to be focused on the nationality of an investor
15 into a trade provision that basically turned on the
16 national origin of goods. And so, for example, if
17 you had two stores in the United States, one owned
18 by a U.S. investor, one owned by a Canadian
19 investor, and both sold clothing, if the Canadian
20 store decided that it wanted to sell imported
21 clothing, Canadian clothes, and it imported the

1 clothes from Canada and there are tariffs placed on
2 those clothes, and there are still tariffs in the
3 Mexico, Canada, United States--I don't know what
4 they attach to, but assume they attach to textiles--what ADF
5 is in essence saying is look, that's less
6 favorable treatment under Article 1102 because my
7 investment is the clothing that I have in the
8 United States and I had to pay more for it, because
9 I wanted to bring it in from Canada, whereas this
10 U.S. company next to me, they just wanted to sell
11 U.S. clothing, and that we submit is not a proper
12 analysis of 1102(2). What you need to look at
13 there is the ownership of the investment. If a
14 U.S. owner--U.S. investor owned that same store and
15 wanted to sell that Canadian clothing, it would
16 have to also pay the same price to bring it in, pay
17 any tariffs and sell it. If the Canadian--and vice
18 versa. If the Canadian owner wanted to own the
19 U.S. store that sold U.S. clothing, there's no
20 problem in there. There's nothing to prevent that
21 Canadian investor from establishing its investment,

1 and so too here. There are fabrication plants in
2 the United States and their ownership is not
3 restricted on the basis of nationality. ADF
4 International is free to expand its plant in
5 Florida to bring it up to the capacity to enable it
6 to supply steel for federally-financed highway
7 projects if it chooses to do so. If it doesn't
8 want to do so, it can't then bring the steel to
9 Canada and have it fabricated there. But a U.S.
10 owned steel fabricator in ADF International's
11 shoes, is in the same position, is treated in the
12 same manner. If it doesn't have the capacity, it
13 can't rely on the foreign affiliate whether it be
14 affiliated with the company or not, to gain a cost
15 advantage in shipping the steel outside of the
16 country to get it fabricated and bringing it back
17 in.
18 MS. LAMM: Then how is that different, if
19 that's the analysis than the analysis one would
20 exercise in under 1102(1), because you're basically
21 comparing the restrictions on the investor.

1 MS. MENAKER: You're comparing the
2 nationality of the investor in both, but they
3 protect different things. So, for example, in
4 1102(1), if the United States had a law that said
5 if Canadian investors want to invest in a certain
6 industry, they have to pay an extra tax, for
7 example. Now--and I know tax measures are treated
8 differently so this is just a general example. A
9 measure such as that would or might violate 1102(1)
10 because it might afford the Canadian investor less
11 favorable treatment than a U.S. investor in like
12 circumstances.
13 If on the other hand a measure said we,
14 the United States is going to nationalize all
15 Canadian-owned airplane manufacturers, that's an
16 issue that would fall under 1102(2), because there
17 the--it would be we're going to nationalize a plant
18 that--car plants, Canadian-owned car plants. There
19 the car plant in the United States is an
20 investment. A car plant is not an investor. But
21 you're discriminating against the car plant based

1 on the nationality of its owner, based on the
2 nationality of the investor. So that's where the
3 difference between 1102(1) and (2) lies. One
4 protects the investor, one protects the investment
5 of the investor. But both protect the investor on
6 the basis of its nationality or the investment on
7 the basis of the nationality of the investor of the
8 investment.
9 MS. LAMM: And can you distinguish that
10 then from the situation where we would be saying
11 that all Canadian-owned steel in the United States
12 would not be permitted to be used.
13 MS. MENAKER: Yes, because there it's--again the
14 distinction is not being drawn based on
15 the nationality of the owner of the investment.
16 The investment in that case is steel. And so it's
17 not all Canadian-owned steel that can't be used.
18 It's all steel that has Canadian content. All
19 Canadian steel might not be able to be used, but
20 regardless of who owns that steel.
21 MS. LAMM: Right, right.

1 PRESIDENT FELICIANO: Can I just ask, is
2 the concept of reference to conditions of
3 competition in determining less favorable--presence
4 of less favorable treatment, which is something
5 that is used in WTO; would you regard that as
6 pertinent in this particular case under 1102,
7 considering that you said it's on the basis of the
8 nationality of the investor, the protection that is
9 given on the commitment of nondiscrimination is a
10 commitment of nondiscrimination on the basis of the
11 nationality of the investor. Are conditions of
12 competition still pertinent?
13 [Counsel conferring]
14 MS. MENAKER: The best way that I can
15 answer that question is really to just refer to the
16 language in 1102, and I know that you are perhaps
17 looking for more guidance on the definition or
18 elaboration of less favorable treatment, but all I
19 can reiterate is that in order to find an 1102
20 violation or to look into whether there has been
21 one. It has to be less favorable treatment with

1 respect to one of these things, the establishment,
2 acquisition, expansion, management, conduct,
3 operation, sale or other disposition of
4 investments. So to the extent that some--I think
5 the term you used was competitive conditions--to
6 the extent that that falls into one of those
7 categories, you know, that's the only guidance we
8 really have here, but I would just reiterate again
9 that all ADF has offered in this regard is
10 speculation, speculation that there has been some
11 de facto discrimination on the basis of its
12 nationality because it said this morning it's more
13 likely that a U.S. investment in like circumstances
14 with ADF International would have larger facilities
15 in the United States because that's its home
16 country, and there's no evidence in the record to
17 support that, and in fact, there's no reason for us
18 to think that that would indeed be the case.
19 Steel fabricators in the United States,
20 they can be owned by whomever. There is no barrier
21 to ownership of those steel fabricators and a

1 fabricator in the U.S. that has the capacity to
2 fabricate an amount of steel from one of these
3 projects may very well be Canadian owned. At the
4 same time you could have a U.S.-owned fabricator in
5 the U.S. that has a parent or sub or other
6 affiliate in Canada with larger facilities. Maybe
7 it's set up there because of lower labor costs or
8 whatever, and it's unable to take advantage of that
9 relationship, regardless of the fact that it is
10 U.S. owned, so ADF has produced absolutely no
11 evidence to show that there was actually any less
12 favorable treatment here.
13 PRESIDENT FELICIANO: Thank you. I will
14 ask Professor de Mestral to raise the succeeding
15 questions.
16 PROFESSOR de MESTRAL: Thank you. Just
17 pursuing this question of evidence, we recall that
18 there was a request for a review of access to
19 documents from ADF, particularly in respect of
20 waivers that might have been issued in the past.
21 And we wonder what the results of that search for

1 information have been. Has some pattern with
2 respect to the grant or a refusal of waivers been
3 determined as a result of the search which was
4 made?
5 MR. KIRBY: Assuming that the question is
6 addressed to ourselves, I'd like to consult with my
7 friend here for two seconds. Thank you.
8 [Counsel conferring]
9 MR. KIRBY: Just to briefly respond to the
10 question that we did receive documentation relating
11 to the grant of waivers, and no particular patent
12 is discernible. There are waivers granted from
13 time to time in respect of a narrowly-defined range
14 of products that are not debatable in the United
15 States, ferry boats parts and--waivers are--if
16 there's any pattern, it's that waivers are
17 difficult to obtain and don't seem to be granted on
18 a sort of broad basis, but on a fairly narrowly-defined
19 product basis.
20 PRESIDENT FELICIANO: In other words,
21 there has been no history of denial of request for

1 waivers from Canadian steel fabricators?
2 MR. KIRBY: We're certainly not basing a
3 claim on a history of denial, but it may well be
4 that it was--no, we're not basing our claim on
5 history of denial of waivers. We're basing our
6 claim on the fact that there is a straight
7 prohibition throughout history.
8 MS. LAMM: I think now I'd like to move to
9 1105. We have several questions under 1105, and
10 I'd like first, Mr. Kirby, to have you focus on--well, there
11 are actually two for you, but I think
12 we'll start with--we now have from Mr. Legum a
13 definition that is sketchy but nonetheless a
14 definition under 1105, that in his view it would
15 include denial of justice, potentially fair and
16 equitable treatment problems, full protection and
17 security problems, at a minimum level.
18 What we would like you to do is to take
19 that, since we don't have another definition, and
20 have you tell us what evidence is there? Are you
21 giving us any evidence of any violation of those

1 specific things? Is there arbitrary or capricious
2 treatment? Have you been treated in some
3 unjustifiable, unreasonable manner by the U.S.
4 bureaucracy? Other than--we understand completely
5 your argument with respect to the 1982 act, the
6 regulation, the requirement, but putting that
7 aside, is there anything else, or is there any way
8 that you would fit even that act within one of
9 these?
10 MR. KIRBY: I think the response to this
11 will be fairly brief. I hadn't understood, first
12 of all, Mr. Legum to suggest that there was a fair
13 and equitable content in--I understood him to talk
14 of denial of justice and full protection and
15 security, and you've now said he seemed to indicate
16 that there may be--I got the same impression, but I
17 was even less definite. I thought he--there was a
18 suggestion that there was some standard.
19 MS. LAMM: Well, it is, and it's even
20 specified in the FTC, paragraph (2), that there is
21 a fair and equitable treatment concept, but it is

1 limited by this minimum standard of treatment of
2 aliens, but we're going to go to that section next.
3 Right now we're asking what--what are you alleging?
4 If this is the definition, what is it?
5 MR. KIRBY: The treatment--the treatment.
6 And you said you fully understand our case in
7 respect of the law and how the law becomes practice
8 on the ground, and that's our allegation. In other
9 words, if you're asking me in respect of this
10 particular contract or in respect of any other
11 particular contract, there is something other than
12 the methodical application of these principles by
13 the agencies involved. That's what we're
14 complaining about. We're complaining from the
15 start down to what eventually becomes policy, but
16 that is policy. We're complaining about how this
17 measure is implemented generally, not how this
18 measure was implemented specifically in any
19 different way.
20 MS. LAMM: Okay. So let's then take that
21 measure, and can you tell us how it would violate

1 fair and equitable treatment, denial of justice or
2 full protection and security?
3 MR. KIRBY: It's fair and equitable
4 treatment. The notion--maybe to set the stage,
5 I'll go back and talk about the act, clearly
6 protectionist, clearly--I'm sorry.
7 PRESIDENT FELICIANO: Forgive me, Mr.
8 Kirby. It might help you to understand if I give a
9 little bit of background. We have understood your
10 argument to be of the following tenor. You have
11 Article 1102 and 1103.
12 MR. KIRBY: Uh-huh.
13 PRESIDENT FELICIANO: We understand you to
14 be saying that you have made a claim under 1102.
15 You also made a--you're saying 1103, although that
16 is objected to or denied by the U.S. We understand
17 you to be saying that even if we--the requirements
18 of 1102 and 1103 have been complied with,
19 nevertheless, this particular measure remains an
20 arbitrary and fair and reasonable one so that it
21 violates a standard of fair and equitable treatment

1 for protection and security, which is set out in
2 1105. We're not going to discuss that problem of
3 interpretation and so on. We understand you can be
4 saying that. I'm sorry if--in other words, the
5 reference is to a claim that you have been denied
6 the protection of 1105, even if you may have--assuming for
7 arguendo you failed to show a
8 violation of 1102, 1103, nevertheless you are
9 entitled to redress because you have been denied
10 treatment required by 1105. That's the background
11 of the question now being posed to you.
12 MR. KIRBY: Just two seconds to consult
13 with my friend to--
14 PRESIDENT FELICIANO: The suggestion is
15 made by our Secretary, would you like a coffee
16 break at this point?
17 MR. LEGUM: That would be lovely.
18 MS. LAMM: In fact, if it might help, I
19 can tell you what the question after this is, and
20 it's very much related, because then you can think
21 about it during the break.

1 The question for you, Mr. Kirby, is you've
2 made the argument that under 1103, you would have
3 the benefit of a better minimum standard of
4 treatment under the Albanian Treaty, for instance,
5 which I guess doesn't appear to be excluded by the
6 reservation in Annex IV because it was signed--it
7 entered into force after NAFTA. So we understand
8 your argument that you've got the benefit of this
9 better standard, but we're struggling with the
10 definition, what is the better standard? What is
11 the substance of the better standard? We have
12 already heard from Mr. Legum that even the minimum
13 standard included fair and equitable treatment,
14 denial of justice, full protection and security.
15 What's different about this better standard? So
16 that's the question for you.
17 And for Mr. Legum we have: why isn't the
18 minimum standard of treatment in 1103, why doesn't
19 that encompass this minimum standard? And we're
20 not relying on the minimum standard of treatment
21 for investors. We're not--that is articulated

1 under 1105. We're not relying on 1104, to read it
2 back in there. We're just saying when you assess
3 the treatment of investors from other countries, if
4 there are investors that have what is arguably a
5 higher standard in terms of the minimum standard of
6 treatment they receive, then why, under 1103,
7 wouldn't this investor be entitled to that better
8 standard of minimum treatment? And we're not
9 saying we think that there is a disparity, but
10 assuming arguendo that there is, why under 1103
11 wouldn't that be the kind of treatment that you
12 would have to give them the advantage over the
13 Albanian Treaty standard?
14 PRESIDENT FELICIANO: Mr. Legum, our
15 Secretary has just raised an interesting
16 possibility, that perhaps considering the time it
17 is now and considering the fact that the cafeteria
18 or the restaurant are going to be closing soon,
19 would you rather we have a lunch break now and come
20 back after say an hour or so because if you have a
21 coffee break now, it will take away all appetite

1 you have for lunch and so on. We can do that if
2 that is convenient.
3 MR. KIRBY: Perfectly acceptable, and one
4 hour is certainly plenty.
5 PRESIDENT FELICIANO: I don't think we
6 will go very long after lunch. This is my guess.
7 MS. LAMM: Right. There's one other area
8 or two after that.
9 MR. LEGUM: Good. No, it's always good to
10 talk on a full stomach. Thank you. So 1:45?
11 PRESIDENT FELICIANO: Yes, is that all
12 right? 1:45.
13 [Whereupon, at 12:45 p.m., the hearing
14 recessed, to reconvene at 1:45 p.m. this same day.]

1 A F T E R N O O N S E S S I O N
2 [1:47 p.m.]
3 PRESIDENT FELICIANO: Mr. Kirby?
4 MR. KIRBY: Thank you, Mr. Chairman. If I
5 might, in fact, answer the second question first,
6 and the second question was: If one proceeds
7 through Article 1105 to one of these additional
8 Bilateral Investment Treaties, is there a
9 difference, what's the difference, what's the
10 content of the difference? And I think--the reason
11 I'm answering question two first is because I think
12 the answer is there ought not to be a difference,
13 but in any event, what we are talking about in this
14 arbitration is fair and equitable treatment and the
15 content of that concept of fair and equitable
16 treatment. Whether it's reached through 1105
17 directly or indirectly through 1105(2) and (3), our
18 destination is fair and equitable treatment.
19 Now, to try to pour content into fair and
20 equitable treatment, we won't attempt to do it in
21 the abstract but, rather, refer to the specific

1 instances of unfair and unequitable treatment in
2 respect of this particular arbitration.
3 Just as a prefatory matter, I'll recall
4 the--and it's set out in the Investor's Memorial,
5 the history of the legislation from the highest
6 level of Congress down through regulations and
7 policies as administered by the Federal Highway.
8 We think that on that somewhat tortured
9 road that the U.S. Government failed in its
10 obligation to provide us with fair and equitable
11 treatment in a number of ways.
12 Firstly--and this is a bird's-eye view of
13 what happened--Congress passes legislation which is
14 admittedly highly protectionist, designed to be
15 highly protectionist, and of an extremely broad
16 scope--steel, iron, and manufactured products, 100
17 percent U.S. origin.
18 [Pause.]
19 MR. KIRBY: In fact, the reason I looked
20 it up is because I thought I had misstated and I
21 had, in fact, misstated. Congress didn't require

1 100 percent U.S. origin. They stated steel, iron,
2 and manufactured products must be produced in the
3 United States.
4 As we work our way down into the
5 regulations, that litany of steel, iron, and
6 manufactured products is allowed to become steel
7 materials--steel or iron materials, and in another
8 portion of the regulation, it becomes materials and
9 products, including steel and iron materials.
10 So, clearly, from a language consistency
11 perspective, we're already into a fairly slippery
12 slope in terms of what Congress wanted and what the
13 regulations said, and then when you finally get the
14 application of this law on the ground, you have no
15 manufactured products. You have steel and iron.
16 And you have a rule that every single activity
17 conducted on that steel and iron is 100 percent.
18 What you have in fact is now you have the
19 administrative officials who have delegated
20 authority to apply the law actually writing law.
21 They're the ones that are creating the legal

1 standard, and that legal standard is not what
2 obviously appears from the governing statute. So
3 you have the sense of arbitrariness in terms of
4 what the final product looks like after Congress
5 has passed its legislation. We think the Congress
6 had a duty that it owed to investors to ensure that
7 their laws were not applied in an arbitrary
8 fashion, and we believe that the application of the
9 laws in the present case were arbitrary. Basically
10 all decisionmaking authority was not delegated in
11 an official sense, was allowed to flow down into
12 the hands of the administrative officials.
13 We have an issue--I'm sorry.
14 MS. LAMM: So I just want to make sure I
15 understand it. This 1983, I think it is,
16 regulation that was promulgated beyond the scope,
17 as you contend, of the enabling statute was,
18 therefore, devoid of congressional authority.
19 Under a domestic, you know, Administrative
20 Procedure Act one might be able to attack that.
21 Are you saying that a fair and equitable treatment

1 concept would be analogous to that kind of an
2 approach?
3 MR. KIRBY: That's right. There's a
4 sense--but the arbitrary claim is not simply--it
5 doesn't stop at the regulation. It stops--
6 MS. LAMM: It doesn't stop with the--
7 MR. KIRBY: When the administrative
8 officials took that regulation even at the level of
9 the administrative official--
10 MS. LAMM: Right, right.
11 MR. KIRBY: --the application was totally
12 different than what the regulation says--
13 MS. LAMM: That there was no power to do
14 what they did. They went beyond the scope of the
15 congressional authority that you would say was
16 deficient to begin with.
17 MR. KIRBY: The congressional authority--no, I'm
18 not criticizing or challenging the
19 authority of Congress to pass laws. They can pass
20 laws. What I'm saying is that once they have
21 passed laws, they have an ongoing duty to ensure

1 that those laws are applied in a manner in which
2 Congress has indicated its intent, and not to allow
3 the law-making function to float down to
4 administrative officials.
5 MS. LAMM: And you think that a NAFTA
6 claim can reach that even though it pre-dates NAFTA
7 by decades--
8 MR. KIRBY: Because--
9 MS. LAMM: --because the U.S. should have
10 brought their reg into compliance at the time NAFTA
11 was--
12 MR. KIRBY: I'm not suggesting that you
13 reach back into 1982. What I'm saying is we have
14 an ongoing violation, and there is an ongoing duty
15 on the part of Congress to rectify and not to leave
16 that arbitrary application of the laws in the hands
17 of the administrative officials at Federal Highway.
18 Federal Highway officials report regularly
19 to Congress on what they're doing, and I don't
20 think there's any issue did Congress know.
21 Congress certainly can be presumed to know.

1 We have an issue with transparency, and
2 transparency is set out as one of the goals of
3 NAFTA and one of its objects and purpose in
4 Article--I believe it's 102 of NAFTA. And I'll
5 read--it's Article 102(1), "The objectives of this
6 agreement, as elaborated more specifically through
7 its principles and rules, including national
8 treatment, most favored nation treatment, and
9 transparency, are to"--and then there's a series of
10 objects and purpose. So, clearly, the issue of
11 transparency is raised to a fairly high level
12 alongside national treatment and most favored
13 nation treatment under NAFTA.
14 Now, my friends undoubtedly will tell that
15 Mr. Justice Tysoe in the British Columbia Superior
16 Court, sitting in appeal from the Metalclad
17 decision, stated that transparency was not one of
18 the objects and purposes of NAFTA. It was simply
19 one of the tools through which NAFTA achieves its
20 objects and purpose.
21 We're saying that, nonetheless, you know,

1 through the concept of fairness and equity,
2 transparency of laws is a fairly fundamental
3 concept that the person affected by laws can know
4 precisely what he needs to do in order to bring
5 himself within those laws.
6 Again, my friends will say ADF should not
7 have had a problem with transparency, it knew
8 exactly what it needed to do to bring itself within
9 the law. It needed to provide 100 percent
10 Canadian--U.S. content, and there is no issue of
11 transparency. I suggest that the issue of
12 transparency is not--is the violative
13 administrative policies which are questionable in
14 terms of are they truly an interpret--are they
15 truly the application of congressional intent.
16 The fact that the rule might be
17 transparent in an absolute sense in the way that
18 100 percent domestic content is transparent, we
19 know what that rule is. But when that rule doesn't
20 reflect what is in the statute, an issue of
21 transparency arises.

1 There's also an issue of transparency in
2 the way the contractual provisions have been
3 drafted, and we looked at Special Provision 102C,
4 and Ms. Lamm asked if, for example, if 102C--did
5 ADF have a problem or did they notify their intent
6 to fabricate in Canada, and we had this debate
7 about why, after seeing 102C, ADF was nevertheless
8 of the opinion that it could fabricate in Canada.
9 102C of the contract provision...
10 MS. LAMM: Are you in the Memorial? Page
11 4.
12 MR. KIRBY: Sorry. I thought I would at
13 least have done things chronologically, but I guess
14 not. Thank you. Which states steel products in
15 one paragraph requires them to be produced in the
16 United States, and then clarifies by saying that
17 that means all manufacturing processes where raw
18 material is changed, and because of that process is
19 different from the original material, which, again,
20 is non-transparent. There seems to be a sense of
21 absolutism in the provision, but in no way can it

1 be said to either tell ADF clearly what its
2 requirements are under the law, because it's, in
3 fact, not an interpretation of the law but an
4 interpretation or an application of what is the
5 administrative policy. It also doesn't accurately
6 reflect the administrative policy, which is 100
7 percent U.S. origin.
8 MS. LAMM: I'm sorry. Which sentence are
9 you referring to in this?
10 MR. KIRBY: The first paragraph, 102.05
11 states, "Except as otherwise specified, all...steel
12 products...shall be produced in the United
13 States..." and then, "`Produced in the United
14 States' means all manufacturing processes whereby a
15 raw material...is changed, altered or transformed
16 into an item or product which, because of the
17 process, is different from the original
18 material..." That must occur in the United States.
19 The issue here is: Does that sufficiently
20 give notice that fabrication of steel, which is, in
21 fact, cutting, punching, welding, and not creating

1 a manufactured product, does that give sufficient
2 notice as to what ADF needs to do in order to bring
3 itself within the four corners of that particular
4 provision? We would suggest that it does not.
5 I think we've already--I'm sorry, Mr.
6 Chairman.
7 PRESIDENT FELICIANO: I'm sorry to
8 interrupt you. I'm having great difficulty
9 appreciating your argument, Mr. Kirby. Firstly,
10 you heard me suggest earlier, when I really wanted
11 you to address it, you have this doctrine or rule
12 that says that municipal law is a question of fact
13 that must be proved to a Tribunal.
14 Now, what I understand you to be saying is
15 that the U.S. law on this matter purports to have
16 been stated by the Federal Highway Administration
17 in the rules and regulations adopted by them. Are
18 you questioning the status of those regulations
19 issued by the Federal Highway's administrator as
20 law of the United States?
21 MR. KIRBY: No. It clearly is law of the

1 United States. However, when it finds its way down
2 into the policies of the administrative officials,
3 it's not entitled--the policies as stated by the
4 administrative officials is not entitled to the
5 same deferential treatment.
6 PRESIDENT FELICIANO: It's not a question
7 of deferential treatment. It's a question of--
8 MR. KIRBY: Of an absolute prohibition of
9 going behind it.
10 PRESIDENT FELICIANO: I mean, it either is
11 or is not the law of the United States as far as
12 the Tribunal is concerned. That is a question of
13 fact to be proven.
14 MR. KIRBY: Perhaps you missed the
15 distinction I was trying to draw between the
16 regulation on the books and the administrative
17 policy printed and applied by the Federal Highways,
18 and there is--
19 PRESIDENT FELICIANO: Well, that tells me
20 that you're questioning the correctness of the
21 regulations issued. You're saying that the

1 regulators have acted ultra vires. But that's--we
2 can't pass on--
3 MR. KIRBY: I'm not asking whether the
4 regulators acted ultra vires. What I'm saying is
5 that the administrative officials purporting to
6 apply regulations and to apply laws were not doing
7 it. In other words, you may have a law authorizing
8 an administrative official to do A, B, and C. And
9 if he then moves away from there and does D, I
10 would suggest that this panel has every authority
11 to look at that behavior without questioning the
12 domestic law, without wondering is this law valid
13 or not, but, rather, is this law sufficient
14 authority for him to act. The fact that he might
15 claim to be acting on a particular law is not
16 sufficient to insulate his actions from review by
17 this Tribunal because that would simply open the
18 door to administrative anarchy. Any administrative
19 act could be cloaked in the immunity of a purported
20 exercise of statutory authority, and I think that
21 this Tribunal can look to the question of whether

1 that administrative act--not a regulatory act, an
2 administrative act, whether that administrative act
3 is, in fact, an exercise of any statutory
4 authority.
5 MS. LAMM: So as I understand it, your
6 contention would be that fair and equitable
7 treatment at an international level would encompass
8 basically what an APA review would encompass at a
9 domestic level, and that is, an action not in
10 compliance with the law by an administrative
11 official, because the law does not permit them to
12 exclude all manufacturing processes, and so it's
13 beyond the scope of the enabling statute.
14 MR. KIRBY: I understand your reluctance
15 and your quite justified reluctance in seeking to
16 determine the precise meaning of the municipal
17 statute. However, the question is: Can one arrive
18 at the point of testing the validity of an
19 administrative act done in purported compliance
20 with the law without at the same time casting an
21 eye on what that law purportedly authorizes

1 administrative officials to do.

2 I would suggest that, of course, this

3 panel has the authority to look at that

4 administrative act, and if the defense to the act

5 is I was simply acting under my statutory authority

6 to act, I think you're entitled to look at what the

7 scope of that statutory authority was. That's what

8 brings in--there's an additional aspect which I

9 mentioned earlier, and I don't want to lose that

10 from it, the duty of Congress to ensure that its

11 laws are properly administered and applied.

12 As I said earlier, Federal Highway goes

13 back to Congress every year and reports on what

14 it's doing. And I don't think my friends would

15 deny that Congress knew exactly what was happening

16 with its statute. And I think--

17 PRESIDENT FELICIANO: Mr. Kirby, you have

18 me puzzled still. The duty of Congress that you

19 refer to, is that a duty owed under international

20 law, under NAFTA? Or is that a duty, a political

21 duty owed by Congress under the Constitution of the

1 United States to its people?

2 MR. KIRBY: Within the context of fair and

3 equitable treatment, owed by the United States to

4 the investors of Canada, it's a duty on the

5 Government of the United States to ensure that its

6 laws are properly applied to investors of Canada,

7 within the concept of fair and equitable treatment.

8 PRESIDENT FELICIANO: Ordinarily, one

9 would speak of the duty of a state party to a

10 treaty to make sure that the laws are in compliance

11 with the requirements of the treaty and to

12 implement the treaty. That's all.

13 And I'm still grappling with the problem

14 of exactly where does transparency come in here and

15 how has the ADF been denied fair and equitable

16 treatment in respect of transparency as a standard.

17 MR. KIRBY: Transparency requires that a

18 person affected by a particular regulation, law,

19 policy, practice can look at that collection of

20 instruments that is affecting him and know

21 precisely what it is he needs to do to bring

1 himself within the law.

2 PRESIDENT FELICIANO: Do you know what

3 that reminds me of? The doctrine of

4 unconstitutional vagueness. Is that what you're

5 referring to, Mr. Kirby?

6 MR. KIRBY: I don't think that I'm saying

7 that this is unconstitutionally vague. What I'm

8 saying is--what I'm trying to get at is that a

9 reasonable actor in the steel fabrication business

10 would look at the law, the regulation, the policy

11 as it's applied and would say I don't know what it

12 is that I need to do to bring myself within that

13 framework.

14 Now, my friends would say of course you

15 know; you simply provide 100 percent U.S.-origin

16 steel. That's basically saying what you need to do

17 is to comply with the last act in the chain. The

18 last act in the chain, we contend, is faulty.

19 That's the administrative policy.

20 That's not sufficient because our actor is

21 not looking only at the last act in the chain. Our

1 actor is looking at globally the entire chain. And
2 when he looks at that entire chain, what he sees is
3 a very, very difficult beast to conceptualize, and
4 he is left with either believe what the lowest
5 official tells me and that's it, or believe that
6 that lower official must surely recognize that what
7 he's doing is so different to what the statute
8 requires that we challenge him or we do something
9 else. But the bottom line is when, for example,
10 our actor, ADF, went to fulfill its contractual
11 requirements, it believed at the time it could do
12 so by fabricating the steel in Canada and looked at
13 the provision and thought it could, was confirmed
14 in that interpretation when it went through the
15 statutory history and saw that the regulators, in
16 fact, had completely removed manufactured products
17 and were not talking about steel.
18 It's quite a reasonable interpretation of
19 the entire package, the entire chain, to say we
20 know that this legislation was enacted for steel
21 mill protection. We don't know that it was enacted

1 for steel fabricator protection. We know that when
2 you talk about steel, all steel must be U.S.
3 origin, our investor had mill certificates which
4 said that its steel was U.S.-origin steel. So all
5 steel must be of U.S. origin, I qualify. But, no,
6 he doesn't qualify. He doesn't qualify because as
7 you move down the chain, the rules become more and
8 more complicated. That's the lack of transparency.
9 And it's not a defense to that lack of transparency
10 to say all you had to do was to follow the last
11 line, the last actor. You had to follow the
12 instructions of the administrative official.
13 That's not a defense to the absence of transparency
14 because that assumes that we simply do what we're
15 told each and every time by an administrative
16 official without referring ever to his statutory
17 authority for acting.
18 The consequence, I think we discussed it
19 earlier in terms of the very easy regulatory device
20 of taking out manufactured products, and thereby
21 absolving yourself of the obligation to enact rules

1 to try and deal with the beast--let me go back
2 again.
3 We've heard a number of times about the
4 difference between the Buy American type rules and
5 the Buy America rules, that the Buy America rules
6 are 100 percent origin, the Buy American rules are
7 different rules of origin based on percentage
8 content and generally will affect products rather
9 than the output of steel mills.
10 Here we have a mixed--at its conception, a
11 mixed beast of steel--it's pretty easy to tell the
12 origin of steel; iron--it's pretty easy to tell the
13 origin of iron; and manufactured products--it's
14 very difficult to tell the origin of manufactured
15 products. That's what Congress wanted. That's
16 what Congress said it wanted.
17 So now the choice is we either enact rules
18 to deal with that or we take away the need for
19 rules by taking away manufactured products, and
20 make sure that we stretch the steel to cover steel
21 manufactured products. I believe that that was the

1 intention.

2 The way the law was applied--once again,

3 not challenging that that was the way it was done.

4 That's what the regulations say. But the way it

5 was done has an impact on ADF in that ADF doesn't

6 get the benefit of what traditionally had been a

7 benefit in respect of manufactured products. That

8 is a rule of origin other than 100 percent content.

9 PRESIDENT FELICIANO: You seem to be

10 complaining that the rules changed. That's what it

11 comes down to, isn't it?

12 MR. KIRBY: No. What I'm--the rules did

13 change, and we don't like it. The change in those

14 rules had a direct impact on us in that we were

15 denied the benefit of a rule of origin in respect

16 of manufactured products. Or because you can well

17 say--they could still have passed it as a rule of

18 origin--as a 100 percent content rule.

19 Theoretically, Congress could have said all

20 manufactured products as well, 100 percent content.

21 Theoretically.

1 I would put forward the proposition that
2 if that were to happen, there would be no way to
3 apply that statute--this particular statute across
4 the board without--for a period of 20 years, I
5 might add, without significant pressure to either
6 adopt the rule of origin, change the law, do
7 something. What the regulators did was basically
8 avoid that pressure building up by saying we won't
9 apply the statute as drafted, we'll simply apply
10 the statute to steel manufactured products but not
11 others.
12 You wish to ask a question?
13 MS. LAMM: Well, I'm just wondering, is
14 your complaint--or doesn't your complaint have to
15 be under Chapter Eleven not this promulgation of a
16 statute and the regulation and the application up
17 until NAFTA, but really the application post-NAFTA
18 to your client? How can it be anything more than
19 that? Pre-NAFTA there was nothing wrong with it in
20 terms of--that you could make any claim about under
21 Chapter Eleven. Was there?

1 MR. KIRBY: No, in the sense of Chapter
2 Eleven doesn't reach back into history and correct
3 past wrong.
4 MS. LAMM: Right. So what you have to do
5 is say looking at the passage of NAFTA, that,
6 according to your contention, would have become
7 non-conforming, a non-conforming measure, and when
8 it was then applied to your client, that's got to
9 be the act that's not fair and equitable treatment.
10 Doesn't it? I mean, I'm just trying--
11 MR. KIRBY: What happens after NAFTA is
12 enacted is that we have a requirement to bring laws
13 into conformity.
14 MS. LAMM: Right.
15 MR. KIRBY: And some laws are seen to be
16 non-conforming one day and eventually the laws come
17 into conformity.
18 If the claim is cast in terms of the
19 refusal...I was going to say inability. No, there
20 was certainly an ability to bring it in--a refusal
21 to bring the practice into conformity, that starts

1 from January 1--from whenever, in fact, the impact
2 happened. We're dealing with the impact of these
3 measures at a particular point in time. Now, those
4 measures did not get grandfathered. The impact
5 happens because of a series of circumstances which
6 happened in the past. The regulations were passed
7 prior to NAFTA. The law was passed prior to NAFTA.
8 And the administrative policy was developed in many
9 respects prior to NAFTA.
10 The impact of all of those transgressions
11 was felt by the investor at the time the contract
12 was let.
13 MS. LAMM: It's got to be that because
14 they couldn't have been transgressions before
15 NAFTA. There was nothing that would have said--
16 MR. KIRBY: They weren't transgressions
17 under NAFTA before NAFTA.
18 MS. LAMM: Right, right.
19 MR. KIRBY: Of course.
20 MS. LAMM: So we've got to focus on at the
21 time the contract was let, the application of these

1 things to your investor.

2 MR. KIRBY: That is, I would suggest,

3 absolutely, all you should be focusing on.

4 MS. LAMM: Right.

5 MR. KIRBY: It's the application of these

6 measures, however they may have developed, but it's

7 the application of these measures at a particular

8 point in time. I don't think, however, that these

9 measures were grandfathered by the passage of NAFTA

10 and the passage of time.

11 PRESIDENT FELICIANO: Is it your

12 suggestion, Mr. Kirby, that the failure of the

13 NAFTA party to remove or suspend or withdraw

14 nonconforming legislation and nonconforming

15 regulations, from starting from the date of

16 activity of NAFTA, or a violation of the standard

17 of treatment, fair and equitable treatment under

18 1501--not--1105.

19 MR. KIRBY: That's a very good question.

20 I'm not certain that I would say that any failure

21 by a state party to correct a violation, because it

1 happens all the time that state parties are found
2 to be in violation, sometimes under treaties that
3 were enacted 20 years ago or 30 years ago.
4 Professor de Mestral mentioned the DeFira
5 case yesterday. That's a very good example of a
6 continuing violation. It was noticed much later in
7 the day, okay. So as a general principle one
8 cannot say that a state's failure to correct
9 deficiencies in respect of the treaty or to correct
10 all nonconforming measures is in and of itself a
11 violation of the obligation to give fair and
12 equitable treatment, because we're not saying that.
13 However, I think it can be quite plausibly
14 argued that in the present instance, given the
15 context that--and we've seen the legislation to
16 Treaty Chapter Ten and Chapter Eleven--given the
17 following context that there is an issue about not
18 correcting the nonconforming measure, the context
19 is as follows. The Federal Government negotiates
20 procurement obligations and promises to eliminate
21 Buy America preferences in its own procurement.

1 And at the same time, the state governments take on
2 no obligations. We've seen the fact that--now
3 we've seen the U.S. argument as to why we think
4 that that measure is conforming, and that requires
5 one to consider that an element of the program is
6 procurement while the rest of the program is not,
7 at the time all the administrative officials were
8 describing this as a grant program. At the time
9 the Clean Water Act was exempted under NAFTA, I
10 think the failure to move on and deal with the
11 federal highway program may well be a demonstration
12 that in those circumstances, there may have been a
13 lack of fairness.
14 But failure to correct nonconforming
15 measures as a matter of principle on the record,
16 no, that as a matter of principle is not a failure
17 to afford fair treatment.
18 MS. LAMM: Is there anything else that you
19 contend constitutes the violation of a fair and
20 equitable treatment standard or denial of justice
21 or full protection and full security?

1 MR. KIRBY: Okay. The denial of justice
2 and--this isn't a denial of justice case. This
3 case is based squarely on fair and equitable
4 treatment. When you ask such a question I hesitate
5 about going on the record to say that there is
6 nothing else. What I will say is with the
7 exception of what we have set out in our written
8 materials and with the exception of what I've
9 discussed today and in the previous days, there is
10 nothing else on the record.
11 Thank you, Mr. Chairman.
12 MS. LAMM: Do you have any comments on
13 both the standard, the substantive difference
14 between the MFN standard, so to speak, and the
15 1106--1105 standard, I'm sorry--and then anything
16 else that he said about what constitutes the
17 violation?
18 MR. LEGUM: Sure. What I heard from Mr.
19 Kirby was that he's not contending that there is a
20 difference between the BIT standard in Article
21 1105(1), and we would agree with that. So there's

1 no dispute among the parties on that particular
2 topic. On the topic of ADF's claims under Article
3 1105 of a denial of fair and equitable treatment, I
4 must say that I'm a bit confused as to what it is
5 exactly that I am responding to, since we did hear
6 a number of different contentions, some of which
7 seemed to have been withdrawn at various points,
8 and therefore we'll perhaps touch upon topics that
9 are no longer live topics, as it were.
10 But I'd like to start with the time bar
11 issue. Clearly any assertion based on the process
12 by which the FHWA promulgated its regulations in
13 1983 is time barred. It's not--it can't be a
14 violation of the NAFTA. The NAFTA did not--it was
15 not in effect at the time, and therefore there
16 could be no breach of a NAFTA obligation with
17 respect to what happened long before the treaty was
18 even dreamed of.
19 Now, at one point I had the impression
20 that Mr. Kirby was asserting that there was some
21 kind of ongoing violation as a result of Congress's

1 failure to tell the FHWA to change its regulation,
2 but later on in the discussion I had the impression
3 that that was withdrawn so I'm not sure exactly
4 where the record stands. I guess we'll read the
5 transcript after the day is over and get a better
6 idea then. But for the sake of good order, I will
7 nonetheless respond to that.
8 First of all, there is no international
9 administrative procedure act. The community of
10 states is a varied community, composed of
11 monarchies, democracies, dictatorships and a wide
12 variety of other forms of state. There is no
13 international consensus as to any one proper way of
14 enacting or promulgating a law of general
15 application. It is not a viable claim under
16 international law that a monarch has, without
17 consulting with anyone, promulgated a law, or that
18 democracy has, as was done here, promulgated its
19 law in accordance with notice and comment
20 procedures. So there is no international
21 administrative procedure act.

1 What's more, it is well recognized in
2 public international law that the acts of a state
3 in its municipal law system are entitled to a
4 presumption of regularity. It is presumed that
5 governmental action, such as the regulations that
6 we're talking about here, are regular under
7 municipal law unless that is conclusively
8 demonstrated to the contrary. We would submit that
9 we have absolutely nothing in the record here to
10 suggest that there is anything whatsoever wrong
11 with the regulations promulgated by the FHWA in
12 1983 under U.S. Law. And in fact, what Mr. Kirby
13 noted was that the FHWA reported regularly to
14 Congress on what it was doing in these regulations,
15 and Congress did nothing.
16 Now, if anything, that to me suggests that
17 Congress did nothing because it thought that the
18 FHWA's regulations were in full accord with its
19 intent in enacting the 1982 act. But again, we're
20 talking about things that occurred in 1982 and
21 1983. Those could not, by definition, be a

1 violation of the NAFTA.
2 On the subject of transparency, well, of
3 course the NAFTA does deal with transparency.
4 There's a chapter in the NAFTA on transparency. It
5 is Chapter Eighteen. A violation of that chapter,
6 however, which does set forth a number of
7 conventional obligations with respect to
8 transparency, cannot be a violation of Article
9 1105(1). And if we could have on the screen
10 subparagraph (3) of Part B of the FTC
11 interpretation.
12 Subparagraph (b) reads: "A breach of
13 another provision of the NAFTA or of a separate
14 international agreement does not establish that
15 there has been a breach of Article 1105(1)."
16 So it's certainly true that one of the
17 objectives of the NAFTA is transparency, and there
18 are specific provisions in the NAFTA to achieve
19 that objective, but even if ADF could show that
20 there had been a breach of that chapter, that could
21 not be a violation of Article 1105(1).

1 What's more--and again, I reiterate that
2 there has not been anything remotely approaching a
3 showing of any defect in the procedure adopted by
4 the FHWA in implementing the regulations.
5 Do you have a question?
6 MS. LAMM: In your view, is transparency a
7 component of fair and equitable treatment?
8 MR. LEGUM: No. No, as I said before,
9 there is no international consensus as to whether a
10 state must engage in a notice in common procedure
11 before publishing its regulations--I should perhaps
12 be less equivocal. Certainly the allegations of a
13 lack of transparency that we've heard here could
14 not rise to a violation of customary international
15 law.
16 Now, let's focus a little bit on what ADF
17 alleges to be a lack of transparency, because I
18 think that is of some importance to the issues
19 before the Tribunal. What ADF pointed the Tribunal
20 to was Section 102C of the main contract. That's
21 the violation, according to ADF, of demonstrating a

1 lack of transparency. That's the provision that
2 ADF claims it misread.
3 Two points on that. First of all, this is
4 a provision in a procurement contract. Again, what
5 we're talking about in this case is procurement.
6 It is not anything else. Second point. The FHWA's
7 regulation is a regulation that tells the states
8 and the officials of the Federal Government, when
9 the Federal Government will make funding available
10 to the states. So if there were any lack of
11 transparency, it would be of concern to those
12 parties because those are the parties that deal
13 with that particular regulation. What we're
14 talking about here is a contractual provision.
15 Section 102C is in the contract between Shirley and
16 VDOT and that was incorporated into the subcontract
17 between ADF and Shirley.
18 If ADF is right and Section 102C, as ADF
19 viewed the contract, permitted it to supply
20 Canadian produced steel to the project, then it
21 would have a contract claim. It would have a

1 contract claim against Shirley because ADF could
2 contend it did comply with the plain terms of the
3 contract. And Shirley could then, should it want
4 to, assert a claim against VDOT under the main
5 contract, but of course Shirley waived all of its
6 claims against VDOT under the main contract when it
7 accepted the $10 million incentive bonus. So there
8 is no question of a contractual claim here.
9 In sum, there is not the remotest evidence
10 of any violation of Article 1105(1) in this case,
11 and unless the Tribunal has any further questions,
12 I will be quiet.
13 PRESIDENT FELICIANO: I wanted to make one
14 final comment on transparency. Chapter Eighteen
15 deals with publication, notification,
16 administration of laws. Normally, you know,
17 general information as to government legislation,
18 regulation, measures of government. But I think
19 you are using it in a somewhat different sense.
20 You are using it in a due process sense, in the
21 same sense that retroactive application of a penal

1 law, for instance to catch people who could not
2 have possibly known about the requirements of a
3 statute are penalized. But in my vocabulary,
4 that's not generally covered by transparency. It
5 may be a violation of fairness that's
6 retroactivity, a retroactive application of a
7 particular governmental measure, but it take it you
8 are not making that argument here.
9 MR. KIRBY: Yes, of course there is a
10 provision on what might be called--it's almost a
11 guarantee of access to official documents, official
12 records, and let's see what's on the books, and
13 that's what Chapter Eighteen, and that's in part
14 what caused Mr. Justice Tysoe an issue. When he
15 was interpreting objects and purpose of the NAFTA,
16 and he had trouble with the notion that
17 transparency in and of itself was an object and
18 purpose of NAFTA. He thought it wasn't an object
19 and purpose in and of itself, but rather it was a
20 tool by which we achieve the objects and purposes
21 of NAFTA. And I'm suggesting--I refer to the fact

1 that it's mentioned in the same provision as
2 national treatment and most favored nation
3 treatment as an extremely important tool, and I
4 don't think that its entire scope is described in
5 Chapter Eleven because Chapter Eleven is simply one
6 transparency aspect.
7 If I understood my friend correctly when
8 he said one--he may have corrected himself, but he
9 said transparency was not within fairness and
10 equitable treatment. I would disagree with that.
11 But using that argument, it's not in fair and
12 equitable treatment--using that argument, and then
13 saying a breach of another provision of NAFTA,
14 i.e., a breach of Chapter Eleven will not in and of
15 itself establish a breach of Article 1105. I don't
16 think he was going so far to say that we cannot
17 establish a breach of 1105 by demonstrating a lack
18 of fairness and equity. We're contending that
19 transparency is a requirement of fairness and it's
20 a requirement of equity, that in order to fairly
21 treat, in this case investors, one must be--the

1 rules of the game must be transparent, that is,
2 readily discernible, readily understood, so that
3 somebody may know what standard he needs to
4 achieve.
5 If the provision in the interpretative
6 note, which says that a breach of another provision
7 does not establish a breach of 1105 mean that we
8 cannot raise the transparency claim at all, because
9 transparency is dealt with in Chapter Eighteen,
10 therefore we pull transparency out of fairness and
11 equity. Why? Because the interpretive note says a
12 breach of one provision. That would mean that a
13 good defense to any alleged breach of Article 1105
14 is that NAFTA deals with it somewhere else and it's
15 a breach of some other provision of NAFTA. I don't
16 think that's what the note says. I don't think it
17 says if you breach any other provision, that
18 automatically eliminates your right to claim a
19 breach of 1105. I think what it says is that you
20 cannot prove a breach of 1105 simply by proving a
21 breach of some other provision of NAFTA. I think

1 that's the most that it says.

2 That leaves us with the question, we're

3 not relying on a breach of Chapter Eleven--Eighteen--for the

4 record, we are relying on a

5 breach of Chapter Eleven. We're not relying on a

6 breach of the transparency obligations in NAFTA.

7 We're saying transparency is an integral part of

8 fair and equitable treatment, long recognized. An

9 actor must know what the rules of the game are, and

10 in this particular case, ADF was not given that

11 sort of transparent clear treatment of what the

12 rules of the game were. That's our transparency

13 claim.

14 MS. LAMM: Just a few more on this and

15 then we'll be finished I think. So as I understand

16 your response on the question that I left you with

17 before lunch, it's really a distinction without a

18 difference in comparing the minimum standard now

19 under the FTC Note for 1105, and any that they

20 would be entitled to under 1103 if they referred to

21 the Albanian BIT, for instance. Your view is they

1 are essentially the same in terms of substance?
2 MR. LEGUM: That's correct. And if I
3 could just illustrate this with a slide, if you
4 could show the next one.
5 What you have at the top of the screen is
6 the statement from the Canadian statement of
7 implementation published on the day that the NAFTA
8 went into effect in 1994, and that says: "Article
9 1105 provides for a minimum absolute standard of
10 treatment based on longstanding principles of
11 customary international law."
12 What you have at the bottom is the State
13 Department letter of submittal to the United States
14 Senate for the Albanian-U.S. BIT, which states--the
15 paragraph in question that says "fair and equitable
16 treatment", et cetera, sets out a minimum standard
17 of treatment based on standards found in customary
18 international law.
19 Now, of course, it's not a coincidence
20 that the statement of the Canadian Government and
21 the statement of the United States Government

1 concerning these two different treaty provisions
2 are so similar is because the two different treaty
3 provisions do the same thing.
4 MS. LAMM: Thank you very much. We have
5 one other question that I still have a note of, and
6 there may well be others from other Members of the
7 Tribunal. And that is, we understand why there is
8 the exception taken for the Clean Air Act
9 provision. And the question--and we've seen in
10 other annexes that the U.S. has said, for instance,
11 in Annex IV, basically out of an abundance of
12 caution, we're accepting these things. Why is it,
13 do you know, that the U.S. didn't accept all of
14 these myriad Buy America provisions from the act?
15 Did you think it simply wasn't necessary because of
16 the language of Chapter Eleven, or did you just--
17 MS. MENAKER: We did not accept the 1982
18 Buy America Act because it was considered to be
19 government procurement, so it was already exempt by
20 Article 1108. There was no need for a specific
21 exemption.

1 Now, the Clean Water Act is clearly
2 different because that act, some of it would be
3 procurement by a party, but as we demonstrated over
4 the past few days, that act, as quoted in the
5 reservation, provides that grant recipients may be
6 privately-owned enterprises. In that case that
7 would not be government procurement and would not
8 already be exempt by the express provisions in the
9 treaty. So an extra reservation was necessary for
10 that.
11 MS. LAMM: Okay, thank you.
12 PROFESSOR de MESTRAL: We have had some
13 discussion of this point already I think from both
14 sides. But it is an issue of some principle, and
15 going both to NAFTA and perhaps the ICSID Special
16 Facility Rules, so that I come back to it again.
17 That is the issue of the admissibility of the claim
18 under 1103. I think you've taken the position that
19 since the claim was not set out in the original
20 notice, it is not admissible at this point. Now,
21 there are provisions, for instance, in the ICSID

1 Special Facility Rules for a certain degree of
2 exercise of discretion.
3 So that at least on that matter is it your
4 view that because of NAFTA there is no such
5 discretion in this Tribunal to receive additional
6 claims, or that claims so entered closely related
7 as national treatment and MFN treatment cannot be
8 raised during the course of a hearing, or are you
9 doing this because there has not been a formal
10 statement by way of a written, an additional
11 written procedure, making the 1103 claim? So I
12 just ask you to review again for the record your
13 position on that and I think it might be useful to
14 hear, Mr. Kirby, as to why he considers an 1103
15 claim would be admissible?
16 MR. KIRBY: If you could give me just one
17 moment, please?
18 [Counsel conferring.]
19 MR. LEGUM: If I may respond, our argument
20 is that the NAFTA does provide for express
21 procedures that an investor must comply with before

1 a claim can be submitted to Chapter Eleven
2 arbitration. I think we have demonstrated quite
3 conclusively that ADF has not complied with those
4 procedures, and therefore it has not submitted
5 those claims to arbitration in accordance with the
6 procedures set out in this agreement, which is a
7 pre-condition to consent of the state party to the
8 arbitration.
9 Of course, Article 48 does contemplate, as
10 a general proposition in ICSID Additional Facility
11 claims, that a party may present an additional
12 claim, but only provided that it is within the
13 scope of the arbitration agreement of the parties.
14 That is not the case here.
15 PROFESSOR de MESTRAL: May I ask, then,
16 how you interpret the concept that the scope of the
17 Article 48 speaks, within the scope, what is
18 implied by that concept of the scope of the
19 proceeding?
20 MR. LEGUM: Well, I think to determine the
21 scope of any arbitration agreement, you have to

1 look at the arbitration agreement, which here is
2 set forth or reflected in the NAFTA, and the NAFTA,
3 as I have said before, requires that a claim comply
4 with certain procedural conditions before it may be
5 submitted to arbitration.
6 ADF has complied with those conditions
7 with respect to its other claims, claims other than
8 Article 1103 and also other than those additional
9 contracts, and therefore the United States has
10 consented to the submission of those claims to
11 arbitration. It has not complied with that with
12 respect to its Article 1103 claim.
13 PRESIDENT FELICIANO: Mr. Legum,
14 supposing--I am not suggesting it would happen
15 necessarily--supposing a motion for leave to file
16 an amendment of the notice to submit claim to
17 arbitration were filed and then include the
18 amendment consisting of including 1103 among the
19 list of articles and with whatever appropriate,
20 what do you think about that? Is that something
21 that the United States Government would consent to,

1 agree to or not?
2 We are aware of the statement of the
3 Tribunal in the Ethyl Corporation case and also we
4 are aware that under the procedural rules of the
5 Federal Court of Civil Procedure and under, and I
6 believe the same thing under D.C. Rules, that
7 amendments to pleadings are normally very liberally
8 granted, received as a matter of course, provided,
9 of course, that the other side is always given an
10 opportunity to respond and due process is observed.
11 I am just raising it as a possible point.
12 MR. LEGUM: Let me respond, briefly, and
13 then Mr. Clodfelter has the remarks that he would
14 like to make. Of course, what we are talking about
15 here is the arbitration agreement pursuant to which
16 this Tribunal sits. And, of course, this Tribunal
17 has no authority to expand the scope of the
18 arbitration agreement between the parties. So,
19 therefore, a motion to amend would, as a purely
20 legal matter, not be anything that could cure the
21 defect that we are facing here. And on that I will

1 let Mr. Clodfelter make some remarks.
2 [Pause.]
3 MR. CLODFELTER: I apologize, Mr.
4 President, for that delay in answering.
5 We don't think you need to speculate upon
6 whether there are circumstances in which you could
7 entertain such a request for an amendment. We
8 don't think any circumstances justifying granting
9 such a request could possibly be seen to exist in
10 this case.
11 We think it is very important for the
12 orderliness of such proceedings, and not just this
13 case, but future cases that will look back on how
14 this and other early cases are handled, that
15 claimants not be rewarded for their own
16 insufficient preparations and claims.
17 What reasons are given for this delay
18 here? Article 1103 has been the NAFTA as long as
19 Article 1102 has been. No excuse has been offered
20 for failing to raise this claim in a timely manner.
21 Was it done promptly? Was it done within days of

1 the Notice of Intent? It was not. Was it done in
2 even their Memorial? It was not. It was not until
3 their reply to the Counter-Memorial. Such
4 excessive delay could not, in any regime of
5 arbitration, I think justify adding the claim.
6 We don't think that Ethyl supports this
7 notion in any case. In the Ethyl case, you will
8 recall it was a question of whether or not the
9 claim could be maintained because the statute
10 wasn't formally enacted until shortly after the
11 Notice of Intent. We don't have any situation like
12 that at all.
13 We would think that it is a clear case
14 that no such amendment should be considered in this
15 case, and we would just ask that you not even
16 entertain the possibility.
17 MS. LAMM: As I understand it, the
18 contention is that under 1122(1), this is a
19 function of consent. Unless there is strict
20 compliance with the terms of the agreement which
21 would require under 1119 a 90-day notice, and then

1 under 1120, first, a submission of a claim that it
2 simply can't be done, and even--there really isn't
3 any other provision that would permit an amendment
4 of this.
5 MR. CLODFELTER: Clearly, the requirement
6 for inclusion of identification of articles that
7 claim to be violated and the facts supporting them
8 in the Notice of Intent is a procedure of NAFTA,
9 and those procedures have to be complied with in
10 order for the United States to have been deemed to
11 have consented to arbitration. So we think they
12 are clearly jurisdictional.
13 MS. LAMM: All right. Mr. Kirby, do you--
14 MR. KIRBY: Very briefly. Members of the
15 panel, we don't look at Article 1119 as a
16 jurisdictional provision. We think that it is
17 closely linked to basically what amounts to a
18 cooling-off period in the arbitration. Article
19 1118 and Article 1119 really need to be read
20 together. What normally happens in practice is
21 there is a Notice of Claim filed under Notice of

1 Intent filed under Article 1119, and then the
2 parties are obliged, first, to attempt to settle a
3 claim through consultation or negotiation in
4 Article 1118, and then Article 1120 you submit the
5 claim to arbitration.
6 Now, to read Article 1119, and I think the
7 Ethyl and the Pope & Talbot cases both stand for
8 the proposition that Article 19 is not
9 jurisdictional, it is an element that is not
10 critical to giving jurisdiction to the Tribunal,
11 it's there merely to ensure that there is a time
12 for the parties to cool off and to negotiate, and
13 that time to negotiate is 90 days before the claim
14 is submitted. That's in order to give the parties
15 time to actually talk about what their difficulties
16 are, and we took advantage of that 90-day period to
17 talk to the representatives of the United States.
18 Only then can you actually submit a claim
19 to arbitration, and that is under 1120--1120, then,
20 now you've got the arbitration started, because the
21 arbitration doesn't start until you submit the

1 claim to arbitration. The arbitration then starts
2 under the, here, the Additional Facility Rules.
3 Article 1122 states that the applicable
4 arbitration rules, the additional facility rules,
5 will govern, except to the extent as modified by
6 this section. That gives us the right to go into
7 the additional facility rules.
8 There isn't a modification--Chapter
9 Twenty, although it tries to reach a Code of
10 Procedure, it's not a Code of Procedure. What it
11 is is a very basic, bare bones, we'll give you
12 three sets of arbitration rules, and we'll have
13 some very limited notion of how you get to
14 arbitration. We'll provide for the consent of the
15 party.
16 Now you pick your rules and now you work
17 the arbitration under those rules, and Article 48
18 of the arbitration rules clearly says that,
19 providing it's within the scope of the agreement to
20 arbitrate, we read the scope of the agreement to
21 arbitrate being Chapter Eleven, what the are the--what the

1 United States has agreed to arbitrate is
2 claims arising out of Chapter Eleven. Those claims
3 that arise out of Chapter Eleven, there was, in
4 fact, two additional claims that can arise out of
5 Chapter Fifteen. They are not at issue here, but
6 that is the scope of the agreement to arbitrate.
7 Are we within the scope? Yes, we are.
8 And in any event, Article 34 states that a party
9 ought to have known that a provision of the rules,
10 of these rules or any other rules or agreement
11 applicable to the proceedings or of an order of the
12 Tribunal has not been complied with and which fails
13 to state promptly its objections thereto shall be
14 deemed to have waived the right to object.
15 So we have the right to add ancillary
16 claims providing they are within the scope of the
17 agreement to arbitrate. I believe that the United
18 States has given its consent to arbitrate Chapter
19 Eleven claims. Article 1119 is not something that
20 goes to jurisdiction, and therefore I believe that
21 we are well within our rights to make that

1 ancillary claim, given it's within the scope, and
2 that in any event, if we weren't, the U.S. has now
3 foreclosed because the U.S. has deemed to waive its
4 right to object.
5 [Counsel conferring.]
6 MR. KIRBY: I'm sorry. My friend reminds
7 me, the particular circumstances in this case is
8 that the notion of 1103, in respect of 1105, didn't
9 even come into play until the FTC issued its
10 ruling, rather, its interpretative notes, which was
11 I seem to recall it being the day we filed, but
12 everything seems to get accordioned, gets squeezed
13 in time.
14 If it wasn't the day we filed our
15 Memorial, it was the day before we filed our
16 Memorial. I remember it came as quite a shock, but
17 certainly we reacted to it in what we consider was
18 an appropriate amount of time given that we were
19 faced with a state act by one of the arbitration
20 parties in this dispute, which seemed to say on its
21 face that we are now issuing a ruling that is

1 binding on the party and foreclosing other avenues
2 of approach. So we identified the possibility of
3 making a claim under 1103 as reasonably quickly as
4 we could, and mentioned it for the first time in
5 our--we mentioned the possibility in our Memorial.
6 My friend will fill in some additional
7 details.
8 MR. CADIEUX: We had mentioned it in the
9 Memorial as not as a possibility that we would
10 raise it, just by saying that if you read 1105
11 restrictively it would be self-defeating because
12 then we could always move forward to 1103. And
13 when we received the Free Trade Commission notes,
14 then we felt, well, the situation now has arisen
15 where we can move on to an 1103 claim, and
16 parenthetically we don't see the Albanian BITs as
17 giving the same standard as 1105. Because even
18 though they may be based on customary international
19 law, they are not customary international law.
20 They are treaty standards.
21 So that is why we, at the time of our

1 reply, that's when we made the formal submission.
2 We couldn't before because we believed that there
3 was no 1103 claim possible. So the United States
4 says we should have raised it in the notice two
5 years ago in front of factual events which we did
6 not control and could not be aware of.
7 MS. LAMM: I think what the U.S. is saying
8 is that you would have to file a separate
9 proceeding because you would actually have to give
10 them, under 1119, the notice with the 90 days in
11 it, and those 90 days may not just be window
12 dressings. Sovereigns usually have some amount of
13 time to deal with things that is not meaningless.
14 They may have negotiated with you, for instance, to
15 treat those things the same as whatever the award
16 in this does with this claim and not have the
17 burden of defending all of those things.
18 You know, there could be any number of
19 things that would happen in this 90-day period, and
20 I think what they are objecting to is not having
21 what the treaty affords them, this 90 days to

1 consider with you how they might act.

2 MR. KIRBY: If I could just address that

3 in terms of the importance of the 90 days, and I

4 agree the consultation period between the parties

5 is important, and during that period this party,

6 the United States party, was well aware of all of

7 the implications and what the actual fundamentals

8 of the claim for it was. There is no suggestion

9 that with the--the use of Article 1103 is not to

10 introduce something that is particularly new or

11 novel, it's simply to say, listen, if you've given

12 minimum standard of treatment protection to other

13 investors, we have the right to it.

14 Mr. Legum, in fact, and I don't think I

15 misheard him, but he said he doesn't see any

16 substantive difference between the 1105 in the

17 Albanian BIT and the 1105 in NAFTA, the equivalent

18 of Section 1105 in the Albanian BIT. He doesn't

19 see a substantive difference.

20 That is interesting because in the

21 Albanian BIT, the language sets a, in any event,

1 not less than full and equitable treatment, a fair
2 and equitable treatment. So, to complain about a
3 new claim which somehow causes difficulty, when, in
4 fact, that new claim leads to a destination, that
5 is no different than the destination taken under
6 the first claim, that is, 1105. There is clearly
7 no prejudice because if the two provisions are the
8 same, then a violation of one will be a violation
9 of the other.
10 The corollary of that is that if the two
11 provisions, as the U.S. now states, are
12 substantively identical, then I think that that may
13 well be seen as an invitation for this panel to
14 interpret Article 1105 in light of the specific
15 language of the provision in the Albanian BIT.
16 MS. LAMM: I understand that position and
17 the 1103 issue, but I guess you have got two sets
18 of new claims. One is the addition of 1103, a
19 different substantive claim, and the other is the
20 three contracts. And would you take the same
21 position as to the three contracts?

1 MR. KIRBY: Our position with respect to
2 the three contracts is that there was adequate
3 notice in--in fact, our original notice of the fact
4 that continued application of the law, regulations,
5 policies, administrative practices, et cetera,
6 would continue to cause us damage and as we went
7 forward.
8 To adopt the U.S. position in this respect
9 is to do nothing but simply insist that investors
10 become serial litigators, which is not good for
11 investors, it is not good for state parties, it is
12 not good for panels, it is not good for the
13 administration of justice. It serves absolutely no
14 purpose whatsoever. Nothing substantially will
15 change. We are talking about a violative act which
16 is having its impact on contractual situations.
17 The question of what is the impact, what is the
18 damage caused by that act, that's a question for
19 the assessment of damages.
20 MS. LAMM: And given that we don't have
21 any facts with respect to those three, are we to

1 assume--if we were going to consider these, are we
2 to assume for those purposes that your allegations
3 with respect to liability are exactly the same as
4 they are for the first contract?
5 MR. KIRBY: The only difference between
6 the claims in respect of the three bridges will be
7 the steps taken by ADF to complete its contractual
8 obligations in light of the constraints of the Buy
9 America provision. By that I mean--I'm not trying
10 to be--I'm not trying to be smart here. In each
11 case they had to act to complete contractual
12 obligations that called for 100 percent U.S. steel.
13 And I think I've told you that they became better
14 at doing it. In terms of the factual difference
15 that is it. But in terms of how much damage was
16 caused, that will vary. But in terms of what was
17 the cause of the damage--
18 MS. LAMM: The cause, right.
19 MR. KIRBY: The cause is identical. It's
20 the application of Buy America rules by essentially
21 Federal Highway through a state to our client.

1 MS. LAMM: One more question, just back to
2 the U.S., and that's on Article 48. What is your
3 view about the applicability of either Article 48
4 bringing these in as ancillary claims or the waiver
5 provision, Article 34?
6 MR. LEGUM: I might start with Article 34.
7 There are several responses to that argument. Let
8 me start with rules-based response.
9 Article 46 of the ICSID Arbitration
10 Additional Facility Rules, in subparagraph (2)
11 states that, "Any objection that the dispute is not
12 within the competence of the Tribunal shall be
13 filed with the Secretary-General," et cetera, "or
14 if the objection relates to an ancillary claim, for
15 the filing of the Rejoinder..." So Article 46(2)
16 sets forth a quite specific rule governing these
17 objections. It says if it's an ancillary claim,
18 the respondent has until the Rejoinder to object to
19 it. That's when we object to it.
20 So simply as a matter of application of
21 the plain terms of the rules, there is no issue

1 here. In terms of the facts on the waiver claim,
2 the Tribunal will recall that Ms. Toole took us
3 through the submissions of ADF in its Memorial in
4 some detail on Tuesday. She looked at the
5 references to Article 1103 in the Memorial, and
6 there was no reliance on Article 1103 as a basis
7 for relief. Instead, they simply pointed to
8 Article 1103 to support their erroneous contention
9 that a subjective and intuitive form of a fair and
10 equitable treatment standard was incorporated into
11 Article 1105. In other words, they made--they
12 referenced it as part of their argument to support
13 their 1105 claim, but there was no 1103 claim in
14 the Memorial, which can be, I think, quite clearly
15 demonstrated if you look at the submissions, which
16 began on page 72 of the Memorial, paragraph 313. I
17 simply note that for the record. If the Tribunal
18 looks at that, it will find that there is no claim
19 for relief based on Article 1103. So there was no
20 claim under Article 1103 for us to respond to in
21 our Counter-Memorial.

1 As for the suggestion that the fact that
2 the NAFTA parties unanimously interpreted Article
3 1105 in a manner different from ADF, as we have
4 just heard, as the basis for its excuse for not
5 presenting an Article 1103 claim earlier, if the
6 Tribunal looks at the Memorial, ADF's Memorial, it
7 will see in paragraph 213 on page 52 that ADF was
8 well aware that the NAFTA parties unanimously
9 viewed Article 1105(1) to incorporate--and I'm
10 quoting from paragraph 213 of the Memorial. I'll
11 quote the first sentence of that paragraph.
12 "At one end of the spectrum, State Parties
13 have claimed that the protection afforded by
14 Article 1105 is nothing more than the minimum
15 standard of treatment in customary international
16 law."
17 Obviously, at the time that ADF submitted
18 its Memorial, it was well aware that the three
19 NAFTA parties were of that view. And, therefore,
20 we would submit there is no excuse for its delay in
21 presenting an Article 1103 claim, contrary to what

1 we just heard.
2 I think that responds to the waiver point
3 and the point on Article 48.
4 PROFESSOR DE MESTRAL: But you are saying
5 there is no excuse or it cannot be done?
6 MR. LEGUM: Both, actually.
7 PROFESSOR DE MESTRAL: That is what I
8 heard.
9 MS. LAMM: I have one more that's wholly
10 unrelated. I see on page 8 of the Investor's Reply
11 there's a quote--it's the last quote on the page,
12 and it refers to the United States' Counter-Memorial at page
13 23. I haven't been able to find
14 it on that page, but I'm sure it's probably just a
15 typo. Maybe it's in there someplace. But it says,
16 "ADF is quite correct that the federal-aid highway
17 program provides for funding and other assistance
18 that cannot be considered procurement under Article
19 1001(5)(a).
20 MR. CADIEUX: I'm sorry. You're at the
21 bottom of the page.

1 MS. LAMM: Yes.
2 MR. CADIEUX: That's footnote 8, which is
3 at page 32.
4 MS. LAMM: In any event, I'm just assuming
5 that the statement there, you're talking about the
6 funding itself, and that's really your argument,
7 that it's the funding not necessarily the program,
8 which might be the conditions.
9 MR. LEGUM: That's absolutely correct.
10 What we're talking about is the funding, the grants
11 that are provided--
12 MS. LAMM: Right.
13 MR. LEGUM: --and not the domestic content
14 specifications--
15 MS. LAMM: Right.
16 MR. LEGUM: --that are required as a
17 condition for that funding.
18 MS. LAMM: Okay. That's all I have.
19 PRESIDENT FELICIANO: Well, we seem to
20 have come to the end of our questions at this time,
21 and we wanted to say that we appreciate your

1 staying here and responding to these inquiries. We
2 think that we needed to make those inquiries in
3 order to enable us to understand your respective
4 positions.
5 I see that the representative of the
6 Government of Mexico raised his hand. Did you want
7 to say something, sir?
8 MR. ROMERO: Thank you, Mr. President. We
9 would like to join to our friend's request from
10 Canada in order to make an 1128 submission. In
11 this case, we would like to request this Tribunal
12 to grant us the opportunity to inform this Tribunal
13 a week from today whether we will be filing an 1128
14 submission.
15 MR. KIRBY: Mr. Chairman, if I could
16 interject for a second, this is the second time
17 that this has happened without notice to the--certainly
18 without notice to the investor party that
19 at the end of the day a representative of another
20 state party--another state non-party--and I say
21 this with enormous respect for the representatives

1 of Mexico and for the Mexican Government. However,
2 I think that there is an important question of
3 principle at stake here.
4 We have been through a fairly prolonged
5 series of pleadings. The Government of Mexico and
6 the Government of Canada have had access to those
7 pleadings, and the representatives of the
8 Government of Mexico and the Government of Canada
9 have sat through these proceedings silently all
10 along.
11 The Government of Canada and the
12 Government of Mexico have already filed Article
13 1128 submissions. They requested permission and
14 they did so.
15 Now, I think the question of principle,
16 the very important question of principle, is
17 whether 1128 comprehends permitting states that are
18 not parties to the agreement to sit, not
19 participate, but to sit and watch both parties
20 fight it out during an entire week of hearings, and
21 then to once again open the debate by filing

1 submissions after pleadings. I think the Tribunal
2 should consider very, very carefully whether that
3 ought to be established as a question of practice,
4 and I think from the investor community--and I'll
5 take the liberty of speaking for the investor
6 community--I underline the seriousness with which
7 any investor will undertake a Chapter Eleven claim
8 or any other claim against a state government.
9 However, if after litigating that entire
10 claim other parties to the agreement can come in
11 and file post-hearing submissions, thereby
12 reopening the debate, I think that that is placing
13 an inordinantly difficult and heavy burden on
14 investors. I would draw the Tribunal's attention
15 to Article 28, which states, and I quote, "On
16 written notice to the disputing parties, a party
17 may make submissions to a Tribunal on a question of
18 interpretation of this agreement."
19 Both state parties, Canada and Mexico
20 state parties to NAFTA, regular parties to this
21 arbitration, both parties have exercised their

1 rights under Article 28, and now at the end of the
2 day, when the game is basically whistled closed, we
3 have Mexico, the state party, wanting to leave the
4 door open to a brand-new proceeding. Let's have
5 another round of pleadings. I want to put it on
6 the record that I seriously object to the Tribunal
7 considering, at this stage, additional Article 1128
8 submissions, given that the parties have exercised
9 their rights under that provision.
10 Thank you, Mr. Chairman.
11 MR. LEGUM: Mr. President?
12 PRESIDENT FELICIANO: Thank you, Mr.
13 Kirby.
14 Yes, Mr. Legum?
15 MR. LEGUM: May I present a few brief
16 observations by the United States on what Mr. Kirby
17 just said?
18 PRESIDENT FELICIANO: Please go ahead.
19 MR. LEGUM: Under the plain terms of
20 Article 1128, a nondisputing party may, as a right,
21 make submissions to a Tribunal on a question of

1 interpretation of this agreement. The only
2 requirement for that is the provision of written
3 notice to the disputing parties. Now perhaps Mr.
4 Kirby's copy of the NAFTA is different from mine,
5 but mine makes no reference to a limitation on the
6 number of submissions by the nondisputing parties.
7 Now Mr. Kirby is correct that there has
8 been no written notice, although I would submit
9 that the transcript of these proceedings should
10 adequately suffice for that purpose.
11 In terms of establishing a practice, there
12 is already a practice established in these cases,
13 and the practice is that the nondisputing parties
14 very often make precisely these requests. On two
15 occasions in the Loewen case, exactly the same
16 procedure was followed. The nondisputing parties
17 made submissions after the conclusion of the
18 hearings, and in practically every other case that
19 I could think of right now in which there was a
20 hearing, the practice was followed exactly as has
21 been suggested in this case.

1 I would suggest that Mr. Kirby does not
2 speak for the investor community, as he just
3 purported to, because in each of these other cases
4 the investors had no objection to the state parties
5 exercising their right, under Article 1128, to make
6 a submission.
7 Now I can also say from having observed
8 these Chapter Eleven proceedings that the state
9 parties generally are extremely solicitous and very
10 much have in mind not disrupting the proceedings.
11 The Tribunal will recall that the parties
12 suggested, without consulting with Canada or
13 Mexico, that the 1128 submissions in this case come
14 in after the Counter-Memorial, but before the reply
15 and the rejoinder, and therefore before the issues
16 in this case were as fully developed as they are
17 today.
18 It is, therefore, perhaps quite
19 understandable that there may be issues that have
20 been clarified. Certainly, there have been a
21 number of issues that have been clarified during

1 the course of these hearings in such a manner that
2 Canada and Mexico might wish to consider whether
3 they would wish to exercise their right under
4 Article 1128, and therefore we would support the
5 requests of both Canada and Mexico to make such
6 submissions.
7 Thank you.
8 PRESIDENT FELICIANO: Thank you, Mr.
9 Legum.
10 The Tribunal has itself had an opportunity
11 to think a little bit about this particular matter.
12 As a matter of fact, our very efficient secretary
13 has put together what has happened in earlier
14 cases, Mr. Kirby, and in earlier cases
15 representatives of state parties to NAFTA have made
16 requests for submission of post-hearing memoranda.
17 My understanding is that, in many cases, or in all
18 cases, they did not make actually these
19 submissions, but they requested for opportunity to
20 state whether or not they were, in fact, going to
21 make such submissions.

1 I must say that in 1128 we see no
2 limitations as to the number of submissions that
3 may be made. Ms. Lamm has just invited my
4 attention to the fact that in the text of 1128 the
5 word "submissions" used, which is of course plural
6 and, secondly, there is, in fact, quite a bit of
7 time within which they can make or they can give
8 written notice of their intent. I interpret the
9 request of the representative of the Government of
10 Mexico simply as an opportunity within, say, one
11 week, which is the same time that we gave the
12 representative of the Government of Canada to
13 indicate whether or not they would file a written
14 submission in this particular case.
15 The only limitation under 1128 relates to
16 submissions on a question of interpretation of the
17 agreement, but just about everything here relates
18 to the interpretation of the agreement.
19 Having said that, Mr. Kirby, I want you to
20 be assured that if and when the Government of
21 Mexico and the Government of Canada do, in fact,

1 file written submissions, you will be furnished a
2 copy of these submissions, and you will be given an
3 opportunity to make appropriate responses to these
4 submissions. So, please, rest assured that the
5 requirements of due process will be fully observed
6 by the Tribunal.
7 I do not interpret the request as in any
8 way a request for reopening the proceeding in any
9 great big manner. As a matter of fact, the
10 completion of the oral hearing today does not, for
11 ourself, for the members of the Tribunal, signal a
12 closing of the record of this case. We propose to
13 commence our deliberations immediately. In the
14 course of the deliberations, we may well find that,
15 gee, we forgot something, and then there is
16 something that we want to ask another submission
17 from Ms. Menaker over other or from you or Mr.
18 Cadieux.
19 So it will be some time before the record
20 of this proceeding may be regarded as closed
21 definitively, although I am anxious to be able to

1 start deliberations with my two distinguished
2 colleagues here. It is not so easy to get three
3 people from different parts of the world together,
4 as you know. That is all we are doing, but we do
5 propose to start deliberations right away.
6 My colleagues and I want to thank you for
7 the seriousness, and the diligence and the care
8 with which you prepared for this oral hearing. I
9 know all of you spent a great deal of time,
10 expended a great deal of effort in coming here and
11 making your presentations, and in responding to our
12 inquiries.
13 You probably thought some of the questions
14 are unnecessary or maybe off-tangent or whatnot,
15 but that is because for some of us, and that
16 includes me, this is the first NAFTA case I sit in.
17 I hope my learning period isn't too prolonged, Mr.
18 Kirby.
19 Thank you very much, and we hope you have
20 a safe return to your respective places of work and
21 residence.

1 MR. LEGUM: Mr. President, may I ask one
2 point of order just before we close?
3 PRESIDENT FELICIANO: Mr. Legum, go ahead.
4 MR. LEGUM: I would just like to clarify
5 my understanding that although the proceedings have
6 not yet been declared closed, we have, of course,
7 completed the written procedure envisaged by the
8 additional facility rules, and Article 35 of the
9 additional facility rules states that if any
10 question or procedure arises which is not covered
11 by these rules or any rules agreed by the parties,
12 the Tribunal shall decide the question.
13 I would just like to confirm our
14 understanding that absent an agreement by the
15 parties or a decision by the Tribunal, no further
16 written submissions will be entertained? Is that
17 correct?
18 PRESIDENT FELICIANO: I think that is
19 correct. What I meant to say that I do not
20 preclude the possibility that in the course of our
21 discussion in the next few days we, meaning members

1 of the Tribunal, may find that there are some
2 areas, one or more areas, that we feel we would
3 benefit significantly from additional statements
4 from both parties.
5 If that should happen, we would issue an
6 order requesting submission on an identified point
7 or points. But you are quite right, the formal
8 pleading stage has been completed. So we do not
9 propose to ask you a surrebuttal, if there is such
10 a thing, or anything further.
11 If we do request any further statement, it
12 will be on very narrow, identified points, not a
13 full reargue of the matter. I only made that
14 reservation, as of now I do not expect that we
15 would need to do so, but that is all we wanted to
16 state.
17 MR. KIRBY: Mr. Chairman, Mr. Legum knows
18 the rules a lot better than I do and seemed to
19 indicate that further written submissions wouldn't
20 be permitted without agreement of the parties or an
21 order of the Tribunal. I have no difficulty with

1 that. However, I would like the Tribunal to order
2 that in the event Canada or Mexico files
3 submissions, that the investor party will, as a
4 right, be able to respond to those submissions and
5 that that become a part of any order in respect of
6 the right of Canada and Mexico to file such
7 submissions.
8 In other words, I simply want to protect
9 my right to file a submission to anything that is
10 filed by the other two state parties to NAFTA.
11 PRESIDENT FELICIANO: I believe we can
12 give you that assurance. The assurance is given to
13 both parties to make any responding submission that
14 they feel would be appropriate. So neither party
15 should have any concern, as far as that is
16 concerned.
17 Mr. Clodfelter?
18 MR. CLODFELTER: One last point for the
19 written submissions. I would just refer the
20 Tribunal to the request that we made in our
21 Memorial for an award of costs, costs of the panel,

1 costs of the Secretariat, and our own costs of
2 presenting our defense in accordance with Article
3 59 of the ICSID Additional Facility Rules and
4 indicate that we stand ready to provide the written
5 information contemplated in those rules that might
6 be necessary to make such an award.
7 I would just add that one addendum to what
8 might be requested by the Tribunal in the way of
9 writing as well.
10 Thank you.
11 PRESIDENT FELICIANO: Thank you, Mr.
12 Clodfelter.
13 Now, unless any of my colleagues would
14 like to make any additional statement, I guess we
15 can adjourn this.
16 You are finished with your statement?
17 MR. ROMERO: Yes, Mr. President, just to
18 say on behalf of the Government of Mexico, thanks
19 for this opportunity.
20 PRESIDENT FELICIANO: Thank you, sir.
21 [Whereupon at 3:33 p.m. the hearing concluded.] •