IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION
(ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.                     :
Claimant/Investor, :

v.                                    :
Case No.        :

UNITED STATES OF AMERICA, :
Respondent/Party. :

Volume I
Monday, April 15, 2002
Conference Room MC13-121
The World Bank
1818 H Street, N.W.
Washington, D.C.

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

JUDGE FLORENTINO P. FELICIANO, President

PROFESSOR ARMAND DE MESTRAL

MS. CAROLYN B. LAMM

UCHEORA ONWUAMAEGBU, Secretary of the Tribunal
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P R O C E E D I N G S

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

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

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

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

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

In respect of the questioning that the Tribunal might undertake towards the end or after the formal presentations, including the rebuttal
presentations of the parties, please do not imply
anything from either the questions or the tenor of
the questions or the timing of the questions or the
lack of questions from the Tribunal. No inference
as to anything ought to be drawn from those
considerations. None of us has made up our mind in
respect of any of the issues presented by the
respective parties to the dispute.

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

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

MR. KIRBY: Thank you, Mr. Chairman.

Perhaps first before I even get started with my
presentation, I'll introduce the members of our
group, and then if the U.S. wants to do the same, and then I will start with the presentation, or rather than skip the U.S. introduction, I think the U.S. should be given a chance to introduce themselves.

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

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

Thank you, Mr. Chairman.

MR. CLODFELTER: Thank you, Mr. Chairman.

My name is Mark Clodfelter, and I am assistant legal adviser in the Office of International Claims and Investment Disputes at the Office of the Legal
Adviser for the United States Department of State. It's a pleasure and an honor to appear before you again. I'd like to introduce the members of our team.

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

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

Thank you, Mr. Chairman.

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

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

Thank you.

PRESIDENT FELICIANO: Canada?

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

PRESIDENT FELICIANO: Fine. Well, should
ty they show up later, I guess they will make
themselves known to the rest of us.

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

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

Firstly, before I get started with the formal presentation, I would like to thank the members of the Tribunal, the staff at ICSID, for having assisted in conducting what really has been a fairly efficient process from start to finish.

And in that also, I don't think I would be remiss in thanking the United States for their cooperation in making this process fairly efficient and getting us to this point with the least amount of disruption.

Today, in terms of our presentation, where we intend to go is that I will give a very brief introduction to the facts and the applicable law. I will begin my sort of substantive presentation by looking at Article 1108, which is a fairly central issue in this particular case. I will then review
Article 1106 and 1102. My friend, Rene Cadieux, will take us there Article 1105 and will also take us through the claim made by the United States that ADF is--that this Tribunal cannot look at any claims made by ADF other than the claim in respect of the Springfield Interchange Project. After Mr. Rene Cadieux's presentation, I will then summarize and conclude.

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

If I might say a few words about the investor in this particular case, ADF Group Inc. ADF's origins go back to 1956 when an Italian immigrant to Canada, Jean Paschini, opened a blacksmith shop, and sometimes from very small beginnings, great things happen. Over the years, sons and a daughter of Mr. Paschini came into the business, and the business grew from a small blacksmith shop to one of North America's leading fabricators of steel structures. ADF builds bridges, stadiums, buildings, skyscrapers. Interestingly, in Washington, they've recently completed a building at the Smithsonian Institution and are currently working on the National Air and Space Museum. I believe that they also were involved with the Natural History Museum here in Washington.

ADF Group is known as an industry leader in North America, one of the top steel fabricators in the area. It has a subsidiary in Coral Gables,
Florida, called ADF International, a wholly owned subsidiary, which also does steel fabrication work but is somewhat smaller than ADF Group in Canada in terms of capacity and ability to perform certain kinds of work.

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

Soon after the contract was signed, the provisions that are being challenged in this arbitration, the Buy America provisions, came to the fore, and ADF International was told effectively that they could not use U.S.-origin
steel in the project if they brought that steel to
Canada, fabricated it in Canada, and brought it
back into the United States; that if any work was
done on the steel outside of Canada, the steel
would not qualify for the contract requirements
that were under Buy America, that is that
everything used in the contract, all steel had to
be 100 percent U.S. origin.

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

As you might imagine, when you have to--when your
competitors know that you are stuck to
complete a contract, your bargaining position is
not particularly great.

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

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

That provision found its way into a
regulation, which is reproduced on page 18, and the
regulation 635.410, Buy America requirements, and paragraph (b) states that "No Federal-aid highway construction project is to be authorized for advertisement or otherwise authorized to proceed unless at least one of the following requirements is met," and then over the page, the project either doesn't include steel, or, and I quote, "if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States."

It should be noted—and we will deal with this in a little more detail in terms of the background to this legislation when we deal with Article 1102. It should be noted that this particular provision is a significant tightening up—this legislation was made more restrictive in 1982 than it had been previously. I think it's no surprise, back in the 1980s North America was in recessionary times, and these kinds of protective measures come to the fore. Our complaint is that this measure put in place in 1982, still existing
in the year 2002, that's the measure that we're challenging in this particular litigation. And if there's one message that I need to get to the Tribunal, it's the difference between that measure and procurement by the state that's crucial in this litigation.

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

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

The Federal Highway basically appropriates money, gives it to the state for their highway construction projects. When they do that, they say to the state, and they said to Virginia in this
particular case: When you spend that money, discriminate; do not spend that money on anything other than U.S. products.

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

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

Our view of this--
PRESIDENT FELICIANO: Mr. Kirby, forgive me for interrupting, but--

MR. KIRBY: Absolutely.

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

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

There are numbers out there. I'm not certain if I'll be able to answer the state portion versus the Federal portion, but I could certainly answer the question of how much Federal money went to the state. My friends, I'm certain, will be able to answer the second question. I don't want to throw numbers around. We'll get back to you with that answer. But you raise an interesting point, Mr. Chairman. You spent some time
discussing questions this morning. We're going to
be here for most of the day, and sometimes
questions are absolutely essential to keep us all
alert and, you know, on point. So, by all means,
if something comes to mind, rather than hold it off
until some later time, fire the question. I would
enjoy having questions from the panel.

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

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

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

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

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

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

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

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

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

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

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

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

We can lower tariffs, we can talk about
certifying origin, et cetera, but that's not what
the NAFTA negotiators wanted to do. They wanted
something more. They wanted to create the
environment which would build the North American
economy through all of the factors that will
influence greater trade--thus, the investment
protection provisions.

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

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

In the preamble to NAFTA, "Create an
expanded and secure market for the goods and
services produced in the territories. Reduce distortions to trade," and so on.

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

We believe that the federal measure violate Article 1102, National Treatment; Article 1106, which prohibits the imposition or the enforcement of listed performance requirements; and Article 1105, which sets a standard for treatment of investors, and we believe that as a result of
those violations that ADF group is entitled to
claim damages for the losses that it suffered.

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

Before we even get into them, let me just
give conceptually what we're doing. I said before
we're talking about two different things in this
litigation. The U.S. is talking procurement, and
we're talking government assistance. We're talking
financial assistance. Why have we reached those
positions? Because within the procurement
agreement, there is an exception, and we will get to it. There is an exception for, rather, within Chapter Eleven, many provisions of Chapter Eleven do not apply to procurement by a party.

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

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

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

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

1001(5), however, states, "Procurement
includes procurement by such methods as purchase,
lease or rental, with or without an option to buy.
Procurement does not include any form of government
assistance, including grants, loans, fiscal incentives, government provision of goods and services to persons or state governments."

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

Now my friends would take you to Article 1108, which is the page marked 4. Article 1108 states that certain articles, including the article that covers the national treatment obligation,

Article 1108(a) says, "Article 1102," which is national treatment, "does not apply to any existing nonconforming measure that is maintained by a party at the federal level, as set out in its schedule to Annex I."

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

The exemption reads, "The Clean Water Act authorizes grants for the construction of treatment plants for municipal sewage or industrial waste."

It says, "Grant recipients may be privately owned."

And then here is the Buy America provision. "The act provides that grants shall be made for treatment works only if such articles, materials, and supplies have been manufactured, mined or produced in the United States will be used in the treatment works." That is a summary of the Buy America provision.

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

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

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

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

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

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

The next two articles add to context; what kinds of things can be and should be included in a contextual analysis, and then the final argument
states that a special meaning shall be given to a
term if it's established that the parties so
intended.

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

I intend to, in my analysis of
procurements of a party, follow those provisions,
and then relate how the U.S. deals with those
issues and how we deal with those issues. There
are five elements: good faith, ordinary meaning of
the terms, ordinary meaning of the terms in
context, in light of the objects on purpose of the
treaty, special meaning of the parties. Plus, we
are also told, in Article 102(2) of the NAFTA, how
to interpret NAFTA. 102(2) says, "Clearly and
unambiguously, the parties shall interpret and
apply the provisions of this agreement, NAFTA, in
the light of its objectives set out in paragraph 1 and in accordance with the applicable rules of international law."

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

First element, good faith. Article 26 of the Vienna Convention on Treaties states that "every treaty enforces binding upon the parties to it and must be performed by them in good faith."

So not only must the treaty, according to Article 31, be interpreted in good faith, it must be performed in good faith.

The U.S. has said nothing in terms of either issue, in terms of good faith interpretation. However, I would submit that the positions put forward by the United States raise some issues that need addressing.
Firstly, the argument of the United States amounts to the following: A Federal measure imposing on a state an obligation to discriminate is permissible in a Free Trade Agreement, even if the Federal Government has agreed not to do so itself.

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

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

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

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

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

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

This is what the Federal Highway Administration, the people that give out the money and the people that impose the obligation on Virginia, this is what they think about their
measure. Paragraph 8 states, "NAFTA does not apply." We disagree, but why do they think it doesn't apply? There is a specific exemption within NAFTA, Article 1001, for grant programs, such as the Federal Aid Highway Program.

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

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

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

He's talking about if we spend the money in a procurement, we are obliged, that's what he says, we're obliged to apply NAFTA, but we're not spending money in a procurement here. This is a grant program. It is not covered by Chapter Ten. Despite the fact that agencies have consistently conducted themselves on the basis that this program is not a procurement program, it is a grant program, despite that fact, the U.S. is now arguing it's procurement, not a grant.

MS. LAMM: May I ask a question?

MR. KIRBY: Surely.

MS. LAMM: Why is it that a grant can't be a procurement?
MR. KIRBY: We'll get there any number of ways.

MS. LAMM: Okay.

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

Good example. My daughter, I'm proud to announce, recently won a book scholarship. She gets funds to go and buy books from the university. The university isn't buying books. The university is granting funds. Now, it's attaching conditions, but the university isn't engaged in procurement. My daughter, when she buys the books, will be purchasing books. She is engaged in procurement. I think that the notion--and I talked earlier about
this--the notion of trying to merge the two ignores the reality, especially in a federal system, of multi levels of government acting sometimes to achieve one particular end, but that doesn't mean that you characterize the state action that in turn has to characterize the national government action. They can be completely different. And the NAFTA is telling us that they're completely different because they've already pulled out of the grant program--of procurement. They said procurement isn't grants. Just in case somebody might argue that the grant program is procurement, they've said no it's not. We're going to make a distinction between any form of financial assistance and procurement. So why can't a grant program be procurement?

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

MS. LAMM: But isn't it that grants are
just a different means of financing a procurement
of an entity? The same kinds of procurement
regulations would apply with respect to those
acquisitions, et cetera. It's just not a direct
appropriation. It's more indirect.
MR. KIRBY: One of the things that one has to look at in a procurement is what is the situation at the end of the transaction? Who owns it? Is there a change in ownership? If there isn't, there isn't procurement. Has the federal government leased something? Has it acquired something? The federal government doesn't acquire anything. The state government does. Now, is it close to procurement? As soon as you start getting into that realm of saying, well, let's finesse the notion of procurement till somehow we can expand that notion to capture the federal act. If you do that, you run smack into the definition of procurement which says it doesn't cover any form of government. It's just you have to give some meaning to that.

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

There's a matching. There's a--what you have bought is what you were told to buy. The actor is not buying. The intermediary is buying, but the actor wants to know that books are bought as the federal government wants to know that U.S. goods are purchased, but it's not the actor that's actually purchasing, but that would explain why you've got these very clear sort of similarities between both ends. It's only those similarities are there, not because it's procurement, but because the federal government wants to impose the conditions, so the federal government imposes the conditions in this transaction, and lo and behold, those conditions materialize in the procurement. It's not the procurement that drives the materialization, drives the fact that those specifications arrive in the procurement contract. The procurement contract isn't the driving force. What drives it is the conditions set by the U.S. Government.
I want to build a road. Clearly, it's something that has to be specified, and there's a book. I'm sure some of these gentlemen have it, specs from Virginia on how to build a road. I was amazed at how big the specs are and how detailed they are, those clearly procurement specs. Does it have anything to do with road building, that you have to do it, you have to buy U.S. steel? Not really. I mean you want to buy good quality steel. You might want to buy reliable steel, but the fact that you want to buy U.S. Steel, yes, it's a specification now in the procurement. The reason is there though, has all to do with the Federal Government action, not the state action. The state in fact doesn't discriminate of its own. If the state had enough money to do this itself, it wouldn't have discriminated.

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

Mr. Chairman?

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

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

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

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

MR. KIRBY: Let me try and--

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

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

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

PRESIDENT FELICIANO: What was the reason for this express reference to--what is that again?

In the 1005(1)(a), could you--

MR. KIRBY: My reference to it?

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

MR. KIRBY: Okay. Chapter Ten imposes procurement obligations on covered entities.

Generally speaking, most of the Federal Government agencies--

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

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

So the parties sit down and say, "Okay, what are we going to put within Chapter Ten?" They decide, "We're going to put within Chapter Ten procurement by the covered entities." To avoid any discussion, perhaps, of the fact that, well, wait a second, but we, Federal Government, we give money to states, and when they purchase with our money, is that covered? We give grant programs to them. Is that within Chapter Ten? Because the agency
that's going to have the obligations is a non-covered entity. To avoid the debate as to what happens when we give money to a sub-national government, as opposed to buy goods or services.

What happens then?

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

Now, some of your earlier questions raised some very, very interesting issues. How do we decide what's--you know, when you have different levels of government involved in what eventually becomes a procurement, and the--I wish I could say it was the seminal case. The problem is we have so few cases on procurement, that it's very hard to
cite the law. Almost any decision that's written
today, in terms of the international law of
procurement, is going to have an impact on that
debate? And I think what we're dealing with here
is a very, very important question in that area.

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

The issue there was whether or not this was a procurement of the U.S. The U.S. said, "Well, it's not a covered procurement, because it's a services contract," and the issue was--the European I believe were complaining, were saying, "Well, no, this goods portion of it is a good contract which is covered." And, you know, the issue of, you know, is it a U.S. procurement covered by the agreement or not? They looked at transfer of title. They looked at specifications for the goods, for example. You know if you--if you say that you want to have a particular good, who has control, who has various different issues? Some of those issues you could turn to this case and say, "This looks like a federal procurement." The problem is though, if it was a federal procurement, it's covered by Chapter Ten and would have to be conducting in accordance with the rules of Chapter Ten.

If you suggest that somehow,
notwithstanding the exception, what the Federal
Government is doing is essentially procurement.
Given the fact that the state agencies now have no
obligations, you're opening the door to the
possibility that all of a sudden that money flows
down, everything has to be—you know, you impose
this obligation to discriminate, not in a limited
way now in Buy America, in the occasional Buy
America statute, wholesale, whenever the government
spends money. Whenever the government spends
money, whenever the government gives financial
assistance to anybody, they impose these
obligations throughout. Is that what the parties
intended? I doubt it. I think what the parties
intended is to say, "We are going to erect
discipline in respect of these obligations which
the parties have agreed to."
Where there is no requirement of
discipline, Chapter Ten doesn't apply, and the
state governments can do whatever they wish to do
in state procurement. However, where there is no
discipline in Chapter Ten, we're going to take out
from Chapter Ten financial assistance. We're going
to take out government assistance. That's no
longer going to be within the realm of Chapter Ten.
Does that mean that it's completely free of each
and every obligation under NAFTA? No. It just
means that it's completely free of obligations
under Chapter Ten. It now becomes subject to the
general regime of NAFTA. That's what we're saying.
We're not saying that somehow the obligations have
disappeared. What we're saying is: the parties
must have intended to do something by excluding any
form of government assistance. And it's always
almost a crystal ball activity to really determine
what the parties were doing, and I think the proper
approach is to say, "We're not certain what the
parties thought they were doing. We know what they
agree to. We know what the language says, and the
language says that any form of financial
assistance, any form of government assistance is
not procurement." And that then mirrors with the
exceptions which relate to procurement.

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

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

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

[Recess.]

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

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

[Inaudible comment off microphone.]

MS. LAMM: I just wanted to follow up to make sure I understood and had down correctly your contention on one point. And my understanding is that under 1001(5), because grants are excluded from Chapter Ten, they are basically included or subject to the disciplines of Chapter Eleven or any other chapter of the NAFTA. And that includes state--grants to states that are explicitly excluded.

MR. KIRBY: Ms. Lamm--

MS. LAMM: I may have it confused. I just want to make sure I've--

MR. KIRBY: And I intended to reach that point again just in terms of a summary, because I think we covered a lot of material in the last 20 minutes. And I just wanted to make sure that the Tribunal had a good understanding of where we were going.

1001(5) excludes not just grants but any
form--very large wording, any form of government assistance, including grants to states.

MS. LAMM: Correct.

MR. KIRBY: Excluded from Chapter Ten.

It's gone.

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

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

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

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

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

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

PRESIDENT FELICIANO: Yes, Mr. Kirby.

You'll forgive my interrupting you.

MR. KIRBY: Not at all. Carry on.

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

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

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

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: I assume you're saying that because 1108, para (7) identifies
particular articles of Chapter Eleven which do not apply to this, you are al contrario concluding that all the other provisions of Chapter Eleven do apply.

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

Simply stated, the argument is if the parties needed an exemption from a provision, it's because the type of measure that was being exempted would otherwise have been subject to the measure.
Otherwise, you don't need an exemption. So this is confirmation of what we're saying. It's confirmation that it's true. The grants that are excluded from Chapter Eleven become subject to the other provisions of NAFTA in general, subject to Chapter Eleven in particular.

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

The other clarification, because I didn't respond fully to the Chairman's question, the Chairman's omnibus question on various scenarios, joint procurements, what happens with joint procurements. What happens if the Federal Government gives some of the money but not all of the money for the acquisition by the state? What if it gives the majority of the money? What if it gives only a small portion of the money?
These, I suggest, are precisely the kinds of issues that the parties were grappling with when they negotiated NAFTA, because there's nothing in Chapter Ten that tells you how do you determine whether it's a joint or a non-joint. It simply says if this is a procurement by a covered entity, it's covered. If it's not, it's not.

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

The state governments—if you did have, for example, a joint procurement, a grant from the Federal Government, a procurement by the state government, and the state government isn't a covered entity, Chapter Ten does not apply, clearly. It doesn't apply to the Federal Government because what it's doing is granting government assistance. Chapter Ten doesn't apply to the state government because it has no obligations. What if the state government did have
obligations? No case that I know of has ever addressed that problem. It's hypothetical in the sense that presumably when they negotiate state obligations, they might want to deal with that issue.

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

So if I might then go back, you'll recall that we were dealing with the elements under the Vienna Convention in terms of interpreting treaties. I dealt with the good-faith issue, and that left ordinary meaning, meaning in context in light of objects and purpose and special meaning given by parties, and I'll run through those fairly quickly just to make sure that we've covered the ground. But I think that the exchanges that we've had to date has fleshed out many of these issues.
It's our position, if we look at ordinary meaning, it's our position that the U.S. has made no serious effort to provide any ordinary meaning of procurement. In its Counter-Memorial, for example, at page 23, it states that the ordinary meaning of the term "procurement" on its face, however, encompasses any and all forms of procurement by a NAFTA party. That's the equivalent of saying that the word "butter" includes any and all forms of butter. It's tautological and brings you no closer to understanding what procurement is.

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

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

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

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

In terms of blurring the distinction, there are two approaches that I can see taken by the U.S. One is to say while we admit the funding program is not procurement, the specifications within that program as to what to buy is procurement; and, two, by merging the Federal action into the state action to say that it's all procurement by a party.
Looking first at the issue of the specification as to what to buy, the U.S. states--this is on page 7 of their Rejoinder: "As noted above, it's common ground that the ordinary meaning of 'procurement' encompasses purchasing." I would say not encompasses procurement, is purchasing, les achats. Purchasing entails a number of integral activities. Amongst those activities are deciding what to buy, from whom to buy it, what to pay, and how to pay it.

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

I referred earlier to the effort by the U.S. to strip the exemption of all meaning. What the U.S. is doing here is basically to ignore or empty the exemption. The exemption says procurement does not include any form of government
assistance. The U.S. realizes that it cannot get
around that problem. The language is too clear.
So they say, well, any form of government
assistance, but within that government assistance
there is this discriminatory order to purchase
goods in that program, that's procurement.

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

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

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

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

So our position on that approach by the United States is that it simply cannot work. You can't surgically extract from the program the conditions attached to the funding and characterize those conditions as procurement in light of the
clear exemption for any form of financial assistance. What the U.S. would have you believe, that that exemption simply relates to the handing over of the check, nothing more.

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

PRESIDENT FELICIANO: Mr. Kirby?

MR. KIRBY: Yes?

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

MR. KIRBY: I would say that that's one of
the elements that you would look at. Is it the
only element? No, because it also says lease
purchase, lease, et cetera.

PRESIDENT FELICIANO: Assume that the--

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

No question that Federal Highway, given
its responsibilities, had something to say on how
the project might be completed. But as the
expression goes, the buck stops at Virginia. It's
Virginia's procurement. And if it wasn't
Virginia's procurement, the United States would be
bound by its own obligations under Chapter Ten to
conduct procurements in accordance with Chapter
Ten.

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

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

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

I think what may help to focus the Tribunal's thoughts in this area is to recall that there are many, many ways that one can seek to influence decisionmakers. The act itself of influencing the decisionmaker is not the decision. The act of influencing the decisionmaker is a separate act, and the decision taken by that decisionmaker is a separate act. It's two separate
acts. The example: Here we have the decision to
grant funding to the Virginia State, and we want to
influence that decision. If Virginia wants the
money, it needs to do what we tell it in terms of
discriminating against non-U.S. sources of steel.
Governments regularly act in that way.
Governments can regulate or ban the purchase of
goods—guns, cosmetics, drugs. Regulating that
activity, even banning that activity is not to
engage in the activity itself. It's simply to
regulate the activity.
We regulate building construction, the
height of floors, types of construction material.
In earthquake-prone zones, we'll tell constructors
that these are the requirements that, you know,
need to be met if you're going to engage in
construction.
Nobody would suggest that in doing so the
regulators are engaging in construction. They're
engaging in regulating construction. They are
attempting to influence the decisionmakers.
I would submit that the U.S. totally ignores that distinction. The act of providing funds and the act of purchasing goods and services with those funds are two distinct things. Just in common parlance, the way government operates they're two distinctive things. The way NAFTA tells us to look at the activities, they're two distinctive things. NAFTA tells us that procurement and financial assistance are separate. We have provided simple dictionary definitions of ordinary meaning in the materials, and certainly there's nothing in the ordinary meaning—I think it's fairly clear at this stage there's nothing in the ordinary meaning that allows one to conclude that these conditions are procurement. Something more is needed. If one looks at the ordinary meaning in context, if you go back to the Vienna Convention document which we were looking at earlier, I mentioned that Article 31(2) and (3) provides additional information in terms of how does one
approach the ordinary meaning in context. And it
says 31(2), "The context for the purpose of the
interpretation of a treaty shall comprise, in
addition to the text, including its preamble and
annexes, agreements relating to the treaty made
between all parties"—there's nothing on record
that is applicable here—"instruments made by one or
more parties in connection with the conclusion of
the treaty, potentially"—and the U.S. is, I think,
claiming that the statements of administrative
action, which we'll get to, that these may be
instruments made in terms of the conclusion of the
treaty. It's not certain from the materials. I
would say that they probably don't rise to that
level.
And then, together with the context,
"There shall be taken into account subsequent
agreement between the parties regarding the
interpretation of the treaty." There is no
subsequent agreement by the parties regarding the
interpretation of the treaty on this particular
matter. "Subsequent practice," the U.S. has raised some issues in respect of subsequent practice, and I will deal with that, "relevant rules of international law applicable and the relations between the parties."

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

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

One element of context is that the NAFTA is an omnibus trade agreement--no one chapter, no one provision stands alone unless it is specifically said to stand alone. It is, therefore, no surprise and should not cause consternation to see one element of the agreement
impacting on government, to see NAFTA, as a whole, impacting on government activity at several different levels of that activity; in other words, that the NAFTA would operate at the Federal level on a particular measure and then when that measure becomes a state measure, it may or may not operate on the state measure.

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

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

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

Another element of the text of the agreement which informs the context is the parties' use of language. I know that very often, when reading provisions of NAFTA, one ends up scratching one's head, wondering, "What did they think they were doing?" But I think the proper way to approach the NAFTA is to recognize that this is a very sophisticated agreement, and the parties knew exactly what they were doing. When they have wanted to use expensive language, they have done so, and when they have wanted to use narrow language, they have also done so.
The parties knew the distinction between financial assistance and procurement and clearly had in mind that the two were closely connected, capable of being confused, one with the other, and dealt with that problem by making certain that they would not be confused. Thus, the arguments put forward by my friends which would require a tortuous analysis of the language provisions are not supported by any analysis in context because the context says, if you were engaging in that kind of a tortuous analysis, you are probably wrong. Why? Because the NAFTA parties clearly knew what they were doing, and they used language which got them where they wanted to go.

And we have set out in our I believe it is our Reply, some instances of the wide language and the narrow language used by the NAFTA parties, Page 12 of the Reply to the Counter-Memorial, I will just read off some of them, and this is only in procurement. This is consistent throughout the agreement, however. Various ways they touch on
procurement: "Measures relating to procurement; any procurement contract; procurement includes procurement by such measures as purchase, lease or rental, with or without an option to buy." That's 1001(5). "Procurement does not include any form of government assistance--1005(2)."

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

Article 1017, "Procurement covered by this chapter."

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

Article 1019, now here is an effort at specificity. "Any law, regulation, precedential judicial decision, administrative ruling of general application and any procedure, including standard contract clauses, regarding government procurement covered by this chapter."

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

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

The U.S. takes advantage of that, and in
its annex of nonconforming measures, refers to the
Clean Water Act, which contains a Buy America
provision similar to this provision. It states
that we want a reservation from the obligations in
respect of performance requirements.

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

They did not take an exemption for the Buy
America statute that we're dealing with today.

Does that inform the context? I would suggest it
does. It suggests that the parties, again, knowing
what they were doing, realized that these Buy
America provisions are contrary to Chapter Eleven
in certain respects, they are clearly performance
requirements, and exempted them, but did not exempt
the measure in question, the Federal Highway
provisions.
We responded--I'm sorry--the U.S. responded to our suggestion that this informs context by pointing to the exclusion. It states, "Grant recipients may be privately owned enterprises." Now what the U.S. stated in its Counter-Memorial--no, I'm sorry, its Reply--is that the reason this exclusion was taken is because grant recipients may be private parties, that--and this may take a few minutes to explain--but grant recipients may be private parties. Private parties, when they receive the money and go out and procure, will not be engaging in Government procurement. Because they won't be engaging in government procurement, they will not be able to take advantage of the procurement by a party exemption. We're clear on that.

So they're saying we took the exemption in order to enable us to continue to order grant recipients to discriminate, without having to worry about the provision that talks about procurement by a party. Even at that level, if that really was
the motivation, and we will show that it wasn't, but if that was the motivation--I lost my train of thought for a second.

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

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

And then later we state, at paragraph 150, "Thus, the claim by the United States that its reservation, under the Clean Water Act, was driven by the need to preserve its ability to impose
performance requirements in private procurements is deeply flawed, the Buy America requirements of the Clean Water Act are imposed only in respect of applications for grants under that act and only public bodies can apply for such.

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

What was the U.S. response? The U.S. response was to challenge this panel's ability to look at the statute. In other words, and this is found at their rejoinder at Page 22, rather than contradicting our statement that privately owned enterprises cannot benefit under the statute, the U.S. states, at Page 22 of its rejoinder, and I quote, "According to well-established principles of treaty interpretation, however, supplementary means to interpret a treaty may only be resorted to when the treaty terms are ambiguous and obscure." As
the language in the reservation is neither ambiguous nor obscure, there is no justification for this Tribunal to resort to supplementary means such as provisions in domestic legislation to interpret the plain meaning of the reservation.

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

In other words, we point to the exemption. The U.S. responds, and says we have good rationale for that exemption. It's because private enterprises, we needed to protect our ability to
force private enterprises to discriminate. We respond and say that's not true because under the legislation, grant recipients are not private enterprises, they are state entities.

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

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

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

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

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

The NAFTA negotiators agreed not to apply Buy America when they went out and procured. So it is not that unusual to think that, with a few exceptions, we would also be brought into the family under other Buy America statutes, which were not procurement, but which were simply funding
statutes. It is certainly not a radical thought, and this annex simply demonstrates that that is exactly what the U.S. did. They chose what they wanted to exempt, and they exempted it. I would submit that the mistaken belief theory doesn't do credit to the skill of U.S. negotiators and isn't supported by the text.

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

But he refers to the program as a grant
program. The Clean Water Act authorizes grants.

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

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

Yes, Ms. Lamm?

MS. LAMM: If that is the case, why do you
think that this negotiator then wrote, "Grant
recipients may be," not always are, but "may be
privately owned enterprises"? What was the purpose
MR. KIRBY: I wish, you know, we are trying to read negotiators' minds. I agree, there is an issue that arises with respect to this privately--it seems to say that the annexes provide information for whoever. How do you draft the text of it? Who knows. But the bottom line is that where one is U.S. burden, the U.S. is trying to demonstrate that we are covered by procurement by a party. We suggest that this casts light and casts some doubt on that. Their explanation, the negotiator was mistaken.

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

I wish I could explain--I can't explain why he referred to privately owned enterprises, other than to simply say that it's an element of
description of the program. But if he really knew what he was doing, you would have assumed that he would have dealt with that grant program issue because that's not procurement.

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

Why we are referring to that, because it clear shows the distinction. It's not--it's pursuant--it's procurement pursuant made to the
loans. That's the kind of language that shows the
distinction between what's happening at the level
of the granting of the funds and what's happening
at the level of the spending of the funds that have
been granted. And Mexico clearly recognized a
distinction between loans and positions--procurements made
pursuant to those loans.

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

First, an aside. The Vienna Convention
doesn't require, permit a general look at the
subsequent conduct of the party. It's put in a
somewhat more formal requirement. The parties
shall take into account, together with the context,
any subsequent practice in the application of the
treaty, which establishes the agreement of the
parties regarding its interpretation. Much of the
material filed by the United States fails in that
respect and doesn't establish the agreement of the parties in respect of the application. I will, nevertheless, deal with most of the material, and where I have a particular issue, particular problem with material that's been filed, I'll draw the Tribunal's attention to that.

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

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

Canadian Statement of Implementation.

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

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

The U.S. points, at the bottom of the page, to a statement by the Canadian Government expressing disappointment in respect of the results in procurement, and I'll read the quote, the last paragraph. "The government will, therefore, continue to press its NAFTA partners to liberalize their restrictive government procurement laws and practices. In particular, the government will use the further negotiations called for in the
agreement to negotiate access to small business
set-aside programs and transportation procurements
currently restricted under Buy America programs."
The U.S. seems to say that here we have
Canada expressing disappointment at the inability
to get at the Federal Highway program. That's the
reading that the U.S. would like you to have of
that provision, saying the reference to
transportation procurements is a reference to these
Federal Highway programs.

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

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

In other words, the Canadian note does nothing but reproduce the references in the annex, the exclusions taken in the notes by Canada. Recall that what the U.S. is putting forward is that that Canada note is not a reference to the provision in the annex but is, rather, a reference to their disappointment in respect of Federal Highway. They say look at the difference between the Canadian note, which talks about transportation procurement, and the U.S. note, which talks about procurement of transportation services. And they say that that indicates there is something much different going on and that what Canada is doing is admitting that it did not get
the elimination of the Federal Highway program.

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

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

MR. KIRBY: That's correct.

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

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

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

It's interesting, though, that the U.S. is even making this argument in terms of—when we pointed out to the U.S. in our reply that transportation procurement was a reference to the
note that referred to procurement of transportation services, the U.S. response, if I may summarize it--and if I get it wrong, no doubt my friends will correct me. But the U.S. argument is that these are different things. One says transportation procurement, and the other says procurement of transportation services.

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

I'd also like to draw the Tribunal's attention, in its Rejoinder the U.S. gives a reference to precisely the kind of procurement of
transportation services that are covered by that
general note and refer to the Cargo Act. If I
might read it, the restrictions referenced in the
annex--this is the one we've just read, the
restriction respective procurement of
transportation services.

MR. LEGUM: Do you have a page number?

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

We say Canada's reference is clearly a
reference to the two notes. The U.S. would seem to
read something more into it, but we would submit
that it is really stretching to try to say that,
one, that statement of interpretation is really
something that we can use to read content into--to
understand what the Canadians were thinking back in
1994.

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

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

Now, can you tell me whether have they, in
fact, been applying consistently?
MR. KIRBY: Let me--three issues, and I hope I can remember all three.

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

PRESIDENT FELICIANO: We can put that aside.

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

Second, though--and this is perhaps more importantly--there may be a rational explanation
for it because they have consistently referred to
the program as a grant program and not as
procurement. And it is true that grant programs
are not subject to the discipline of Chapter Ten.
Nobody is arguing that. The United States admits,
we have said it all along, grant programs such as
the Federal Highway program are not subject to
Chapter Ten.

So has that colored the U.S. sort of
belief? They may well have believed we have no
obligations under Chapter Ten. They have
absolutely no reason to believe that they can flout
every other obligation of NAFTA because they have
been excluded from Chapter Ten. And whether they
consistently flout those obligations or
intermittently flout those obligations, it comes to
the same thing. What's the rationale for their
belief that they can flout the regulations? Today
it's because it's procurement by a party. Since
1994 until this action was brought, it was because
it's a grant.
So the rationale for flouting the obligation has changed. Previously it was we are not subject to Chapter Ten when we grant money to Virginia. Agreed. Not subject to Chapter Ten.

The rationale that you're not subject to Chapter Ten because it's a grant program, and they have consistently said that. Consistently. Now, they realize that that's a problem, because if it is a grant program, it's not subject to Chapter Ten. That means it's subject to all these other obligations. We had better start describing it as procurement. That's the rationale, that's the problem. It has never been consistently described as procurement.

In fact, in this respect the U.S. have cited their own Statement of Administrative Action--that's at page 28 of the U.S. Counter-Memorial--where they state in that Statement of Administrative Action, and I quote, "The rules of Chapter Ten do not apply to certain types of purchases by the U.S. Government, among them"--and we're talking of
Chapter Ten. This is the U.S. Counter-Memorial at page 28. "The rules of Chapter Ten do not apply to certain types of purchases by the U.S. Government, among them: ... procurements by state and local governments, including procurements funded by Federal grants, such as those made pursuant to... the Federal Aid Highway Act."

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

The next section I can deal with in five minutes, which would take us up to 1 o'clock, which might be a good time to take a break. The U.S. has also filed two expert reports purporting to show the practice of the two NAFTA partners of the U.S.—Mexico and Canada. The report from Canada is from Mr. Stobo, and the report from Mexico, Mr. von Wobeser.
Look at Mr. Stobo's report. What does Mr. Stobo say? Mr. Stobo says that the Federal Government funds provinces. He states that the provinces, some of the provinces discriminate in their procurement. But what he does not say is that in any Canadian funding mechanism, Canada forces the recipient of the funding to discriminate in its own procurements.

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

Mr. von Wobeser, speaking about the Mexican situation, in his original affidavit referred to at least three pieces of legislation—I think it was three pieces of legislation—which he claimed were passed in 2000 to implement Mexican obligations with respect to NAFTA. Leaving aside the question of why you would pass legislation in 2000 to implement obligations you undertook in 1994, I don't know. But what Mr. von Wobeser says is that there are Federal Mexican funding statutes
which permit the requirement of domestic--the
imposition of domestic content requirements on the
recipients, in a sense, so he is coming closer to
the U.S. position seemingly to say that the Federal
Government in Mexico has the authority to impose
domestic content restrictions.

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

And Mr. von Wobeser does not sort of deal
with how to get out of that particular conundrum.
In other words, both of the expert witnesses do not
support--their testimony does not support the
position of the United States that it is clearly
within the purview of NAFTA for a funding agency to
order a grant recipient to discriminate. In fact, Canada does not do it. The United States--Mexico has this discretionary ability to do it, but it's subject to international trade agreements, and if the legislation was passed to implement the trade agreements, that may well be in there precisely for that reason, that Mexicans may--the Mexican Government may consider that doing so under a--in a situation governed by a trade agreement would be a violation of NAFTA.

I'm sorry. Ms. Lamm?

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

MR. KIRBY: Yes.

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

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

MS. LAMM: Paragraph 9, the second
sentence.

MR. KIRBY: Some sub-central governments
do give preferential treatment--because sub-central
governments in Canada are not bound by the
procurement disciplines in NAFTA, they are not
required to accord national treatment. That's
correct. I mean, it's the same situation that the
State of Virginia in its procurement is not bound
by NAFTA because it has negotiated--there are no
obligations on the State of Virginia, as there are
no obligations under NAFTA on the Province of
Ontario. So the State of Virginia and the Province
of Ontario are free to discriminate should they
choose to do so. That's not our problem. Our
problem is their liberty to choose to do so or not
to do so has been basically taken away by the
Federal Government in this particular case saying
you do not have a choice, you have to do it if you
want to receive the funds.

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

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

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

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

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

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

MR. KIRBY: There's any number of ways to address the issue. Let me just give you a couple of off-the-top-of-my-head views.
PRESIDENT FELICIANO: You excuse this question because--
MR. KIRBY: No, no. I--
PRESIDENT FELICIANO: --I don't know anything about--
MR. KIRBY: It's a very good question. Does it really make a difference in the end? Does it make a difference?
NAFTA is there to promote--and let's take it for granted that we're all in agreement that promotion of the free trade area of exchange and trade is good, and protectionism is bad. Okay? If it is not a big deal, we're now saying that the Federal Government, the biggest cash supply--I was going to say in the United States. Maybe in the world--is being told that when it gives away money, it can force the recipients of that money to discriminate.
Now what you've done is you've given to the Federal policymakers, politicians, perhaps a temptation that might be difficult to resist when,
in fact, at some point in time they've negotiated
an agreement that precisely takes that temptation
off the table. You're putting it back on the
table. What's the harm that can come from it? The
harm is the Federal Highway program is an enormous
program. Virginia has chosen for its own good
reasons not to have these kinds of domestic
preferences. Why? Simple. Because we all know
that domestic preferences do nothing but increase
costs in the economy. They're bad for the economy.
They're bad for business. It's not the way
government should conduct themselves.

If we look to the genesis of this
particular legislation, 1982, it's still on the
books, even--and we have some records--I'll get to
them later on this afternoon--from the
Congressional Record. There are people that talked
against it. There are people that were talking
against it, Congressmen, referring to the fact
that--they're not new. They weren't new in 1982.
They had been on the books forever. But as a
result of these measures, what had happened is
you've got a domestic steel industry that's still
asking for help in 1982, a domestic steel industry
that still needs help in 2002.

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

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

MR. KIRBY: And when NAFTA was signed--and
I referred earlier to the fact that Canada and
Mexico were brought into the fold with respect to
Federal procurement and protectionist policies, Buy
America policies at a Federal level, that's
precisely the argument that was sold to the
Congressmen and to the American people. This is
part of a good deal for everybody. Okay?

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

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

Now, in hindsight, we can talk about, you
know, the difficulties of putting that into place,
et cetera. But the document is there. This is what the parties intended to do, and I think it's the duty of this Tribunal not to search for excuses to justify measures that are clearly contrary to--

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

MR. KIRBY: No, no--

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

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

PROFESSOR DE MESTRAL: Just following on that, and perhaps not asking for an answer at this moment, but you do raise the whole broad question of how the panel should be interpreting, and you suggest we should adopt a purposive approach, and
perhaps at some later point you or your colleague
might wish for that, I imagine the other side also.
I think that is a central question for us: To what
extent is this panel authorized to adopt a
purposive and a broad approach?

MR. KIRBY: Okay. My initial--

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

MR. KIRBY: My initial answer to that
would be that NAFTA instructs you to interpret the
agreement in light of its object and purpose.
That's not simply reliance on Article 31 of the
Vienna Convention that everybody knows is out
there. That's something extra. That's within the
NAFTA Agreement itself, and it may well be to deal
with the fact that we all know that politics, human
nature, and a general drive of the daily pressures
on decisionmakers are such that if we can point to
a statutory obligation to do something, it's often
much easier to get it done than if we say we want
to do this because we're nice guys. No. That's
why the NAFTA, I think, negotiators said here's our best effort at crafting a document which will get us to where we want to go, that is, establishment of a free trade area free of all but the most clearly exempted non-conforming measures. In other words, if it's not there, if there isn't a clear exemption for a particular measure, I think that's the end of the job. I don't think that this panel has to do much more than say--especially in light of the fact that it's the U.S. bringing forward the exemption to justify a protectionist measure, which is clearly non-conforming, I don't think this panel needs to do much more than say show us the exemption and show us how it's clearly within that exemption. If it's not clearly within it, then the other sort of efforts that one has to make to somehow pull apart other programs and take parts of that program and put it in here, I don't think that's the Tribunal's job. I don't think that's what the negotiators intended to happen, and I don't think it's what the negotiators intended
this panel to be seeking to do.

We did delay lunch. I'm sorry.

PRESIDENT FELICIANO: Okay.

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

PRESIDENT FELICIANO: Okay, fine.

MR. KIRBY: Thank you, Mr. Chairman.

PRESIDENT FELICIANO: Thank you, Mr. Kirby.

[Pause.]

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

MR. KIRBY: Two thirty is fine by me.

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

[Whereupon, at 1:10 p.m., a luncheon recess was taken to reconvene at 2:30 p.m.]
PRESIDENT FELICIANO: Mr. Kirby, I apologize for being late. You may take an extra ten minutes.

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

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

Now, another line of argument that the U.S. took relates to the Government Procurement Agreement, the without agreement. And the argument, if I understand it correctly, is that under the WTO agreement, the United States took a reservation for precisely these measures. And, in fact, I'll be working from--it might be useful to
have these documents in front of you. I'll be working from two U.S. volumes. One is Appendix Volume IV to the U.S. Rejoinder. And the other is Appendix Volume II to the Counter-Memorial of the United States. These are big packages.

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

Just to repeat, the United States makes the argument that under the Government Procurement Agreement, the WTO agreement, they took a reservation under that agreement for precisely the measures talked about here. That's found at Tab 27, second page of text; it says page 2 of 14 at the top right-hand side--I'm sorry. That's the wrong page. It's page 11 of 14, where the reservation clearly states, "The agreement"--and this is for the United States only. It's the United States package of reservations. "The agreement shall not apply to restrictions attached to Federal funds for mass transit and highway
projects." And the U.S. then makes the argument that clearly if these provisions, restrictions attached to Federal funds for mass transit and highway projects were not procurement, we would not have had to make a reservation. We would not have had to make a reservation, the implication being that procurement under NAFTA is the same thing.

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

The same provision in NAFTA—in the GPA—and this is at Tab 11, page 2 of 30—the equivalent provision is found in Article 1. And I hate to jump between the two volumes, but the U.S. exclusions are found in one volume, and the text of
the agreement is found at another volume. But
you'll recall that Article 1001, the scope article
of Chapter Ten, states that procurement includes
procurement by such measures as purchase, lease, or
rental, with or without an option to buy;
procurement does not include--scope Article 2 of
the agreement states, "The agreement applies to
procurement by any contractual means, including
through such methods as purchase or as lease,
rental, or hire purchase, with or without an option
to buy, including any combination of products and
services." So right away you have a different
definition of the scope of the procurement
agreements in question, Chapter Ten and the GPA.

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

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

What does that difference mean? So we
start with the NAFTA which says all financial
assistance is outside of the scope of procurement.
Procurement does not include any form of government
assistance. The GPA doesn't do that, so the U.S.
needs to write an exemption to replicate that. The
exemption it gets presumably in the back and forth
of negotiations is a half measure. We're going to
take out of the procurement agreement government
assistance, but only that government assistance
that goes to entities that are not covered. So
within the GPA, we still have, by definition now,
government assistance being within the scope of
procurement, which is a huge contrast to the NAFTA.
The U.S. still has a problem now because
given the definition of procurement under the GPA,
financial assistance to a covered entity and state
governments--some state governments are covered
entities under GPA. Financial assistance to state
governments that are covered will now be considered
procurement. Why? U.S. has taken a position by
definition, we pull procurement out under NAFTA, we
pull government assistance out of the definition of procurement in NAFTA. We've done that by definition. We then negotiate—the United States negotiates another agreement without that clause. Most lawyers would say, well, wait a second, if you had to exclude it under Chapter Ten and you haven't done so here, it must be included, this a contrario type argument.

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

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

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

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

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

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

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

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

It's hard to conceive that they would—that the negotiators would have used that as a working model without giving something additional to interpreters to be able to comprehend what
exactly are we talking about here. The reason, I would suggest, that the GPA doesn't specifically exclude procurement and that caused the U.S. to have second thoughts and to seek exemptions, why would the U.S. do that? Precisely because of the problem caused by the NAFTA problem, the issue caused by the NAFTA. Not two years previous they have negotiated an agreement respecting procurement, and in that agreement specifically exempted procurement does include government assistance.

So merely by that act, if there was an argument that government assistance was procurement, the U.S. in respect of making the exemption has given force to that argument. I'm not sure that that argument is good in the first place. I'm not sure that if you simply look at procurement and say would procurement normally cover all forms of government assistance, I would say it's a fairly extensive view of what procurement means, and you'd need language to try
and show that. But perhaps it was the overly
cautious approach of negotiators. They wanted to
simply make sure that they defined what procurement
was. That's how they defined it. But in doing so,
they now left open the argument that somehow
procurement under GPA includes government
assistance, and because of the door they left open,
then they had to go in and negotiate the agreement.

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

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

MR. KIRBY: I think the GPA was 1996. The
note--there's a date attached to, I think, the note
on exclusions. The note on exclusions was transmitted January 16, 1996, and that's on page 1 of 14 at Tab 27. So it certainly post-dates NAFTA.

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

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

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

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

MR. KIRBY: Yes.

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

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

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

MR. KIRBY: Exactly.
PRESIDENT FELICIANO: --that you are

invoking?

MR. KIRBY: Precisely. And I'm saying

that--that's one. Now, you might make an argument

that somehow we can try, but I'm saying that if you

then dig and try and find an ordinary meaning of

"procurement" that would support the--we're back to

where we started at the beginning in terms of the

word itself is not capable of extending to grants. Am I making myself clear? In other words, I think they're using the same--"procurement" in Chapter

Eleven means the same as "procurement" in Chapter

Ten. I think that that's the bottom-line assumption.

PRESIDENT FELICIANO: Do you think that

"procurement" as used in the GPA has the same

meaning or would have the same meaning save for

specific clauses stuck in one but not found in the

other in these two agreements? Is that what you are saying?

MR. KIRBY: I'm saying that in both
agreements, in the NAFTA and in the GPA, the
negotiators have decided upon the scope of the word
"procurement," and they've put that scope into
their agreement, that they've defined the word
"procurement" in a particular way. Now, which
implies that they're not using external sources to
give meaning to those provisions. They're defining
carefully what they're talking about, what they're
talking about in each agreement. There's
definitions to the extent that it says procurement
means procurement by any method, including lease
purchase, with an option to buy, et cetera. But
the fundamental point is that the two agreements,
in order to determine what the word "procurement"
means in each agreement, one needs to look at the
terms of that agreement.
So in the abstract, if we--your question
was in the absence of specific terms changing the
meaning of the word in each agreement, would the
word mean the same--
MR. KIRBY: I would say that the core meaning is the bottom-line meaning of procurement, which is to acquire or to purchase. We have--I think my friends have cited the Encyclopedia Britannica. I think we have cited the Oxford University--the Oxford Dictionary. I think abstract from the treaty provisions, what does "procurement" mean? "Procurement" means to acquire something, purchase something, maybe lease it, but it means to acquire. It means to give money and to get something. Fundamentally different to grant, within that sort of abstracted meaning of procurement, can procurement be extended to mean grant? I'd say outside of the agreements it's even more difficult to make that argument because we do not generally think of giving away money to be procurement, even if we give it away for a specific purpose. I come back to the university giving the book scholarship. The university is not in any
sense of the word procuring books. The university
is giving grants.

[Pause.]

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

The Canadian Embassy has posted on its Web
site certain information respecting Buy America and
highway projects. The first thing to note is that
the first paragraph, the notes were written for
Canadian companies seeking to do business with the
Federal Highway Administration in highway
contracts. They were written by the Second
Secretary Commercial at the Canadian Embassy and
there does not constitute legal advice. Indicative
of a Canadian Government position on a particular
issue, I'd say, no, it's not.

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

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

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

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

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

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

The U.S. has not provided any information
on any object or purpose of NAFTA that will be served by the measure in question, quite understandably, because the measure in question is diametrically opposed to most of the objects and purposes of NAFTA. The interpretation put forward by the United States is designed to permit the Federal Government to continue to use its financial clout to force state governments to discriminate in favor of U.S. produced goods. And in this particular litigation the U.S. is seeking carte blanche to continue a textbook example of this protectionism.

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

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

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

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

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

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

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

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

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

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

My friend reminds me that I didn't really
respond to the question about the Clean Water Act.

Is there a reason why under that Clean Water Act
exemption the negotiators would have put in a
provision dealing with a private, you know, some
grant recipients of private enterprises, and we
think that we have one rational reason. These Buy
America have flow-down provisions, so that it's not
simply the first time, but in our case the
provision was in the Buy America funding to
Virginia. Virginia was obliged to apply it in its
contracts with other parties, who necessarily are
not government parties. They are private parties.
So that Shirley imposed the condition on ADF. That was not procurement by a party. That was private procurement between Shirley and between ADF.

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

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

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

PRESIDENT FELICIANO: Mr. Kirby, I may have misunderstood you, and this is why I am concerned that I be able to understand you. I heard you to the effect that Article 1108(7) especially (b), you read this particular provision as in effect saying that Article--that Chapter Eleven, with the exception of 1102, 1103 and 1107 do apply to this situation A and B. And the fact that the exclusion, in respect of 1102, 1103 and
relate to subsidies or grants does not justify the proposition that the subsequent, the downstream flow of the funds that constituted the subsidy or the grant would themselves be free from any disciplines. Is that what you are saying?

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

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

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

PRESIDENT FELICIANO: Subsidies and grants.

MR. KIRBY: Subsidies and grants.

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

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

PRESIDENT FELICIANO: Why?
MR. KIRBY: Why?

PRESIDENT FELICIANO: What is the basis for that position?

MR. KIRBY: Because even though—and there's a connection here with the Clean Water Act. Even though I don't think that it's appropriate to describe what Shirley and what ADF are, their position is grant recipients. I think that once you've given a subsidy or once you've given a grant, that's it, that's the end of the subsidy and that's the end of the grant. What the grantee does with that subsidy and what the grantee does with that grant is something completely different. It may be procurement. It may be investment. He may build a factory himself. It may be any number of things. The question is: when that third party then spends the money, is he—is the recipient of the money he spends, who is now a—the recipient of the money is a vendor. He's not receiving a subsidy or a grant. He is receiving payment for services or payment for goods.
So the notion that I can attach to a grant conditions that will continue and have an indefinite life throughout the economy by virtue of an exclusion which allows me to deny national treatment on the basis of subsidy and grant, I would say that that's a fairly expansive interpretation of the exclusion, because once the grant is given, that's the end of the grant.

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

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

PRESIDENT FELICIANO: Exactly. So then the question is whether the recipient of the money is subject to some requirements or disciplines in the process of spending that money.
MR. KIRBY: That's correct. Question: the recipient gets the money. Now the question is: what discipline is upon the recipient who receives that fund.

PRESIDENT FELICIANO: Yes.

MR. KIRBY: Private sector? No discipline. The private sector recipient of the funds can do what he wants with the funds, presumably, can discriminate, can decide he only wants to buy from Americans. He can do that. He's free to do that. There's another question though. If a state receives it, as in the present case, the question is, well, now that state is engaging in procurement by a party when he spends the money. Can he discriminate? Well, now we have to turn to Chapter Ten and see what that state can do or what that state can do under, for example, the GPA, but can that state save itself from the national treatment by saying, "Even though I might have obligations under Chapter Ten or under the GPA, I'm safe--even though I have obligations under Chapter
Ten, I'm safe because a grant, the grantor, the donor of the grant doesn't have to respect national treatment obligations and he can pass on that immunity to me, and I don't have to respect national treatment."

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

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

MR. KIRBY: With respect, I would say that it makes perfectly good sense, and that the negotiators would not have agreed otherwise,
because picture for a moment industry in need of subsidization because it says grants and subsidies. Industry in need of subsidization, we're going to fund government money into General Electric, and we're going to tell General Electric that when it goes out in the market and buys, that General Electric is going to have to only buy in a particular—will have to apply Buy America restrictions when it buys lightbulbs. That's fairly—a fairly wide view of what governments ought to be entitled to do, or what negotiators would have agreed to in a free trade agreement.

If the Canadian Government had said, "We want to give money to Hydro Quebec, $10 million a year, and we don't want to be subject to national treatment, but we also want to tell"—Hydro Quebec's a bad example. Bombardier, private company. We also want to tell Bombardier, "Not only does Bombardier receive funds, but when Bombardier spends its money, it's going to have to apply the same domestic purchasing policies that we
tell it to apply. And then when the recipients of
that money receive the money, they also will have
to do the same thing. First you have an accounting
nightmare. Secondly, once the money flows into
these organizations, unless it's directly
attributable project financing, you have a
nightmare in terms of managing the funds.

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

PRESIDENT FELICIANO: Go ahead.
MR. KIRBY: Fine.

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

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

If you say there's not end to that provision, to me it seems inconceivable that the
negotiators would have agreed to such a wide open provision.

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

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

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

MR. KIRBY: That's right.

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

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

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

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

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

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

What kind of requirements cannot be
enforced?, Requirements, (b), to achieve a given
level of percentage of domestic content; (c) to
purchase, use or accord a preference to goods
produced or services provided in its territory, or
to produce goods or services from persons in its--to
purchase goods and services from persons in its'
territory.

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

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

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

In the Investor's Reply, at page 34--and
I'll read it, it's only a short--page 34 of the
Investor's Reply. The Investor noted--and this is
at page 34, paragraph 212. "The Investor notes
that the U.S. does not raise any additional
defenses to the violation of Article 1106." That
is, other than the exemptions. "Thus, unless the
Tribunal finds that the exception for "procurement
by a Party" covers the restrictive conditions
applied to Federal funding, the Investor will
succeed on its claim that Article 1106 constitutes
a prohibited performance requirement imposed upon
the Investor and on its investments."

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

Did the measures impose performance
requirements in connection with the establishment,
acquisition, expansion, management, conduct or
operation of an investment? ADF Group is an--ADF
International is an investment of an investor in
the territory of the U.S. The steel purchased by
ADF Group is an investment, and the contractual
interest that ADF International had in the Shirley
Sub-Contract is an investment. The Buy America
requirements required ADF International to achieve a given level of domestic content, what was that level? It was 100 percent. It required it to purchase, use or accord a preference to goods produced or services provided in the territory, or to purchase goods or services from persons in the territory. That was a clear requirement of the measures in question.

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

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

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

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

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

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

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

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

PRESIDENT FELICIANO: Thank you, Mr. Kirby.

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

My presentation on Article 1105 has basically four parts. First I will deal briefly with Article 1105 itself and the arrival of the Free Trade Commission Notes on July 31st, 2001; how in light of these notes we believe that we are now entitled to move forward and make an Article 1102 claim, which will be our second part of the submission; and as well the mirror image of an Article 1102 claim would be an Article 1103 claim, which would be a third part of our submission. This third part of the submission has a preliminary issue as to whether or not we are entitled to make
that claim at all, because the United States objects to it. And finally--and dealing with whether or not we can do the 1103 claim, we will also look at a side issue or a parenthetical issue with respect to future damages because in both instances we are accused of not giving timely notice or proper notice, so I'll deal with these two at the same time. And then finally, the application of the--what we believe to be the better treatment that we are receiving from the Albanian and Estonian bits with respect to fair and equitable treatment, the application of that better treatment to our case.

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

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

We submitted in the Investor Reply Volume
III at Tab 27 the views of Sir Robert Jennings as
to what are the effects of the Free Trade
Commission Notes. Basically, Sir Robert views the
Free Trade Commission Notes as being an amendment
to the treaty because nowhere does Article 1105
mention customary international law or refers to
aliens. The fact that notes refers to aliens is
anachronistic in light of advances in international
human rights law.
Be that as it may, the United States considers that the Free Trade Commission Notes discredits the theory that Article 1105 goes further or gets protection beyond customary international law in relation to aliens. Because of this, we believe that we can move past this and look at better treatment given under Article 1102 and 1103 in relation to subsequent bits entered into between United States and third parties.

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

In any event, at least the Article 1102 claims has been notified. In the Rejoinder at page 30, the United States indicates that treatment accorded to U.S. investors by Albania or Estonia is
not relevant to an Article 1102 claim, but that's
not the 1102 claim we're putting forward. In our
Investor Reply at page 43 we cite the ICSID case of
Maffezini, which is found in Volume I Tab 5, more
particularly at page 23, paragraph 61, for the
proposition that if a government like the United
States seeks to obtain a treatment for its own
investors abroad, which is more favorable than that
granted under the basic treaty to foreign investors
in its territory, then the national treatment
clause is to be construed so as to require similar
treatment to the latter. In other words, here ADF
is requesting the same type of protection given to
U.S. investors that has been secured for their
benefit by their government in Albania and Estonia.
Such protection, we submit, and we'll get to it, is
better than the one found in 1105.

Turning now to the third part of the
submission, being the Article 1103 claim, first of
all, can we make this claim? Again, we invoke
Article 1103 as an affirmative defense to the U.S.
use of the FTC Notes to limit the application of 1105. Since we learned about the FTC Notes on July 31st, 2001, being literally the day before we filed our Memorial, if anybody here was caught by surprise, it was us. The United States was aware in our Memorial that a possible Article 1103 claim was in the arbitration landscape, because we argued that if you tried to reduce the scope of 1105 it would become ineffective because we could then move forward under 1103. The United States should at least have said something about that in its Counter-Memorial, but said absolutely nothing.

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

In our Notice of Arbitration at page 22, we sought a variety of reliefs. We sought first of all, a series of declarations, and at the end such further relief that counsel may advise and that the
Tribunal may permit. We've cited Canadian Case Law to the effect that this allows us to move along if circumstances change. United States has indicated that the Canadian Case Law cited seems to be limited to appellate review, but this is not entirely the case. And we have cases at trial citing the Canadian Supreme Court decision which basically holds for the proposition that you can invoke the basket clause, and I'll get to the principles from the Canadian Case Law because it's reflected in international case law. You can invoke it when the other side has had an opportunity to argue the case on the merits and they were not prejudiced. Here we submit that United States responded fully to the Article 1103 claim and they haven't cried prejudice at all anywhere.

They have cited, however, two cases. One is an ICSID case and the other one is a World Court case, and I will first turn to the ICSID case, the AMCO decision, and I notice that the Chairman of
the Tribunal was involved in that case, and so was
Ms. Lamm. So it's a little bit difficult for me to
say exactly what you meant in the decision, but I
can at least limit myself to a few simple
propositions.

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

The Tribunal did use a reasonably implicit
standard. If you're going to invoke something
further down the chain, it must have been
reasonably implicit that you would have done it
from the start. This is a little bit useful in our
case because 1103 is a mirror image of 1102 in
terms of what protection are we seeking? For 1102
it's the protection given to U.S. investors. For
1103 it's the protection given under the same
treaties to the Albanian and Estonian investors.
So one is a corollary or the mirror image of the
other, and had we known that the FTC Notes were
coming our way, we certainly have covered both.
Of interest, at paragraph 50, the Tribunal
felt that there was no licuna on the ICSID rules
which would justify the Tribunal to have recourse
to the practice before the World Court, but our
friends here have cited World Court precedence, so
I'll turn to that.
They cite the Nauru Phosphates case. I
invite the Tribunal to read the facts of the case
because aside from the fact we're not in the same
situation, what is more particular in the Nauru
case is that what the Court basically said is that
you're reaching too far to get extra claims on
other matters which are not the same as the one
which are before the Tribunal. And in so deciding,
order to advance a new claim it must have been
reasonably implicit, and it must arise directly out
of the question which is the subject matter of the
application.

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

We therefore submit that the Article 1103
claim is reasonably put forward. We have not
blind-sided United States. It arises directly,
directly out of the question which is the subject
matter of the dispute, and it is a logical
corollary of the Article 110(?) claim which in any
event is properly before you.
This brings me to a parenthetical argument with respect to damages based on other contracts. Here we have three propositions. First, all of the other contracts are directly affected by the exact same measure. The only issue is one of damages that will be addressed at a second part of the hearing. Second, deference to a waiver under Article 1116 and 1117 does not bar claims from ongoing damages. At the time the notice was given, ADF, there had been a breach, and ADF had already suffered damage, and now the question is how much in a situation where damages are ongoing? All of the other contracts affected by the same measure are simply in the wake of the Springfield Interchange Contract.

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

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

Now, we get into the nuts and bolts of the better treatment. In its Rejoinder at page 4041, United States asserts that all of these subsequent bids, because we've referred not only--we're
referred only to Albania and Estonia, but the
United States has referred to a variety of other
BITs, to say that all of them give the exact same
treatment as Article 1105.

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

Second, now that the United States is on
the receiving end of such an obligation, here we
have the Free Trade Commission Notes that seek to
limit the rights contained in 1105, but the problem
is those notes don't apply to any other bilateral
investment treaty.

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

In saying that the bilateral investment
treaties are equal to Article 1105, the U.S. avoids
looking at the actual wording of the bilateral
investment treaties, and sends us rather looking at
the letters of transmittal to the Senate. We'll
look at both. But I would have four prefatory
comments before we move to the wording of the
letters of transmittal and the wording of the BITs.
First, the wording of the BITs have echoed in the OECD Multilateral Agreement on Investment and this we find in the Investor Reply Memorial, Volume II Tab 12, page 115. This is the article of Professor Vasiani. At the middle of the page, the model BIT clause states that each contracting party shall accord to investments in its territory of investors of another contracting party, fair and equitable treatment and full and constant protection and security. In no case shall a contracting party accord treatment less favorable than that required by international law.

The wording of this model BIT was looked at—and this is our second proposition—by Mr. Justice Tysoe of the British Columbia Supreme Court in the Metalclad Judicial Review, Volume II(b)(l) Tab 7, page 24 at page 64-65. And for Justice Tysoe this was a very easy call. In light of Article 31(l) of the Vienna Convention, Mr. Justice Tysoe bases his decision on the wording of the model BIT in comparison to the wording of Article
In that decision Mr. Justice Tysoe came to the conclusion that the wording was different, that the wording of the model BIT was additive in character, whereas the wording in Article 1105 was subsumed so that 1105 provided a lesser protection.

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

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

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

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

Now, at page 4, we have the provision itself, (3)(a) and (3)(b). Each party shall at all
times accord the covered investments fair and
equitable treatment and full protection and
security, and shall in no case accord treatment
less favorable than that required by international
law." It doesn't say "customary." It doesn't
mention "aliens."

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

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

PRESIDENT FELICIANO: What page is that,
please?

MR. CADIEUX: Page vii in numerals.

PRESIDENT FELICIANO: In Roman numerals.

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

MS. LAMM: Good, yes.

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

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

The general reference to international law
also implicitly incorporates other fundamental rules of international law. Albanian BIT.

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

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

And then further on, we see something new. "For purposes of dispute resolution under Article 6 and 7, a measure may be arbitrary or discriminatory
notwithstanding the fact that a party had or has exercised the opportunity to review such measure in the courts or administrative tribunals of the party."

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

(c), we have a new paragraph now, something new. "Each party shall observe any obligation entered into with regard to investments." I'll call this the contracts clause. According to the letter of transmittal, this paragraph (a), (b), and (c) with the ELSI clause sets out a minimum standard of treatment based on customary international law. And yet this is quite different than the one in Albania. If this was all customary international law, surely the standard
would be the same. But it isn't. Why? Because it's the treaty language that comes first. And I can go on and on--

PRESIDENT FELICIANO: The what, please?

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

PRESIDENT FELICIANO: The tree?

MR. CADIEUX: The treaty language.

PRESIDENT FELICIANO: Oh, the treaty.

MR. CADIEUX: Yes. I have just done two.

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

If you go at page 9 for Ecuador, paragraph (3) guarantees that investments shall be granted fair and equitable treatment. It also prohibits parties from impairing through arbitrary or discriminatory means the management, operation, maintenance, use, enjoyment, acquisition, expansion
or disposal of investment. This paragraph also sets out a minimum. It does several things, one of which is to set out a minimum.

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

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

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

Application of the principles to the present case. Just a prefatory comment. Professor de Mestral asked a question with respect to purposive interpretation of NAFTA, and he asked the question, well, how far can we go? I also read into that question not only how far can we interpret, but upstream how much authority do we have to do so? Because when faced with these obligations, the first question is, well, what do we give in terms of fair and equitable treatment and full protection and security? Who are we to say so? Who are you to say so is persons appointed under a mechanism given by the United States of America, Canada, and the Mexican state. This is the highest form of sovereignty, the one to be able
to contract it away. And they gave this
responsibility to you. You must approach this
without any lingering doubts as to your legitimacy.

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

Under Buy American—with an "n"—programs,
the U.S. has applied a standard of administrative
and judicial decisions to the effect that post-production
fabrication is not a manufacturing
process. Should we not apply the same standard
The United States sets up a first defense. Well, you're not in like circumstances. The problem with this defense is that the Buy American provision found in direct Federal procurement was also found in the Surface Transportation Assistance Act of 1978. We're now in the same sector.

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

The United States argues there has been a change of rules. In its Counter-Memorial at page 53, the United States says that it covers all, quote-unquote, steel materials. At page 45 of its Counter-Memorial, the United States says that the provision places emphasis on the production of,
quote-unquote, finished products. In its Rejoinder at page 7, the United States indicates that the provision applies to all steel to be produced and, quote-unquote, fabricated.

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

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

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

Here they selectively ignore the fact that all manufactured products are still covered. They ignore that completely. And then they focus squarely and uniquely on steel. I believe this to be arbitrary. I believe this to be discriminatory. And I believe that this creates a serious problem in terms of transparency of the statute.
The Federal Highway Administration has become almost a law unto itself, and it has made the law opaque by the ever so high degree of discretion which it has given to itself. It should not be the discretion which leads. It should be the law. And here we have a serious problem where one can completely ignore a full section of an Act.

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

By selectively focusing on steel and completely ignoring all other manufactured products, the Federal Highway Administration actions are discriminatory and, it is submitted,
Article 1108, which has to be read restrictively, cannot allow—one cannot allow to read Article 1108 to allow such measures to seep through.

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

Now, Mr. Kirby has reviewed the Slater letter. We have nothing, of course, against Mr. Slater. The United States in its Rejoinder indicates that the letter is far too cursory to enable the reader to ascertain on what grounds Mr. Slater believed the 1982 Act is exempt from NAFTA obligations. And yet the letter was issued after some reflection. It took two months before it got
out. And it's also consistent with what is on the Department of Transport Web site. It's also consistent with the U.S. Statement of Implementation Action. They're all saying it's a grant.

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

We submit that this radical change in position is surely a breach of fair and equitable treatment, and we would go so far as to say even under the Free Trade Commission Notes of
Interpretation.
That concludes our submission on Article 1105.

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

Ladies first. Carolyn, please.

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

MR. CADIEUX: And national treatment.

MS. LAMM: And national treatment. My question is: What would you have us to rely on, which authority, to describe substantively what is in that provision of international law or customary international law? What case, or Bin Cheng or something that defines the substantive standards that you want us to rely on to decide this?
MR. CADIEUX: In any judicial review decision when you have patently unreasonable as a standard, for example, what do you rely on? You rely on the good sense of the person who's in front of you and who had the job to decide. That's you. You come from different legal backgrounds. You will decide what is fair and equitable, whether you think this is arbitrary, whether you think this is discriminatory.

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

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

[Pause.]

MR. CADIEUX: I wanted to keep this up my sleeve, as it were, for number five, and I guess the cat's out. It's Maffezini on the merits, and the Kingdom of Spain, it's on the ICSID Web site.
And there at paragraph 83, the Tribunal recognized the principle of transparency in the conduct of Spain towards the Argentinean investor.

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

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

PRESIDENT FELICIANO: I'm sorry. Are what?

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

B, as I indicated--and I forgot to mention
the case because it was in light of Mr. de
Mestral's question. There's also another ICSID
case. It's Antoin Goetz v. Republic of Burundi,
also an ICSID case. It's in French so I can't cite
you the principle. I'm not sure--I don't think--if
I read it in French, it won't pass mark, I don't
think. It comes--they cite a principle enunciated
by the World Court where, I'll translate loosely,
the court refuses to see in the conclusion of a
treat, of whatever treaty, by which a state
undertakes itself to abandon a part of its
sovereignty--no, sorry. By the conclusion of a

treaty, the court does not see this as an

abandonment of sovereignty; rather, the ability to

contract international undertakings is precisely an

attribute of sovereignty.

So this is what they've done. This is an

act of sovereignty. They have given you the power.

You decide what it means. You may turn to anywhere

you wish to give you guidance. The best guidance

is your own background. And in a system, at least

under the common law, a system of precedent, the

House of Lords said at one point, well, there has

to be one one day because or else the system won't

work. And this is the whole idea.

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

Go ahead.

MS. LAMM: I think both the Pope & Talbot

case and Metalclad addressed fair and equitable

treatment. Were you satisfied with the standards

articulated in those cases?

MR. CADIEUX: NAFTA--this is a problem
because each case is its own.

MS. LAMM: Right.

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

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

MR. CADIEUX: Yes, I--

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

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

PRESIDENT FELICIANO: The Federal Highway Administration--
MR. CADIEUX: --and gone astray.

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

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

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

MR. CADIEUX: That they have done this?

PRESIDENT FELICIANO: Do you feel that we are authorized in designing the rulings, the
practice of the Federal Highway Administration and say you're all mistaken, you're mistaken, you're misreading the statute, you're forgetting this and that and the other thing?

MR. CADIEUX: Yes.

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

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Why, sir?

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

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

One way in human rights law to control this—and there are a variety of levels of control depending on how dangerous the measure is or how violative the measure is. The basic standard is
that there has to be a rational connection between the measure you're taking and the objective you want to reach.

What is the rational connection here?

They've given none. They've said under the prior Act it was there.

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

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

PRESIDENT FELICIANO: That we cannot do.

MR. CADIEUX: I don't think so.

PRESIDENT FELICIANO: Thank you very much.

That's the question I wanted to--if we cannot do
that, why should we look into these vagaries and strange interpretations or series of interpretations that you are inviting our attention to?

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

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

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

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

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

PRESIDENT FELICIANO: That is what I'm asking.

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

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

MR. CADIEUX: The municipal--okay.

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

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

PRESIDENT FELICIANO: Municipal law is a question of fact.

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

Now the next step, does that law and that rule, the rule which, by its own terms, say that we're completely ignoring all manufactured product, that's what the rule says. We're doing it completely without any justification whatsoever. I
am asking you is that arbitrary and discriminatory
under the NAFTA treaty standard by way of 1102 and
1103? That's the precise question I am asking. I
still haven't--

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

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

However, what I'm asking you to do is when
the Federal Highway Administration is saying, I
look at the act of Congress, I am going to
completely disregard it for no reason whatsoever
that has been advanced up to now, and the one they
have advanced has no rational connection with the
way the statute is drafted, saying you can go there
and compare that with the obligation of the treaty.

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

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

MR. CADIEUX: Free Trade Commission.

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

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

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

MR. CADIEUX: Okay, but such as--

PRESIDENT FELICIANO: Yes.

MR. CADIEUX: No.
PRESIDENT FELICIANO: Your answer is no.

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

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

MR. CADIEUX: That is being debated as well.

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

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

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

PRESIDENT FELICIANO: Mr. Cadieux--

MR. CADIEUX: Yes?

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

MR. CADIEUX: I understood that. Yes,
indeed.

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

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

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

PRESIDENT FELICIANO: Yes. There is--

MR. CADIEUX: That's in Volume II?

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

MR. CADIEUX: Well, the United States, nobody has ever told us, and I haven't seen it
really expressed clearly anywhere, what is customer international law minimum standard of treatment of aliens? But, from what I've been reading, the governments take the position that unless you are murdered somewhere in the high desert, and even then this practically gives you nothing.

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

MR. CADIEUX: Under Parts--

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

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

My application for access to information
before the Government of Canada won't be probably
not before another year, if at all. So I haven't
been able to get anything, any background on this.
PRESIDENT FELICIANO: I see. Okay.
MR. CADIEUX: I've tried to get access to
original drafts of 1105. I probably won't get that
for another year. This is, of course, in a timely
manner.
I've tried to get information surrounding
all of this and nothing. It's not a criticism of
Canada. I understand it's a problem with the
Access to Information Act inside the Department of
Foreign Affairs, where Minister Pettigrew is not
responsible for that act. So whatever he signed
off on timely manner, well, that wasn't his
responsibility under the Canadian legislation.
That's why I haven't been able to have access to
anything, no memos, nothing, and even then I would
doubt that the memos would be accessible.
So, no, I have no process of reasoning, no
justification. This came out of the blue, without
a warning, and of course we should have given
notice about it.

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

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

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

MR. CADIEUX: Yes, I agree.
PRESIDENT FELICIANO: Oh, well.

MR. CADIEUX: And it's interesting that
Article 1105 says "Minimum Standard of Treatment"
in the heading, but the FTC notes only refers to
the minimum standard in relation to 1105(1), when,
in fact, logically it should apply to all three paragraphs, and they don't address that problem.

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

MR. CADIEUX: Yes.

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

MR. CADIEUX: Yes.

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

MR. CADIEUX: I have to turn to Mr. Jennings, who says this is nonsensical. You cannot have a minimum standard of treatment in relation to the aliens within a treaty that looks at investments. It makes no sense. First of all, the word "aliens" is found nowhere in NAFTA at all; second, investments in Chapter Eleven doesn't cover
the human body, it covers property and a variety of things. How can it use a standard in relation to interest arising from the commitment of capital or other resources? How can you use a human rights standard applied to that?

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

MR. CADIEUX: Yes.

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

MR. CADIEUX: Yes.
PRESIDENT FELICIANO: Is that your reference to this or is this something else?

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

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

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

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

MR. CADIEUX: But really, he wanted
certainty.

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

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

PRESIDENT FELICIANO: I think everybody would agree with that.

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

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

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

MR. CADIEUX: You can say, in the
alternative, okay, regardless of whether or not
1105, as read by the notes, should be interpreted
restrictively or largely. If it is to be
interpreted restrictively, then we move to 1102,
1103. If it's not, we get the same result. I have covered all of the territory.

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

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

MR. ONWUAMAEGBU: Yes.

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

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

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

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

PRESIDENT FELICIANO: Mr. Kirby?

MR. KIRBY: Yes, Mr. Chairman?

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

MR. KIRBY: The best-laid plans often go awry. I am happy. I think that we can complete, I think the schedule called for completion by 6:30. Leave me some time for questions. I am now going to address 1102, and then we are going to have a summary conclusion, and I think, on 1102, we can wrap that up fairly quickly.
And my friend, I had just two points that arose out of my friend's presentation that I will give to you, but I think that we are still looking at completing within the scheduled time.

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

MS. LAMM: Yes.

PRESIDENT FELICIANO: Do you want to take those now?

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

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

MR. CADIEUX: I focused, during the oral
submission, on the elimination of manufactured
products.

MS. LAMM: Yes.

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

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

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

MS. LAMM: Okay.

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

MS. LAMM: Right.

MR. CADIEUX: And 1104.

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

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

MR. KIRBY: Thank you, Mr. Chairman.

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

MS. LAMM: It's 1131.

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

MS. LAMM: Yes, 1131(2).

MR. KIRBY: I wasn't wearing my glasses. I said that my presentation on Article 1102 is going to be fairly short, and I think I can hold to that promise.

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

Article 2 "requires each party to accord to investments of investors of another party treatment no less than favorable than it accords in like circumstances to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct operation, sale or other disposition of investments." Very traditional national treatment standard, well known in international law. The measure in question and one of the reasons why I think that this argument can be dealt with fairly quickly is textbook protectionism in
its raw form. Let me give you a sense of the
genesis of this provision. We have included
extracts from the congressional record slightly
before Christmas, December 1982, at Tab 10 of the
Memorial of the Investors' Material and Case, is
Volume II-A.1 I will just read some of the
statements from the Congressmen when they were
discussing the amendment which eventually led to
the measure that we're discussing, Section 165.

Mr. Applegate states, "Mr. Chairman, the
purpose of my amendment is simple. It is to make
sure that all of the revenues generated by the
increase in the Federal gasoline tax that this
House will pass today will be spent in America on
American goods and services. It is a strong Buy
America clause, yes, but considering the latest
official unemployment figures of 10.8 percent and
the fact that the increased imports are the prime
cause of these high unemployment rates, I believe
it is imperative that strong action be taken to
correct what has been a blatant inequity of trade
One more from the same debate. Mr. Williams of Ohio, a heavy steel area, "Mr. Chairman, I, too, want to compliment the gentleman on his amendment and maybe share with the members of this committee the fact that I believe the real enemy of American industry and of the American industrial community is the foreign import. No longer should we fight each other--labor, management and government--we must attack the enemy and the culprit that has put our people out of work, and that is the foreign import."

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

The reality is that this measure is designed to discriminate in favor of U.S. goods,
U.S. good providers, to the detriment of any non-U.S. goods and any non-U.S. good providers.

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

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

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

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

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

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

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

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

The issue of that long list that's found in Article 1102 with respect to the establishment, acquisition, expansion, management, conduct,
operation, and sale or other disposition, I think
what the NAFTA drafters are saying is basically if
you impact the daily day-to-day business of an
investment, of an investor, that's a measure with
respect to any of these activities. It's not
specific. It's broadly drawn to try to capture all
of the business activities of the investment.
Did it capture the business activities of
the investment? Most certainly it did.
Yes?

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

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

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

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

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

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

PRESIDENT FELICIANO: But you never intended to take any steel other than U.S.-origin steel.
MR. KIRBY: That's correct.

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

MR. KIRBY: No. At the time.

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

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

Now, you could continue to discriminate vis-a-vis the rest of the world. But if the U.S. takes the position that the measure--well, the
position that we are taking with respect to the
measure is that this is a violation of national
treatment and it can't be applied. We're not
saying it's a violation only in respect of the
fabrication work. We're saying that the measure
itself by requiring U.S. content violates the
treaty.

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

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

Now, as you doubtless recall, we
distinguish in Canada in a number of circumstances,
and probably in American law, too, in certain
circumstances, between a law which might be in
relation to something and a law which may merely
affect, and certain consequences might flow if you
characterize it on one side or characterize it on
the other.

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

MR. KIRBY: Very close to "affecting," if
not absolutely smack on top of "affecting." Where
the provision--our position is that clearly this is
a measure in relation to, with relation to
investments. That's what it's designed to do.
It's designed--in our case, for example, it's
designed to force ADF to open investment facilities
in the U.S. if it wanted to engage in the market.
The NAFTA case law has consistently taken
that approach, that it's close if not synonymous
with "affecting." We don't need to show a direct
link between the measure and the investment. The
indirect link that we have here is close enough.
And if you'll recall, Professor, when we talked about the grant in respect of grants and subsidies and how the 1102 issue was--grants and subsidies were excluded, but under 1108, the conditioning of performance requirements. Just go back to 1106(3). These measures, conditioning of performance requirements, are--again, the language there actually--the language there is "in connection with an investment." In 1102 we're looking at language, with respect to all these various activities of the investment, not necessarily with respect to the investment itself.

The scope of the chapter talks about measures relating to investors. I think it was in the S.D. Myers case that the panel...no, let's just look at the--S.D. Myers case was an export prohibition on PCB waste. That was found to trigger national treatment issues, measures related to investments. Why? Because it impacted the investment. And there was a demonstration that there was an intent to favor domestic production
over foreign production. The reason the ban was imposed was so that the domestic producers could transform the waste in Canada rather than ship the waste to the United States to allow it to be transformed in the United States.

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

So do we have a definition of, you know, to what extent can we reach out and get these measures? This is clearly a measure which is designed to reach down into industry at the factory level and determine what kind of goods are going to be produced within factories in the United States. They're meant to encourage the factories. We have an establishment in the United States. It is an investment. This measure is clearly designed to reach down in there and have an effect on that investment. That's the connection in terms of "with relation to."
In fact, if we look for a moment at the
S.D. Myers case, because we've said in our Memorial
that S.D. Myers is to a large extent a mirror image
of the present case. S.D. Myers was an import ban—the
result of S.D. Myers was an export ban. The
result of this measure is effectively an import ban
on steel.

The cases found at Tab 6 of Volume II-B.1
of the investor's material—at page 60 of the
decision, paragraph 241, the Tribunal looked at the
argument which is put forward here by the United
States that the measure affects everybody equally.
Canada argues that the interim order merely
established a uniform regulatory regime under which
all were treated equally; no one was permitted to
export PCBs, so there was no discrimination.
SDMI—that's S.D. Myers—contends that
Article 1102 was breached by a ban on the export of
PCBs that was not justified by bona fide health or
environmental concerns, but which had the aim and
effect of protecting and promoting the market share
of producers who were Canadian and who would
perform the work in Canada.

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

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

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

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

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

In the present case, we have an impact, we
have a direct impact, the inability of ADF to
complete its contract in the manner in which it
agreed to do at an enormous cost, suffered an
impact, had to subcontract work to its U.S. competitors, and as a result, lost a substantial amount of money in the process.

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

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

Finally, to close on this point, we would like to just remind the Tribunal that it is not
simply ourselves that consider that Buy America
measures and measures of its ilk are violations of
national treatment and are discriminatory. No less
a source than the USTR also considers that these
measures are discriminatory.

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

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

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

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

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

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

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

PRESIDENT FELICIANO: [Inaudible comment
off microphone.]

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

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

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

MR. KIRBY: Exactly.

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

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

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

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

You then raised issues with respect to Mr. Cadieux's presentation involving the distinction between what a panel can do in respect of municipal
law versus what a panel can do with respect to international law, and how that affects this particular proceeding, and, in particular, interpretations that we are putting forward in respect of the legislation. We're not putting forward interpretations, but our reading of the legislation. That was number two.

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

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

MR. KIRBY: It will be Wednesday.

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

MS. LAMM: I just had a few questions that
have arisen as a result of both your written
pleadings and your oral submissions today.

As I read the provisions, the Buy America
and the Buy American provisions, your contention is
the Buy America obviously are much stricter than
the Buy American because with Buy American there's
this 50 percent requirement and almost a
substantial transformation approach that is absent
certainly in the Buy America provisions under the
Federal Highway Acts.

Is your position that both would be a
problem?

MR. KIRBY: I see what you're getting at.
Abstractly, if the legislators decide, for example,
that we are going to enact a provision which covers
three categories of product and gives that to the
regulators to make regulations and regulations are
properly made, and then another statute has another
provision, again, given to the regulators and given
to be made, not generally a problem—not a problem
certainly that this panel could tackle, when it's
done properly.

What happened in the instant case, however, is that the normal practice where the regulator makes—where the legislator makes law and says, for example, in the present case, steel, iron, and manufactured products, that's what the Congress said. Then when you start going down the stream, normally what would have happened is when the Congress says manufactured products, what will happen is that somebody somewhere in the process will say, wait a second, we need a rule. Why? Because it is impossible to implement that kind of a law without an origin rule. I say impossible. I'm sure we have all read the rules of origin under NAFTA, and the reason why the rules of origin under NAFTA are becoming bricks is because it is extremely difficult to find any manufactured product which is 100 percent origin of any country. A television might come from six countries. Even watches have workings within them from Hong Kong. So the legislators give three products
that they want to affect in the legislation:

steel, iron, and manufactured products. And I say
go off and do it. Normally that would trigger
just--the necessity of having some way to deal with
that kind of a law, normally that would trigger
this rulemaking process whereby we'd start to find
some rules about what's the content of a
manufactured product.

You don't need those rules with respect to
the output of a steel mill. The output of a steel
mill is clean. It comes out the back door of the
steel mill. And you know because you've got a mill
certificate, that's where the steel is made. So
there's not that same question of, well, how do you
determine the origin.

So that's what Congress did. We're saying
the problem now occurs when it sweeps down into the
regulators and into the administrators, and instead
of saying, wait a second, we need some content
rules in order to be determined--in order to be
able to determine what is a manufactured product
from the United States, because we can't work with
100 percent rule, and that would have happened.
Instead of doing that, what the regulators did is
say what we'll do is we will strip out all other
manufactured products and deal only with steel.
And instead of talking about steel manufactured
products, we'll just say all steel, thereby denying
us the benefit of obtaining origin rules that
normally would have been obtained had the
congressional intent been respected. That's our
argument on national treatment.
MS. LAMM: And are you saying, then, that
the regulators effectively went beyond the grant of
authority in the enabling statute?
MR. KIRBY: We're coming very close to the
municipal law and the international law issue.
MS. LAMM: Right. I'm just trying to
understand exactly what--
MR. KIRBY: What I'm saying--okay. Let
me--yes, I am saying that the regulators basically
have been allowed to overstep their authority.
Now, there's an obligation on the lawmakers to do something about that when that overstepping of authority is impacting investors. There's an obligation to fix the damage. So the regulators, we submit, went beyond their authority and were not corrected by the lawmakers.

MS. LAMM: So the statute is now the objectionable part. It's really the regulation that implements the statute.

MR. KIRBY: No. In this narrow area on this narrow argument--

MS. LAMM: Yes, yes.

MR. KIRBY: --it's the regulation. We're not saying that national treatment is a violation because--you know, we're not--in comparison with the Buy American statutes, we're not saying that there's something in the head statute which is a violation. Why are we not saying that? Because we're--you know, those statutes are separate. But what we're saying is given that Congress put in manufactured products, that normally would have
triggered a requirement for content rules which we would have been entitled to have the benefit of. We've been denied that benefit. Why? Because when the laws went down through the regulatory stream, basically they said we cannot deal—no, basically they didn't say we cannot deal with them. They said we won't deal with manufactured products. We will not do it. And we will restrict the application of the law just to steel and iron. Okay. In doing that—but we will still as a practical matter apply it to something other than the output of mills, and we'll apply, you know, the same rule that we would apply to the output of mills to steel. We're going to consider that steel manufactured products are steel.

We submit that we were denied the benefit of that rulemaking exercise which would have been necessary had the administrators done what Congress told them to do.

PRESIDENT FELICIANO: Mr. Kirby, I am now thoroughly confused. I'm afraid that's my normal
condition, Mr. Kirby. But it seems to me that the
existence of the phrase "manufactured products" can
readily be read to refer to manufactured products
regardless of what the raw materials are, maybe
non-steel raw materials.

MR. KIRBY: Absolutely.

PRESIDENT FELICIANO: So that I don't
suppose you would use a lot of wood in product, but
maybe plastic materials and so on. What I
understand you to be saying is that the Federal
Highway Administration decided to forget about, you
know, imposing any requirement of American origin
or American--how you say, having been mined or
produced--

MR. KIRBY: In the United States.

PRESIDENT FELICIANO: --in the United
States, and they decided to focus only on iron and
steel.

MR. KIRBY: And steel products.

PRESIDENT FELICIANO: And steel products,
although in doing so they decided to capture not
just the manufacture of steel products or from the
original--I don't know what you call--

MR. KIRBY: Mill. Mill.

PRESIDENT FELICIANO: --metallurgical

products which go into the mill and from where
steel comes out. So in a sense, they decided to
forget about the non-steel items and then--but in
that sense they restricted their authority because
they could have done so. They could have imposed--

MR. KIRBY: Yes, they could.

PRESIDENT FELICIANO: --Buy American

requirement with respect to the non-steel
manufactured products.

MR. KIRBY: Yes, absolutely. They could
have passed a regulation in respect of manufactured
products, and they chose not to do so.

PRESIDENT FELICIANO: So, in a sense, they
were generous in that, in refusing to restrict
those particular non-steel, non-iron products to
American--

MR. KIRBY: Generous to one group of
people, and--

PRESIDENT FELICIANO: Right. Okay. Now, my real inquiry is: Does the relative cost of doing the fabrication, does that figure at all in here? If you were to do the fabrication, if ADF were to do the fabrication itself in Canada, I presume you would have X profit or return.

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: Because you--

MR. KIRBY: I hope, because they'll have to pay my fees. I'm sorry.

PRESIDENT FELICIANO: Oh, I certainly hope they'll pay your fees, Mr. Kirby. It would be disastrous if they didn't.

What about the cost of the U.S. fabricators? Was there any price differential?

MR. KIRBY: Are you talking about what actually happened?

PRESIDENT FELICIANO: Would there have been a natural tendency to utilize U.S. fabricators in this particular case?
MR. KIRBY: I am not certain I understand the question. Let me just briefly review the facts. We won a competitive tender by submitting a bid which was found to be the best bid that was submitted. So we bid a price that I presume was not higher than the competitors because otherwise we likely would not have been chosen, although the reputation of ADF does carry some weight. So, if the bids were close enough, we might even get chosen.

In any event, that bid was based on the cost of fabricating the steel in Canada at the facilities in Canada. We have two facilities in Canada. When that was unable to occur, we then had to use the steel, which was now steel in the United States, for the most part, and now send it to five or six different fabricators throughout the United States and have those fabricators fabricate the steel. We paid them to do that, and we paid handsomely.

PRESIDENT FELICIANO: Oh, I see, because
ADF had to use U.S. fabricators--

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: --the costs went up and were absorbed.

MR. KIRBY: If you can imagine, the costs went up and were absorbed by ADF. The costs went up because of transportation. We had to transport steel--now not to one place, but to five different places. When you cut steel, you have waste. When you cut steel in five different places, you have five times as much waste. You have huge issues of logistics, et cetera, et cetera. So all of this went to increase the price, plus our competitors were not giving us the most favored pricing because they probably were aware of the fact that we needed steel in a hurry and everybody was busy at the time.

All of this is not my testimony, but it is a recounting I think of the various affidavits that have been filed.

MS. LAMM: I want to go back to just this
discrepancy between the statute and the reg for one
minute. It seems that while Congress did say
manufactured products, what the regulators
transformed that into is all manufacturing
processes, which--

MR. KIRBY: Of steel products.

MS. LAMM: Of steel products--

MR. KIRBY: That's correct.

MS. LAMM: --which is obviously--

MR. KIRBY: Exactly. What they did was

say, if the universe is manufactured products--

MS. LAMM: Right.

MR. KIRBY: What I assume they did was to
say, if the universe if manufactured products,
we're going to have to have some fairly easy-to-apply rules
or a lot of rules for different
products. In NAFTA, we have rules according to
each tariff item or you can say it's 60 percent or
it's 30 percent, but at least we'll know. We will
know what the rules are.

They said they couldn't do that or,
rather, they chose not to do that. So they take
off the table everything, and they leave back on
the table, now there is a much smaller universe,
well, now we can live with 100-percent rule because
it's not terribly difficult to make 100-percent
steel products, so we'll do it.

But the thing is had they not taken that
manufactured product grouping off the table, they
wouldn't have been able to impose that same sort of
requirement on the—-not that they wouldn't have
been able to do it, they theoretically could have
done it, but it would have been an enormous burden.
And, in fact, I think in the administrative rule
where they talk about doing it, they talk about the
fact that one of the reasons why they are doing
this is that it would be a huge burden, that it's
very difficult to find manufactured products, most
manufactured products that are 100-percent U.S.
origin.

MS. LAMM: Now the thing that is somewhat
troublesome here is that in the directions for the
preparation of the bid that you quote on Page 4 of
your Memorial, it refers to this question of
manufacturing processes for the steel, and it draws
a fairly definite distinction between domestic and
foreign.

MR. KIRBY: Yes.

MS. LAMM: So that at the time you were
submitting your bid, you had to disclose, it seems
to me, that you were going to use foreign
manufacturing processes. Did you do that?

MR. KIRBY: The answer to that is twofold.

In the material, there is an opinion, not from
myself, but from a lawyer which certainly suggested
to the company that what they were proposing to do
was in conformity with the regulations, and the
theory behind that, and it's a theory that isn't
exactly, perhaps we should say it's not completely
ludicrous, the theory being that the object and
purpose of this statute, and if you read through
the congressional record, the object purpose, the
goal is the American steel industry. It's a
measure designed to promote the output of U.S.
steel companies, steel mills.

So, when they were buying U.S.-origin steel and simply fabricating that steel, the thought was, well, wait a second, when we come back to the U.S., we will have a mill certificate. That mill certificate will say that this steel came from Bethlehem Steel. It's U.S.-origin steel. So this issue of did the fabrication change, it is possible to interpret the regulations to say that all manufacturing processes to produce the steel is a reference, including the reference to coating, is a reference to mill activities only, and that was the intention of the statute, and that's it.

Now that argument was also bolstered by the three cases that we have cited, which by American legislation is treated, I agree, but they all deal with the issue of does fabrication change the origin of steel, and in that case it was Japanese steel came to the U.S., was fabricated, remained Japanese steel. The U.S. steel goes to
the U.K., was fabricated, remains U.S.-origin steel, and the other was an undefined foreign steel being fabricated in the U.S. It remains foreign steel.

So going back, this question of did they knowingly get themselves into this jam because the contractual documents tell them you've got to produce U.S. steel, there was a rationale behind the bid. It wasn't reckless. What they thought, they had consulted a lawyer in the U.S. who said, given this interpretation, you can fabricate in the United States. The legislation itself would tend to indicate that who is being protected, steel mill workers, not steel fabricators, steel mill workers, and the three cases that we have cited would also tend to indicate that fabrication, as an activity, won't change the origin of steel.

MS. LAMM: Well, so--

MR. KIRBY: But they made a mistake.

MS. LAMM: --your position was basically that these manufacturing processes, the
fabrication, wasn't a substantial transformation of the product so that it would be Canadian origin.
To do that analysis, one usually looks at how much value was added by the fabrication. How does that compare to what the raw product was worth and how much value was added by the fabrication process? What kind of a change was it? Did it take it to a new tariff category?

MR. KIRBY: I recognize the roots of the analysis--

MS. LAMM: Right.

MR. KIRBY: --but that's not applicable in this situation. When this provision, when they bid for the contract, et cetera, they were working under their U.S. counsel that gave them the advice, and a previous experience with other Buy American statutes that seemed to permit it under different things--

MS. LAMM: Right.

MR. KIRBY: But the question of this substantial transformation, now one looks at the
Federal Highway policy, there is nothing that you could do to that steel that could effectively, if you did anything to that steel in Canada, it loses its ability to qualify under the contract anything, it would appear, any manufacturing, any cutting, coating. Basically, you can't take it out of the United States.

So, in hindsight, and we're all gifted with 20/20 hindsight, they could have avoided this wrangle by not bidding on the contract or basically opening a new facility in the United States in order to get this kind of work, that is true. But the reality is that the existence of this measure of this measure, whether or not ADF made a mistake, the existence of this measure violates NAFTA, caused damage to the investor and that damage is recoverable under Chapter Eleven.

MS. LAMM: And you contend that the steel is an investment because it was U.S. origin, and the U.S. investor bought it and was going to sell it profitably for the business it was conducting
MR. KIRBY: And part of the definition of "investment" relates to any property, tangible or intangible.

MS. LAMM: Right.

MR. KIRBY: Steel is property, and I'm only talking about the steel that did not leave the United States because there is an issue if the steel came to Canada, it's no longer an investment in the territory, but certainly there was a significant amount of steel that remained in the United States.

Additionally, the interest in the contract also qualifies as an investment under Chapter Eleven. That contractual interest, that's property, that's an investment.

MS. LAMM: And there is not any question of raising this as an issue in a waiver application as a violation of public policy and therefore the waiver should be granted.

MR. KIRBY: I actually was involved in the
waiver application, but that was sort of as the,
and I met most of the participants here today, when
we sought a waiver, but just the exercise is a good
eexample of how this thing played out.

We first went to VDOT and said, you know,
what can we do about this because we have a very
serious problem, and we made the arguments that I
have just recounted to you, that congressional
intent was such to only produce the mills, that we
have a mills certificate that says it is U.S.
origin, all of those kinds of arguments, and it
simply didn't work.

But Virginia basically said, "It's not our
issue. It's Federal Highway. They are the guys
that will decide whether or not this steel
qualifies. They are the guys that will make that
call," and on the waiver we had to go to Federal
Highway, through Shirley, through VDOT, and it
disappeared into the Federal Highway Department and
came back after we had submitted some information,
responded to some questions, it came back and it
was denied. My understanding is that that was not unusual, that most waiver requests would be denied. I am not suggesting that they told us otherwise, but it was an exercise that we had to do.

Could we have litigated in the United States on that issue? Possibly. We chose to abandon our right to litigate in the United States, which we have done by way of a waiver, and to bring it before a panel here. I think you probably have a good sense of our chances of success in the United States.

MS. LAMM: Yes. And there wasn't a 25-percent price differential, I take it--

MR. KIRBY: No.

MS. LAMM: Not there.

MR. KIRBY: It was U.S. steel--

MS. LAMM: Right.

MR. KIRBY: That was the problem.

MS. LAMM: And you made the short supply argument. They rejected it.

MR. KIRBY: We tried.
MS. LAMM: Yes, which is not the public policy, it's violation of NAFTA.

MR. KIRBY: That's correct. And the chances of getting redress within the system within the United States, clearly, was not there. It simply wouldn't happen. Personally, I'm of the opinion that a significant part of the United States, political class, if you want to call it that, would not be at all averse to finding that this measure is a violation and can disappear from the requirements under Federal Highway in respect of Canada and NAFTA. It gets rid of an irritant. It is certainly something that, from a public policy perspective, we've just, the United States has just implemented safeguard measures.

The problem is to find the political will to deal with these, and oftentimes that political will is found by saying there was nothing we could do. The NAFTA panel told us it violated NAFTA.

MS. LAMM: Thank you.

MR. KIRBY: Thank you. Thank you.
PRESIDENT FELICIANO: I don't think we have any further questions at this point, Mr. Kirby.

MR. KIRBY: Thank you very much.

I would like to thank the panel for their extraordinary attention span and energy. Thank you very much.

PRESIDENT FELICIANO: Thank you, Mr. Kirby. I guess tomorrow we will just start at--is 9:40 acceptable?

MR. LEGUM: Or 9:30 would be fine, whatever is--

PRESIDENT FELICIANO: Is 9:30 all right?

Well, I think we could be here at 9:30, Mr. Legum. Why don't we do that. We'll all be here at 9:30--give you an extra 10 minutes.

MR. LEGUM: Hopefully, we won't need it.

PRESIDENT FELICIANO: Thank you.

[Whereupon, at 6:20 p.m., the proceedings were adjourned, to reconvene at 9:30 a.m., Tuesday, April 16, 2002.]