

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

BETWEEN

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

Wednesday, April 17, 2002

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

The hearing in the above-entitled matter
was reconvened at 9:35 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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Mr. Legum 674

Ms. Menaker 685

Mr. Legum 745

1 PROCEEDINGS

2 PRESIDENT FELICIANO: Good morning. I
3 think today we move to the rebuttal period, each
4 side having given its presentation in chief. You
5 go ahead, Mr. Kirby. You have the first crack at
6 this.

7 MR. KIRBY: Thank you, Mr. Chairman. Good
8 morning, members of the panel.

9 To try and give you a sense of where we're
10 going today, I wish I could give you a firm time.
11 I don't think we'll be taking up the full allotment
12 of time. I would like to keep the rebuttal as
13 short and to the point as possible.

14 Just on a preliminary matter, I want to
15 say again what I said at the beginning of the
16 hearing: that if we do not address a particular
17 issue in oral pleadings, the Tribunal is not to
18 consider that to be a withdrawal of any particular
19 claim. Claims that are found in our written
20 materials stand even if they are not addressed with
21 greater specificity in the oral presentation.

1 In terms of the organization of the
2 rebuttal, I would like, first of all, to deal very
3 quickly with the three questions that seem to be
4 remaining outstanding; then talk about two of what
5 I think are the big issues, the critical issues in
6 this hearing; and then to work my way through the
7 pleadings from yesterday in chronological order.

8 The first question related to the value of
9 the contract, and the question was posed by Judge
10 Feliciano, and I think that's been answered in the
11 U.S. submission yesterday that the contract value
12 was \$112,639, of which--million, of which \$98
13 million was Federal money, 87 percent of the value
14 of the contract.

15 Other than the fact that clearly there is
16 a huge, huge Federal contribution of money to that
17 contract, I'm not sure that we can take much more
18 from it, not knowing, you know, how the \$112
19 million is actually made up. But those are the
20 numbers that are before you at the moment.

21 In the same vein, on an issue relating to

1 the value added by fabrication, the number that
2 came out yesterday was 70 to 80 percent value
3 added. Now, this value-added issue is going to be
4 addressed at the damages stage. My client informs
5 me that the amount of value added is in the region
6 of approximately 20 to 25 percent, not 70 to 80
7 percent.

8 Professor de Mestral asked us to address
9 the issue of Article 1102, 1103, 1104, and 1105,
10 and his concern appeared to be that Article 1104
11 talks about the better treatment of Article 1102
12 and 1103 and doesn't refer to Article 1105. And
13 Professor de Mestral asked the question in terms of
14 what is the interrelationship between those four
15 articles, and does the fact that the absence of a
16 reference in 1104 to Article 1105, does that affect
17 anything?

18 Our position on that particular issue is
19 that 1102 and 1103 are typical national treatment
20 and most favored nation standards based on "in like
21 circumstances." Okay? So there--

1 PRESIDENT FELICIANO: Forgive me for
2 interrupting. Could you restate the proposition or
3 the matter you are now addressing?

4 MR. KIRBY: Certainly. Professor de
5 Mestral asked a question. We can have the text of
6 it, but his question was: I look at Article 1102,
7 national treatment; 1103, most favored nation
8 treatment; and 1105, this what's called "minimum
9 standard"; all relate to standards of treatment
10 offered to the investor. The question was posed in
11 Mr. Cadieux's presentation within the context of if
12 1105 does not give the proper--give a sufficient
13 level of protection, can you use 1102, national
14 treatment, or 1103, most favored nation treatment,
15 to go beyond 1105 itself and get a standard that is
16 better, either a standard offered to other
17 investors from other countries, foreign investors,
18 or a standard under 1102 offered to U.S. investors
19 that is better? In other words, can you use 1102
20 or 1103 to move out of 1105 itself and find another
21 standard?

1 And then our proposition is that, yes, you
2 can. The question that Professor de Mestral raised
3 is: Why does--let me read the question.

4 "Perhaps you don't want to answer this
5 immediately, but I think we would have to at some
6 point look at the question of what is meant by the
7 principle in Article 1104 that said that the higher
8 of the two standards"--parenthetically, that's
9 national treatment and most favored nation
10 treatment--"the higher of the two standards under
11 international treatment shall be given, but there
12 is no cross-reference to 1105. You may want to
13 think about that." And we have thought about that.
14 So that's the context in terms of the question.

15 1102 and 1103, as I said, are typical
16 examples of national treatment and most favored
17 nation treatment, standards that must be given to
18 the investor and to its investments in like
19 circumstances.

20 1105 is not an "in like circumstances"
21 standard. 1105 is an absolute standard. It says

1 minimum standard of treatment under international
2 law, fair and equitable treatment, full protection
3 and security. Absolute.

4 The question then is: What if that
5 absolute standard given under that particular
6 agreement falls short of what the U.S. is affording
7 to other investors, foreign investors, or to its
8 own investors under, for example, the additional
9 Bilateral Investment Treaties? Our position is
10 that you can then go to the national treatment or
11 the most favored nation treatment standard to bring
12 those higher standards in, not by application of
13 Article 1105 but by application of Articles 1102
14 and 1103.

15 Once you do that, you then have to go one
16 step further. Now when you are applying the new
17 1105 standard, which is the standard from outside
18 of the treaty, once you are applying that, now you
19 have an "in like circumstances" test to apply.
20 There is no "in like circumstances" in 1105. There
21 is when you're applying 1102 and 1003.

1 So now you have to ask yourself the
2 question: Who is in like circumstances to the
3 Canadian investor and its investments when we're
4 applying the better standard than 1105? So
5 normally when you would apply 1105, you don't apply
6 an "in like circumstances" test. If you get to a
7 higher standard than is provided for in 1105--you
8 can only get there by way of 1102 or 1103. If you
9 get there, you have to then apply the "in like
10 circumstances" to the application of that higher
11 standard.

12 In that analysis, Article 1105 is just
13 like any other standard of treatment set out in
14 Chapter Eleven whereby--and this is commonplace in
15 agreements throughout--whereby the agreement will
16 contain a most favored nation standard or a
17 national treatment standard. What that says is if
18 there is something--if there is an obligation in
19 this treat which falls short of what we have
20 granted to others in other treaties, you get the
21 benefit of the better treatment.

1 So we are saying that Article 1105, if it
2 does fall short of that, of the treatment offered
3 in the Bilateral Investment Treaties, 1102 and 1103
4 requires you to grant the better treatment after
5 you've applied the "in like circumstances" test.
6 So the absence of any reference to Article 1105 in
7 Article 1104 is, in fact, to be understood by the
8 fact that there is no need to have a reference to
9 all of the possible obligations in the treaty that
10 might be affected by the national treatment and the
11 most favored nation treatment standard.

12 And I see looks of puzzlement and
13 bewilderment, and I think we will need to just
14 slowly go back over the ground.

15 Generally, treaties will contain a whole
16 host of obligations that one party has undertaken
17 vis-a-vis the other party. In order to make sure
18 that all of those obligations keep pace with both
19 the treatment that one party applies internally and
20 the treatment that a party gives to its other
21 trading partners, in order to make sure that those

1 obligations keep pace with other developments,
2 we've put into treaties national treatment
3 requirements and most favored nation requirements.
4 In other words, these are the doors through which
5 you move out of your frozen treaty obligations and
6 you can move into other sets of obligations or
7 other standards. So Article 1102 and Article 1103
8 are the doors out of the treaty.

9 That being said, when you come across a
10 standard set out in the treaty which you claim to
11 be inferior to that given or offered to others--and
12 in the instant case, it's Article 1105, which may
13 fall short. We use Article 1102 and Article 1103
14 to move out of the treaty into standards that the
15 United States has granted to other investors.
16 Hence, the absence of any reference to Article 1105
17 in Article 1104, because Article 1105 seen in that
18 context is merely another obligation assumed by the
19 parties that we do not want to freeze in time. We
20 have said that if over time somebody else gets
21 better treatment than you are getting under 1105,

1 you can have that better treatment.

2 I would also state that this doesn't
3 constitute our full sort of rebuttal on Article
4 1105. We are going to take a much deeper look at
5 Article 1105 later on this morning. But that was
6 just to deal with why does 1104 not talk about
7 1105, and the context is 1104 simply deals with the
8 doors out of the treaty for reaching other
9 obligations, and Article 1105 is simply one of
10 those other obligations that you might want to move
11 out of the treaty to change.

12 MS. LAMM: I just want to make sure I
13 understand exactly your argument.

14 MR. KIRBY: Sure.

15 MS. LAMM: And as I understand it--and
16 please correct me if I'm wrong--the minimum
17 standard of protection offered, particularly in
18 light of the FTC interpretation, if there were to
19 be a better level of protection offered to an
20 investor under something else, you would apply
21 1102, for instance--looking at 1104, you would

1 apply 1102 to see if U.S. investors got better
2 treatment; you would apply 1103 to see if other
3 foreign investors got better treatment; and you
4 would then say that your investor must be accorded
5 the minimum standard that any of the best of them
6 got.

7 MR. KIRBY: That is correct.

8 MS. LAMM: But you use like circumstances
9 to do the analysis.

10 MR. KIRBY: Because Article 1102 and
11 Article 1103 require you--

12 MS. LAMM: Right.

13 MR. KIRBY: --when you are making that--

14 MS. LAMM: Right, right.

15 MR. KIRBY: --analysis to use like
16 circumstances.

17 MS. LAMM: So what does that mean about
18 the FTC's decision that it can--

19 MR. KIRBY: I'll discuss the FTC's
20 decision--

21 MS. LAMM: All right.

1 1105 considering that you already have 1102 and
2 1103 there?

3 MR. KIRBY: Okay. 1105, we see 1105 as
4 being no different in terms of--obviously there's
5 different obligations, but it is merely another
6 obligation, but an absolute obligation that the
7 parties have negotiated vis-a-vis themselves. They
8 have guaranteed absolutely--without the restriction
9 of a like circumstances test, they've guaranteed to
10 do certain things in the same way that we'll find
11 other obligations that they have committed to do.

12 It's an absolute standard. It's not
13 limited by the like circumstances test. It
14 basically operates on all investors and all of
15 their investments, without a determination of like
16 circumstances. We will treat them in accordance
17 with the minimum standard of international trade--
18 international law, fair and equitable treatment and
19 full protection and security. That's it. It's a
20 standard that the parties have agreed to apply.

21 It is quite common--in fact, it would be

1 unusual to find a treaty obligation, especially in
2 investment and trade areas, that is frozen in time,
3 that is completely static. What the negotiators do
4 is to say we have got the best that we can get
5 today. If you, however, go off and negotiate
6 better treatment, we want to have the benefit of
7 that better treatment, and that's the relationship.
8 1105 fundamentally is no different to any of the
9 other articles which define a standard in the rest
10 of Chapter Eleven. The function is simply a
11 standard within the agreement. The other two
12 agreements are simply there to protect future gains
13 or the possibility of future gains and future
14 liberalization and to make sure that the agreement
15 keeps up and is not sort of left behind and the
16 standards become that you--you understand the
17 process.

18 PRESIDENT FELICIANO: Could I put it this
19 way? In your belief, does 1105 give the investor
20 something that it would not otherwise get under
21 1102 and 1103?

1 MR. KIRBY: If--

2 PRESIDENT FELICIANO: Some treatment
3 better than what it would get under 1102 and 1103.

4 MR. KIRBY: I would say that, provided
5 somewhere out there there was a Bilateral
6 Investment Treaty in which one of the parties was
7 the United States that offered--1105 is as fairly
8 typical clause that we find in various
9 permutations. But providing that was out there
10 somewhere, the absence of 1105 from the treaty,
11 from NAFTA, would be corrected--

12 PRESIDENT FELICIANO: [Inaudible comment
13 off microphone.]

14 MR. KIRBY: No, if 1105 was not in the
15 treaty, then by 1103, we could still say there is
16 no such protection within NAFTA. However, you have
17 negotiated that protection under another Bilateral
18 Investment Treaty; we have the right to that better
19 treatment. And that's precisely what 1102 and 1103
20 do.

21 So the question is: Does the investor

1 have more rights because it's there--

2 PRESIDENT FELICIANO: 1105--

3 MR. KIRBY: Because 1105 is there.

4 PRESIDENT FELICIANO: [inaudible] 1105.

5 MR. KIRBY: That depends on how you read
6 1105. If--and, again, I'm trying to keep out of
7 the morass of the Free Trade Commission's notes for
8 the moment. But if you interpret 1105 to give a
9 significant level of protection to the investor,
10 the investor will benefit by having that there if
11 that is the best treatment that's available to him,
12 even in applying 1102 and 1103. In other words,
13 normally the investor would come, would look at the
14 statute and say I know the standard I'm getting.
15 In the instant case, we're looking at these other
16 two because all of a sudden the standard that the
17 investor appears to be getting under 1105 is not
18 quite as--we're told is not quite as high as the
19 standard that other investors and their investments
20 might be getting.

21 PRESIDENT FELICIANO: But, Mr. Kirby, then

1 you don't need 1105. You can go to 1103.

2 MR. KIRBY: I thought that that's what I
3 said at the very beginning. If the treaty had been
4 negotiated without Article 1105 in there, either
5 1102 and 1103 would tell you that it's still
6 applicable if you can find it in some other BIT.
7 That's correct.

8 PRESIDENT FELICIANO: So what is 1105--just to
9 provoke further discussion, 11--if it has
10 minimum standard, does that suggest that it is a
11 floor, a floor underneath 1102 and 1103?

12 MR. KIRBY: I preface this by I have
13 difficulties with the title that says minimum
14 standard and the actual content which suggests
15 something other than a minimal standard. But let's
16 leave that--

17 PRESIDENT FELICIANO: Minimal standard.

18 MR. KIRBY: It says minimum standard. And
19 if one reads the Free Trade Commission notes, that
20 that wording may have influenced the Free Trade
21 Commission a lot more than the actual content of

1 1105, because 1105 doesn't set a minimum standard.

2 It talks about a fairly high standard. Okay.

3 Not debating that issue for the moment,
4 the question was: Does it set a floor underneath
5 Article 1102 and 1103? I would say that these are
6 different provisions doing different things. As I
7 said earlier, I see 1104 as simply another
8 commitment that was made by the parties in respect
9 of their treatment of investors and investments,
10 not unlike a commitment not to apply performance
11 measures, not unlike any of the other commitments
12 that you see in Chapter Eleven. It is simply
13 another obligation assumed by the parties.

14 Does it operate to affect 1102 and 1103?
15 No. The effect comes the other way. 1102 and 1103
16 are the guardians to ensure that whatever 1105
17 gives you, nobody else will get better treatment
18 than we are giving you today. That's basically it.

19 PRESIDENT FELICIANO: Say that again,
20 please.

21 MR. KIRBY: Whatever level of protection

1 1105 gives, Article 1102 and 1103 is there to
2 ensure that the United States will never give a
3 higher--that if the United States ever gives a
4 higher level of protection to anybody else in that
5 area, you will benefit from it.

6 PRESIDENT FELICIANO: That's 1103.

7 MR. KIRBY: That's what I'm saying, that
8 that's what those articles are doing. So, you
9 know, is it a floor beneath it? I have difficulty
10 with the concept of considering the action of 1105
11 on 1102 and 1103, because I consider 1102 and 1103
12 are doing different things. And I'm not sure in
13 terms of interaction--I think all they're doing is
14 allowing you to move somewhere else to get a better
15 1105 treatment in the event--a better minimum
16 standard of treatment under international law in
17 some other treaty. That's what the function of
18 1102 and 1103 is.

19 PRESIDENT FELICIANO: If I understood you
20 correctly, you think of 1102 and 1103 as avenues
21 for improving treatment, that you would otherwise

1 have to be satisfied with under 1105? Is that what
2 you said?

3 MR. KIRBY: I think 1102 and 1103 ensure
4 that the agreement is not frozen in time.

5 Now, if 1105 applies to a fixed,
6 crystallized standard of treatment. Now, there's a
7 wording in 1105 which suggests, in fact, that it's
8 living obligation which in and of itself will
9 change over time, because it is set in respect of
10 this standard that's out there, the minimum
11 standard of treatment in international law.
12 Because it is set in terms of a standard which the
13 standard itself might change, there is a built-in
14 mechanism within Article 1105 to allow it to adapt,
15 because the minimum standard of treatment in
16 international law, let us say, in 1840, is
17 different than the minimum standard of treatment in
18 international law in 2002, let's assume.

19 1105, by setting a standard which by
20 itself will change over time, is allowing for that
21 self-correcting mechanism to occur. 1102 and 1103

1 simply say if some formulation that's out there in
2 respect of that self-correcting mechanism, if some
3 formulation out there is even better than the
4 formulation that you have, you're entitled to that.

5 And I haven't forgotten the question
6 relating to the FTC notes, and I will deal with
7 that in Article 1105.

8 Two of what I call the big issues because I was
9 not terribly creative last evening, big issues that
10 seem to be coming up; one is trade versus
11 investment, and this was a debate that lasted quite
12 a while yesterday in terms of is there a
13 demarcation between trade and investment in the
14 NAFTA that would allow one to think that somehow
15 the investment provisions can't reach trade, and
16 the trade provisions are separate, and I think
17 everybody agrees that that is not the case. But
18 just one observation in terms of even the debate,
19 you will recall when we were talking about the
20 annexes and my friends used the example that to
21 support their case they said that Canada had said

1 that they were disappointed with an inability to
2 negotiate concessions in respect of transportation
3 procurements, and my friends were arguing that that
4 reference is a reference to the highway contracts
5 and not a reference to an annex note which talks
6 about transportation services for procurement
7 contracts.

8 I drew the Tribunal's attention to the fact
9 that that kind of very close definitional context
10 is completely at odds with what they are doing in
11 terms of defining procurement, which is to say that
12 procurement actually reaches into other programs,
13 and you can pull out elements of other programs and
14 call them procurement.

15 A similar example, in terms of this trade and
16 investment debate, is happening here. On the one
17 hand, what my friends are trying to place before
18 the Tribunal is the notion that, yes, there is a
19 bright line between trade issues and investment
20 issues and that that bright line ought to inform
21 this Tribunal's analysis. In fact, in the NAFTA

1 text, there is no bright line.

2 Where there is a bright-line distinction in the
3 NAFTA text between procurement and government
4 assistance, my friends try to ignore that bright
5 line, but I think the easy way to settle that
6 debate is to ask the members of the panel to look
7 to the definition of investments, which is found in
8 Article 1139.

9 Article 39 contains a host of definitions, one
10 of which is a very exhaustive definition of
11 investment. Item (g) states that investments can
12 be real estate or other property, tangible or
13 intangible, acquired in the expectation or used for
14 the purpose of economic benefit or other business
15 purposes.

16 Property, in all its forms, tangible,
17 intangible. I would suggest real estate and
18 nonreal estate. The steel, my friends admit that
19 the steel qualifies as an investment. If that is
20 the case, then all of the inventory held by ADF
21 International is an investment, that inventory is,

1 it's investment because it is property. If
2 inventory is an investment, then stating that you
3 may only sell me the inventory which is 100-percent
4 Canadian origin is discrimination in respect of
5 that investment in respect of national origin.

6 Let me repeat that. Investment includes all
7 forms of property. I'm a vendor of steel. The
8 steel that I own, ADF International, the steel that
9 ADF International owns, and my friends admit that,
10 that steel is an investment. Article 1102 states
11 that every party shall accord to investments of
12 investors of another party, treatment no less
13 favorable--and now my investment is steel--treatment no less
14 favorable than it accords in like
15 circumstances to investments of its own investors
16 with respect to the establishment, acquisition,
17 expansion, management conduct, operations, sale or
18 other disposition of investments.

19 In other words--and my friends have admitted
20 this--if we distinguish between the investments on
21 the basis of national origin, we would be violating

1 Article 1102. The measure in question clearly does
2 distinguish between investments on the basis of
3 national origin. If your investment, your steel,
4 has any Canadian content, we will not buy it or we
5 will not fund the state to buy it.

6 Do you have a question? I'm sorry.

7 MS. LAMM: Are you in the middle of--

8 MR. KIRBY: No, no.

9 MS. LAMM: But they are saying that that
10 is not the like circumstance comparison to be made.
11 They are saying that you must compare it to other,
12 under 1102, other U.S. steel and none of them,
13 because you have U.S. steel to begin with, you
14 compared to other U.S. steel, none of them, whether
15 they were owned by a U.S. entity or a foreign
16 investor would be permitted to have Canadian
17 content. So it is applied equally.

18 MR. KIRBY: That argument might, and we
19 are talking, at the moment, at the de jure level,
20 that argument might hold weight. Let's forget
21 about the impact and the disparate impact on the

1 Canadian fabricator vis-a-vis the U.S. fabricator
2 because there is a disparate impact, and we are
3 saying if you dig down, you will see that the
4 actual impact is fundamentally aimed at and hits
5 the U.S.--the Canadian investment, ADF
6 International.

7 If you take it down one step, though, not
8 look at ADF International, but look at ADF
9 International's next level of investment, that is
10 the inventory held by ADF International. That's
11 the investment. Now we're saying if that is your
12 investment, that investment must be 100-percent
13 U.S. origin.

14 So we're not saying that everybody is
15 treated alike here, what we're saying is that you,
16 the Canadian operator, cannot invest in the United
17 States if any part of your investment is Canadian.
18 What we're saying is the implication of that is
19 that if I am an investor in the United States, I am
20 ADF International, I fabricate the steel, so I have
21 got U.S. steel that has been fabricated in Canada,

1 bring that steel back into the United States, put
2 it into my inventory, that is now an investment.
3 The U.S. measure tells me that that investment is
4 now, for the purposes of the Federal Highway is now
5 worthless.

6 MS. LAMM: But, analytically, anyone who
7 did that, whether they were U.S. in origin or
8 foreign in origin, whether we are looking at an
9 1102 or an 1103 analysis, anyone who did that with
10 a foreign content would be dealt with in the same
11 way by this regulation, it is just what level you
12 are looking at. The fact that you have a
13 relationship with the Canadian fabricator or a
14 foreign fabricator, I don't know that that enters
15 into it because what you are analyzing is treatment
16 of the U.S. investor for the business in the U.S.
17 or the U.S. investment.

18 MR. KIRBY: That is correct. But,
19 basically, what the American position is, is that
20 when you read the definition of investment in
21 NAFTA, you need to read that as saying not simply

1 investment in the territory of a party, but as
2 investment in the territory of a party that is 100-percent
3 party content, U.S. content. We have an
4 investment in the territory of the party. We have
5 steel which contains some U.S. material. They now
6 devalue that investment. They say that investment
7 is worthless for the purposes of doing business
8 with us, but it is still an investment in the
9 party. Why is it worthless? It's worthless
10 because it's not 100-percent U.S. origin.

11 PRESIDENT FELICIANO: Can I push this a
12 little bit?

13 MR. KIRBY: Absolutely.

14 PRESIDENT FELICIANO: If we stay within
15 the context of the facts of this case, Mr. Kirby,
16 ADF had, in the United States, a certain quantity
17 of steel. It so happens that that still was of
18 U.S. origin.

19 MR. KIRBY: That's correct.

20 PRESIDENT FELICIANO: That's what you
21 insisted. I understood the U.S. to be saying that,

1 well, for that steel to be protected, it must be in
2 the United States--

3 MR. KIRBY: That's correct.

4 PRESIDENT FELICIANO: --rather than in
5 Canada.

6 MR. KIRBY: That's correct.

7 PRESIDENT FELICIANO: Okay. So there it
8 is. ADF has U.S.-origin steel, U.S. manufactured
9 steel as of that point in the United States.

10 MR. KIRBY: That's correct.

11 PRESIDENT FELICIANO: I don't hear you
12 really complaining that that steel, as such, at
13 that point is being treated differently from any
14 U.S.-origin steel owned by any U.S. company located
15 in the U.S.

16 MR. KIRBY: That investment is being--

17 PRESIDENT FELICIANO: Forgive me. Let me
18 just finish my inquiry.

19 MR. KIRBY: Oh, I'm sorry. Carry on.

20 Yes.

21 PRESIDENT FELICIANO: I understood ADF to

1 have wanted to be able to bring that U.S.-origin
2 steel from the U.S., back to Canada, subjected it
3 to fabrication operations and then bring it back to
4 the U.S.--

5 MR. KIRBY: That's correct.

6 PRESIDENT FELICIANO: --for incorporation
7 into the Springfield Project.

8 MR. KIRBY: That's correct.

9 PRESIDENT FELICIANO: That's what they
10 won't allow you to do; am I right, sir?

11 MR. KIRBY: Exactly.

12 PRESIDENT FELICIANO: But is that what you
13 are saying now? Are you objecting to the very fact
14 that if ADF had, in the United States, at the
15 beginning of this dispute, steel, a certain
16 quantity of steel--let's say a million tons of
17 steel--that was not of U.S. origin, but was of
18 Canadian origin, you are objecting to the fact that
19 they won't treat that Canadian-oriented steel
20 located in the United States that you brought to
21 the United States in the same way that they would

1 treat U.S.-origin steel located in the U.S. and
2 that they are insisting that that steel be of U.S.
3 origin for it to be in the ball game at all; is
4 that not what you are saying?

5 MR. KIRBY: Absolutely. Absolutely.

6 PRESIDENT FELICIANO: But isn't that a
7 little irrelevant? Because that is not the fact
8 here.

9 MR. KIRBY: No, no. What I'm saying is
10 we're looking at de jure discrimination. ADF has
11 inventory in the United States, okay? That
12 inventory in the United States, the issue was is
13 there facial discrimination in respect of an
14 investment. This measure states that if you have
15 inventory in the United States and that inventory
16 has 1-percent content other than the United States,
17 that inventory cannot be used to do business with
18 us. Okay? And that's what the measure says.

19 Our position is that inventory is an
20 investment of the investor in the United States.
21 The measure facially discriminates on the basis of

1 nationality in respect of that investment.

2 Now it is not just in respect of that
3 investment, it's in respect of the establishment of
4 that investment.

5 PRESIDENT FELICIANO: Forgive me. Is that
6 on the basis of nationality? Isn't that on the
7 basis of the origin of the product, of the
8 material, the steel?

9 MR. KIRBY: I think, given the definition
10 of investment, the definition of investment--

11 PRESIDENT FELICIANO: Because if ADF had
12 acquired that steel in the U.S. and then subjected
13 it to smelting, rolling, whatever you call it, in
14 the U.S., it would be U.S. steel, wouldn't it?

15 MR. KIRBY: I'm not sure that I
16 understand--

17 PRESIDENT FELICIANO: If the
18 manufacturing--if the pre-fabrication operations
19 constituting the manufacturing operations in your
20 own argument took place in the United States, that
21 would be U.S. steel, wouldn't it?

1 MR. KIRBY: I think the answer is, yes,
2 that if the steel is milled in the United States
3 and has a mill certificate, the U.S., it's U.S.
4 steel, no question.

5 Now, but I think your question went to the
6 question of origin versus nationality in respect of
7 the investment. Now, traditionally, and this is
8 where the trade and investment issue becomes
9 critically important, traditionally, one thinks of
10 investment protection as protection of businesses
11 overseas. To make an investment, you are going to
12 protect my family in Mexico or my factory in
13 Albania. You're not going to expropriate.

14 NAFTA, Chapter Eleven, is placed squarely
15 in the middle of a Free Trade Agreement. The
16 definition of investment doesn't talk about
17 factories, doesn't talk about equity--it does talk
18 about factories. Of course it covers factories--it
19 talks about equity, it talks about the traditional
20 investments, but it also says other property,
21 tangible or intangible. It is drilling very, very

1 far down into the landscape of trade. Why?
2 Because you have this fairly significant definition
3 of investment.

4 Given that definition of investment, you
5 then look at the other obligations in terms of
6 nondiscrimination. It says, "Do not discriminate
7 in terms of nationality." Now I quite agree.
8 Nationality may or may not be shorthand for origin.
9 We don't have the rules of origin in respect of
10 this particular product for the purposes of Chapter
11 Eleven. There are no rules of origin to determine.
12 What we have is property in the United States with
13 1-percent Canadian content, which is now
14 disqualified from doing business. Why? On the
15 basis of that 1-percent Canadian content.

16 The property is an investment. The
17 measure acts upon that investment to say that that
18 investment is worthless for the purposes of Federal
19 Highway. On what basis? On the basis of the
20 nationality or the origin, certainly on the basis
21 of the fact that there is 1-percent Canadian

1 content.

2 Now no doubt my friends will make much of
3 the distinction between origin and nationality, but
4 I think that making that distinction in the present
5 context ignores the fact that the negotiators
6 drafted a very large, it's a closed definition of
7 investment, but it's a very large definition of
8 investment. It covers all kinds of property.
9 That's what the negotiators did.

10 Now, when they determined the 1102 and
11 1103 obligations, they talked, and let's just make
12 certain, they talked about nationality--actually,
13 not. They talked about treatment no less favorable
14 than the treatment afford its own investments, its
15 own investments of its own investors in the United
16 States, what are the same investments? The same
17 investments is steel owned by steel fabricators in
18 the United States. That steel can do business with
19 the United States because it is 100-percent U.S.
20 origin; our steel cannot because it is 1-percent
21 Canadian origin. That is not giving us the same

1 level of treatment that is afforded to the other
2 investments in the United States.

3 That is why you can't draw a bright line
4 between investment and trade under NAFTA. To do
5 so, is to ignore what these provisions are trying
6 to do.

7 If there are no additional questions on
8 this section, I think I would pass to procurement
9 in Chapter Ten and procurement in Chapter Eleven,
10 which was something else that caused us some
11 consternation.

12 If I understand the U.S. position
13 correctly, Mr. Legum stated that 1001(5) is a scope
14 provision--I'm sorry, just one last point before
15 leaving that trade and investment issue because
16 there was something that Judge Feliciano said that
17 caused a light to go on.

18 In terms of "that's not the facts in this
19 case," I think that was the expression. The
20 protection afforded to investments relates to all
21 three phases of investment: entry, operation and

1 exit. The establishment of an investment. Let's
2 take, for example, that ADF decides not to bring
3 that steel to Canada, to bring it back into the
4 United States to fulfill its contractual
5 arrangements, decides not to do that because of the
6 existence of a measure. I would submit that that
7 is a clear example of a measure which restricts the
8 establishment of an investment. We were told that
9 if we did that we would be in breach of our
10 contractual obligations.

11 We, therefore, ADF had enormous amounts of
12 inventory, but let's say that one ton of that steel
13 we decided to keep in the United States, and we
14 kept a lot of steel in the United States. We kept
15 it in the United States because of this problem
16 with the contract. We were told, if we bring it to
17 Canada and bring it back into the United States,
18 you can't use it in the contract.

19 Well, that movement from the United States
20 into Canada and back into the United States was
21 clearly the intention to establish an investment in

1 the United States.

2 Back to procurement. My friend, Mr.
3 Legum, was arguing that Article 1001(5) needs to be
4 seen as a scope provision, and this is in the
5 context of asking the question is the reference in
6 Chapter Eleven to procurement to be read in the
7 same way as the reference to procurement in Chapter
8 Ten? Can we have an identity of definitions in
9 respect of procurement?

10 And Mr. Legum, if I understand him
11 correctly, was saying that 1001(5) is a scope
12 provision. What it's doing is limiting the scope
13 of Chapter Ten by taking out the two provisions
14 excluding the depository services exclusion and any
15 form of government assistance. If that is the
16 case, he argues, if that is a scope provision which
17 reduces or narrows the scope of procurement, then
18 procurement may well include government assistance.
19 And then if you take that broader definition of
20 procurement, which includes government assistance,
21 that is the definition of procurement which applies

1 in Chapter Eleven.

2 Mr. Legum stated the argument much better
3 than I can, but that is my understanding of how the
4 argument works, and I will now tell you why I think
5 the argument doesn't work in practice.

6 Quite simply, Chapter Ten does not use as
7 its starting point the word "procurement." So, if
8 the narrowing provision of 1001(5), if it really is
9 a narrowing scope provision, it's not narrowing any
10 definition of procurement, it's narrowing the
11 starting point of Chapter Ten and the starting
12 point of Chapter Ten is matters relating to
13 procurement.

14 I'm sorry. I misstated. Chapter Ten's
15 starting point is, "This chapter applies to
16 measures adopted or maintained by a party relating
17 to procurement." Admittedly, that is a broad
18 provision and, admittedly, it is broader than
19 procurement itself.

20 Chapter Eleven, however, does not deal
21 with matters relating to procurement. The

1 exclusion in Chapter Eleven is procurement by a
2 party. That alone I think should be enough to say
3 that there is no broad meaning of procurement in
4 Chapter Ten, and Mr. Legum's argument, the United
5 States' argument that somehow there is a broad
6 definition of procurement that is applicable in
7 Chapter Eleven, sufficiently broad to capture
8 government assistance, that is not correct.
9 Because the scope provision in 1001(5), which
10 extracts government assistance, does so because
11 Chapter Ten applies to measures relating to
12 government procurement, and we have no limitation
13 on how close or how far that relationship might be.

14 In addition, Chapter Eleven contains
15 measured designed precisely to capture conditions
16 attached to the grant of an advantage, which
17 suggests that the proper place for the provisions
18 we are talking about here is Chapter Eleven, not
19 Chapter Ten.

20 And the final, if there are no questions
21 on those particular comments, I will move on, but

1 basically it was to say that the analysis
2 undertaken by the U.S. yesterday in terms of, if
3 this is a scope provision, it narrows down
4 procurement, which implies that if you need a scope
5 provision, that procurement must be fairly large.
6 And if in a scope provision you need to take out
7 government assistance, it implies that somehow it
8 must be in procurement, but in fact the only thing
9 it applies is that financial assistance may be
10 considered to be a measure relating to procurement.
11 Whereas, Chapter Eleven does not talk about
12 measures relating to procurement, Chapter Eleven
13 talks about procurement by party.

14 MS. LAMM: Now your argument, though,
15 continues to be that you view the Chapter Ten
16 provision in 1001(5) as a definition that is
17 applicable in Chapter Eleven.

18 MR. KIRBY: I have problems with if it's a
19 definition. It's not said to be a definition. We
20 have a section which talks about definitions, et
21 cetera.

1 MS. LAMM: Okay.

2 MR. KIRBY: So can we use it in a
3 definitely fashion? Yes. I think what it's
4 telling us is that financial assistance is clearly
5 not a measure relating to government assistance.
6 As far as I'm concerned, it also supports the
7 argument that any form of government assistance is
8 not to be considered to be procurement, and I think
9 that we should be governed by that consideration
10 throughout the agreement. Why? Because when we
11 pull out any form of government assistance, if we
12 follow the U.S. argument, any form of government
13 assistance, much of the content of that government
14 assistance slips under the table.

15 The conditions relating to the grant of
16 the government assistance all of a sudden become
17 nonsubject to NAFTA. Whereas, what our argument
18 is, no, no, if you take out government assistance
19 from the procurement provisions, that government
20 assistance doesn't disappear, and my friends say it
21 doesn't disappear. It appears in Chapter Eleven.

1 However, what my friends would do is in the
2 transition between Chapter Ten and Chapter Eleven,
3 my friends would pull out some, not all, of the
4 conditions attached to the Government assistance.

5 They pull out the conditions which require
6 domestic content. I mean, it's a clever argument.
7 It's not that clever. It's a very fine argument.
8 It requires delicate, surgical work on the notion
9 of what government assistance is in order to
10 extract it out of--to extract the domestic content
11 requirements out of the government assistance
12 provision, where they belong, and somehow to graft
13 them into the government procurement provisions,
14 where they don't belong because the Federal
15 Government is not procuring. Why do we want to do
16 this? This is a very interesting question because
17 oftentimes treaty interpretation can be sort of
18 discerned through where are we going with these
19 arguments? What exactly are we trying to
20 demonstrate?

21 And I think here what the United States is

1 trying to do is we've been talking the last few
2 days about states have been exempted from Chapter
3 Ten. That is not accurate. States do not have
4 obligations under Chapter Ten. It's not an
5 exemption. They simply did not assume any
6 obligations. So Chapter Ten does not apply to
7 states or other subnational governments. It
8 doesn't apply to Canadian provinces either. The
9 states can do what they want. They did not agree
10 to any obligations.

11 The Federal Government did agree to
12 obligations under Chapter Ten and, as a result, in
13 its own procurement, doesn't apply any of these Buy
14 America provisions in its own federal procurements,
15 doesn't apply Buy America to Canadian or Mexican
16 goods. That is the starting point.

17 Now financial assistance was taken out and
18 put into Chapter Eleven, clearly, not part of
19 Chapter Ten, and the exemption was enacted for
20 government procurement--procurement by a party.
21 Now the states don't need any benefit from this

1 exemption, procurement by a party. Why? Because
2 they don't have any obligations, so they don't need
3 an exemption. Okay. The exemption, if it is
4 serving a purpose, it is serving the Federal
5 Government's purpose. It doesn't have to serve any
6 state purpose because the states simply are not
7 involved. It's not their issue. But procurement
8 by a party is there.

9 Now my friends want to expand that
10 definition of procurement by a party to allow the
11 conditions of financial assistance to be integrated
12 into it in order that we can see the whole package,
13 not as federal procurement, but as state
14 procurement, put it into state procurement and, lo
15 and behold, these conditions have disappeared from
16 the landscape. They are not subject to any NAFTA
17 discipline, not because the Federal Government won
18 an exemption, but rather because the state
19 government simply not partake, but they have now
20 managed to get their own conditions, which are
21 admittedly federal conditions, it's Federal

1 Government acts, they've managed to get them out of
2 any NAFTA obligations by widening a definition
3 beyond what is necessary because the states, they
4 widened the definition in order to get their
5 particular measure included with a state
6 procurement, but that definition is not even
7 necessary to benefit the states. The states don't
8 need the exclusion, procurement by a party, the
9 states have no obligation.

10 So what we are talking about here is we
11 are going to widen the obligation, we are going to
12 widen the exclusion, rather, definition of
13 procurement, to include our conditions. Why? In
14 order that something that we have promised not to
15 do in our own procurements, we can be permitted to
16 do under the guise of state procurements. That is
17 the bottom line.

18 Now, if that is what the parties had
19 intended, very easily have negotiated such a
20 measure. The United States promised, in its own
21 federal procurements, not to apply these

1 conditions. Chapter Eleven deals with all kinds of
2 provisions which can be clearly linked to the kinds
3 of conditions we are talking about--domestic
4 content requirements, conditioning the continued
5 receipt of an advantage on purchasing domestic
6 goods. So Chapter Eleven, the landscape of Chapter
7 Eleven contains lots of provisions where you can
8 point to and say this is clearly talking to the
9 kinds of measures we are dealing with here.

10 The only way out of Chapter Eleven is to
11 say that it is procurement by a party, but by
12 taking benefit of that exemption in that way, you
13 are expanding the definition in order to give more
14 exemption to a state-level government that really
15 has no need of it, in any event, but the reality is
16 that we are expanding the definition to allow the
17 United States to do what it promised not to do in
18 its own procurement. I have some difficulty with
19 that, sort of purposeful interpretation of the
20 statute. I am not sure if that answers your
21 question.

1 PRESIDENT FELICIANO: Yesterday I think it
2 was Mr. Legum--actually, it might have been one of
3 the young ladies--said you are not really objecting
4 to the grant of assistance, you are really
5 objecting to one portion of that. I think that's
6 one thing that they said.

7 Secondly, could you also address what I
8 understood to be a major point being made by them
9 that still and all what had happened here was that
10 the state government, Virginia VDOT--

11 MR. KIRBY: VDOT.

12 PRESIDENT FELICIANO: VDOT, yes, had
13 incorporated something that is of federal origin
14 and stuck it into its own specs.

15 MR. KIRBY: I can address that.

16 PRESIDENT FELICIANO: Yes. And then I
17 know you had said that that was coercion on the
18 part of the Federal Government, but unless you can
19 point to some gun that was put at the head of VDOT,
20 that's a little difficult, isn't it? Because
21 presumably they wanted the project.

1 MR. KIRBY: I have no doubt that they
2 wanted the money.

3 PRESIDENT FELICIANO: Please, sir.

4 MR. KIRBY: I think, if you want to sort
5 of see a unifying thread in the argument and I
6 think in the questions that you are addressing, you
7 are faced with two chapters, Chapter Ten/Chapter
8 Eleven, you've got the exemption. You can either
9 say that your act, and I think it's important, I
10 think I started off on Monday morning by saying the
11 importance of deciding what are we talking about
12 here, we have admittedly a procurement measure
13 undertaken by the state, VDOT procured. Nobody
14 disputes that.

15 We have--I'm having a little trouble with
16 the microphone there for a second. We have a
17 federal measure which we contend, in fact, our
18 friends agree, the federal program is not
19 procurement. Now my friends want to extract from
20 the federal program, which they say is not
21 procurement, certain elements of it, which is the

1 domestic content requirements and say that those
2 domestic content requirements are procurement.
3 They can do it in a number of ways. They can
4 attempt to do it in a number of ways, and I would
5 submit that each and every one of those ways that
6 they have attempted to do it doesn't quite work.

7 You can expand the definition of
8 procurement to include conditions attached to
9 funding. You can expand the ordinary meaning, and
10 this is where they get to what does procurement
11 mean, is there a difference between procurement in
12 Chapter Ten versus procurement in Chapter Eleven,
13 what's the ordinary meaning in context, et cetera,
14 et cetera. I would say that every attempt to get
15 to that expansive definition of procurement has
16 failed because the text doesn't support such an
17 expansive definition.

18 The other way you can do it is to say, ah,
19 if procurement, if we're not going to be able to
20 work on the expression "procurement," then let's
21 work at the act itself or the measure itself and

1 try somehow to characterize that measure as
2 procurement within a more reasonable definition of
3 what procurement is. In fact, let's try and
4 characterize that measure as, in fact, being
5 incorporated in what everybody agrees is
6 procurement.

7 So that's where--there are sort of two
8 lines of argument here. One is operating on the
9 definition of procurement in the statute and trying
10 to expand it to capture the measure; the other is
11 to say, well, okay, if we can't do that, let's work
12 on the measure itself and try to characterize that
13 as procurement.

14 This might be referred to as trying to
15 blur the line or blur the distinction between what
16 the state is doing and what the Federal Government
17 is doing because we have said, consistently, that
18 there is a real difference between what the Federal
19 Government does, funding, and what the provincial
20 government does, which is the state government,
21 which is to purchase goods and services.

1 And you heard I think during argument
2 yesterday that the contract was Virginia's. The
3 project was owned by Virginia. They maintained
4 ownership after the project, the maintenance of the
5 contract, all of those traditional elements that
6 you might look at to see who is procuring, Virginia
7 is procuring.

8 Those conditions that were attached to the
9 contract were deeply imbedded within a funding
10 program. If you do not do this, we will not give
11 you the funding. If you try to say that those
12 conditions are, in fact, the procurement, what you
13 are doing is you are ignoring the difference, and I
14 think it's an essential difference, between the
15 actor, the real actor, and the thing that was acted
16 upon.

17 The thing that was acted upon was
18 Virginia. Virginia did what it's told. Who is the
19 real actor in this? The real actor is the Federal
20 Government when they were funding. In the same
21 way, I might take off the hand brake of a car that

1 is parked on a hill, and when it rolls down the
2 hill and smashes into somebody's house say it
3 wasn't me, it was the car. We never did anything.
4 The car caused the damage.

5 No, the real actor in all of this is the
6 Federal Government. It's their act. To say that
7 their act somehow became procurement and became
8 merged in procurement is just to ignore the
9 distinction between what the Federal Government was
10 doing and what the state government was doing.

11 If one were to take that definition of
12 procurement put forward by my friends, you would
13 then have this other issue of then, well, whose
14 procurement is it? If my friends are correct and
15 the U.S. Government is writing procurement
16 specifications, then it begins to look like
17 Virginia is their agent, and this is a federal
18 procurement. That is not our position. Our
19 position is that there's two separate actors,
20 there's two separate acts, and we can claim that
21 one set of those actors are violating their

1 obligations without necessarily claiming that the
2 other is.

3 Just, again, if one recalls that Article
4 1108(3) talks about the prohibition against--this
5 is Article 1108(3)--the prohibition against
6 attaching conditions to the receipt of an
7 advantage. And it doesn't say simply the advantage
8 in terms of funding, it just says--I'll read it for
9 the record--"No party may condition the receipt or
10 continued receipt of an advantage in respect of any
11 of the following requirements. For example, to
12 purchase domestic goods in the territory." That to
13 say that the drafters of NAFTA clearly envisaged
14 that conditioning advantages would be within
15 Chapter Eleven, not Chapter Ten.

16 Yes?

17 MS. LAMM: Just one quick question. So
18 your contention is that the Federal Government is
19 the actor, but its action is not procurement.

20 MR. KIRBY: Absolutely. We are saying
21 that what the Federal Government does is fund

1 projects and that that is not procurement in any
2 definition of the word. My friends pointed to, and
3 they think that it supports their position, but
4 procurement is purchasing. It's the acquisition of
5 goods or services. The Federal Government was not
6 purchasing, it was funding. It was giving money
7 away.

8 It's not procurement under Chapter Ten.
9 It's not procurement under Chapter Eleven. Under
10 Chapter Ten, why not? Because it is specifically
11 government assistance. Under Chapter Eleven,
12 Chapter Eleven contains provisions that are
13 directed to continued receipt of an advantage.

14 MS. LAMM: But it is not just acting as a
15 bank. Financing it has very clear and definite
16 requirements for what can be done with that money.
17 It's got to build roads.

18 MR. KIRBY: Come back to the book
19 scholarship issue. The fact that I will attach
20 conditions to a grant doesn't make me a purchaser
21 of goods and services, it makes me a rather

1 demanding grantor.

2 You see, part of also the problem, in
3 terms of this interpretation, is the U.S. can't
4 make the argument strong enough that all of a
5 sudden it becomes a federal procurement because
6 they have already promised not to do what they're
7 doing in the funding. They've always promised not
8 to do that at the federal level, and the state
9 doesn't have any procurement obligations.

10 PRESIDENT FELICIANO: Mr. Kirby, if your
11 position is not that the U.S. had become the
12 procurement agency or the actor doing the
13 procurement, but that Virginia remained the agent
14 or the agency that carried out the procurement, am
15 I correct in assuming that you are conceding that
16 the requirement of utilizing U.S.-made, U.S.-manufactured
17 steel had become part of the specs of
18 the Virginia procurement?

19 MR. KIRBY: Without question, when
20 Virginia procured, it passed on those requirements
21 to ADF--to Shirley. And when Shirley procured,

1 Shirley passed on those obligations to ADF, no
2 question.

3 PRESIDENT FELICIANO: Yes.

4 MR. KIRBY: The question is--

5 PRESIDENT FELICIANO: Did Virginia have a
6 right to do that?

7 MR. KIRBY: Had Virginia chosen--did
8 Virginia have the right to do that? The U.S. made
9 the argument yesterday that all the Federal
10 Government was doing was telling Virginia to do
11 what it has a right to do.

12 That's correct. Virginia did have a right
13 to do it. However, we contend that the Federal
14 Government had no right to continue--to condition
15 the funding on the state discriminating. Two
16 different things. One is the state can
17 discriminate. No question. The Federal
18 Government, we contend, cannot order the state to
19 discriminate, and especially given the size of the
20 sort of the Federal budget to use that kind of
21 power to impose its will. We talked about

1 coercion. I'm talking about the practicalities of
2 it.

3 Virginia needed the Federal money. There
4 was only one way to get the Federal money, and that
5 was to do what it was told. Virginia did what it
6 was told and discriminated.

7 Can the U.S. hide behind an exemption to
8 escape its liability? I would contend that, no, it
9 can't. In this particular instance, it was
10 conditioning those funds on discrimination. it is
11 responsible for the discrimination.

12 MS. LAMM: So your contention is that
13 Virginia was procuring, I guess almost under duress
14 imposing this obligation. But how do you then--if
15 Virginia was procuring, how do you reconcile the
16 procurement by a party under 1108(7)? Is Virginia
17 not part of the party?

18 MR. KIRBY: That's not what we're saying.
19 We're saying that we are not attacking procurement.
20 we are attacking funding.

21 MS. LAMM: Okay.

1 MR. KIRBY: And that the funding is not
2 procurement. And my friends admit the funding is
3 not procurement. My friends say the program itself
4 is not procurement. Some conditions within the
5 program--the drunk-driving conditions and the
6 various licensing--some conditions within the
7 program which are similarly obligations, if you
8 want to do this, you have to do X--if you want to
9 have the funds, you have to fulfill these
10 conditions.

11 My friends admit that the program is not
12 procurement, that some of the conditions within the
13 program are not procurement, but the conditions
14 respecting Buy America, that's procurement.

15 I made the analogy to a surgeon extracting
16 an organ from a patient to put it into another
17 patient. That's what the U.S. is doing. They are
18 trying to extract surgically some--very few of the
19 conditions, but the conditions that are the most
20 violative of its international trade obligation,
21 they're trying to extract those conditions and put

1 them into an exemption so that they can basically
2 get the benefit of a state procurement treatment.

3 PRESIDENT FELICIANO: Mr. Kirby, so what
4 exactly in your view is the act or behavior or
5 measure on the part of the U.S. that you believe is
6 violative of the NAFTA? Can you please pinpoint
7 that?

8 MR. KIRBY: Okay. We'll start at the top.
9 The Act, the 1982 Act, Section 165, which is the
10 first moving force.

11 The Act becomes regulations. The
12 regulations become administrative policy.

13 PRESIDENT FELICIANO: You mean the
14 maintenance of the--or the existence or maintenance
15 of the Buy American provisions--

16 MR. KIRBY: Provisions--with respect--with
17 respect to Canadian or Mexican investors.

18 PRESIDENT FELICIANO: Yes.

19 MR. KIRBY: Yes. That the existence of
20 that provision, the regulations, administrative
21 policy, all the way down to the contract, the fact

1 that the Federal Government, Federal Highway took
2 such a degree of care that they insisted that that
3 provision or a contract provision be inserted in
4 the contract and would refuse funding if that
5 contractual provision was not inserted into the
6 contract.

7 So what we're complaining about is the
8 conditions attached to the Federal measure--to the
9 funding, rather, the conditions attached to the
10 funding, and the statute, regulations,
11 administrative policy that went into ensuring that
12 those conditions were attached to the funding.

13 PRESIDENT FELICIANO: [inaudible] the
14 application of the--

15 MR. KIRBY: To the extent that the
16 application was--

17 PRESIDENT FELICIANO: To this project
18 here.

19 MR. KIRBY: To this project, and to other
20 projects, the continued application of the Federal
21 measures. And it is, of course, essential to make

1 that distinction between what is procurement and
2 what is not procurement. And our contention is
3 that the NAFTA clearly makes that distinction,
4 draws a bright line between procurement and non-procurement.

5 Before we go to a break--and I see from
6 the timetable we were supposed to break at 11
7 o'clock. Judge Feliciano discussed yesterday the
8 issue of judicial review and acting outside
9 jurisdiction, et cetera, et cetera. There are, I
10 know, some fairly hot potatoes in this particular
11 litigation. And you raise the issue, you may or
12 may not have to get there. I would suggest that
13 there is a very straightforward way to deal with
14 this matter without raising any of those hot-potato
15 issues. The definition of procurement is clearly
16 within the panel's jurisdiction. The meaning of
17 the exemption "procurement by a party" is clearly
18 within the jurisdiction.

19 If this panel wishes to deal with this
20 issue fairly simply, what it can do is find that

1 the funding measures in question are not
2 procurement by a party and are not saved by the
3 exemption. And virtually at that point you have an
4 admission from the United States that Article 1106
5 is violated in any event because the Clean Water
6 Act, which--the Clean Water Act, there's an
7 exemption for the Clean Water Act which is an
8 exemption brought under Article 1106 for a very
9 similar measure, that I would contend is an
10 admission by the United States that these kinds of
11 measures, these conditions attached to funding
12 violate at least Article 1106.

13 PRESIDENT FELICIANO: I guess this is an
14 appropriate time for a coffee break, and I think
15 you have earned your cup of coffee.

16 MR. KIRBY: Thank you very much, Mr.
17 Chairman.

18 PRESIDENT FELICIANO: So half an hour.

19 [Recess.]

20 PRESIDENT FELICIANO: Mr. Kirby?

21 MR. KIRBY: Thank you, Mr. Chairman. As a

1 matter of preference, I'm now going to go through
2 what we heard yesterday by speaker, by Peter. Some
3 of the issues we will already have addressed, and
4 I'll try to avoid going over the same ground. The
5 structure is also not worked up to perfection, so
6 that you will apologize if I have to stop and find
7 my place from time to time. That's the nature of
8 the beast.

9 The U.S. began its presentation yesterday
10 with Mr. Clodfelter, and there's one point that
11 arises out of his presentation, recalling again
12 that if I don't touch on other points it's not
13 because I agree with them necessarily, it's simply
14 because I'm trying to focus. He stated that ADF--I
15 believe he stated. I haven't checked the record,
16 but I have notes saying he stated that ADF conceded
17 there was no discrimination on the basis of
18 nationality. We do not so concede. We're alleging
19 that this measure is de jury and de facto
20 discriminatory.

21 Mr. Pawlak talked about the background,

1 the factual background. A couple of points that
2 came up. One of the threads running through the
3 U.S. presentation, and Mr. Pawlak picked it up
4 first, is that what Virginia did was entirely
5 voluntary and I think the Panel raised some issues
6 this morning about coercion. Coercion is perhaps
7 not the right word for it. Nobody was holding a
8 gun to the head of Virginia. Bottom line is the
9 Federal Government has enormous amounts of money.
10 The state governments like to access that money.
11 If they wanted to access the money, they had to do
12 what the Federal Government told them to do. They
13 did so. That's the point. The point is not did
14 they do it voluntarily or did they do it under
15 coercion? The point is that had they not done so,
16 they would not have received the funds.

17 One of the speakers--I don't think it was
18 Mr. Pawlak, but one of the presenters suggested
19 that our line of argument would require the Panel
20 to almost see inside the minds of the state
21 government to assess whether they were acting

1 voluntarily of their own volition or whether they
2 were acting under duress. That's not the point of
3 our argument, and in fact, bringing the focus down
4 to the Virginia State is not where we want to be.
5 We want to be focused on what the Federal
6 Government is doing. We're not asking for an
7 examination of what was the real motivation of the
8 Virginia Government. What we're saying is that the
9 federal program obliged the Virginia Government to
10 do certain things in response--if they wanted to
11 get the funding. The mirror image of that problem
12 of assessing the motivation of the state government
13 is in fact what the U.S. is trying to argue before
14 the Panel, that instead of assessing the motivation
15 of the state government, they're asking you to make
16 a fairly detailed examination of the program itself
17 and to pull out of the program those conditions
18 which they would qualify as procurement versus
19 other conditions which they would say are not
20 procurement.

21 So we're not asking you to look into the

1 minds of the Virginia procurement officials. We're
2 also not asking you to go into a program and cut
3 the program apart. I think as Ms. Lamm said, to
4 tease out some of the elements of that program to
5 say that while the program itself is not
6 procurement, these particular elements are
7 procurement, and therefore the Federal Government
8 can do it. What we're saying is the program stands
9 on its own. It's a unitary program and one ought
10 not to be engaging in surgical analysis of elements
11 of that program.

12 At the end of Mr. Pawlak's presentation,
13 Ms. Lamm raised the issue of the contract being in
14 there and ADF having--the contract containing a Buy
15 America provision and ADF having in mind the notion
16 that they would fabricate in Canada, and did ADF
17 raise this issue at any point? And perhaps the
18 consequence of that is does one draw an adverse
19 inference from the fact that ADF did not disclose,
20 at the point that it was signing the contract, that
21 it proposed to fabricate in Canada.

1 Our response to that is there is no
2 adverse interest--there is no adverse inference for
3 a number of reasons. ADF intended to comply with
4 the contract as it understood the contract. The
5 mill certificates of all the steel used in the
6 contract would be U.S., demonstrating the steel was
7 U.S. It had this lawyer's opinion which said that--which
8 implied that what it was proposing to do was
9 in accordance with the law and the regulation. I
10 think one of the most telling aspects of were they
11 right in having done so, in our Memorial at page 4,
12 we have cited the contract provision that ADF was
13 working under, and whatever its good points,
14 clarity is not one of them.

15 The contract, which was binding ADF reads
16 in part, "All iron and steel products incorporated
17 for use in the project shall be produced in the
18 United States." Produced in the United States
19 means all manufacturing processes whereby a raw
20 material or a reduced iron ore material is changed,
21 altered or transformed into an item or product

1 which becomes, because of the process, is different
2 from the original material. There seems to be at
3 least two or three definitions and tests that might
4 be applied in that provision, so the fact that ADF
5 thought that it was in compliance if it fabricated
6 in Canada, certainly no adverse inference ought to
7 be drawn from that fact.

8 And finally, at the end of Mr. Pawlak's
9 presentation we heard that the value-added of
10 fabricating the steel was 70 to 80 percent, and I
11 said this morning my client tells me it's more in
12 the way of 20 percent, and of course, that issue
13 will be addressed in any damage inquiry.

14 Mr. Legum's first presentation addressed
15 the issue of the ordinary meaning of procurement by
16 a party. My observations on that would be as
17 follows. Nowhere in the U.S. materials and nowhere
18 in the U.S. pleadings do we see any reference to
19 the application of good faith in the interpretation
20 of the measure in questions. NAFTA--the Vienna
21 Convention requires a good faith interpretation.

1 NAFTA requires good faith application. Good faith
2 is not put forward as a support for the
3 interpretation provided by the United States.
4 United States also did not put before this Tribunal
5 any suggestion as to how its interpretation was to
6 foster the objects and purpose of NAFTA, and I
7 think it's quite clear that they didn't do so
8 because there is no possible construction of their
9 argument that would foster the objects and purpose
10 of NAFTA.

11 In this respect--and I am not certain if
12 it was Mr. Legum or somewhat thereafter--in
13 response I had earlier said to this Tribunal that
14 the Tribunal ought to look to the treaty in terms
15 of the aspirations and the ambitions of the
16 negotiators when they were negotiating the treaty,
17 and it was said that, no, the Tribunal ought not to
18 look to aspirations and ambitions. Aspirations and
19 ambitions of the negotiators are simply shorthand
20 for the object and purpose of the act.

21 We've already spent a good deal of time

1 dealing this morning with procurement in Chapter
2 Ten versus procurement in Chapter Eleven, so I
3 won't spend more time on that. You have our
4 position. But one point that Mr. Legum made in
5 respect to that analysis was that, if I understood
6 it correctly, grant conditions--if conditions
7 attached to grants could never be procurement, then
8 you wouldn't need Article 1108. 1108 though talks
9 to the continued--to imposing conditions on the
10 continued receipt of a benefit.

11 Let me just--somebody said yesterday that
12 Article 1108 would be burned into our retinas.
13 It's probably true. Article 1108. No party may
14 condition the receipt or continued receipt of an
15 advantage on domestic content requirements. 1106--I'm
16 sorry--1106(3). Continued receipt of an
17 advantage is a good deal broader than government
18 assistance, and theoretically certainly one could
19 argue that doing business with the Federal
20 Government in Federal Government procurements was
21 an advantage. There are good reasons for excluding

1 conditions relating to funding from Chapter Eleven,
2 and Mr. Legum's observation in that respect really
3 doesn't hold water.

4 Grants and conditions attached to grants
5 are clearly within the scope of Chapter Eleven.
6 There are several provisions of Chapter Eleven
7 which referred to grants and conditions imposed on
8 grants. Textual analysis would get you to the same
9 point.

10 Mr. Legum said that the U.S. position was
11 supported by all three governments, all three
12 parties to NAFTA. In respect of the Canadian
13 statement of interpretation and the Canadian
14 website, I think we've seen enough on that. The
15 Canadian statement of interpretation simply doesn't
16 support the position put forward. Canadian
17 website, what we have seen was that the argument
18 put forward by the U.S. Government stated that the
19 Canadian website said that NAFTA doesn't apply to
20 the Federal Highway Program. The most recent
21 version of the Canadian website says NAFTA Chapter

1 Ten does not apply. Thus, the Canadian Government
2 certainly cannot be said to support the position
3 that the NAFTA Chapter Eleven does not apply to the
4 Federal Highway Program, simply that Chapter Ten
5 doesn't apply.

6 The Canadian Government had the
7 opportunity, under Article 1128, to criticize,
8 contest or otherwise object to any of our
9 submissions in respect of anything. It chose only
10 to put before this Tribunal its opinion on Article
11 1105, nothing more. So one cannot say that the
12 Canadian Government is in support of the U.S.
13 position in this respect.

14 The Mexican position on the issue of
15 whether these measures constitute procurement
16 within the meaning of the exception, Mr. Legum says
17 that the Mexican Government supports their
18 position. I'll just read a brief extract from the
19 Mexican Government's Article 1128 submission. It
20 reads, and I quote: "Mexico disagrees with the
21 claimant that U.S. national law forbidding states

1 from purchasing foreign-processed steel in certain
2 circumstances and the interpretation of that law by
3 the U.S. National Government, can somehow be
4 characterized as unrelated to government
5 procurement."

6 What they say, they disagree that it can
7 somehow be characterized as unrelated to government
8 procurement. First observation is that use of a
9 double negative, I'm nervous about using double
10 negatives. I once had an economics professor who
11 told me that the results were not unambiguous,
12 instead of clearly stating that they were
13 ambiguous. Double negatives generally reflect
14 something of trepidation, an unwillingness to state
15 things positively. Even if we take it for what it
16 says, it still doesn't help us. All they are
17 saying is that they disagree that the measure can
18 be characterized as quote, "unrelated to government
19 procurement." The issue before this Tribunal is
20 not whether or not these measures are quote
21 "related to government procurement." The issue is

1 whether they are a government procurement.

2 Mr. Legum states that our argument makes
3 no sense in the sense that why would the parties
4 have agreed to exempt states and then impose
5 constraints on the Federal Government when funding
6 those states in their procurements. It makes
7 perfectly good sense. The agreement doesn't exempt
8 states. As we said, the agreement simply says
9 nothing about states. State governments have no
10 obligations under the agreement. That being said,
11 there is no rational reason for saying if states
12 have no obligations, we are going to give the
13 Federal Government unrestricted ability to force
14 those states to discriminate.

15 Another element that I'm not certain is
16 clear to the Tribunal, even at this late date. The
17 U.S. is arguing that the measures in question are
18 procurement by party and therefore not subject to
19 Chapter Eleven. And we're arguing that the
20 measures in question are subject to Chapter Eleven
21 and they are not procurement by a party. That's

1 the federal measures.

2 What needs to be clear to the Tribunal is
3 that if the U.S. is right these measures will be
4 totally isolated from review under NAFTA, subject
5 to no NAFTA obligations because Chapter Ten will
6 never reach these measures. Chapter Ten provides
7 for a bid protest in the event that somebody who's
8 trying to get government work objects, and Article
9 10--I believe it's 1017, talks about that right to
10 protest, to challenge a bid. 1017(1)(a) states
11 that to promote fair, open and impartial
12 procurement procedures, each party is to adopt bid
13 challenge procedures in accordance with the
14 following: (a) each party shall allow suppliers to
15 submit bid challenges concerning any aspect of the
16 procurement process, which for the purpose of this
17 article begins after an entity has decided on its
18 procurement requirement and continues through the
19 contract award.

20 The measure in question is not going to be
21 challenged, cannot be challenged under that

1 provision. The entity in question that's procuring
2 decides its requirement later on, and this is not a
3 part of procurement procedures.

4 Under Chapter Twenty it would not be
5 challenged either. Why? Because if the United
6 States is correct in its interpretation, this is
7 not a federal procurement, but a state procurement
8 not subject to any obligations. Thus, it's not
9 true that--it made no sense for the parties to put
10 this measure in Chapter Eleven. The parties put
11 this measure in Chapter Eleven because it's not
12 subject to discipline anywhere else.

13 In respect of Ms. Menaker's--sorry.

14 MS. LAMM: If you are about to leave
15 procurement by a party, I just wanted to--

16 MR. KIRBY: I'm not sure I'll be able to
17 leave procurement by a party until I leave the
18 building.

19 [Laughter.]

20 MS. LAMM: I just wanted to make sure.

21 You are contending that this is not subject to

1 discipline anywhere else than Chapter Eleven, so it
2 is subject to discipline here under Chapter Eleven.

3 MR. KIRBY: Yes.

4 MS. LAMM: But although you contend
5 Virginia's action is procurement, that doesn't come
6 within the 1108 procurement by a party, or you're
7 arguing it doesn't matter because what you're
8 trying to get at is the financing by the United
9 States.

10 MR. KIRBY: Exactly.

11 MS. LAMM: Okay.

12 MR. KIRBY: I think we're getting there.

13 MS. LAMM: Okay.

14 MR. KIRBY: If you were to ask me--and
15 I'll feed the question--is Virginia's procurement
16 procurement by a party? The answer is yes.

17 MS. LAMM: Okay.

18 MR. KIRBY: Is Virginia's procurement
19 subject to discipline? The answer is no. Is the
20 Federal measure which caused Virginia to do
21 something in its procurement, is that Federal

1 measure procurement? No. Is that Federal measure
2 subject to discipline? Yes.

3 MS. LAMM: Okay.

4 MR. KIRBY: In Ms. Menaker's presentation--and she
5 spent some time talking about this
6 definition of procurement by a party, and I think
7 we don't need to go into that. What is worth
8 commenting is this argument that somehow the
9 Federal measures did not do anything to ADF, that
10 the measures really didn't have effect until they
11 were incorporated into the contract, and it was the
12 contract, not the measures, that impacted on ADF.

13 I simply do not understand any principle
14 of law which says that the moving force behind an
15 action is not responsible, it is merely the agent
16 that carries out that action that is responsible.
17 And I gave the example of taking the hand brake off
18 a car. The damage was caused by the car. The car
19 caused it. Who's the real moving force behind the
20 damage? It would be the person who took the hand
21 brake off the car and allowed it to roll down the

1 street.

2 To say that there was no impact on ADF
3 until the Federal measures were incorporated into
4 the contract ignores the reality of the fact that
5 the reason why the Federal measures were
6 incorporated into the contract was because of the
7 Federal measures, the application by the Federal
8 Government of conditions and the imposition of
9 conditions in respect of their grant.

10 One cannot avoid responsibility simply by
11 pointing to the final result of the Federal action
12 and saying it's that result that caused the damage.
13 We're saying no. The cause of the damage was the
14 Federal action further up the line when it attached
15 the conditions. This is all the more significant
16 in this particular case because Virginia, as we've
17 heard, doesn't have its own Buy America provisions.

18 The Government Procurement Agreement, this
19 was dealt with by Ms. Menaker, and I may have
20 missed something, but it struck me that Ms. Menaker
21 did not address any of the arguments that we had

1 raised in the oral pleading.

2 The U.S. position, briefly, is that under
3 the Government Procurement Agreement, the U.S. has
4 taken an exemption for these highway measures,
5 saying that they're not subject to the agreement,
6 and conclude from that that if they took the
7 exemption, it must be subject to the agreement, and
8 if it is subject to the GPA Agreement, that means
9 it must be procurement.

10 Do you follow the logic? In other words,
11 if you exempt something, the implication is that
12 it's in the statute to start with. And then they
13 look at NAFTA and say because we did not take an
14 exemption for these measures under NAFTA, it also
15 must be in the statute, it must be procurement
16 under NAFTA. That's the argument.

17 We pointed out on Monday, however, that
18 the starting point for the analysis is different in
19 NAFTA than it is in the GPA. The GPA does not have
20 this limiting scope provision that NAFTA has. The
21 GPA does not state that government procurement does

1 not include any form of government assistance.

2 So the starting point against which you're
3 going to measure do we need an exemption, do we not
4 need an exemption, is completely different under
5 NAFTA than it is under the GPA. The conclusion
6 that if we took an exemption under the GPA and we
7 didn't take an exemption under NAFTA, you can't
8 draw any conclusions from that comparison because
9 the starting point is completely different.

10 Under the GPA, the absence of an exclusion
11 for any form of government assistance meant that
12 the U.S. had to deal with that problem. Why?
13 Because the GPA generally covers measures relating
14 to procurement, this broad notion. So under NAFTA,
15 negotiated two years earlier, the scope provision
16 clearly pulled out government assistance. Under
17 GPA, as it stood before the U.S. exemptions, people
18 could have argued that if you didn't take an
19 exemption, then the agreement may well include
20 government assistance. The U.S. took an exemption.
21 They took an exemption for, off the top of my head

1 to quote it, any form of government assistance, but
2 only to non-covered entities. And we have the
3 details of this analysis in our reply--I'm sorry.
4 It's in my oral presentation from Monday, and the
5 texts are cited.

6 Our response is, if you would look at our
7 argument again, the oral argument on Monday, we'll
8 see the argument set out. That was not addressed
9 by the United States in any way, and the
10 consequence being that the fact that they had taken
11 an exemption under the GPA for this kind of measure
12 leads to no conclusion under NAFTA.

13 If the panel would like, I could walk
14 through the GPA issue, if the panel thinks it's
15 important.

16 No? All right. We'll move on.

17 Ms. Menaker referenced the Mexican
18 reservation that was taken under NAFTA, and you
19 will recall that under NAFTA, Mexico stated that
20 the discipline of Chapter Ten did not apply to
21 conditions--I'll read the provision.

1 [Pause.]

2 MR. KIRBY: I won't delay the Tribunal.

3 The Mexican reservation basically is--what it is is
4 exempting from NAFTA procurement by--procurement
5 procedures, not procurement, procurement procedures
6 where those procedures are determined by conditions
7 attached to loans from World Bank and other kinds
8 of institutions. It's quite common for the World
9 Bank when it makes a loan to a country to say--and
10 this is to ensure that they get value for money--that the
11 recipient country follows certain
12 procurement procedures. And the World Bank has
13 their own procurement procedures. Mexico wanted to
14 protect its ability to apply those procedures if
15 they were different to the procedures set out in
16 NAFTA. In no way does that apply support for the
17 United States position. What it does is show that
18 Mexico, in taking that exemption, clearly knew the
19 difference between conditions attached to loans and
20 procurement procedures and knew that they were not
21 one and the same thing.

1 The Clean Water Act. We've heard a lot
2 about the Clean Water Act. We put the Clean Water
3 Act on the table at the very beginning of this
4 process. We said that what the Clean Water Act
5 reservation meant was a couple of things. We said
6 that it meant that the United States recognized
7 that these kinds of Buy America provisions were
8 violative of Article 1106, at least; otherwise, why
9 take the reservation? So it's an admission by the
10 United States that a Buy America provision in a
11 funding statute violates 1106. It shows that those
12 funding provisions can be reached through Chapter
13 Eleven.

14 The U.S. response to that was we took that
15 reservation not to protect conditions we impose on
16 state governments but to protect these conditions
17 when they are imposed on privately owned companies.
18 They said that these grants may be given to
19 privately owned companies, and if they are given to
20 privately owned companies, we can't benefit from
21 the exemption for procurement by a party, so we

1 will exempt it. That was their defense.

2 We came back and said, well, if you read
3 the statute, grant recipients are not privately
4 owned companies. Grant recipients are public
5 bodies. The corollary of that is that if that's
6 the case, then all the grant recipients, when they
7 spend the money, would be engaging in procurement
8 by a party, according to the United States. And,
9 therefore, they wouldn't need the reservation. The
10 only reason for the reservation was the fact that
11 it's private parties involved. The law says, in
12 fact, that grant recipients will be public bodies,
13 not private bodies.

14 The U.S. response to that was not to deny
15 the accuracy of our claim. They said, first, you
16 can't look at the domestic statute to test the
17 accuracy. And, two, even if you are right, all
18 that means is that the negotiator was mistaken and
19 took a reservation where he didn't need to take a
20 reservation. This was the mistaken negotiator
21 theory.

1 What we're saying is the purpose of that
2 provision is to protect the flow-down, to protect
3 these Buy America provisions as they flow down
4 through the system. In other words, when the grant
5 recipient receives the money, that grant recipient
6 can discriminate and so on and so on. We have
7 flow-down in the system in the particular case
8 we're dealing with where money goes to Springfield,
9 money went from Springfield to Shirley, money went
10 from Shirley to ADF, and in all cases there was the
11 domestic content requirement. And the reservation
12 taken was to avoid the prohibition against
13 attaching conditions to the grant of an advantage
14 under Article 1106.

15 Now, what does that mean? That means
16 simply that the parties recognized that this
17 provision was a violation of NAFTA, a violation
18 under Article 1106, and they took a reservation for
19 it. They did not do so in respect of the Federal
20 Highway program, and the conclusion is obvious
21 because it was never intended that the Federal

1 Highway program would survive in respect of
2 Canadian and Mexican goods and services, investors
3 and investments. The Federal Highway program is
4 subject to the discipline of Chapter Eleven.

5 I believe it was Ms. Menaker again--I'm
6 beginning to lose track of who we're dealing with.
7 But this is the curious argument that there is a
8 state practice of discrimination which didn't form
9 the interpretation of NAFTA. Why do I character it
10 as "curious"? It's curious because it would have
11 this Tribunal interpret NAFTA not in terms of
12 NAFTA's object and purpose, but in terms of a so-called
13 state practice of discrimination.

14 In other words, you would be interpreting
15 the NAFTA informed by discrimination which the
16 NAFTA is deliberately or purposefully designed to
17 avoid.

18 A subsidiary observation on that issue is
19 that there is no demonstrated state practice of
20 discrimination, that some countries or some
21 agencies discriminate and have "buy national"

1 policies. We know the USTR believes they're
2 discriminatory. We believe they're discriminatory.
3 But that certainly ought not to flavor the
4 interpretation of NAFTA.

5 Ms. Menaker also discussed the Mexican
6 Article 28 submission. We've dealt with that. The
7 Canadian Statement of Interpretation, we've dealt
8 with that one. And the old and the new Web site,
9 which we've dealt with, but there was one
10 suggestion, which I find extraordinary, that when
11 we pointed out that the new Web site, in fact, said
12 that the Federal Highway program was not subject to
13 discipline under Chapter Ten, which is what the Web
14 site says, the suggestion was made, if Canada
15 believed that the Federal Highway program was
16 subject to Chapter Eleven, it would have said so in
17 its Web site.

18 Canada does not speak to this Tribunal or
19 to anybody through the scribblings of the Second
20 Secretary of the embassy on the Web site. And
21 absolutely, in particular, in light of the fact

1 that one does not have before this panel an 1128
2 submission from Canada on the issue, no conclusions
3 can be drawn except for the very obvious, that
4 Canada has stated on its Web site that Chapter Ten
5 is of no help. That's exactly what we're saying.

6 On the issue of Article 1102, Ms. Menaker
7 addressed that issue in the afternoon. We have, I
8 think, this morning fairly--carefully gone over
9 that ground and exposed to yourself the notion of
10 what exactly is an investment and how is that
11 investment treated and how it's important to look--
12 to not simply abstract, look at the text. The text
13 tells you what an investment is. Steel held by ADF
14 in the United States is an investment by ADF.
15 Measure in question, clearly discriminates on the
16 basis of nationality in respect of that steel. If
17 that steel is 1 percent U.S. content--Canadian
18 content, it can't be used. That's treatment in
19 respect of an investment.

20 If ADF had the intention of taking steel
21 from--contractually obliged to provide steel under

1 the Springfield contract, fabricated steel, and
2 intended to take that U.S.-fabricated steel, bring
3 it to Canada, bring it back into the United States
4 to fulfill its obligations, when that steel comes
5 back into the United States, that's property owned
6 by the investment, that's an investment in the
7 United States. That steel is disqualified.

8 That intention is an intention to
9 establish an investment. The intention to do the
10 work in Canada is an intention to establish an
11 investment.

12 That brings us to, I say with great
13 trepidation, Article 1105.

14 First, there was a question from I believe
15 it was Ms. Legum--I'm sorry--Mr. Legum, I believe
16 it was Ms. Lamm.

17 [Laughter.]

18 MR. KIRBY: Article 1131, and the question
19 was is this FTC interpretation of 1105 binding on
20 this Tribunal? Article 1131 states clearly that an
21 interpretation by the Free Trade Commission of a

1 provision of NAFTA is binding on this Tribunal.
2 Our position on that issue, though, is that a
3 threshold issue that has to be decided is whether
4 the Free Trade Commission note is an interpretation
5 or a failed attempt to amend the treaty.

6 We would submit that given the enormous
7 disconnection between the terms of the note and the
8 terms of the treaty provision itself, that the FTC
9 note cannot be characterized as an interpretation
10 of the treaty, but rather as an attempt to amend
11 the treaty. That is our first provision, our first
12 submission.

13 PROFESSOR de MESTRAL: If that is the
14 case, what is the consequence of their opinion?

15 MR. KIRBY: The consequence is that the
16 interpretive note is of no use to this panel, in
17 terms of interpreting Article 1105 and that this
18 panel is free to interpret Article 1105 in
19 accordance with normal rules of interpretation of
20 treaties.

21 PROFESSOR de MESTRAL: In that case, would

1 you also be of the view that the interpretative
2 note, of very longstanding in the GATT, declaring
3 that an exemption of goods and services taxes is
4 not an export subsidy is something which could be
5 ignored because it is an amendment of what is
6 manifestly an export subsidy?

7 MR. KIRBY: There is I think a very big
8 difference between that amendment and what we are
9 faced with here today. Before I get to that, I
10 should just preface my remarks, I'm watching the
11 clock, because I intend to go through the analysis,
12 and we are not stopping there. We are going to go
13 on, what if there is still life in the
14 interpretative note?

15 There is a substantive difference between
16 an interpretation which has stood the test of time,
17 which appears to be accepted by the parties over
18 time. There is a very big difference between that
19 kind of a measure viewed in 2002 and the kind of
20 measure we are looking at today. Why? The measure
21 was filed in enormous haste before panels which

1 were ongoing.

2 It appears to be indisputably designed to
3 impact directly and immediately ongoing litigation
4 on that particular issue. The terms of domestic
5 politics and policies, we're not certain to what
6 extent it will survive the test of time. It is
7 certainly being challenged from various quarters,
8 in particular, from the investor community
9 certainly in Canada and in the United States.

10 If that provision stands the test of time,
11 one might say that it has become something
12 different. It has become something close to an
13 agreement under Article, I think it is 31(a) or
14 (b). State practice and agreement between the
15 parties and the instrument in respect of the treaty
16 which the parties have accepted and have considered
17 themselves to be bound by.

18 So I think that the temporal issue is the
19 way to look at that. Today, one year after, less
20 than one year after the signing of the note by the
21 three ministers, I don't think that the matter is

1 settled to such an extent that this Tribunal is
2 automatically bound to consider it an
3 interpretation, but maybe over time, if it stands
4 the test of time, it will become an instrument
5 which the parties consider themselves to be bound
6 by and is reflective of the parties' intention.
7 Today, I don't think that it would pass that test.

8 Yes, Ms. Lamm?

9 MS. LAMM: I'm just having trouble because
10 the preface to the note says very clearly that,
11 "Hereby adopts the following interpretations of
12 Chapter Eleven," and that's the exact, same
13 language used in 1131. How can we ignore it?

14 MR. KIRBY: That's right. No, no. But
15 I'm saying that there is a threshold question. How
16 can you ignore it? I think if one takes just an
17 analysis, and my friend, Mr. Cadieux, went through
18 this in some detail. But if you simply hold, as
19 the United States was asked to do when Judge
20 Feliciano, if you put the two measures side-by-side, it
21 strains the interpretative skill of even

1 the best lawyers to find this as a mere
2 interpretation of Article 1105, rather than an
3 attempt to radically alter our contention to amend
4 Article 1105.

5 Now why do we say that? Article 1105,
6 "Each party shall accord to investments of
7 investors of another party treatment in accordance
8 with international law, including fair and
9 equitable treatment and full protection and
10 security."

11 It then starts off to say, as its
12 interpretation, "Article 1105 prescribes the
13 customary international law minimum standard of
14 aliens as the minimum standard of treatment to be
15 afforded to investments of investors of another
16 party."

17 There's two ways of looking at it.
18 Either, and this is perhaps easier to do in the
19 context of we're not dealing with an amendment,
20 we're really dealing with an interpretation. It
21 appears to be, in terms of language, so

1 disconnected from the standard set out in 1105 that
2 one has to wonder have we tried to effect a real
3 change? Now can you proceed with that analysis
4 without looking at what's the content of this
5 interpretive note? I don't think you can. I think
6 that, in order to determine that it is or is not an
7 amendment of the treaty, you need to go into the
8 note and try and understand is it so radically
9 different that it cannot be an interpretation or is
10 there some meaning that you can pour into the note
11 to say that, under this construction, it is merely
12 an interpretation?

13 That opens the debate between is this an
14 historic snapshot of a standard for the treatment
15 of aliens prevalent in the 1920s and set out in the
16 Near case, is that what we're talking about? If
17 that's what we're talking about, it begins to look
18 like a fairly significant attempt to amend the
19 legislation, to move it back, because that is not,
20 by any construction, the standard developed in the
21 early part of the century is not "treatment in

1 accordance with international law, including fair
2 and equitable treatment and full protection and
3 security." Because the Article 1105 talks to, one
4 would assume, treatment in accordance with
5 international law today, not treatment in
6 accordance with what was international law at the
7 beginning of the century.

8 I think the better approach is then to say
9 let us assume that the parties were not, and I
10 think this is perhaps even an obligation, that the
11 parties were not attempting to amend NAFTA, they
12 were simply attempting, as best they could, to pour
13 content into 1105, and they did so by way of this
14 interpretative note.

15 The question is what interpretation, and
16 we need to interpret, what interpretation can we
17 give to that interpretative note that would allow
18 it to be seen as an interpretation of 1105 and not
19 an amendment of 1105. That's the obligation. If
20 it's an amendment of 1105, I would say that it is
21 ineffective, and if all it is doing is

1 interpreting, pouring content into 1105, but not
2 otherwise amending it, then we can live with that.
3 The question is what content has it poured into
4 1105?

5 You then go back to the text, and you say,
6 well, what standard are they talking about if they
7 are not talking about the standard existing in the
8 early part of the century? It's very difficult to
9 find a standard.

10 This panel has repeatedly asked the state
11 party, one of the state parties responsible for
12 this note, to put forward a standard, and they have
13 been unable to do so--unable, reluctant, have
14 refused to do so. There is no standard that we can
15 point to that anybody can point to that matches
16 this criteria and, at the same time, meets the
17 requirements of 1105. Even at their most basic,
18 there is no such standard because we have this
19 temporal problem.

20 The only standard that really connects
21 with the standard set out in the interpretative

1 note is an historic standard. 1105 is a modern
2 standard. Now, if we assume that we are not
3 talking about the historic standard, we are talking
4 about the modern standard, what exactly is it that
5 conforms to this treatment, the minimum standard of
6 treatment of aliens? A concept unknown today.

7 I am not sure we can do the job.
8 Certainly, we have seen that the United States
9 can't do the job. All they do and all the Canadian
10 1128 submissions have done and the Mexican 1128
11 submissions have done is said, basically, repeat
12 the text. Leave it to you.

13 What happens then to the investor. We
14 have seen what happens to the investor. Nobody
15 knows the standard, and then the United States
16 stands up and says, The investor has failed to
17 bring forward the standard.

18 Well, we don't know what the standard is.
19 There is no standard, minimum standard, a customary
20 international law minimum standard of treatment of
21 aliens. There is no standard that we can find that

1 will reconcile that language and minimum standard
2 of treatment in accordance with international law
3 today.

4 I would suggest that the approach to the
5 problem is to say, and it requires some gymnastics,
6 I would agree, but it is to say that if we know
7 that the note was an interpretation of 1105, then a
8 good place to start would be Article 1105, because
9 we can at least try to understand what 1105, what
10 standard that is, and that may be the way to pour
11 content into the note. Why are we pouring content
12 into the note? Because there is no content readily
13 accessible in terms of outside sources. That is
14 the Tribunal's job. The Tribunal must reconcile
15 these two provisions--a modern day international
16 law standard and language which seems to reflect a
17 frozen standard from the early part of the century.

18 How does one reconcile? One assumes good
19 faith on the part of the parties. One assumes that
20 the Canadian Minister, the USTR and the Mexican
21 Minister were acting in good faith. That requires

1 them, in their interpretation, to pay close
2 attention to the text of Article 1105, and Article
3 1105 will inform their interpretation.

4 One of the provisions of Article 1105,
5 minimum standard of treatment, including fair and
6 equitable--minimum standard of treatment in
7 accordance with international law, including fair
8 and equitable treatment. We would say that one of
9 those elements, fair and equitable treatment, is a
10 standard that this Tribunal is entitled to apply
11 even in light of the interpretative note. Why?
12 Because that is one of the standards that is going
13 to inform the interpretative note. I think you
14 have to assume that fair and equitable treatment
15 has not been wiped off the treaty, fair and
16 equitable treatment still lives. Because if it
17 doesn't still live, it means that the treaty has
18 been amended.

19 If I could just come to the close on this
20 issue. My friends then turn around and say, "Well,
21 you haven't given us a standard, therefore, you

1 haven't met it," and then they suggest, "If you
2 think for one moment that the negotiating parties
3 would have agreed to put the determination of what
4 is fair and equitable into the hands of a Tribunal
5 such as this, you are mistaken. They would never
6 have done so."

7 That is not true. That is what judges and
8 Tribunals have been doing since time and memorial.
9 These Tribunals are constrained in the extreme.
10 Their decisions have no precedential value that's
11 set out in the treaty. They are struck in respect
12 of individual cases and not in respect of matters
13 that go on for any number of years. They are many
14 times very largely fact based. They have no power
15 to effect the laws of a particular country. You
16 cannot order the United States to cease its
17 violation. All you can do is grant an award of
18 damages to the investor.

19 So the parties have constrained your
20 ability to effect anything, but they have not
21 constrained your ability to test what has been done

1 to a particular investor against a standard of what
2 is fair and what is equitable. What's fair?
3 Judges have been determining what is fair since
4 time and memorial. It is not subjective, but the
5 notion that it is incomprehensible that we would
6 have given that power to arbitral panels to
7 determine what is fair and equitable, that is
8 simply not true. That is what we have been doing.
9 That is what judges do.

10 The NAFTA parties have trusted these
11 panels sufficiently to say that they can establish,
12 looking on a particular basis of fact, whether this
13 is fair and equitable, and that, I submit, is what
14 this panel ought to be doing in respect of Article
15 1105.

16 If it finds that the note somehow has
17 constrained Article 1105 so that the expansive
18 language in 1105 looks pale in comparison, now, in
19 fact, the protection is really quite low, then what
20 we would state is that, by virtue of Article 1102
21 and by virtue of Article 1103, we, the investor and

1 its investments, can go off and seek a better level
2 of protection in bilateral investment treaties
3 negotiated by the United States, and that is what
4 we propose to do.

5 There are other bilateral investment
6 treaties which talk about minimum standard of
7 treatment in accordance with international law, but
8 never less than fair and equitable treatment, and
9 my friend has gone through those provisions at
10 length. The language is different.

11 Mr. Justice Tysoe in the B.C. Superior
12 Court, compared NAFTA language with those other
13 BITs, and said those other BITs, fair and equitable
14 is additive, not including, it's additive. It's an
15 additional protection. Well, if that's the case,
16 then we require that additional protection, and we
17 require it by way of Article 1103.

18 Additionally, the Maffezini case stands
19 for the principle that if the American Government
20 has gone out and negotiated treaties which give its
21 investors, its American investors, better treatment

1 in foreign countries, the national treatment
2 standard requires them to grant us the same
3 treatment under the investment provisions of
4 Chapter Eleven.

5 That's our summary of our position on
6 1105.

7 PRESIDENT FELICIANO: Before you realize
8 this, I realize you probably--

9 MR. KIRBY: No, I have one more section to
10 do, and we'll be done, but I'm in good time. No,
11 no, please ask.

12 PRESIDENT FELICIANO: Go ahead.

13 MR. KIRBY: No, not on the 1105. I was
14 now going to turn to additional claims. So maybe
15 we can wrap up 1105. The additional claims, I
16 will--

17 PRESIDENT FELICIANO: Go ahead.

18 MR. KIRBY: Wrap it up, okay.

19 The question of jurisdiction, Article 1122
20 talks to the consent to arbitration by the party
21 and by the investor. The party consents to the

1 submission of a claim to arbitration in accordance
2 with the procedures set out in this agreement. The
3 procedure, Article 1119 is one of the procedures.
4 It talks of the Notice of Intent to submit a claim
5 and states, amongst other things, that the claim
6 must set out the issues and the factual basis for
7 the claim, the relief sought, and the approximate
8 amount of damages claimed.

9 In respect of the additional contracts,
10 the Lorten contract, the Brooklyn-Queens Expressway
11 contract, and there is one other contract. My head
12 is full. I think the name escapes me, but there
13 are three contracts we have named. But we have
14 also named in our Notice of Arbitration, the first
15 document that the U.S. received, we told the U.S.
16 very clearly that if the measures continued to be
17 applied in the way that they were applied, we would
18 continue to suffer damage. We have always
19 continued to fabricate steel.

20 So there is this ongoing problem, and we
21 contend that we have certainly given the United

1 States enough factual information for it to
2 determine what it needs to determine for the
3 purposes of this arbitration.

4 With respect to the Article 1103 claim,
5 the U.S. states that this is a new claim, not on
6 the basis of fact, but on the basis that we hadn't
7 raised the 1103 argument, and we are going to
8 submit to the Tribunal for its assistance on this
9 issue two cases under NAFTA Chapter Eleven which
10 specifically addresses the question of whether
11 Article 1191 is jurisdictional or nonjurisdictional
12 and concludes that they are nonjurisdictional.

13 PRESIDENT FELICIANO: 1119?

14 MR. KIRBY: 1119.

15 There is also, though, an interesting
16 provision in that Article 1120 states that the
17 rules that are going to govern the parties, and it
18 is by way of Article 1120 that we find ourselves in
19 the Additional Facility Rules.

20 Unfortunately, Article 1120 is what brings
21 us into the Additional Facility Rules of the

1 Tribunal and basically says that an additional
2 claim--I'm sorry. I would refer you to Article 48
3 of the Additional Facility Rules, which states that
4 "Except as the parties otherwise agree, a party may
5 present an incidental or additional claim or
6 counterclaim provided that such ancillary claim is
7 within the scope of the arbitration agreement of
8 the parties."

9 We would say that the agreement to
10 arbitrate, which is contained in Chapter Eleven,
11 includes this provision and, in any event, Article
12 34 of the rules states that, "A party which knows
13 or ought to have known that a provision of these
14 rules or any other rules or agreement applicable to
15 the proceedings or of an order of the Tribunal has
16 not been complied with and which fails to state
17 promptly its objections thereto, shall be deemed to
18 have waived its right to object."

19 Recall the circumstances of the 1103
20 claim, a very clear, direct response to the filing
21 of the FTC note which was filed, in part, by one of

1 the parties to this particular arbitration or which
2 was, I'm sorry, which was drafted by one of the
3 parties to this arbitration. I should note, in
4 that respect, that our friends from the United
5 States have not made any claim of prejudice in
6 respect of the Article 1103 claim.

7 On the damage element, there is an
8 important principle at play here, and I think the
9 Tribunal ought to be aware of it. I had stated
10 there was an important--in the question of the
11 assessment of damages in respect of contracts other
12 than Springfield Interchange, what's the important
13 principle?

14 I said earlier that NAFTA does not permit
15 this panel to change legislation or to order that
16 the offending party bring its nonconforming measure
17 into compliance. It has no such authority. All
18 that it can do is assess damages which were
19 inflicted on the investor.

20 When we filed our Notice of Intent to
21 Arbitrate, we told the state party that if it

1 continued to impose its nonconforming measures,
2 that we would continue to suffer damages in Federal
3 Highway contracts. Of course, the state party did
4 continue to enforce its nonconforming measures, and
5 we did continue to suffer damages. Some of those
6 damages have crystallized in certain contracts, and
7 some of them have yet to crystalize, but no doubt
8 will crystalize until the measure is amended.

9 So what is an investor to do?

10 We can file a multiplicity of cases--of
11 claims against the United States for each and every
12 contract that we suffer damages in or that we are
13 excluded from, and we can litigate ad infinitum,
14 not a palatable prospect for anybody buy lawyers
15 and Panel members, that nobody wants to get into
16 that situation, and certainly it's unreasonable to
17 consider that that's what NAFTA parties intended.

18 We've given notice of a situation which is
19 causing us continuing damage and we have now given
20 notice of specific aspects of when that damage has
21 occurred, and we are entitled to claim that, to

1 claim those, and to prove what our future damages
2 will be. In terms of future damages are these--future
3 damages result from the continuing violation
4 of an obligation by the party. If this Tribunal
5 considers that--no, you must file an individual
6 claim in respect of each and every incident, we
7 multiply the number of claims, when in fact the
8 factual basis of each claim is virtually identical.
9 The only difference will be the quantum. The
10 measure will have been applied. We will not have
11 been able to fabricate as we wish to do. We will
12 be out of pocket for certain expenses, and I would
13 expect that that could continue.

14 We then, however, hit up against the
15 problem of prescription because the NAFTA--the
16 ability to make claims is limited in time to 3
17 years after the investor knew or ought to have
18 known of the violation that was causing injury. We
19 think, quite reasonably, that the United States
20 would, at some point in time, raise a defense of
21 prescription. In other words, you ought to have

1 known of this problem long ago and litigated it.
2 And we would then be arguing, well, we knew about
3 the problem on Springfield, but we didn't know
4 about it on this. We did know about it. We know
5 that as long as these--as long as these
6 nonconforming measures continue to be applied, we
7 will have damages. And we realize that at some
8 point the argument of litigation--the argument of
9 prescription will be raised.

10 Effectively, what the U.S. is seeking then
11 is simply a price ticket to continue its
12 nonconforming behavior. In other words, if we can
13 only challenge on one contract at a time, even
14 though we know that 6 months later another contract
15 is going to come up and we're going to have the
16 same problem, it either becomes too expensive for
17 us to litigate each contract, and we're prescribed
18 from litigating the contract because we ought to
19 have known. The U.S. then continues to--it
20 continues its nonconforming measure after having
21 paid off the investor who is damaged, but that

1 investor still can't get access to the market. I
2 think what the whole intention of NAFTA in this
3 respect was where a conforming measure prohibits
4 the establishment of the investment or the
5 continuing operation of the investment, that it
6 would be--the proper approach is to take a view of
7 damages that are related simply to the continued
8 application and allow the investor to prove his
9 damages. At some point the proof of the damages
10 becomes too remote. But that's a question that
11 really ought to be tested at the level of damages.
12 Can you demonstrate the damages? And if you can in
13 terms of going out into the future, can you
14 demonstrate it? Can you bring that damage to a
15 present level if that measure continues
16 indefinitely, which we have every reason to believe
17 that it will.

18 So our position on these additional claims
19 is that we have given notice of our intention to
20 make additional claims. We have now given notice
21 of specific contracts in respect of which we're

1 going to make additional claims, and we think we're
2 also open to making claim for damages for contracts
3 that have yet to be let on the basis of an economic
4 analysis that we're going to demonstrate, that
5 given the level of funding, we would have had
6 access to a certain percentage of that funding, and
7 we would have expected to make a profit in respect
8 of that funding. We've been denied that
9 opportunity if the measures continue.

10 Now, I believe the Presiding Member had
11 some questions, but that's our position in respect
12 of the additional claims issues.

13 PRESIDENT FELICIANO: [off microphone --
14 inaudible]

15 MR. KIRBY: And wrap up?

16 PRESIDENT FELICIANO: Wrap up, finish your
17 presentation.

18 MR. KIRBY: The claims that the investor
19 has made in this are really quite simple. What we
20 are saying is that the measure in question, a
21 measure which nobody contests is discriminatory in

1 the extreme, 100 percent U.S. content, that that
2 measure is not procurement by a party, it is in
3 fact a condition attached to funding, and it's an
4 act of the U.S. Federal Government separate and
5 distinct from the act of procurement. The U.S.
6 Government admits that the funding program is not
7 procurement, had admitted it for any number of
8 years, has worked on that assumption that it's not
9 procurement, and now in this litigation takes the
10 view that while the program is still not
11 procurement, the Buy America conditions within that
12 program are procurement.

13 We submit that there is absolutely no
14 provision of NAFTA that will support that
15 conclusion, and we have gone through each and every
16 definition. If you apply the Rules of
17 Interpretation set out in the Vienna Convention,
18 you will see that the definition of procurement by
19 a party cannot support the construction proposed by
20 the United States.

21 We consider that the measures in question

1 violate national treatment. We have gone into the
2 rationale for that. Violate national treatment on
3 its face, violate national treatment in action.
4 Measures apply to the investor and to its
5 investment, and the fact that they have their final
6 impact in a contractual clause which appears in a
7 contract between two private parties is irrelevant.
8 The reason the clause is there is because of the
9 federal measures alone.

10 The parties agreed to certain obligations
11 under Chapter Ten, but the U.S. ought not now to be
12 able to protect its discriminatory measures by
13 taking advantage of the fact that the state
14 governments never did engage any procurement
15 obligations. We believe that the United States has
16 admitted a violation of Article 1106 by these
17 measures, and that admission is found in the fact
18 that they took an exception to it, a reservation
19 from the 1106 obligations for virtually identical
20 provisions. Even if that admission were not there,
21 any reasonable reading of Article 1106 would lead

1 to the conclusion that these measures violate
2 Article 1106(1) and Article 1106(3).

3 Finally we conclude that these measures
4 violate Article 1105 in their construction and
5 application, and if Article 1105 of the NAFTA is
6 not sufficiently robust to support that conclusion,
7 then we seek access to the additional protection
8 provided under the Albania and the Estonian
9 Bilateral Investment Treaties.

10 So we would ask this Tribunal to order
11 that this arbitration proceed to the next step
12 which is the assessment of damages.

13 And I'd like to take the opportunity to
14 thank the Members of the Tribunal for their
15 extraordinary attention. Thank you.

16 PRESIDENT FELICIANO: Thank you very much,
17 Mr. Kirby for the effort you have exercised. I
18 take it you have no--

19 MR. KIRBY: That now completes our
20 rebuttal unless the Panel has any questions. And I
21 note in the timetable that there is still a

1 provision should the Panel wish to address the
2 parties on questions. And that may or may not be
3 the intention of the Panel. Then at the tend of
4 today we wouldn't close the proceedings, we would
5 keep them open until we finally close with some
6 period for questions. I'm not sure how the
7 procedures would work. But we're certainly
8 available should the Panel, as set up in the
9 schedule, should the Panel require to see the
10 parties for additional questions. Thank you.

11 PRESIDENT FELICIANO: I believe that the
12 Tribunal, as of now anyway, proposes to take
13 advantage of the additional days which have been
14 reserved for further questioning. We wanted to be
15 sure that you have the fullest possible opportunity
16 to present your respective positions. And while we
17 have been able to ask some questions in the process
18 of your presentations, I think we have not
19 exhausted the questions in our minds, and would
20 like to be able to raise those in the next day or
21 two. I am not saying we will take two full

1 additional days, but certainly we propose to be
2 here tomorrow for this purpose.

3 So then this afternoon we will proceed to
4 the rebuttal presentation of the United States.
5 Did you want to say something, Mr. Clodfelter?

6 MR. CLODFELTER: Mr. President, just
7 briefly. Over lunch as we prepare our rebuttal, we
8 would also give consideration to whether or not the
9 rebuttal could be limited so that the Tribunal had
10 time yet this afternoon, and substantial time yet
11 this afternoon to ask questions, perhaps obviate
12 the need for extending the hearing beyond today.
13 But we can discuss that after lunch.

14 PRESIDENT FELICIANO: So we can adjourn
15 now and come back. What time are we supposed to be
16 back? Is it 3 o'clock? What does our schedule
17 say? 3 o'clock

18 Is that all right, Mr. Clodfelter?

19 MR. CLODFELTER: Yes.

20 PRESIDENT FELICIANO: Mr. Kirby, 3
21 o'clock?

1 MR. KIRBY: Yes, that's fine.

2 [Whereupon, at 12:56 p.m., the hearing

3 recessed, to reconvene at 3:00 p.m. this same day.]

1 is that the United States has been in intentional
2 violation of the NAFTA since 1994. And second,
3 that Canada, the investors' own government, which
4 is not shy about invoking violations of trade
5 agreements, chose to remain silent in spite of this
6 alleged violation.

7 We don't believe either proposition is
8 credible. Clearly the United States did not think
9 it was violating Chapter Eleven by continuing to
10 conduct this long established and consistently
11 implemented program. Nor has the Canadian
12 Government, even when prompted to change the
13 Canadian Embassy website just before this hearing,
14 chosen to contradict the positions we have
15 expressed in this case since the very beginning.
16 Mr. Kirby discussed the impact of the 1128
17 submissions in this case. He questioned the impact
18 of the Mexican submission, and we just commend that
19 submission to you, and it's imminently apparent on
20 whose side the Mexican Government falls on this
21 question.

1 Mr. Kirby also noted that the Canadian
2 submission was limited to the question of the
3 interpretation. In our mind that is much more
4 telling about the agreement of the parties. What
5 is remarkable is not that Canada did not file an
6 1128 submission in support of our position on
7 procurement. What's remarkable is that they did
8 not file one in support of the investor's position.

9 The fact of the matter is that all of the
10 NAFTA parties accepted and understood that programs
11 like Buy America were not subject to the
12 disciplines of 1102, 1103 and 1106.

13 We think the debate has also clarified
14 that even if Article 1108 does not apply, ADF's
15 Article 1102 claim is without merit. We are not
16 asking this Tribunal, and there is no need, to draw
17 a bright line between investment and trade in the
18 abstract. All the Tribunal has to do is apply the
19 terms of Article 1102 themselves. That article
20 bans treatment of foreign investors and investments
21 of those investors that is less favorable and

1 accorded to U.S. investors and investments. In
2 other words, it bans discrimination on the basis of
3 the nationality of the investor. It says nothing
4 whatsoever about the national origin of goods, or
5 this new concept, the nationality of goods, even
6 goods that become part of a foreign investor's
7 inventory.

8 It may come as a surprise to Mr. Kirby
9 that even Americans can own Canadian steel in the
10 United States. They could have whole inventories
11 of Canadian steel. And they can sell that steel.
12 They can sell it to governments and private
13 persons, except they may not sell it to states for
14 highway projects funded by the Federal Government.
15 In other words, these American owners of Canadian
16 steel, these American investors, are treated
17 exactly the same way as ADF. That is why we say
18 that Chapter Eleven is about investment disputes
19 and not trade disputes. And that is why Section
20 165 cannot be a de jure violation of Article 1102.
21 While that section does indeed on its face

1 discriminate against goods on the basis of their
2 national origin, it says nothing whatsoever about
3 the nationality of owners of goods. It says
4 nothing about discrimination against Canadian
5 investors.

6 And what about de facto violations? ADF
7 has still not articulated how it received less
8 favorable treatment than any American investor or
9 investment in like circumstances. Ms. Menaker will
10 have more to say about how ADF International has
11 been treated in relation to American investors.

12 But I would just like to point out
13 something I pointed out in my opening remarks
14 yesterday, that ADF has presented no evidence
15 whatsoever to prove any less favorable treatment,
16 no evidence whatsoever to prove any less favorable
17 treatment.

18 Yesterday Mr. Kirby made a few allusions
19 to the notion of disparate impact. But even if
20 disparate impact could even show less favorable
21 treatment, something that has not yet been even

1 argued or shown in this case, ADF has produced no
2 evidence that they felt the impact of Section 165
3 more than any American company. We know nothing
4 from the evidence in this case about the ownership
5 structure of the Canadian steel industry or the
6 American steel industry. ADF has not proven a
7 single instance of more favorable treatment of a
8 U.S. investor or investment.

9 This Tribunal may not find the United
10 States Government liable in the absence of
11 evidence. I would note that we have heard no
12 response to this point in Mr. Kirby's remarks.

13 I would like to make a few comments also
14 about Article 1105. Mr. Legum will explain why
15 there can be no question about the applicability of
16 the FTC interpretation here. Given that
17 applicability, this claim must fail because ADF has
18 not even identified a single principle of customary
19 international law, the customary international law
20 minimum standard of treatment that was violated
21 here.

1 Now, ADF bemoans the fact that they could
2 not find any principle, and seemed somehow to fault
3 us for not doing their job for them. Now, they've
4 known about this interpretation since last July
5 31st, and they've been unable to identify a single
6 principle within the minimum standard treatment
7 under CIL, customary international law, that was
8 violated here.

9 Finally, Mr. Legum will address some of
10 the arguments relating to the additional claims
11 before you. Mr. Kirby this morning addressed a
12 number of sections of the rules. The one
13 instrument he did not address, the one provision he
14 did not address is that in Article 1119, which is
15 clear and unmistakable in its terms about what is
16 required before claim can be made against one of
17 three NAFTA parties. Mr. Kirby says we know all we
18 need to know about these additional claims, even
19 though he couldn't remember the names of all of
20 them. We don't know anything about these
21 additional claims, we submit, nor does the

1 Tribunal. We know nothing about the contracts
2 involved. We know nothing about the projects
3 involved. We know nothing about the circumstances
4 or the role which ADF or ADF International plays in
5 these projects. We're at the stage of jurisdiction
6 and liability. There simply is no way that the
7 United States can be found liable for any of these
8 additional claims in the absence of, in the total
9 absence of evidence.

10 Mr. President, I'd like to turn the floor
11 over now to Mr. Legum, who with Ms. Menaker will
12 address issues relating to the issue of procurement
13 in Section 1108, after which Ms. Menaker will
14 address issues related to the Article 1102 claim,
15 and then return the floor to Mr. Legum at the end
16 to address the remaining issues. Thank you.

17 MR. LEGUM: Mr. President, Members of the
18 Tribunal, I will make a few remarks on the topic of
19 government procurement this morning. The
20 presentation this morning that we heard--this
21 morning, excuse me, it is the afternoon now. I

1 should keep that in mind, as should we all. This
2 morning we heard several important concessions from
3 ADF and a number of extraordinary and plainly
4 erroneous contentions by ADF with respect to
5 procurement by a party. I'd like to just explore a
6 few of those here.

7 First, on the subject of concessions, in
8 Mr. Kirby's discussion of Article 1001,
9 subparagraph (5)(a), he admitted this morning that
10 that provision was not a definition. He further
11 admitted that its purpose was to clarify the scope
12 of Chapter Ten based on Chapter Ten's starting
13 point, as he put it, that starting point being
14 measures adopted or maintained by a party relating
15 to procurement. Mr. Kirby's assertions this
16 morning, we submit, are entirely consistent with
17 the position of the United States, which is that
18 1001(5)(a) is a scope provision. It defines the
19 scope of Chapter Ten. It does not purport to
20 define the term "procurement" for purposes of
21 anything other than the scope of Chapter Ten.

1 That being said, I'd also like to
2 reiterate that it is our position that the measure
3 at issue is not a grant. The measure that is at
4 issue is a domestic content restriction that is a
5 condition that's attached to Federal funding for
6 state highway procurement projects. So from our
7 point of view, Article 1001(5)(a) is certainly not
8 dispositive and perhaps not even relevant to the
9 Tribunal's inquiry.

10 The second point I would like to make is
11 with respect to the text of Article 1108's
12 exceptions for procurement by a party. In our
13 Rejoinder, and again in my presentation yesterday,
14 we devoted considerable attention to the second
15 half of that equation, "by a Party." We explored
16 what "a Party" meant both as a general proposition
17 and also what "a Party" meant as the term is used
18 in Chapter Eleven. We demonstrated that it
19 included the Federal Government, the state
20 governments, the local governments of a party, as
21 well as different governmental units acting in

1 unison or in collaboration. ADF had no response to
2 that argument either in its initial presentation on
3 Monday or in what we heard this morning. What it
4 did offer was an assertion that the government
5 procurement exception, although it doesn't say this
6 in Article 1008, their assertion is that that only
7 applies to the Federal Government because, Mr.
8 Kirby asserted, the state governments are not
9 subject to the obligations stated in Chapter
10 Eleven.

11 This new assertion by ADF is plainly
12 erroneous. And if we could have the first slide
13 please? This is a slide that I showed yesterday.
14 It shows the provisions of Article 1102,
15 subparagraph (1) and subparagraph (3). Now, it
16 could not be clearer that the obligations of
17 Chapter Eleven apply to a Party and that the term
18 "Party" to which those obligations apply includes
19 state or provincial governments. It is not
20 accurate to suggest, as ADF did this morning, that
21 the states are not covered by Chapter Eleven's

1 obligations. Clearly they are. And I would note
2 as an aside that in fact in a number of the Chapter
3 Eleven cases that have been brought, it is in fact
4 state government actions that are at issue.
5 Therefore, under the plain terms of the treaty,
6 both Article 1102 and Article 1106 apply to the
7 states as well as to the Federal Government. ADF's
8 attempt to explain away the breadth of the term
9 "Party" in Article 1108 is without merit.

10 I'd also like to address another erroneous
11 assertion that we heard this morning, and that was
12 that under the United States' interpretation of
13 "procurement" and "procurement by a party", that
14 under no circumstances would the states--let me
15 back up--under no circumstances would the measures
16 at issue here be covered by Chapter Ten. That is
17 not accurate, and if the Tribunal could turn to
18 Article 1001 subparagraph (1), I would be grateful.

19 Subparagraph (1) is kind of the nuts and
20 bolts of Chapter Ten's scope provision. As you can
21 see it says, "This Chapter applies to measures

1 adopted or maintained by a party relating to
2 procurement, (a)"--and I'm going to add a little
3 eclipses here--"...by a state or provincial
4 government entity set out in Annex
5 1001(1)(a)(iii)." Now, as the NAFTA currently
6 reads, there are no state government entities set
7 out in that annex. If the parties agree to cover
8 state government entities, then at that point the
9 Buy America restrictions at issue in this case will
10 be a measure maintained by a party relating to
11 procurement by a covered state or provincial
12 government entity. At that point, once the NAFTA
13 parties decide to cover state, provincial or local
14 government procurement, the measures they were
15 talking about here clearly would be encompassed by
16 Chapter Ten. ADF's contention that the United
17 States' interpretation of procurement would strip
18 Chapter Ten of meaning in some sense is also
19 without merit.

20 If the Tribunal has any questions about
21 that point, I'd be happy to answer them now.

1 Otherwise I'll move on to my next point.

2 MS. LAMM: It's not exactly that point.

3 In your second statement that you made when you
4 started, you said very clearly, this measure is not
5 a grant; rather it is a--I just want to make sure I
6 understand what you contend that it is, taking it
7 out of 5.

8 MR. LEGUM: Taking it out of 5?

9 MS. LAMM: 1001(1.5).

10 MR. LEGUM: Right. In our view, it is a
11 measure that prescribes domestic content for state
12 government procurement affected with federal funds.

13 PRESIDENT FELICIANO: Mr. Legum, I was
14 just going to note that 1001(1)(a) does refer to a
15 state of provincial government entity set out in
16 Annex 1001.1(a-3) in accordance with Article 1024.
17 Now, I turn to Annex 1001.1(a-3). There is a
18 reference here to state or provincial government
19 entities, but all it does say it says that coverage
20 under this annex will be the subject of
21 consultations with state and provincial

1 governments. What does that mean? Does that mean
2 that the extent to which states and provincial
3 government entities will be covered by Chapter Ten
4 is going to be the subject of consultations?

5 MR. LEGUM: That's precisely correct.

6 PRESIDENT FELICIANO: You mean in
7 principle they are subject, but that they are
8 covered by Chapter Ten, but the entities subject to
9 this chapter have not been identified and will be
10 identified pursuant to consultations?

11 MR. LEGUM: That's correct. Essentially
12 what the parties did is they built the structure
13 for covering state and local government entities,
14 and said in Article 1024, which you see is
15 referenced in this annex, they said in that article
16 that they would consult with a view towards
17 reaching agreement to include those entities, but
18 as of today they have not reached that agreement.
19 So as of today state and provincial government
20 entities are not covered.

21 PRESIDENT FELICIANO: Thank you. Please

1 go ahead.

2 MR. LEGUM: We also heard this morning a
3 number of references to Article 1106, and Article
4 1106 is something that does have relevance here
5 because it's one of the provisions that is
6 addressed in the government procurement exception
7 of Article 1108. And if we could have the next
8 slide.

9 This again is a slide that I showed
10 yesterday, which sets out on the top the provision,
11 the text of Article 1108 subparagraph (8)(b), and
12 then outlines what the references are in some of
13 the subparagraphs of Article 1106(1) and (3) that
14 are excluded by the exception.

15 Now, as I pointed out yesterday--and we
16 heard nothing to contradict that this morning--a
17 reading of Article 1108(8)(b) shows that what the
18 NAFTA parties had in mind to exclude were measures
19 concerning--rather prescribing domestic content
20 requirements for government procurement. So
21 Article 1106, if one takes a careful look at the

1 provisions that are excluded, 4 of the 6 provisions
2 in Article 1006, excluded by Article 1108, address
3 domestic content requirements. And we know from
4 the scope of Chapter Eleven that what is at issue
5 are measures. For this reason we submit it's clear
6 that a careful reading of the text of Article 1108
7 and 1106 shows that the parties intended to exclude
8 measures prescribing domestic content requirements
9 for government procurement, and that, we submit, is
10 precisely what is at issue here.

11 I'd like to make a couple of very brief
12 statements about Mr. Kirby's reference to good
13 faith in Article 31 of the Vienna Convention on the
14 Law of Treaties. We have not previously mentioned
15 this point because in our view it is, of course,
16 indisputable that all of the parties before this
17 Tribunal are advancing their interpretations of
18 this treaty in good faith. And we would submit
19 that ADF has offered absolutely nothing to support
20 its insinuation that the United States is acting in
21 anything other than the utmost good faith.

1 On the subject of object and purpose, I
2 thought that I had devoted a significant portion of
3 my presentation to discussing object and purpose
4 and how that was supported by the interpretation
5 we're advancing here. But in case that was not
6 clear, Mr. Clodfelter demonstrated at the beginning
7 of the day yesterday, that the NAFTA parties' goals
8 was to substantially increase investment
9 opportunities in their territories. The language
10 that he referred to is that in Article 102(1)(c).
11 By using the word "substantially" the parties made
12 it quite clear that what they had in mind was a
13 measured approach to increasing investment
14 opportunities. I demonstrated in my presentation
15 yesterday, I believe, that the parties also adopted
16 a measured approach to opening their markets for
17 government procurement. It's quite clear from
18 examining the text of the agreement that the
19 parties did in fact agree to, that they wanted to
20 open their markets to some extent, but only to some
21 extent and no more than that. The interpretation

1 that we've advanced, we submit, is fully consistent
2 with those goals.

3 Unless the Tribunal has any questions
4 about any of the rebuttal points that I've made on
5 government procurement, I would ask the President
6 to call upon Ms. Menaker to continue our
7 presentation on that.

8 PRESIDENT FELICIANO: Please proceed, Ms.
9 Menaker.

10 MS. MENAKER: Mr. President, members of
11 the Tribunal, I just have a few additional points
12 that I will make regarding the United States's
13 argument that Article 1108, the Procurement by a
14 Party Exception applies in this case.

15 First, we argued yesterday that what is at
16 issue here was a domestic content requirement and
17 not a grant, as ADF had characterized it, and as
18 such that domestic content requirement was an
19 integral part of the procurement that Virginia
20 conducted with the funds it received from the
21 Federal Government and fell within the procurement

1 by a party exception.

2 I think it is noteworthy that this morning
3 it was right before our break, in response to a
4 question posed by Judge Feliciano, asking ADF what
5 was the measure that you are challenging here? And
6 in response, Claimant's counsel said, and I quote, a
7 although I will say that I don't have the
8 transcript, I was just taking notes furiously, what
9 I have quoted here is they are "complaining about
10 the conditions attached to the funding."

11 That is what this case is about. This
12 case is about the conditions attached to that
13 funding or to the domestic content restrictions.
14 It's not about a grant or the funding itself. ADF
15 can't complain about that funding. It can't, and
16 should not, have a problem with the Federal
17 Government giving Virginia money. That doesn't
18 impact ADF in any way. It doesn't impact any
19 foreign investor in any way.

20 If the Buy America program had been
21 structured differently, if it contained the same

1 domestic content restrictions, but did not give any
2 Federal funds to any state, if it just said,
3 "States, whenever you build highways, you have to
4 impose domestic content restrictions," I submit
5 that ADF would have the same case. They'd be
6 complaining about the same measure we would be
7 advancing, the same defense. The funding is
8 irrelevant. What we are looking at here is the
9 conditions that were attached to that funding, the
10 domestic content restrictions.

11 We also submit that those restrictions
12 can't be divorced from the procurement that
13 Virginia conducted with the funds it received. I
14 noted this morning that ADF did not have any
15 response to our argument that interpreting the
16 conditions to be separate and apart from the
17 procurement would lead to illogical results.

18 Yesterday, I showed a slide on the screen
19 and took the Tribunal through two hypotheticals and
20 then the case here. And if you will recall, I
21 noted the possibility that where the Federal

1 Government had a law that mandated domestic content
2 requirements, for example, the 1933 Buy American
3 Act, and then the Federal Government made a
4 purchase pursuant to that law, those domestic
5 content requirements and the purchase are seen as
6 one in the same. We submitted there that the 1933
7 Buy American Act no longer applies with respect to
8 Canada or Mexico, but that is because those
9 restrictions are part of the procurement, and
10 Federal Government procurement is covered by the
11 disciplines in Chapter 10.

12 I submitted that the United States has
13 never posed as a defense that the law, the 1933 Buy
14 American Act, cannot violate Chapter Ten, it is
15 just the purchase made with those
16 conditions/restrictions attached. I submit that
17 that would make no sense.

18 In the same manner, Claimant has
19 acknowledged that if Virginia itself had a Virginia
20 Buy America Act, it would have no claim. It states
21 that in that case that Virginia procurement

1 conducted in accordance with the Virginia Buy
2 America Act would fall under the Procurement by a
3 Party Exception. It also concedes that, as we've
4 just discussed, since Chapter Ten doesn't apply to
5 sub-central government entities, it wouldn't be
6 subject to Chapter Ten's obligations.

7 Yet, if we accept Claimant's argument,
8 then it would only be the state purchase,
9 Virginia's purchase of the goods, that would fall
10 within a procurement by a party exception, and the
11 Virginia Buy America Act law that contained the Buy
12 America restrictions would not fall within the
13 Procurement by a Party Exception and could be
14 challenged by a Claimant. We submit that that made
15 no sense.

16 And the same thing is happening here.
17 Here we have a federal law that contains the Buy
18 America domestic content restrictions and a
19 Virginia purchase made in accordance with that law.
20 It should not matter that the law is a federal law
21 rather than a Virginia law. It is all within the

1 Procurement by a Party Exception, and today we
2 didn't hear any response to that argument or any
3 explanation.

4 I think by conceding that what they are
5 complaining about are the conditions to the
6 funding, we have to draw the conclusion that those
7 conditions are an integral part of the procurement
8 that Virginia conducted, and thus ADF's Article
9 1102 and 1106 claims are within the Exception for
10 Procurement by a Party.

11 MS. LAMM: Just in terms of thinking
12 through and trying to stay as close as we can to
13 the language of NAFTA, which we are required to do
14 in making decisions, we need to assess carefully
15 why the scope provision in 1001 should not be
16 applied consistently throughout the treaty in the
17 absence of any other definition, even though both
18 sides admit it is not necessarily a definition, it
19 is a scope provision.

20 And so when looking at it, we are looking
21 for indicia in the language of the agreement itself

1 that would tell us whether or not you would apply
2 it at all beyond Chapter Ten, and I understand
3 completely Mr. Legum's argument that this is not a
4 grant. We are only talking about the conditions to
5 it.

6 I guess the question is still the
7 relationship, in part, to the provisions of Eleven.
8 Would the drafters have used a term in a wholly
9 different way in Eleven? Does it require us to
10 cross that bridge in order to decide this under
11 Eleven? And one of the things that we look to,
12 certainly, is the use of a small piece so that it
13 doesn't appear to be a defined term from any place.
14 It is just procurement. If that is the case, what
15 is the frame of reference for deciding what is
16 encompassed in procurement under Eleven that is not
17 encompassed in procurement under Ten?

18 I know you have both been trying to
19 explain this for two days now.

20 PRESIDENT FELICIANO: Ms. Menaker, before
21 you proceed, can I add something so that you can

1 address both points at the same time?

2 I think a related inquiry is this: In
3 1001(5)(a), it is stated that procurement does not
4 include any form of government assistance. Now
5 there is no question that the 1982 act is a form of
6 government assistance, and therefore would not be
7 covered by the term "procurement." But at the same
8 time, the Section 165, the domestic content
9 requirement is in a statute that provides a form of
10 government assistance.

11 So what comes out is the following: The
12 funding is not procurement, but at the same time,
13 the domestic content requirement is part of the
14 funding in the same that it is found in the statute
15 providing for funding, but you state that it is
16 part of procurement, that it is part of
17 procurement. Can you clarify at the same time that
18 you clarify the point made by Ms. Lamm here, can
19 you clarify this particular point?

20 MS. MENAKER: I can certainly try.

21 PRESIDENT FELICIANO: Please.

1 MS. MENAKER: Now the domestic content
2 requirements are contained in a statute that does
3 provide for funding. As we described yesterday,
4 that statute is a very large one. It provides for
5 funding, it provides for a number of different
6 requirements. Some of those requirements we
7 contend are part and parcel of the procurement that
8 is conducted with those funds, and that would be
9 like the domestic content requirement here.

10 We refer to several other different
11 sections in that same statute upon which funding is
12 contingent that would not be part of procurement,
13 such as the drinking age requirement, the
14 revocation of driver's licenses for people
15 convicted of felonies, for drugs, things like that.
16 So I don't think it's inconsistent that within the
17 same statute portions of a statute or, as you know,
18 the chapter applies to measures, and a measure can
19 be a portion of a statute. A portion of it can be
20 funding, which is not procurement. A portion can
21 provide for a requirement that has nothing to do

1 with procurement, and another portion can be an
2 integral part of that procurement.

3 MS. LAMM: So you are saying the various
4 conditions, and there are many with Federal Highway
5 financing, that it has to be used on a road, it has
6 to be used on a particular road, that it has to be
7 used in a certain way, they have to use competitive
8 bids. There are any number of requirements that
9 that entire panoply of requirements, including this
10 Buy America provision, are procurement requirements
11 that are passed on to the state and implemented by
12 the state and therefore an integral part of the
13 procurement.

14 MS. MENAKER: Yes.

15 PRESIDENT FELICIANO: Forgive me. Then
16 what is excluded by the form procurement, by the
17 use of the phrase "any form of government
18 assistance"? Is it strictly absolutely, if you
19 can, the funding alone or what? If you find the
20 funding statute and you find a whole host of things
21 attached to it, isn't there at least a presumption

1 that the whole thing is excluded from the coverage
2 of procurement?

3 MS. MENAKER: I would respectfully submit
4 that that is not the case. I believe that the way
5 to understand 1001(5)(a) is to look at it as a
6 scope provision. Now Chapter Ten, as it is
7 currently drafted, only applies to federal
8 procurement, it does not apply to state
9 procurement. So you could have procurements such
10 as procurement at issue here, where the Federal
11 Government pays money to Virginia and Virginia
12 procures stuff for a road.

13 Now there we contend that that is exempt
14 from challenge under Chapter Eleven by the
15 Procurement by a Party Exception.

16 Then you have the question, well, is it
17 subject to any obligations under Chapter Ten? In
18 order to know that, you have to know was it federal
19 procurement that falls within a scope of Chapter
20 Ten or is it state procurement that falls outside
21 of the scope of Chapter Ten, as Chapter Ten is

1 currently drafted.

2 Now we heard a lot yesterday about the
3 amount of funding that comes from the Federal
4 Government, and it is a large amount. It
5 approaches 90 percent of the funding for the road
6 was provided by the Federal Government. Now some
7 might say, "Well, does that make it Federal
8 Government procurement?" That is subject to
9 Chapter Ten. And I believe what 1001(5)(a) says is
10 no. 1001(5)(a) says that financial assistance is
11 not procurement.

12 So, when the Federal Government gives
13 money to Virginia, who is the procuring entity?
14 It's Virginia, and that explains, again, the scope
15 of coverage so you don't need to get into a debate
16 over is this federal procurement that is covered by
17 Chapter Ten or should we say it's state
18 procurement, it's Virginia's procurement? That's
19 not, and this explains that when you have a
20 financial funding by one level of government to
21 another level of government, there is no debate

1 there which entity is actually going to be
2 considered to be doing the funding, and then you
3 can determine if that entity is subject to any of
4 the procurement obligations.

5 And in this case, it works exactly like
6 that. We can say, even though the Federal
7 Government provided Virginia with close to 90
8 percent of the funding because we know that
9 procurement does not include any form of government
10 assistance, the Federal Government's providing that
11 funding does not make the Federal Government the
12 one procuring. So it is Virginia that is procuring
13 and state governments are not currently subject to
14 Chapter Ten.

15 MS. LAMM: Programmatically, when the
16 Federal Government hands over these funds, they
17 just don't do a wire transfer to VDOT's bank
18 account and never hear from them again. Isn't
19 there some continued interaction to see that the
20 various conditions are fulfilled throughout the
21 project?

1 MS. MENAKER: Let me just consult with my
2 colleagues for a moment.

3 PRESIDENT FELICIANO: Excuse me, Ms.
4 Menaker, so that you can consult about this one,
5 too. It's partly same ball of wax.

6 What I understood Mr. Kirby to have been
7 saying is this: While the funding admittedly is not
8 procurement, but if it isn't then how can a
9 condition for the funding not also be not
10 procurement? How can a condition for the funding
11 become procurement or go back to where the whole
12 thing was excluded from? Do you see what I'm
13 driving at? I thought that's what he was saying.
14 I may be wrong. If I'm wrong, he should speak up.

15 [Pause.]

16 [Counsel conferring.]

17 MR. LEGUM: Members of the Tribunal, if I
18 can just interject with what I hope is a simple
19 answer that will perhaps shed light on what are
20 sometimes apparently complex concepts, we can
21 return to the example of the bottle of wine that I

1 gave yesterday. I keep returning to that bottle of
2 wine.

3 If your spouse tells you to buy a bottle
4 of red Cabernet Sauvignon from California, I think
5 we can all agree that that is part of the purchase
6 of the bottle of wine for your family. The fact
7 that she or he gives you the money to buy the
8 bottle of wine doesn't make the specification any
9 less an integral part of the purchase of that
10 bottle of wine.

11 In our view, Article 1001(5)(a) is not
12 inconsistent with the ordinary meaning of
13 procurement. Ordinarily, a grant is not, by
14 itself, procurement. The fact that the interchange
15 of money in the example I just gave between the two
16 spouses, you know, that's not procurement. Those
17 are financial arrangements.

18 Similarly, the change of money between the
19 Federal Government and the state government it's
20 not procurement. It would never be considered
21 procurement. And Article 1001(5)(a) is just

1 clarifying what I think is already clear in the
2 ordinary meaning of the term. Procurement,
3 purchases, it's all about money. It's all about
4 funding. And in every instance, you are going to
5 have funding by one governmental unit to another
6 governmental unit, depending on where in the system
7 of government the money is set up.

8 And I think that what the provision really
9 does is it just says it doesn't matter where the
10 funding comes from. That's a simple answer, and on
11 that note I will turn the floor back over to Ms.
12 Menaker unless the Tribunal has questions about
13 that.

14 MS. MENAKER: I will resume with a simple
15 answer, which was, yes, to your question, "Does the
16 FHWA remain involved?" So we just consulted with
17 our colleagues and apparently they do.

18 Let me see, do you have further, did Mr.
19 Legum's answer resolve that question or do you have
20 further questions on the issue of just because the
21 funding is not procurement, the conditions attached

1 to that funding may be part of that procurement.

2 MS. LAMM: And that is because all of the
3 conditions are essentially integral to the RFP that
4 the state puts out, the contract that they
5 ultimately enter into, and the way the project is
6 completed and I'm sure the audit that is done at
7 the end to see if the federal funds were
8 appropriately spent.

9 MS. MENAKER: Precisely.

10 PRESIDENT FELICIANO: The impression I get
11 is that nothing everything attached to the funding
12 is necessarily excluded from the coverage of
13 procurement and that you may or may not have--you
14 may have procurement and nonprocurement aspects or
15 provisions of the funding; is that what--that's
16 basically what you're saying, isn't it?

17 MS. MENAKER: Yes, that's correct.

18 PRESIDENT FELICIANO: I mean, the
19 exclusion is not one big territory, but simply an
20 ocean of where the money comes from. I suppose
21 VDOT could have gotten the money from private

1 bankers who could have gone to Chase Manhattan or
2 gone to whatever.

3 MS. MENAKER: Yes. Yes.

4 PRESIDENT FELICIANO: But, yeah, and the
5 Federal Government could have still--but where
6 would the Federal Government tack on the domestic
7 content requirement? It couldn't, couldn't by
8 itself. I mean, the domestic content requirement
9 is as if it were tacked onto the grant of money.

10 MS. MENAKER: It is in its current form,
11 but I don't know that there would be any problem
12 with having a federal law that basically said
13 states impose a domestic content requirement when
14 you build highways, for instance. Maybe there's
15 some domestic legal issue, but if you look at it,
16 and if there were a domestic legal issue, that
17 would not affect this case, of course. But if you
18 look at it from that perspective, the money is
19 irrelevant.

20 If we had that situation here, like I
21 said, that would make it very clear that what we

1 are looking at is not a grant, and ADF would be in
2 the same, exact situation. If there were a federal
3 law that said, "States, when you build highways, yo
4 must impose domestic content requirements in your
5 contracts," ADF would have the same complaint, we'd
6 have the same defense. We would say, "Well, that's
7 a procurement by a party. You can't challenge
8 that," and there would be no funding changing hands
9 or money changing hands, but that domestic content
10 requirement would still remain an integral part of
11 the procurement that the states conducted,
12 regardless of the fact that it were a state law
13 that imposed it on the purchase or federal law that
14 imposed that requirement on the purchase.

15 MR. CLODFELTER: Mr. President, if I could
16 just add a general point. I don't want to suggest
17 that the provisions of Chapter Ten are totally
18 irrelevant, but understand the issue here is the
19 meaning of the term "procurement" in 1108 and
20 Chapter Eleven. It has now been agreed that the
21 provisions of 1001(5)(a) are not definitional.

1 Remember, there was a question the first day on
2 whether or not the definition, the so-called
3 definition of procurement in Chapter Ten applied to
4 other chapters, was not even a definition. We're
5 all agreed upon that now.

6 The provisions of that subsection are
7 merely scope provisions. They define the coverage
8 of Chapter Ten. So they don't even purport to
9 define the ordinary meaning of the term
10 "procurement." Looking at that term as used in
11 1108, it is used in conjunction with the term
12 "party." So our basic argument is that class of
13 government activity called "procurement"
14 necessarily includes the specifications for
15 purchases.

16 If it is procurement by a party, you
17 cannot exclude from that class of government
18 activity a specification for a domestic content
19 requirement simply because it comes from a
20 different level of the government called, included
21 in the term "party," and that is the essential

1 argument. I don't think you have to resolve every
2 question relating to the interpretation of Chapter
3 Ten to determine that, in fact, this is procurement
4 by a party.

5 With that, I will return the floor to Ms.
6 Menaker.

7 PRESIDENT FELICIANO: I found that very,
8 very useful, Mr. Clodfelter. I just have a tiny,
9 little footnote saying I am not sure that there is
10 a great, big difference between a scope provision
11 and a definitional provision. Etymologically, as
12 we all know, definition means the marking out of
13 scope or boundaries. So we were probably talking
14 approximately the same thing anyway.

15 MS. LAMM: I do want to see what your view
16 is of that because in terms of conceptually, when
17 you approach a section of a treaty or an agreement
18 and there is a scope definition, doesn't it tell
19 you, for purposes of that chapter or whatever,
20 what's going to be included or not included, and it
21 may or may not be a definition per se that would

1 affect Chapter Twelve, Chapter Fourteen, Chapter
2 whatever, because what it's doing is telling the
3 scope of the one that it happens to be in or do you
4 see it differently? That's what I understood Mr.
5 Legum's argument yesterday to be saying.

6 MS. MENAKER: Yes, and, not surprisingly,
7 I agree with Mr. Legum. I do read a scope
8 provision in that same manner. Yes, as you have
9 seen, Article 1001 is entitled "Scope and
10 Coverage."

11 So I now want to turn just briefly to--

12 MR. CLODFELTER: Sorry to belabor the
13 point, but I don't want there to be any confusion
14 about it. Sure, in some sense, definition and
15 scope do accomplish the same purpose. Maybe it's
16 just a matter of semantics. You could look at a
17 scope provision as being a definition for a very
18 limited purpose, and that is essentially what we
19 are saying here. The provisions of 1001(5)(a) are
20 scope-limiting terms. They don't redefine what the
21 ordinary meaning of procurement is. They say, "For

1 purposes of this Chapter Ten, this is what we're
2 going to consider procurement."

3 So, in that sense, you could also consider
4 it a special definition. That doesn't affect the
5 argument whatsoever. The question for you still is
6 what is procurement by a party in 1108 in its
7 ordinary meaning? And it's not affected by whether
8 1001(5)(a) is definitional, strictly speaking, or
9 scope-limiting. The point of the matter is it
10 doesn't limit the meaning of the term in 1108.

11 PRESIDENT FELICIANO: Let's push that a
12 little bit further.

13 You do have, in most texts or conventions
14 on treaty interpretation, also, of statutory
15 interpretation and so on. If you use the same term
16 in more than one place in a treaty, a presumption,
17 disputable, of course, arises that you mean the
18 same thing.

19 In this particular case, can you help us
20 by pointing to some indicators that the scope of
21 the term "procurement" in 1108 is or may be broader

1 than the scope of the term "procurement in
2 1001(5)." That's all I'm--that's what we're
3 groping for.

4 MR. CLODFELTER: It's really in Chapter
5 Ten where we found some evidence of that, textual
6 evidence of that. But maybe the best explanation
7 is the one suggested by Professor de Mestral
8 yesterday, and that is the process by which all of
9 these disparate chapters were pulled together.
10 This is one of the most complicated treaties in the
11 world, and I understand the principle you cite.

12 For most treaties, of course, there is no
13 problem. When you've got as complex a treaty as
14 this, with so many disparate parts being negotiated
15 by so many different negotiating teams, which then
16 has to be coordinated at the end to make sense as a
17 whole, you're going to get special definitions in
18 each chapter. That's inevitable, and that's what
19 happened here.

20 Now we know that the special scope
21 limitations of 1005(a) are not intended to limit

1 the meaning of the word "procurement" because, in
2 two other places that we've cited in Chapter Ten,
3 it talks about procurement within the coverage of
4 this chapter which must be seen as a direct
5 reference back to that limiting language, which,
6 therefore, at the same time is an acknowledgment
7 that there's a broader meaning to the term
8 "procurement." But we're only talking about
9 procurement within the coverage of this chapter,
10 which is a reference to the scope definition. So
11 that's the evidence we would cite that--in using
12 the term in 1001(5)(a), the parties were limiting
13 themselves to Chapter Ten. And then that's
14 confirmed by the prefatory language in 1017, and I
15 believe the other provision was 1006. But that's
16 the explanation we would offer.

17 PRESIDENT FELICIANO: Thank you.

18 PROFESSOR DE MESTRAL: Just a general
19 question, and perhaps in a sense addressed to both.
20 In your preparation for this case, and I guess in
21 your search for documents, did you come across any

1 travaux preparatoires that might help understand
2 the interrelationship of these two chapters?

3 MR. CLODFELTER: Professor de Mestral, I'd
4 like to say that we're not aware of any travaux
5 that relates to the relationship between the use of
6 the term in these two chapters.

7 MS. MENAKER: I would only add to that
8 that we don't think there is, you know, an
9 inconsistency. As we explained earlier today and
10 yesterday, we think that the interpretation of
11 procurement that we're advancing for Chapter Eleven
12 is entirely consistent and the treaty as a whole,
13 looking at Chapters Ten and Eleven together, our
14 interpretation and argument is entirely consistent.
15 If you look at this 1001(5)(a), like you say you
16 liked to describe it, as a definition and say it
17 doesn't include loans, well, sure, we never have
18 said that a loan is procurement.

19 As Mr. Legum stated earlier, in the
20 ordinary meaning of procurement, that doesn't
21 include a loan. And if the loan was being

1 challenged, we would not say that a loan falls
2 within Article 1108's exception for procurement by
3 a party. So in that sense, the definition of the
4 word, so to speak, "procurement" is consistent. I
5 don't think there's an inconsistency here. It's
6 merely a matter of the scope of coverage of Chapter
7 Ten versus the scope of coverage of Article 1108,
8 and 1108 is broader because it applies to
9 procurement by a party, and the party, as Mr. Legum
10 explained, includes all levels of government;
11 whereas, Chapter Ten's scope is more narrow
12 because, as currently set up, it does not apply to
13 all levels of government.

14 I will move forward unless the Tribunal
15 has further questions.

16 Yesterday, I spoke about both a
17 reservation in the Government Procurement
18 Agreement, the WTO, and also a reservation taken by
19 Mexico in its annex, the one that pertained to
20 loans from multilateral or regional financial
21 institutions. And we looked at both--or we relied

1 on both of those reservations because we believed
2 that they demonstrate that restrictions that are
3 attached to loans or grants can be deemed to be an
4 integral part of the procurement itself.

5 Now, nothing I heard this morning from
6 ADF's counsel really in my mind cast any doubt on
7 that, so I'm inclined to--I don't want to repeat
8 all of the arguments I made yesterday on either of
9 those reservations, but if the Tribunal has any
10 questions on either the Government Procurement
11 Agreement reservation that we relied on or the
12 reservation in Mexico's annex that ADF relied on,
13 I'd be happy to answer questions.

14 Next, I just wanted to comment very
15 briefly--

16 MS. LAMM: I'm sorry. There is one--in
17 the Government Procurement Agreement, is there any
18 explicit definition that you would rely on for
19 "procurement"?

20 MS. MENAKER: There is not, and, in fact,
21 it's--there is no definition of "procurement"--

1 MS. LAMM: Right.

2 MS. MENAKER: --in that agreement, and you
3 may recall, I believe I stated yesterday in the
4 Sonar Mapping case that was cited by ADF's counsel,
5 the panel there explicitly acknowledged that that
6 agreement did not contain any definition of
7 "procurement."

8 Now, with respect to the Clean Water Act,
9 you know, yesterday I described the reason for the
10 reservation taken by the United States, and you'll
11 recall that the reservation in question states that
12 grants may be made to privately owned enterprises.
13 And we submitted it was for that reason that the
14 United States took a reservation for that Act and
15 none was necessary for the Buy America Act.

16 This morning ADF's counsel suggested that
17 the reason why we took a reservation was not
18 because grants could be made to privately owned
19 enterprises which would not make it procurement by
20 a party, but, rather, it was to protect flow-down.

21 Now, my understanding of what ADF's

1 counsel meant by flow-down is it would protect the
2 United States' ability to impose the Buy America
3 restrictions on various levels of contractors. So,
4 for example, if a grant is made pursuant to that
5 Act to a public entity, the reservation preserved
6 the United States' ability to force that public
7 entity who then contracts out to impose a similar
8 condition. And I think this argument can be easily
9 dismissed by the Tribunal.

10 The reservation we took for the Clean
11 Water Act was taken for the reasons I set forth
12 yesterday because grant recipients may be privately
13 owned enterprises, and not to protect any so-called
14 flow-down.

15 In any type of procurement, there's likely
16 to be flow-down. You're likely to have a grant
17 recipient. That grant recipient will have further
18 contracts with other individuals. And that grant
19 recipient must always impose the same conditions on
20 its subcontractees that is imposed on it. If it
21 doesn't, it will be in breach of its contract.

1 So if you had, you know, a Virginia Buy
2 America law, which ADF says would be perfectly
3 okay, they concede that that would not violate
4 Chapter Eleven because it would fall within Article
5 1108's exception for procurement by a party. They
6 concede no reservation is necessary there.

7 If in this case Virginia had a Buy America
8 Act, Virginia imposed the domestic content
9 requirement on Shirley, Shirley then imposed it on
10 ADF, that's the example of flow-down. And,
11 obviously, no reservation is needed for that.
12 Shirley is always going to have to impose a
13 domestic content requirement on any subcontractor.
14 If ADF in turn subcontracts, it's going to have to
15 apply that same condition, or else the main
16 contractor is going to be in breach of its
17 contractual obligations.

18 So we submit it was not to protect any
19 right of flow-down that we had this reservation.
20 It was for the reasons I expressed yesterday. And
21 unless the Tribunal has any questions on that, I

1 can move on.

2 The last point that I want to make with
3 respect to Article 1108 is state practice, and in
4 our argument, we relied on the fact that the state
5 practice of all three parties demonstrated that the
6 measure that ADF challenges here is not governed by
7 the NAFTA and--or cannot be challenged under the
8 NAFTA, I should say.

9 First, I cited to Mexico's Article 1128
10 submission. You heard this morning ADF cited to a
11 different sentence in that same Article 1128
12 submission, and I just invite the Tribunal to
13 review that submission for itself. As I noted
14 yesterday, Mexico, I think, quite clearly states
15 that the measures challenged by the claimant are
16 not within the coverage of Chapter Eleven. And I
17 think that is quite clear.

18 Second, I just want to reiterate a point
19 that I believe Mr. Clodfelter made in his opening
20 remarks, and that is that the absence of an 1128
21 submission by Canada should not be construed in

1 ADF's favor, as it seemed to insinuate this
2 morning. I think you will find, if you do look at
3 the 1128 submitted by Canada--and I should say the
4 absence of an 1128 submission on this point.
5 Canada did indeed submit an 1128 submission.

6 The first paragraph of that submission
7 states that its silence on any issue should not be
8 construed as an agreement or a disagreement with
9 any issue. But I would say that we have introduced
10 evidence that Canada does indeed agree with the
11 United States' interpretation that the measures
12 challenged here are not within a scope of Chapter
13 Eleven and can't be challenged by the claimant.
14 And we relied on a few sources for this.

15 First, we relied on the Canadian Statement
16 of Implementation where Canada expressed
17 disappointment that it did not have access to Buy
18 America programs. And I submit that the claimant
19 has offered no compelling argument in response to
20 this notice by the United States.

21 We also noted the information on Canada's

1 Web site that this program was not subject to
2 NAFTA's provisions, and yesterday I spoke very
3 briefly about the fact that that Web site has been
4 changed where it now reads is not subject to
5 Chapter Ten's provisions.

6 ADF expressed some alarm this morning that
7 we would draw the conclusion that, despite that
8 change, we believe that Canada still recognizes
9 that this program is not subject to Chapter Eleven.
10 I submit that that is not at all a surprising
11 conclusion to draw.

12 I think that it is clear Canada went
13 through the trouble of describing both the 1933 Act
14 and the 1982 Act, and did take the time to note
15 that the 1982 Act was not subject to Chapter Ten's
16 provisions. If the 1982 Act was subject to the
17 very same obligations under Chapter Eleven, I don't
18 think it is a very large leap to believe that
19 Canada would have informed its investors of that
20 fact, especially given this ongoing arbitration
21 here.

1 And, finally, just note that the United
2 States introduced evidence that in all three
3 countries, sub-central governments, states, and
4 provinces impose domestic content restrictions in
5 their procurement. In all three governments--in
6 all three countries, excuse me, the Federal
7 Government funds a portion of that procurement.
8 And ADF has never disputed this. ADF has said that
9 the difference is that here the requirement was
10 forced upon Virginia. Yet this morning they seemed
11 to back down from that. They said, well, it wasn't
12 exactly coercion. Virginia wanted the money. We
13 won't call it coercion.

14 Then they told this Tribunal that they are
15 not asking the Tribunal to look into Virginia's
16 motivation in adopting that requirement. So I
17 submit if this Tribunal does not have to look at
18 the question of whether Virginia was coerced into
19 adopting this provision and whether Virginia's
20 motivation for doing so was irrelevant, then I
21 think the clear conclusion is that there is no

1 difference between the measure that ADF challenges
2 here and the state practice that is occurring in
3 both Canada and Mexico, that all three governments
4 clearly engage in this type of practice, and that,
5 we submit, is because this type of practice was not
6 currently covered under the NAFTA. It's not
7 covered under Chapter Eleven of the NAFTA at all
8 because all procurement by a party is exempt from
9 coverage.

10 With that, I will conclude my remarks on
11 1108 unless the Tribunal has any questions.

12 PRESIDENT FELICIANO: Thank you, Ms.
13 Menaker. At this time we don't have any further
14 questions. You have been very, very clear. Thank
15 you.

16 MS. MENAKER: Thank you. Could I suggest
17 breaking for a short coffee break now before
18 continuing?

19 PRESIDENT FELICIANO: Oh, sure. Fine, we
20 would break at this time, 30 minutes. Is that
21 okay?

1 MS. MENAKER: Thank you.

2 MR. KIRBY: It's fine by me.

3 [Recess.]

4 PRESIDENT FELICIANO: Should we proceed
5 now, Mr. Clodfelter? Please.

6 MS. MENAKER: Mr. President, members of
7 the Tribunal, I will now address ADF's arguments
8 pertaining to its national treatment claim.

9 Now, I think--

10 PRESIDENT FELICIANO: Forgive me. This is
11 of intense interest to everybody. Please speak a
12 little louder to make sure that everything gets
13 through.

14 MS. MENAKER: Okay. Now, during our
15 arguments, we have made a point of drawing a
16 distinction between trade and investment. Now, I
17 think that this distinction is--it's important to
18 make, and it's highlighted by ADF's Article 1102
19 argument.

20 Now, what we are not saying--and I
21 repeated this yesterday in my argument. We are not

1 saying that there is a bright line to be drawn
2 between trade disputes and investment disputes. We
3 recognize that in some cases a measure may be
4 characterized or impact trade to some extent, and
5 yet that could also be deemed to be a measure that
6 impacts an investor or an investment in a certain
7 situation. But at the same time, there are also
8 measures that are purely trade measures.

9 Now, this morning ADF said--noted that the
10 NAFTA is a free trade agreement and urged the
11 Tribunal to take a very expansive look at Chapter
12 Eleven because of that fact, and somehow seemed to
13 suggest that just because Chapter Eleven was
14 embedded within a free trade agreement, that
15 somehow changed the nature of Chapter Eleven and
16 made Chapter Eleven more applicable to trade
17 disputes than it otherwise would be.

18 We submit that that is a false premise.
19 Sure, NAFTA is a free trade agreement, but Chapter
20 Eleven deals with investment. And Chapter Eleven
21 deals solely with investment. Chapter Eleven does