IN THE ARBITRATION UNDER CHAPTER ELEVEN

OF THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

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

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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P R O C E E D I N G S

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

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

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

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

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

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

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

In the same vein, on an issue relating to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

you can have that better treatment.

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

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

MR. KIRBY: Sure.

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

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

MR. KIRBY: That is correct.

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

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

MS. LAMM: Right.

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

MS. LAMM: Right, right.

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

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

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

MS. LAMM: All right.

MR. KIRBY: --in the broader discussion on Article 1105.

MS. LAMM: Right, right.

MR. KIRBY: But that's a good question, and we will get to it.

PRESIDENT FELICIANO: Excuse me. I'm not very bright this morning, Mr. Kirby.

MR. KIRBY: Your humility amazes me.

PRESIDENT FELICIANO: No, I wish it were humility. I understand the function of 1102 and 1103 and how you go outside the three reference points. It's the relationship of 1102 and 1103 on the one hand and 1105 on the other that I thought you were going to address. I also understood the question that Professor de Mestral had raised, which was 1105 and 1104.

Now, is it your--could you address then the specific relationship between 1102 and 1103 and 1105?

MR. KIRBY: Sure.

PRESIDENT FELICIANO: What is the role of

1105 considering that you already have 1102 and 1103 there?

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

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

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

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

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

MR. KIRBY: If--

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

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

PRESIDENT FELICIANO: [Inaudible comment off microphone.]

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

So the question is: Does the investor

have more rights because it's there--

PRESIDENT FELICIANO: 1105--

MR. KIRBY: Because 1105 is there.

PRESIDENT FELICIANO: [inaudible] 1105.

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

PRESIDENT FELICIANO: But, Mr. Kirby, then

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

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

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

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

PRESIDENT FELICIANO: Minimal standard.

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

1105, because 1105 doesn't set a minimum standard. It talks about a fairly high standard. Okay.

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

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

PRESIDENT FELICIANO: Say that again, please.

MR. KIRBY: Whatever level of protection

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

PRESIDENT FELICIANO: That's 1103.

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

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

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

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

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

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

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

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

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

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

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

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

text, there is no bright line.

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

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

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

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

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

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

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

Do you have a question? I'm sorry.

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

MR. KIRBY: No, no.

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

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

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

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

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

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

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

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

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

PRESIDENT FELICIANO: Can I push this a little bit?

MR. KIRBY: Absolutely.

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

MR. KIRBY: That's correct.

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

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

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: --rather than in Canada.

MR. KIRBY: That's correct.

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

MR. KIRBY: That's correct.

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

MR. KIRBY: That investment is being--

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

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

PRESIDENT FELICIANO: I understood ADF to

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

MR. KIRBY: That's correct.

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

MR. KIRBY: That's correct.

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

MR. KIRBY: Exactly.

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

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

MR. KIRBY: Absolutely. Absolutely.

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

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

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

nationality in respect of that investment.

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

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

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

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

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

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

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

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

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

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

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

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

content.

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

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

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

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

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

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

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

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

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

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

the United States.

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

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

in Chapter Eleven.

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

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

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

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

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

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

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

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

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

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

MS. LAMM: Okay.

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

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

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

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

And I think here what the United States is

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

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

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

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

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

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

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

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

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

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

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

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

MR. KIRBY: VDOT.

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

MR. KIRBY: I can address that.

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

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

PRESIDENT FELICIANO: Please, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

obligations without necessarily claiming that the other is.

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

Yes?

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

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

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

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

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

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

demanding grantor.

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

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

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

Shirley passed on those obligations to ADF, no question.

PRESIDENT FELICIANO: Yes.

MR. KIRBY: The question is--

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

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

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

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

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

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

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

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

MS. LAMM: Okay.

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

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

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

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

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

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

The Act becomes regulations. The regulations become administrative policy.

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

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

PRESIDENT FELICIANO: Yes.

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

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

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

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

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

PRESIDENT FELICIANO: To this project here.

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

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

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

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

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

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

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

PRESIDENT FELICIANO: So half an hour.

[Recess.]

PRESIDENT FELICIANO: Mr. Kirby?

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

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

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

Mr. Pawlak talked about the background,

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

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

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

So we're not asking you to look into the

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

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

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

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

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

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

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

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

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

We've already spent a good deal of time

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

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

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

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

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

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

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

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

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

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

whether they are a government procurement.

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

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

the federal measures.

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

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

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

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

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

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

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

[Laughter.]

MS. LAMM: I just wanted to make sure. You are contending that this is not subject to

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

MR. KIRBY: Yes.

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

MR. KIRBY: Exactly.

MS. LAMM: Okay.

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

MS. LAMM: Okay.

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

MS. LAMM: Okay.

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

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

MS. LAMM: Okay.

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

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

street.

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

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

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

raised in the oral pleading.

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

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

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

not include any form of government assistance.

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

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

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

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

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

No? All right. We'll move on.

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

[Pause.]

MR. KIRBY: I won't delay the Tribunal. The Mexican reservation basically is--what it is is exempting from NAFTA procurement by--procurement procedures, not procurement, procurement procedures where those procedures are determined by conditions attached to loans from World Bank and other kinds of institutions. It's quite common for the World Bank when it makes a loan to a country to say--and this is to ensure that they get value for money--that the recipient country follows certain procurement procedures. And the World Bank has their own procurement procedures. Mexico wanted to protect its ability to apply those procedures if they were different to the procedures set out in NAFTA. In no way does that apply support for the United States position. What it does is show that Mexico, in taking that exemption, clearly knew the difference between conditions attached to loans and procurement procedures and knew that they were not one and the same thing.

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

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

will exempt it. That was their defense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That intention is an intention to establish an investment. The intention to do the work in Canada is an intention to establish an investment.

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

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

[Laughter.]

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

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

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

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

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

PROFESSOR de MESTRAL: In that case, would

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

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

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

were ongoing.

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

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

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

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

Yes, Ms. Lamm?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That's our summary of our position on 1105.

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

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

PRESIDENT FELICIANO: Go ahead.

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

PRESIDENT FELICIANO: Go ahead.

MR. KIRBY: Wrap it up, okay.

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

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

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

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

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

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

PRESIDENT FELICIANO: 1119?

MR. KIRBY: 1119.

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

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

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

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

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

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

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

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

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

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

So what is an investor to do?

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

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

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

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

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

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

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

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

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

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

PRESIDENT FELICIANO: [off microphone -- inaudible]

MR. KIRBY: And wrap up?

PRESIDENT FELICIANO: Wrap up, finish your presentation.

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

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

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

We consider that the measures in question

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Is that all right, Mr. Clodfelter?

MR. CLODFELTER: Yes.

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

MR. KIRBY: Yes, that's fine.

[Whereupon, at 12:56 p.m., the hearing recessed, to reconvene at 3:00 p.m. this same day.]

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

[3:09 p.m.]

PRESIDENT FELICIANO: Mr. Clodfelter, shall we begin? You have the floor, sir.

MR. CLODFELTER: Thank you, Mr. President.

We think the debate of the last couple of days has simplified the task facing this Tribunal somewhat dramatically. ADF's 1102, 1103 and 1106 claims are clearly not actionable because they are excluded by Article 1108. The restrictions of the Buy America Program are inseparable, an inseparable part of the Virginia procurement for the Springfield Highway Project.

Mr. Legum and Ms. Menaker will respond to the more specific arguments that we head this morning, but I just want to make a couple of general comments. To accept ADF's position that the Buy America Program violates the national treatment and most favored nation treatment, and performance restriction provisions of Chapter Eleven, you have to accept a couple of things. One

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Otherwise I'll move on to my next point.

MS. LAMM: It's not exactly that point. In your second statement that you made when you started, you said very clearly, this measure is not a grant; rather it is a--I just want to make sure I understand what you contend that it is, taking it out of 5.

MR. LEGUM: Taking it out of 5?

MS. LAMM: 1001(1.5).

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

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

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

MR. LEGUM: That's precisely correct.

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

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

PRESIDENT FELICIANO: Thank you. Please

go ahead.

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

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

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

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

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

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

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

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

PRESIDENT FELICIANO: Please proceed, Ms. Menaker.

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

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

by a party exception.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

address both points at the same time?

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

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

MS. MENAKER: I can certainly try.

PRESIDENT FELICIANO: Please.

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

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

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

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

MS. MENAKER: Yes.

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

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

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

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

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

currently drafted.

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

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

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

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

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

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

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

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

[Pause.]

[Counsel conferring.]

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

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

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

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

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

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

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

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

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

to that funding may be part of that procurement.

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

MS. MENAKER: Precisely.

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

MS. MENAKER: Yes, that's correct.

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

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

MS. MENAKER: Yes. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I now want to turn just briefly to--

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

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

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

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

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

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

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

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

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

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

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

PRESIDENT FELICIANO: Thank you.

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

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

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

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

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

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

I will move forward unless the Tribunal has further questions.

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

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

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

Next, I just wanted to comment very briefly--

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

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

MS. LAMM: Right.

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

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

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

Now, my understanding of what ADF's

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

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

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

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

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

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

can move on.

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

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

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

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

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

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

We also noted the information on Canada's

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

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

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

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

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

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

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

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

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

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

MS. MENAKER: Thank you.

MR. KIRBY: It's fine by me.

[Recess.]

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

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

Now, I think--

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

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

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

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

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

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