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 IV

Thursday, April 18, 2002

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

The hearing in the above-entitled matter was convened at 10:43 a.m. before:

JUDGE FLORENTINO P. FELICIANO, President

PROFESSOR ARMAND DE MESTRAL

MS. CAROLYN B. LAMM

UCHEORA ONWUAMAEGBU, Secretary of the Tribunal

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P R O C E E D I N G S

PRESIDENT FELICIANO: Good morning. We thank you for being with us again today. I hope we don't have to go beyond today. I am going to ask Ms. Lamm to initiate this process by raising the first questions.

MS. LAMM: Okay. We have many questions for both sides, and we do want to hear both sides' responses on the questions, and we are raising them not because anyone has reached any conclusions, but in thinking through kind of the decision tree of where we have to go on certain issues, these have just become areas that we want to make sure we have the parties' contentions fully in mind.

On procurement and the definition of "procurement" in Chapter Ten, the exclusion for grants and aid, we are still struggling with the implications of that, and we understand the U.S. argument that it's really just a provision of scope. But we're struggling with the meaning of that for other chapters. And if, in fact, grants

are excluded from the definition of procurement under Chapter Ten, what are the implications of that if we were to--you know, assuming arguendo you use that approach to procurement in Chapter Eleven, does that mean they are nonetheless included under the Chapter Eleven disciplines when you're analyzing it? And one indication that we've seen is looking on page 695, Annex IV, the United States--and, actually, all of the countries, if you look at the schedules--all of the countries do exclude certain foreign aid programs. And the question is: If these things are not covered, why was there an exclusion if all grants or aids or whatever are not covered?

And this isn't to say that we've reached any conclusions at all, but we were just troubled about this issue and thought we would like to hear from both parties with respect to that issue.

MR. KIRBY: Just a point of clarification, and I still haven't found the provision because the page reference is not--

MS. LAMM: Oh, I'm sorry. It's Annex IV. It's the last paragraph in Annex IV.

MR. KIRBY: Of the United--

MS. LAMM: Right.

MR. KIRBY: But it's in everybody's schedule.

MS. LAMM: Yes.

MR. KIRBY: But before we get to that question--and this is just a procedural question, and it's not meant to indicate anything at all but just to inform me as to how we're going to proceed during the day. Is the general round of questions going to be addressed to the claimant first and then to the United States? Or are we going to--

MS. LAMM: No, not necessarily, because we--some questions arise because of certain parties' contentions. So what we'll do is ask them first, and then, of course, we want to hear from the other party. And this one, it's really the U.S.' contention that's at the bottom of it, so I assume we would hear--we'd like to hear from them

first. I mean, they can have a few minutes to discuss it if they want, and then we'll hear from you.

MR. LEGUM: With the Tribunal's permission, it would be useful for us to discuss this for a couple of minutes.

MS. LAMM: Sure.

MR. KIRBY: Were you looking to me to answer the question first? Because I can begin to answer the question while my friends are--

MS. LAMM: Sure, if you're ready, if you--except you don't want to discuss it. You want to listen to what he has to say. Take a few minutes.

[Pause.]

MR. CLODFELTER: We're ready, when Mr. Kirby's ready and when you are ready?

MS. LAMM: Are you ready?

MR. KIRBY: Yes, I am. And I will get to the question of how do we insert that reservation taken by Canada during the process. And I think what your question goes to is how do we establish

what the difference is between what's in Chapter Ten versus what's in Chapter Eleven and where do we draw the distinction and have the chapters drawn a distinction that is relevant to the inquiry.

I think the starting point for that--and I think the starting point for everything before this Tribunal--is the text of the agreement. We've heard lots on Vienna Convention, et cetera, et cetera. The text is what has to govern as a first issue.

Chapter Eleven begins by saying that the chapter--I'm sorry. Chapter Ten begins by saying that the chapter applies to "measures adopted or maintained by a party relating to procurement." It doesn't say it applies to procurement. It applies to measures relating to procurement.

I would say that one of the first issues--there's lots of issue that arise from that. One of the first issues for the drafters then was to say, well, how can we deal with this, because there are many measures relating to procurement that may be

not procurement. And what's happening in Chapter Ten, Chapter Ten is more--much more of a procurement process chapter rather than a general chapter. The focus in just about every article relates, obviously, to non-discrimination. But there's a heavy emphasis on how the procedure will work in terms of procurement.

You'll recall yesterday--I draw your attention to an article which says you can have a bid challenge to the procurement process, which is, for the purpose of bid challenge, when the entity indicates its requirement in a notice and that starts off, that kicks off the process. So you can complain about the notice and you can complain about everything up to there until the final contract. So there's necessarily an element of process in there which doesn't quite fit handily with the first expression, this chapter relates to measures relating to procurement. What did the drafters do? The drafters extracted from any possibility that all measures--government

assistance would be considered a measure relating to procurement by simply taking out government assistance from that chapter. Procurement does not include government assistance.

Where is government assistance, all forms of government assistance? Clearly, time and again, government assistance and, we would submit, conditions attached to government assistance are clearly found in Chapter Eleven, and the drafters of Chapter Eleven spent a good deal of time and thought into what that means.

Now, if you could turn to Article 1106 to show what they've been doing in Article 1106, Article 1106--and we're interested in 1106(1) and (3) and 1106(1) paragraphs (b) and (c) and 1106(3)(a) and (b).

1106(1) is the imposition or the enforcement of domestic content requirements; just in general it's prohibited on the investor. 1106(3) states that you cannot impose a condition on the receipt or continued receipt of an advantage

on domestic content requirements. So domestic content requirements are dealt with twice in 1106, in 1106(1) and 1106(3). You can't impose them, you can't enforce them, and you can't condition the receipt or continued receipt of an advantage.

The expression "the continued receipt of an advantage" means an advantage given by the government. We contend that that expression "advantage" clearly can include grants and other forms of government assistance. I don't think there's any debate on that, that any form of government assistance would be properly considered to be an advantage for the recipient.

In doing that--so clearly government assistance is included in (3) where it says you cannot condition the receipt of an advantage. And what we are talking about in this case is conditioning the receipt of an advantage.

Now, how do the parties deal with the issue now of government procurement vis-a-vis conditioning the receipt of an advantage? They

deal with that issue in Article 1108. Now they have to try to carve out from this because why do they need to deal with government procurement when we're only talking about conditioning the receipt of an advantage.

Well, the language "conditioning the receipt of an advantage" is fairly broad. It's conceivable--in fact, I would say it's quite reasonable to argue the right to do business with the government is an advantage, that mere right to do business with the government. Conceivably, therefore, getting to do business, selling to the government is an advantage. So the negotiators want to ensure that they take out from that because it's already dealt with in Chapter Ten, that procurement issue, how did they do it. They do it in Article 1108(7) and Article 1108(8). And this is where I think the clarity of the line is apparent.

1108(7) is an exclusion which excludes from national treatment and from 1103, most favored

nation treatment, two things. It excludes procurement by a party, and it also excludes subsidies or grants provided by a party.

So what does that operate on? That doesn't operate on 1106. That operates only on 1102, 1103, and 1107. And just parenthetically you will recall that our position on the 1102 issue is that that national treatment exclusion works only to one level, that you can't continue to push it down through the economy.

But, clearly, 1108(7) does not deal with the issues raised in 1106. For the exclusions in 1106--but it does tell you that the drafters of the chapter distinguished between procurement on the one hand and grants on the other hand. They're not the same thing.

Now, when we turn to the exclusion in respect of 1106, where again we've seen conditioning the receipt of an advantage, that is, conditions relating to grants, we see that conditions relating to grants have not been

excluded under 1108(8). All that's excluded is government procurement.

If we want to ask--and my friends I think are trying to say that within that scope of procurement, you've got this bag of conditions, which, if they operate from--you know, attached to a grant, or yesterday it was said just in a pure statute itself, i.e., the Federal Government could order all state governments to discriminate. In either case, it would be covered by a procurement exemption. Why? Because it is--it's a procurement activity.

In the article that talks about conditions relating to the receipt of advantage, Article 1106(3), the article that talks about conditions attached to financial assistance, the governments, the negotiators choose not to exclude grants from that discipline, and we assume they included--they intended to include it.

So to get to the U.S. position on this, one has to ignore the previous paragraph, which

says that procurement by a party and grants are two different things. That's clear from the language.

In the language which deals with an obligation not to condition an advantage on domestic content requirements, grants are not excluded, only procurement by a party.

PRESIDENT FELICIANO: Mr. Kirby, from that you infer that 1106--the requirements of 1106 would be applicable in respect of grants of assistance?

MR. KIRBY: Exactly, because the receipt of an advantage is broad enough to cover both--I think it indisputably covers grants. That's an advantage. And it covers conditioning the receipt of a grant an advantage on domestic content requirements. That's what 1106 covers.

MR. KIRBY: It strikes me as being a little odd that the result of your position, what you have just stated, is that a government cannot restrict the granting of its largess to its own people in its own territory.

MR. KIRBY: Oh, but it can. It can,

absolutely. Under 1102, which is the national treatment standard, grants are exempted, under 1102. 1106 doesn't say you cannot discriminate in the giving of your largess. That's not what it says. What it says is that you may discriminate because Article 1107--1108(7) excludes national treatment, excludes from national treatment grants. So it does not say you cannot discriminate when you give your largess to whoever you want. You can discriminate. 1106 says while we permit you to discriminate when you give the money, you cannot condition that grant on further discrimination.

PRESIDENT FELICIANO: I'm sorry. Would you start again?

MR. KIRBY: All right. Two different things. Can a government give money and discriminate in violation of national treatment? Yes, absolutely. Why? Because 1108(7) excludes from national treatment grants and subsidies. Okay. So we have the right to discriminate when we give money away. Quite normal.

The next question: When we give money away, can we subject that grant to a requirement that the recipient himself discriminates? That's what 1106 deals with. 1106 deals with the imposition of conditions, conditioning the receipt or continued receipt of an advantage on the imposition of domestic preference requirements.

So pure discrimination at the level of the grants, that's permitted. 1108(7) specifically exempts grants and subsidies. Question: Can the government do what it claims it can do in this case, which is to--I'm sorry.

PRESIDENT FELICIANO: 1108(7) refers only to three articles: 1102, 1103, and 1107.

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: It does not refer to 1106.

MR. KIRBY: Exactly. That's my point.

PRESIDENT FELICIANO: Yes.

MR. KIRBY: Okay. My point is--now, clearly the parties recognized the need for

governments or the desire for governments to discriminate when they give away money. That's not the issue before this court. The issue before this court is whether in giving away the money they can force the recipient of that money to itself discriminate. That's the issue. You understand the--

PRESIDENT FELICIANO: Well, what we're trying to do is trying to explore the proposition that because a state--because grants of assistance are excluded from the scope or coverage or the ambit of procurement under Chapter Ten, do the--are those grants of assistance, are they subject to the disciplines of Chapter Eleven? And if you say yes, to what extent? That's the general inquiry that we are trying to explore.

MR. KIRBY: Okay. And that's what I'm trying to--it's been a long week, and the brain is functioning a little more slowly than it did on Monday morning. But let--I think one of the ways one could do it is to identify a provision of

Chapter Eleven which conceivably might describe the situation that's occurring in this case, then see how has that obligation been treated in terms of exclusions.

Now, I think that we can identify in 1106--I think that we can identify in Article 1106(3) the type of behavior which is precisely the type of behavior which is at issue here. 1106(3) talks about conditioning the receipt of an advantage on domestic content requirements. The advantage in this case is Federal funding. The conditioning is an obligation to buy domestic. I think we're squarely within Article 1106(3).

Now, is the precise behavior which is clearly within 1106(3) excluded? We need to turn to 1108. 1108 excludes--and 1108(7) clearly excludes subsidies and grants, but it doesn't exclude subsidies and grants from the obligation in 1106(3), the obligation which describes the behavior that's occurring in this case. 1108(8) does not exclude subsidies and grants but only

excludes procurement by a party.

Question: Is the condition that's imposed in the grant procurement by a party? First, you look at the previous section, 1108(7), which distinguished between procurement by a party and grants. Okay? Then we say, well, is it plausible to interpret procurement by a party as meaning the condition that is inserted into the grant? And I'm saying given the use of the language in the earlier one, it's not, and not in particular in this particular case because Article 1108--Article 1106 specifically talks to the conditioning of grants.

In other words, in order to take the benefit of the exclusion for procurement, you would have to take the condition which is contained in the grant and put it into procurement in order to escape the obligation which says specifically you cannot condition grants.

So does the obligation of--does Chapter Eleven deal with conditions respecting domestic content contained in grants? Absolutely, the text

is abundantly clear. That's exactly what it's designed to prohibit.

Now, to get to the--why would they draft the annex, or did you want to--

PRESIDENT FELICIANO: Go ahead.

MR. KIRBY: Okay. Why would they draft the annex? And I'll preface this by saying that this is not the most considered--we've had a few minutes to look at it, but one thing that might illustrate--okay. Let's just stick to the text. The text begins with the expression "for greater certainty." And this relates to an Article 1103 most favored nation requirement.

What does this confirm? It confirms that grants are involved in Chapter Eleven, which I don't think anybody disputes. And it confirms that the parties want a particular category of grants not to be subject to discipline, international grants not to be subject to the discipline of MFN in respect of investors. It's for greater certainty. The expression "belts and braces," I

think somebody once told me, which is not what lawyers tend to do when they're drafting statutes, but it does appear in a few examples in NAFTA where people wanted to be absolutely certain. They simply say, well, whatever you decide in respect of Chapter Eleven as a whole, absolutely--in case you make a mistake there, we want you to be absolutely certain you can't touch this particular provision. And I don't think it goes much further than that.

MS. LAMM: But it does deal with grants.

MR. KIRBY: Which Chapter Eleven does deal with.

MS. LAMM: No, I--

MR. KIRBY: I'm sorry.

MS. LAMM: I'm sorry. I was still on your last statement, which was Annex IV, the exclusion, for greater certainty.

MR. KIRBY: Oh, okay. So what it's doing is Article 1103, we already have an exclusion in Article 11--

MS. LAMM: 1108(7) right.

MR. KIRBY: 1108(7) for subsidies and grants.

MS. LAMM: Right.

MR. KIRBY: And then the--

MS. LAMM: Right.

MR. KIRBY: --nervous negotiators said maybe that's not clear enough, let's nail it home; so we will say "for greater certainty," just in case anybody--somehow can't--or will try to characterize that--a tied aid program, for example, as something other than a subsidy or a grant. I think that's all that that says.

Thank you.

PRESIDENT FELICIANO: Please?

MR. CLODFELTER: Mr. President, we'd like to beg the Tribunal's indulgence for a couple of more minutes, if that would be all right. Thank you.

[Pause.]

MR. ONWUAMAEGBU: I'd like to remind everyone to please remember to speak into the mic.

I've been advised that we might end up with a lot of gaps in the transcript for today because there will be a lot of turning on and off of mics. So if you can please remember to turn on your mics and speak into the mics. Thanks.

MR. CLODFELTER: Mr. President, Ms. Menaker will answer the question directly and then Mr. Legum will follow up with some additional comments in response to Mr. Kirby's comments and some elaboration.

MS. MENAKER: Mr. President, Members of the Tribunal, I just want to make a few comments in response. First is just want to reiterate the point that we've made a few times over the last few days, and that is what's at issue here is not a grant. What's at issue here is the condition requiring domestic content, and as Mr. Kirby noted, discrimination in the giving of grants is exempt from national treatment and most favored nation requirements. So as, Mr. President, you noted also, when the United States gives away its money,

it can discriminate. It can choose to whom it wishes to give its money, and we agree with claimant's counsel that Annex 4 merely puts for greater certainty, it is a belts and suspenders provision. It basically states that when we give away our money for programs like the Caribbean Basin Initiative, as mentioned here on particular, that that is not going to be a violation of the national treatment and most favored nation treatment obligations. That doesn't mean that we similarly need to give the same amount of money to another foreign investor or foreign investment program.

But we disagree with claimant's analysis of the Article 1108(7)(b) exemption for grants, and particularly claimant's contention that what is at issue here was--and I think he stated that what was at issue here was the giving of a grant and the conditioning of an advantage on that grant. Here ADF did not receive a grant from the Federal Government. The grant is irrelevant to the issue

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

So I hope that answer the Tribunal's question on the grant issue and on Annex 4. And now I just would ask Mr. Legum to just expand upon a few of the additional points that ADF's counsel made in response to the Tribunal's question.

PRESIDENT FELICIANO: Mr. Legum.

MR. LEGUM: I just wanted to respond quite briefly to the arguments that we just heard concerning Article 1106 subparagraph (3).

I would begin by calling the Tribunal's attention to subparagraph (5) of Article 1106. That provision reads: "Paragraphs (1) and (3) do not apply to any requirement other than the requirements set out in those paragraphs."

Now, one would normally anticipate that in fact requirements addressed by a given paragraph don't apply--that the paragraphs don't apply to any requirements except for the ones addressed. This provision, I submit, indicates the intent of the drafters that these paragraphs be interpreted very carefully and very narrowly, according to their

terms.

I would also draw the Tribunal's attention to Note 41 to the NAFTA, which appears on page 393 of the CCH book, and I'm sorry that I don't have the page references for other publications. That note reads: "Article 1106 does not preclude enforcement of any commitment, undertaking or requirement between private parties." Again, an indication from the drafters that one should read Article 1106 quite strictly in accordance with its terms.

Now, let's take a look at Article 1106 subparagraph (3), which ADF referred to. "No party may condition the receipt or condition continued receipt of an advantage in connection with an investment in its territory of an investor of a party or in compliance with"--and for our purposes here we can say domestic content requirements.

What was the advantage that ADF received here according to it? According to Mr. Kirby, the advantage that ADF received here was doing business

with the United States. That's the advantage that ADF received. What is doing business with the United States? It's called procurement by a party. It's government procurement. Now, as for ADF's contention that this paragraph is relevant because there's a grant in the picture somewhere, and Ms. Menaker just noted, there was a grant here. It was a grant from the Federal Government to the state government. It was a grant from one pocket of the United States of America to another pocket of the United States of America. ADF received no monies from any government entity actually. It received monies only from Shirley Contracting, and it certainly didn't receive any Federal funds.

So we would submit that this argument that somehow the exclusion of a grant from Article--Chapter Ten via Article 1001(5)(a) is relevant here, is a red herring.

Unless the Tribunal has any questions, I will turn off my microphone.

MS. LAMM: Just a little follow up. The

question that we started with was the interplay between Chapter Ten and Chapter Eleven, which you have discussed often. And if in the scope definition for procurement in Chapter Ten grants and other forms of aid are excluded, what does that say about Chapter Eleven if anything? And I guess on the basis of what you have just said, you don't believe they're covered in Chapter 11 or you do?

MR. LEGUM: What's covered? I'm sorry.

MS. LAMM: Grants and other forms of aid.

MR. LEGUM: Certainly grants and aid are as a general proposition covered.

MS. LAMM: Okay, all right.

MR. LEGUM: That's what Article 1106 has in mind. It's not necessarily intergovernmental assistance that's covered.

MS. LAMM: Right.

MR. LEGUM: And that's what Article 1001(5)(a), intergovernmental assistance, really much more than it does government assistance to any person. Again, the text that is, the controlling

text here, the dispositive text here is procurement by a party. "Party" includes all of the governmental units in the United States of America. For purposes of that exception, it doesn't matter whether the United States took money out of one of its pockets and put it in another pocket before handing it over to Shirley Contracting. If you think about it in terms of a single governmental entity or a single governmental level, it highlights the absurdity of the direction that ADF is suggesting.

The Federal Treasury could be viewed as granting money to other departments of the U.S. Federal Government. Does that mean that if you have a domestic content restriction attached to a U.S. Treasury appropriation, that somehow it's not procurement by the Federal Government? Of course it's not. Doesn't matter where the money comes from. That's what 1001(5)(a) says. What we're dealing with here is, as Mr. Kirby put it, ADF doing business with the United States. That's

procurement.

MS. LAMM: Okay.

PRESIDENT FELICIANO: I just wanted to inquire, Mr. Legum, is there some general proposition or theory that explains why in 1001(5)(a) you have this list of things which do not fall within procurement, which are excluded from procurement? What's the general objective of (5)(a) then?

MR. LEGUM: To again borrow an expression that Mr. Kirby used this morning, belts and braces. I think as we saw, one might be able to suspect or devise some kind of theory under subparagraph (4) of Article 1001, that federally funded state or local procurement was an attempt to get around the provisions of the chapter. What 1001(5)(a) did was to make clear, for purposes of Chapter Ten, where it does matter which level of government is engaging in the procurement, to make clear that the exchange of money or other government assistance between different governmental levels or different

governmental entities is not covered by the chapter, and therefore, one can't build an argument that by funding a project, even providing substantial funding for a project, a party has structured a procurement contract in order to avoid the obligations of this chapter.

PRESIDENT FELICIANO: And just to confirm my understanding of what you just said, all these things and activities which are excluded from the coverage of procurement, are in principle subject to the disciplines of the other chapters of NAFTA. Am I correct? That's what I understood Mr. Kirby to say. I just wanted to infer my understanding that you have agreed with that, subject to the specific provisions of 1108.

MR. LEGUM: For example, yes. There may be other exclusions as well, but I think as a general proposition, one can assume that government measures has to be a measure, I believe, for the application of most if not all of the NAFTA chapters. Government measures are covered unless

specifically excluded.

PRESIDENT FELICIANO: Thank you.

MS. LAMM: And, Mr. Kirby, just so we're clear, you aren't raising any claims under Chapter Ten, you're only raising claims under Chapter Eleven?

MR. KIRBY: No, we're not raising any claims for a violation under Chapter Ten. Our claims are limited to Chapter Eleven. Thank you.

MS. LAMM: All right. Next we'll turn to 1102(2). And the first question is for Mr. Kirby, although we will turn back to the U.S., obviously, for comment.

Yesterday we heard from Mr. Clodfelter and Ms. Menaker under 1102(2), that the focus of our analysis must be the investment of the investor, so you really look at how in that context the investor is being treated. And I'm just wondering how the investment of the investor is being treated as a class in comparison under 1102 to other investors from the United States? And I'm wondering, do you

agree with that as kind of the analytical construct here, that we're looking at the investment of the investors, and you're comparing other--you're comparing the investor and what's being done to the investor, so to speak?

MR. KIRBY: Thank you, Ms. Lamm. I have had some difficulty understanding precisely what the nature of the U.S. argument was in this respect, without it being simply that Article 1102 has to be read as being identical with Article 1102(1). That is, Article 1102(2) and 1102(1) are essentially doing the same thing. They're not. They're doing two different things, and once again, if you go back to the text, each party shall accord to investments of investors of another party. Treatment has to be accorded to the investments, not to the investors, to the investments of investors of another party. Treatment that is no less favorable than it accords in like circumstances to investments of its own investors, not the investors, to the investments. That's what

the treatment--that's where you're going to measure compliance with the national treatment standard. Why? Because in paragraph (1) you're measuring compliance at the level of the investor. Paragraph (2) means that it's not simply the investor that you must treat as favorably as you treat your national investors. You must also treat all of the investors investments, all of the investments, as favorably as you would treat investments of national investors in the same way.

Where do we claim that there's a violation? The investments of ADF in steel--and this is not to say that we don't have any other claims that we have set out, but the one that I think that highlights it the most with the greatest degree of clarity is that we are being said--first we establish an investment. The investment is steel. No question, as far as I'm concerned, and I don't think the U.S. is denying that property is an investment. That may not be the traditional nature of investment. I mean when we think about

investment traditionally, we think about building factories and we think of owning land and various things. That's not what we're dealing with here, because the definition of investment is broad enough, deliberately so, to cover a wide range of investments and clearly covers the steel. So steel is our investment.

We have steel with 1 percent U.S. content. And somebody else has--so we ask, can we do business with the U.S., and they say, "No, you can't because of that 1 percent content." That's discrimination on the basis of the--we are not getting the same level of treatment that the investments of U.S. steel fabricators get. What is the investment of U.S. steel fabricators? It is the steel that they have fabricated. Our investment is the steel that we have fabricated. Our investment cannot be placed in the highway. Their investment can be placed in the highway. That's the discrimination. Clear, no question. If it is not 100 percent U.S. origin it does not

qualify. They're devaluing our investment.

I think, Ms. Lamm, that it was in an exchange with Mr. Clodfelter that you had said the him, if I understand how you are reading it, you would need to insert some words, and he said, "yes." And I think that there is no reasonable interpretation that you can put on that paragraph without inserting words into the paragraph to give it the meaning that the U.S. would like it to have. But the words that you need to insist--to insert in the paragraph are words that brings the meaning up to what 1102(1) says in any event. That's not a reasonable interpretation of the paragraph. I think that the text of the paragraph is clear. And as Judge Feliciano pointed out, if you take out the word "investments" and change the word for "steel." Our steel is treated differently because it is not 100 percent U.S. origin steel.

MS. LAMM: But it's not treated differently because you're a Canadian investor or a foreign investor. It's treated differently because

it's different steel. And so is there a like circumstance issue?

MR. KIRBY: That's another issue. In terms of, you know, did the fact that the investor was in Canada have an impact? And we'd say if you were digging deep into a de factor argument, yes, that's an impact. But let me put that aside for a second and just focus on this one issue that you had, is there a like circumstance issue.

The investment of ADF, steel with let's say 1 percent U.S. content sitting in the United States and steel with 100 percent U.S. content sitting in the United States. Our steel won't qualify. A steel fabricator's 100 percent origin steel will qualify.

Is there a like circumstances test? I think the like circumstances is basically the steel produced by steel fabricators. The investments that steel fabricators have in the United States, and that generally is fabricated steel. It's raw steel in inventory, and it's fabricated steel

coming out of the factory. The only--just let me complete the thought. The only like circumstances test that would allow the U.S. argument to be compelling is to say "We treat all U.S. origin steel correctly in the same way, and we treat all non-U.S. origin steel in the same way. That's an interpretation which forces you to basically interpret in order to avoid the obligation which doesn't bear analysis. In other words, the like circumstances is not is all U.S. steel treated alike? The like circumstances is, is all the steel ready for sale to the, for example, Springfield project, is all that steel treated alike? And if it is not, if there is discrimination against non-U.S. steel, that's a violation of national treatment in respect of the investment of the investor.

MS. LAMM: So your argument is essentially on like circumstances, that it's a like product argument? If it's a like product, that's how you compare it, because you--you don't do what the U.S.

essentially does and say that there's actually a subset of products, and one is--has different content, and you compare--it doesn't matter who the investor is, because remember it's saying the investment of the investor. It doesn't matter who the investor is. If you take a subset of like product and that subset is U.S. steel with Canadian content, that subset no matter who holds it, if it's a U.S. citizen, if it's a Canadian citizen, no matter who, it's going to be treated the same.

So in part it's the question of what is like circumstance, is it like product or a subset of like product?

MR. KIRBY: I think you're casting light on the--you're making it a little bit clear in my mind now what the issue might be. The requirement is to give national treatment to investments, investments of investors. That's your starting point for determination of like product. Are the investments of ADF steel treated at least as favorably as the investments of U.S. steel

fabricators? We would say no. They get one step further.

Now, a U.S. steel fabricator has non-U.S. steel that it wants to sell. That analysis is then to cross over de jure discriminatory nature of the provision which is clearly on its face discriminating. And then say, well, let's make the assumption. Let's carry on the analysis. I would say the next step in the analysis is then to see what the impact of the de facto application of that measure is and the impact is of course that U.S. steel fabricators would still be benefiting, because if they're in business to fabricate steel, in the United States that's what they're doing, and who would be the ones who would have the disproportionate burden of supporting that? It would be Canadian steel fabricators. But just to conduct the analysis on the basis of we're going to compare all steel containing a proportion of--containing a percentage of Canadian content, we're going to compare that steel held by Canadians and

that steel held by United States, and there's no debate, it would all be disqualified. That's not the issue because it simply ignores to discrimination. It doesn't test the discrimination. By making that kind of analysis you've already assumed what the answer is. So the like circumstances for us is the like circumstances of the investment, which is basically the same economic sector, whatever formulation you want to use, but basically it's the steel is ready for insertion into the highway program.

MS. LAMM: And if Canadian fabrication services are in fact less expensive than U.S. fabrication services, why wouldn't U.S. investors have an equal interest with a Canadian investor in getting their steel fabricated in Canada and selling it to the U.S.? They can make more on their contracts. So why is that not an appropriate comparison? It doesn't--I mean you're saying it assumes the discrimination, but U.S. steel producers would have the same incentive as a

Canadian steel producer to use those Canadian fabrication services.

MR. KIRBY: One, the basic assumption--and I'll take it as an assumption, but just on a factual basis I don't think that we can make that assumption. But let's assume that to be the case, that somehow there's an advantage. The analysis that you have to undertake is first of all, what's this measure designed to? This measure, there's no question, nobody is arguing, is designed to assist the U.S. industry, U.S. steel producers at the expense--or rather to assist them at the expense of the rest of the world. It's not designed to do anything but that. That's the entire rationale behind the whole measure.

Could the fact that the U.S. steel fabricators might obtain an advantage by going to Canada, should that influence the discussion of how are we going to draw the boundaries around a like circumstances test. The hypothetical, given the rest of the landscape, given the facts, again is

designed to get you back to a position where because you have defined it in terms of are we treating all steel with some Canadian origin the same, and are we treating all U.S. 100 percent origin steel the same? In fact, the analysis assumes the answer. If you get into that kind of analysis and say let's assume that the U.S. fabricators really want to send their steel to Canada, get it fabricated and bring it back, and they're suffering a burden at least as bad as the burden suffered by ADF, it flies in the face of the reality that that's not what they're doing, that's not what they want to do. They want protection in their home market. They have factories here. They want to load their factories, and they will do so by ensuring that politicians can continue to ensure that these kinds of measures are enforced.

MS. LAMM: Yesterday we did hear--I think it was yesterday--from Mr. Clodfelter that the value of the fabrication services in the U.S. was 70 to 80 percent of the product--

MR. KIRBY: And we denied it.

MS. LAMM: And you said it was 20 to 25 percent of the value. Now, I don't know--that was a 60 percent spread, but that would induce me as a steel fabricator to take my steel to Canada.

MR. KIRBY: I hadn't thought about it in that way as being sort of a price comparison. I thought we were having a difference on what normally would fabrication cost on basically the same steel?

If the facts were to disclose that U.S. origin steel, the fabrication cost because the U.S. fabricators are so inefficient that it's adding 70 or 80 percent of the cost to the steel, whereas Canadian fabricators are so efficient, that they're adding only 20 percent, I don't think that that's--I think we're having a debate not as to whether that situation, there's a 60 percent spread between the cost, I think we're having a debate over what's fabrication?

PRESIDENT FELICIANO: Forgive me for

butting in at this point. What we are really groping for is the substance of your claim of less favorable treatment. That's where we're going, Mr. Kirby.

MR. KIRBY: Let me say it in 30 seconds.

PRESIDENT FELICIANO: Well, I know what you have said before. What we are trying to find out is how you respond to the arguments made by the United States and how exactly it impacts on you, remembering that--we can accept the notion of de facto versus de jure discrimination or less favorable treatment. But you have to show us exactly where the treatment accorded to either your investment, meaning the steel, including the steel that you had in the United States, and your company, ADF International and U.S.-origin steel owned by a U.S. company located in the United States. You know, you gave us those three points. You said you are required to subcontract to U.S.--

MR. KIRBY: Fabricators.

PRESIDENT FELICIANO: Fabricators. I'm no

economist, but that seems to me not necessarily a less favorable result. It depends upon the costs. That's where this element of cost comes in.

MR. KIRBY: I draw the Tribunal's attention to the affidavits which have been filed--

PROFESSOR DE MESTRAL: Just to reinforce that point, particularly if we are in the realm of de facto discrimination, it would seem the range of factual evidence to explain and to elucidate the claim becomes even more important. One can imagine a de facto claim that can be proven simply on the basis of a description of a certain circumstance, but generally something more is useful--much more is useful.

MR. KIRBY: Let me draw the Tribunal's attention, as I said earlier, to the affidavits of evidence that have been filed, particularly the affidavits of Mr. Paschini and Mr. Vandevelde. They describe--Mr. Labelle's affidavit describes simply some of the procedural issues. But the story with respect to Springfield--and my friends

have said that there is no evidence in respect of the others. That evidence will be put forward at the damage claim. But to establish de facto discrimination in this case, the story is as follows:

ADF International signs a subcontract with Shirley to participate in the wonderful highway interchange that we saw in the slides, a significant contract to supply the fabricated steel for the bridges and the off ramps and--there's a lot of work.

ADF goes off and begins to start purchasing U.S.-origin steel to supply on that contract with the intention of taking the U.S.-origin steel, bringing it to Canada where it has two facilities, and fabricating that steel in accordance with the shop plans, and then bringing the steel back and erecting it on the job site.

It was told that it could not do so, that all the fabrication of that steel would need to be done in the United States by U.S. steel

fabricators.

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

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

the less wastage you will have. It's like cutting cloth, because you can use the bits and pieces that are left over. So there was a lot of wastage, and there was a multiplication of transportation costs, plus instead of doing it in-house, he had to hire steel fabricators to do it for him. So he had, you know, labor issues, et cetera.

Eventually, all of the steel was delivered to the site and was erected, but the process of being able to complete the contract on time under the conditions set by the Buy America legislation cost the company an awful lot of money.

Now, is that de facto discrimination? The reason why he needed to go through this process was because he was refused permission to use his facility in Canada to fabricate the steel.

Now, I well understand that NAFTA doesn't reach into Canada. However, what NAFTA does do is to say, for example, if you want to create an investment in the United States, the establishment of an investment, you're free to do so and we can't

impose domestic content requirements to inhibit you from doing so. Establishment of--the delivery of the fabricated steel into the United States was an integral part of establishing that investment in the United States. We intended to complete our contract to provide fabricated steel to our co-contracting party.

We couldn't do that. We couldn't--if the steel is an investment, we could not establish that investment the way we wanted to do it in the United States. We were prohibited.

In essence, what happened with respect--if you take one level up and you start looking at the more traditional type investments in terms of the companies themselves, we say that you can establish a claim for de facto investment on the basis of--the impact of the legislation is basically to cut ADF International, the subsidiary, to cut ADF International off from the corporate group.

In other words, U.S. steel fabricators--providing they stay in the U.S., but generally U.S.

steel fabricators are located in the United States. U.S. steel fabricators can use their facilities in whichever way they deem appropriate in order to produce the finished product. We couldn't. We couldn't go to--we couldn't use the entire production facilities available to ADF. We had to be content with what was available to ADF International. And there wasn't enough available. We think that that demonstrates once again discrimination against the subsidiary in terms of its ability to manage, operate, and--

PRESIDENT FELICIANO: Excuse me. I would request you to please focus upon the issue raised. I would still want to know exactly how less favorable treatment was accorded to the investment involved, steel, presenting from the question of like circumstances, whether that includes like products, you know, what was meant by like products in this context. It's the--

MR. KIRBY: Okay--

PRESIDENT FELICIANO: --less favorable

treatment. That's what I--it's a little bit impalpable, as far as I can see.

MR. KIRBY: In terms of at the level of the steel or are we still at the level of the investment itself?

PRESIDENT FELICIANO: Whatever.

MS. LAMM: 1102(2). The investment.

MR. KIRBY: The investment. Okay. I'm sorry.

The level of the steel, I think we've dealt with that issue in terms of the like circumstances case. We consider that like circumstances has to be established at the basis of the steel with which we were competing, the business for which we were competing and who were our competitors. Our competitors, our U.S. competitors, the steel fabricators in the U.S. who were bidding on the Shirley contract against us, who were seeking to use steel in that particular piece of work. Who are they? What is that steel? That steel is U.S.-origin steel.

So, for example, the output of the five subcontractors, U.S.-origin steel fabricated in the U.S., that's steel in like circumstances to our own. It's steel that's available and competing with ADF's output for that particular job.

PRESIDENT FELICIANO: Does less favorable treatment relate to the economics of a particular transaction? Are you saying that because the cost of--that you couldn't bring the steel back to Canada and there perhaps more efficiently and for less cost done the same job that you had to subcontract out to U.S. fabricators in the U.S.? Is that what--

MR. KIRBY: I think I understand the difficulty that you're having, and distinguish--

PRESIDENT FELICIANO: Yesterday Professor de Mestral drew attention to the notion of less favorable treatment as that term is used in Article 3(4) of the General Agreement on Tariffs and Trade and WTO. There the principal reference is to equality of competitive opportunity. I'm not

saying that that is necessarily the interpretation to be given to the words "less favorable treatment," but it certainly is a plausible reading that would be given to Article 1102 here. So, please, can you address it from that point of view?

MR. KIRBY: I'll do my best, and I apologize for assuming sometimes that I've said things or said them in a particular way. Sometimes you assume more than you actually say. And I think it's important to distinguish between the factors that make up less favorable treatment than the consequences of that less favorable treatment. And the consequences of the less favorable treatment are the damages, but the less favorable treatment itself is the bottom-line exclusion from the market. That's the less favorable treatment.

We could not participate in the market for fabrication of steel in highway projects. We were excluded. That's the less favorable treatment because--

PRESIDENT FELICIANO: But if you had set

up facilities as you had in Florida, if those facilities had been of such dimension and capacity, you would have been able to do it in Florida.

MR. KIRBY: That relates to the notion that you're not treated any less favorably than any other steel fabricator. In other words, all steel fabricators were working under--

PRESIDENT FELICIANO: But a facility--

MR. KIRBY: --the same compunction. What we're saying is that--and this is now stepping up from the level of the steel. Let's just deal with the level of the steel so that we can get that out of the way.

That argument at the level of the steel is that--would be that anybody with steel containing Canadian content would be equally treated, would be excluded from the market. That's not the test at the level of the steel.

At the level of the steel, it's--what's the like circumstances? It's any steel investment, any steel ready to go into the particular highway

project. That's the like circumstances test at the level of the steel, not steel with Canadian content versus steel with U.S. content. We simply reject the notion that you can distinguish between steel with U.S. content versus steel with Canadian content at the level of the investment, because if you do that distinction, if you make that distinction, you basically take the content out of national treatment. That's not the purpose. That's the question of the steel.

Now, moving up, ADF International as a factory, a steel fabricator in the United States, and other steel fabricators in the United States, the less favorable treatment is that steel fabricators generally in the United States have the facilities that can engage in the kind of work. It's their home base. This is where the steel fabricating industry that is subject to the measure, that is, in fact, being protected by the measure, the United States is the home base of that industry. By enacting a measure to protect that

home base, in other words, to protect the collection of U.S. steel fabricators, and then that measure operating on them means that in ADF we are faced simply with the choice. We now no longer can use the family of--the ADF family to produce the steel.

We're given the choice of if you want to participate in the market, you either expand your facilities or--and this is what's happened with companies like Bombardier--or you jump over the wall and you establish your facilities in the United States.

PRESIDENT FELICIANO: Which you have done in this--

MR. KIRBY: We jumped--

PRESIDENT FELICIANO: Which you did in--

MR. KIRBY: No, the facility in Florida is not capable of doing this kind of work.

PRESIDENT FELICIANO: But that's--

MR. KIRBY: We have established--we haven't established facilities in the United States

in response to--ADF International was not established in response to the highway program. What I'm saying is to participate in the highway program or, to put it more narrowly, to have participated in Springfield, we would have needed to establish a facility significantly larger than the ADF International facility.

So we had a choice that was not faced by the U.S. facilities who were bidding against us in the contract. Our choice was do something with your facilities, increase your investment, come here, build a new plant, buy a U.S. investor, but basically don't expect to be able to enjoy the same freedom as U.S. steel fabricators to compete in the market, unless you become a U.S. steel fabricator.

MS. LAMM: Okay. That's it?

MR. KIRBY: Yes.

MS. LAMM: All right. I don't know who's going to respond on the U.S. side.

[Pause.]

MS. LAMM: Maybe while they are caucusing

I can just ask--follow up with one more thing. You have these other three contracts that you've alleged, and this isn't to indicate that we're going to consider or not consider them.

MR. KIRBY: But it's an issue that's been raised by my friends.

MS. LAMM: Right. I am just wondering about those contracts. We have no facts on those contracts. Are they all Federal highway contacts with various states?

MR. KIRBY: I think the frame of reference for that goes back to paragraph--I believe it is 62 of the Notice of--

MS. LAMM: Right, right. No, I understand that.

MR. KIRBY: All of these contracts are on all fours with Springfield Interchange, Federal Highway contracts where the same regulations is applied, the same laws. If they were not Federal Highway contracts, if they were not contracts governed by the measure in question, I would agree

with my friend--

MS. LAMM: Right, right.

MR. KIRBY: --that, you know, we haven't brought a claim in respect of those. We brought a claim in respect of the application of a Federal Highway contract throughout the--you know, whether it's applied in Wyoming or whether it's applied in New York or in Virginia, it's the same thing. That's our--

MS. LAMM: And, chronologically, where do they fall? Were they at or about the same time? Were they subsequent to the--

MR. KIRBY: Subsequent.

MS. LAMM: Subsequent?

MR. KIRBY: They were later contracts.

MS. LAMM: Now, on all of those, did you disclose you were going to use foreign fabrication services and you were still permitted to compete?

MR. KIRBY: No. In all of those, we subcontracted the work

MS. LAMM: Yes.

MR. KIRBY: In fact, there was one interesting one--I think it was Brooklyn-Queens--where there were two bridges, one which was a state bridge and one which was a Federal bridge. We could do the work for the state bridge in Canada. We did the work for the U.S. bridge in the United States, the Federal bridge, the one that was federally funded.

MS. LAMM: Federally funded, you could do the one in Canada?

MR. KIRBY: No. Federally funded, we had to do it in the United States. State-funded, without Federal funds, we could do it in Canada.

MS. LAMM: Oh, state-funded, without Federal funds.

MR. KIRBY: So were they federally--they're all Federal Highway projects. They were subsequent to the Springfield Interchange. But the reason why we haven't loaded the details is because that's a damage issue, as far as we're concerned. The measure that's at issue here is the application

of the Federal Highway, and we're in a liability phase.

MS. LAMM: Right, right. So on all of those, what were the problems for you as the investor getting the services that you needed in the United States? Obviously all except the federally funded one--or the State-funded one, you had to use U.S. fabrication services to do the work.

MR. KIRBY: That's correct. None of the fabrication work for any of those contracts were done in Canada.

MS. LAMM: And the less favorable treatment for all of these contracts is the same as you've described, that you had to go to U.S. fabricators?

MR. KIRBY: Yes, but I believe that the company may have become a little more efficient in handling that sort of off-site work. Certainly at Springfield, it was a learning curve, and it was a learning curve within a fairly short period of

time. But I believe that they became more experienced at dealing with those things, and then managed to--you know, the cost is going down as they become expert at basically subcontracting work to continue to participate in the market.

MS. LAMM: And were there any problems, I mean, were there any--did you--were you denied access to any--were there problems in doing this? You've been able to get the services? You said now that you've become efficient, you know, you've got the cost down.

MR. KIRBY: Well, now that we've become efficient at using our competitors to do work that we really ought to be doing--but that's not a long-term viable solution for the company.

MS. LAMM: Right.

MR. KIRBY: Have we become better at doing it? With time, one becomes better at everything, one hopes. But I also have to underline that I see these at a high, high level. I don't see the nuts and bolts of some of these contracts.

MS. LAMM: Okay.

MR. KIRBY: So as we spend time talking about it, I get more and more nervous.

MS. LAMM: Okay.

MR. CLODFELTER: Mr. President and Members, let me just begin perhaps on that last point. The very fact that all these questions have to be asked just underscores the basic obvious fact that there's absolutely no evidence in the record--let me read to you the sum total of all of the evidence in the record on these other projects, which are the basis for its other claims.

There's paragraph 54 of Mr. Paschini's affidavit. "Subsequent to the Springfield Interchange Project, ADF Group has also worked on several other Federal aid highway projects where the application of the Buy America measures have resulted in additional costs. These projects are the Lorten Road Bridge in Virginia, the Brooklyn-Queens Expressway Bridge in New York, and the Queens Bridge in New York."

Two sentences in an affidavit, that's the entire proffer of proof that the U.S. Government is liable for the application of this measure on projects other than the Springfield Interchange.

The real issue is that ADF has made no effort to prove that it has been discriminated against because it is a Canadian investor or because its investments are owned by Canadians. And I think Mr. Kirby is trying to insert words into my mouth by suggesting that I was suggesting that we had to insert words into the NAFTA. My point wasn't--my point was exactly the opposite. You don't have to insert any words in the NAFTA. You can just apply the words of Article 1102(2).

1102(1), which refers to investors, says you can't discriminate against an investor in the listed activities just because that investor is Canadian. 1102(2) says you can't discriminate against an investment in the listed activities just because the investors--that is, the owner of that investment--is Canadian.

These are different provisions, and contrary to what Mr. Kirby said earlier today, the U.S. Government position is not that 1102(1) and 1102(2) are the same. They obviously apply, in one instance, to investors; in the other, to investments. But the comparison factor in each case is the same, the nationality of the investor.

1102(2) does not say that you can't discriminate against an investment on the basis of the national origin of the investment. And that's what Mr. Kirby attempts to insert into the terms of 1102(2).

Of course, what he's really trying to do is induce you to make a comparison of two investors who are not in like circumstances.

An 1102 violation cannot be based upon a comparison between an American investor holding U.S. steel and a Canadian investor holding Canadian steel. Those two investors are not in like circumstances. Nor can a violation be made out because an American investment--a steel company

holds American steel and a Canadian investment, here ADF International, hold Canadian steel. There is no 1102 violation there because there's no discrimination based upon the nationality--no discrimination shown based upon the nationality of the investor.

This is not the result of words that I want to insert in Chapter Eleven. This is the result of the words that are there.

Therefore, when Ms. Lamm asked Mr. Kirby that you're not saying that you're being discriminated against because you're Canadian, and he said in an initial answer, "That's correct," that's an admission that this case has to be dismissed.

Now, he quickly qualified that, perhaps because he saw the problem with that answer. To say that, of course, if you wanted to look deeply into the question of impact, maybe something could be said. Well, and then there were--then the President asked some questions to try to get ADF to

be clear about impacts it may have suffered as an investor that would be different from an American investor's impacts.

Now, we saw from the difficulty that Mr. Kirby had in describing that that it might be very difficult to show any different impacts. An American steel company, say the same size as ADF, same facilities, would have exactly the same choices to make as--I'm sorry, ADF International, exactly the same choices to make that ADF International faced under this contract. They might well have wanted to fabricate steel in Canadian plants because of the cost differential. But they were denied that right to do so no less than was ADF International. There was no discrimination based upon the nationality of ADF International's owners compared to the owners of the American company.

It's our position you don't have to go any further in terms of looking for a basis for a claim of de facto discrimination. First of all, ADF has

not even proffered a test for such a notion under 1102.

It certainly has not proffered any authority for the conclusion that different treatment can be measured by differential impacts. And of course, even more conclusively, ADF has presented not a bit of evidence that would allow this to be--you know, to make such a comparison.

I will conclude my remarks with that, and just turn the floor over to Ms. Menaker to add some additional comments.

I think we can just entertain additional follow-up questions if you have any. But let me just note, Mr. Legum reminds me of the conclusion of the Tribunal in Azinian who said it's not the purpose of NAFTA to compensate companies for every business disappointment they face. We're sorry that ADF International faced some business disappointments here, but it did not involve a violation by the United States of its NAFTA obligations.

MS. LAMM: So as I understand what you're saying and as I understood what you said yesterday, it wasn't including any new words in 1022, it was just looking at the words "investments of the investor of another Party." So those words are there, and you can't extract the "investment" word from "of the investor." And so your position is that you have to compare the investment as held by a Canadian investor to an investment as held by an American investor and see what disparities if any there are with respect to the treatment that investment is receiving.

MR. CLODFELTER: That's correct. The comparison clearly is out of 1102(2), investments of investors of another party versus investments in like circumstances of its own investors. So that's the comparison, investments of investors of another party versus investments, like circumstances, of its own investors. That's the comparison.

And those terms are, by the way, defined terms together. If you look at the definitional

Section C of Chapter Eleven, you'll see that the definition is for investor of a party.

MS. LAMM: And that's in--

MR. CLODFELTER: And investment of an investor of a party as well.

MS. LAMM: 201?

MR. LEGUM: Article 1139.

MS. LAMM: Okay, I'm sorry. And for like circumstances it is not necessarily a comparison on a like product basis so you'd have all fabricated steel. Rather, your contention would be that it's the subset of steel produced in the U.S.?

MR. CLODFELTER: Well, since the comparison is between the ownership of the investment, investors of another party versus your own investors, you have to control for the investment. You have to look at if this investment were owned by an investor of your party, would you be treating that investment differently? So in fact, the investment is the same. You'd have to attribute the same investment to investors from the

two countries to see whether or not one investor is being treated better than the other or one investment is being treated better than the other. So if we're looking at the steel, we have to look at whether or not an America company that owned the same steel would be treated differently. That's the comparison that's called for in 1102(2).

Ms. Menaker will add a point.

MS. MENAKER: I just want to add a point to elaborate on that, which would be the--what would be the outcome of accepting ADF's argument on this point which we've said time and again it would turn 1102 in national treatment, which is supposed to be focused on the nationality of an investor into a trade provision that basically turned on the national origin of goods. And so, for example, if you had two stores in the United States, one owned by a U.S. investor, one owned by a Canadian investor, and both sold clothing, if the Canadian store decided that it wanted to sell imported clothing, Canadian clothes, and it imported the

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

and so too here. There are fabrication plants in the United States and their ownership is not restricted on the basis of nationality. ADF International is free to expand its plant in Florida to bring it up to the capacity to enable it to supply steel for federally-financed highway projects if it chooses to do so. If it doesn't want to do so, it can't then bring the steel to Canada and have it fabricated there. But a U.S. owned steel fabricator in ADF International's shoes, is in the same position, is treated in the same manner. If it doesn't have the capacity, it can't rely on the foreign affiliate whether it be affiliated with the company or not, to gain a cost advantage in shipping the steel outside of the country to get it fabricated and bringing it back in.

MS. LAMM: Then how is that different, if that's the analysis than the analysis one would exercise in under 1102(1), because you're basically comparing the restrictions on the investor.

MS. MENAKER: You're comparing the nationality of the investor in both, but they protect different things. So, for example, in 1102(1), if the United States had a law that said if Canadian investors want to invest in a certain industry, they have to pay an extra tax, for example. Now--and I know tax measures are treated differently so this is just a general example. A measure such as that would or might violate 1102(1) because it might afford the Canadian investor less favorable treatment than a U.S. investor in like circumstances.

If on the other hand a measure said we, the United States is going to nationalize all Canadian-owned airplane manufacturers, that's an issue that would fall under 1102(2), because there the--it would be we're going to nationalize a plant that--car plants, Canadian-owned car plants. There the car plant in the United States is an investment. A car plant is not an investor. But you're discriminating against the car plant based

on the nationality of its owner, based on the nationality of the investor. So that's where the difference between 1102(1) and (2) lies. One protects the investor, one protects the investment of the investor. But both protect the investor on the basis of its nationality or the investment on the basis of the nationality of the investor of the investment.

MS. LAMM: And can you distinguish that then from the situation where we would be saying that all Canadian-owned steel in the United States would not be permitted to be used.

MS. MENAKER: Yes, because there it's--again the distinction is not being drawn based on the nationality of the owner of the investment. The investment in that case is steel. And so it's not all Canadian-owned steel that can't be used. It's all steel that has Canadian content. All Canadian steel might not be able to be used, but regardless of who owns that steel.

MS. LAMM: Right, right.

PRESIDENT FELICIANO: Can I just ask, is the concept of reference to conditions of competition in determining less favorable--presence of less favorable treatment, which is something that is used in WTO; would you regard that as pertinent in this particular case under 1102, considering that you said it's on the basis of the nationality of the investor, the protection that is given on the commitment of nondiscrimination is a commitment of nondiscrimination on the basis of the nationality of the investor. Are conditions of competition still pertinent?

[Counsel conferring]

MS. MENAKER: The best way that I can answer that question is really to just refer to the language in 1102, and I know that you are perhaps looking for more guidance on the definition or elaboration of less favorable treatment, but all I can reiterate is that in order to find an 1102 violation or to look into whether there has been one. It has to be less favorable treatment with

respect to one of these things, the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments. So to the extent that some--I think the term you used was competitive conditions--to the extent that that falls into one of those categories, you know, that's the only guidance we really have here, but I would just reiterate again that all ADF has offered in this regard is speculation, speculation that there has been some de facto discrimination on the basis of its nationality because it said this morning it's more likely that a U.S. investment in like circumstances with ADF International would have larger facilities in the United States because that's its home country, and there's no evidence in the record to support that, and in fact, there's no reason for us to think that that would indeed be the case.

Steel fabricators in the United States, they can be owned by whomever. There is no barrier to ownership of those steel fabricators and a

fabricator in the U.S. that has the capacity to fabricate an amount of steel from one of these projects may very well be Canadian owned. At the same time you could have a U.S.-owned fabricator in the U.S. that has a parent or sub or other affiliate in Canada with larger facilities. Maybe it's set up there because of lower labor costs or whatever, and it's unable to take advantage of that relationship, regardless of the fact that it is U.S. owned, so ADF has produced absolutely no evidence to show that there was actually any less favorable treatment here.

PRESIDENT FELICIANO: Thank you. I will ask Professor de Mestral to raise the succeeding questions.

PROFESSOR de MESTRAL: Thank you. Just pursuing this question of evidence, we recall that there was a request for a review of access to documents from ADF, particularly in respect of waivers that might have been issued in the past. And we wonder what the results of that search for

information have been. Has some pattern with respect to the grant or a refusal of waivers been determined as a result of the search which was made?

MR. KIRBY: Assuming that the question is addressed to ourselves, I'd like to consult with my friend here for two seconds. Thank you.

[Counsel conferring]

MR. KIRBY: Just to briefly respond to the question that we did receive documentation relating to the grant of waivers, and no particular patent is discernible. There are waivers granted from time to time in respect of a narrowly-defined range of products that are not debatable in the United States, ferry boats parts and--waivers are--if there's any pattern, it's that waivers are difficult to obtain and don't seem to be granted on a sort of broad basis, but on a fairly narrowly-defined product basis.

PRESIDENT FELICIANO: In other words, there has been no history of denial of request for

waivers from Canadian steel fabricators?

MR. KIRBY: We're certainly not basing a claim on a history of denial, but it may well be that it was--no, we're not basing our claim on history of denial of waivers. We're basing our claim on the fact that there is a straight prohibition throughout history.

MS. LAMM: I think now I'd like to move to 1105. We have several questions under 1105, and I'd like first, Mr. Kirby, to have you focus on--well, there are actually two for you, but I think we'll start with--we now have from Mr. Legum a definition that is sketchy but nonetheless a definition under 1105, that in his view it would include denial of justice, potentially fair and equitable treatment problems, full protection and security problems, at a minimum level.

What we would like you to do is to take that, since we don't have another definition, and have you tell us what evidence is there? Are you giving us any evidence of any violation of those

specific things? Is there arbitrary or capricious treatment? Have you been treated in some unjustifiable, unreasonable manner by the U.S. bureaucracy? Other than--we understand completely your argument with respect to the 1982 act, the regulation, the requirement, but putting that aside, is there anything else, or is there any way that you would fit even that act within one of these?

MR. KIRBY: I think the response to this will be fairly brief. I hadn't understood, first of all, Mr. Legum to suggest that there was a fair and equitable content in--I understood him to talk of denial of justice and full protection and security, and you've now said he seemed to indicate that there may be--I got the same impression, but I was even less definite. I thought he--there was a suggestion that there was some standard.

MS. LAMM: Well, it is, and it's even specified in the FTC, paragraph (2), that there is a fair and equitable treatment concept, but it is

limited by this minimum standard of treatment of aliens, but we're going to go to that section next. Right now we're asking what--what are you alleging? If this is the definition, what is it?

MR. KIRBY: The treatment--the treatment. And you said you fully understand our case in respect of the law and how the law becomes practice on the ground, and that's our allegation. In other words, if you're asking me in respect of this particular contract or in respect of any other particular contract, there is something other than the methodical application of these principles by the agencies involved. That's what we're complaining about. We're complaining from the start down to what eventually becomes policy, but that is policy. We're complaining about how this measure is implemented generally, not how this measure was implemented specifically in any different way.

MS. LAMM: Okay. So let's then take that measure, and can you tell us how it would violate

fair and equitable treatment, denial of justice or full protection and security?

MR. KIRBY: It's fair and equitable treatment. The notion--maybe to set the stage, I'll go back and talk about the act, clearly protectionist, clearly--I'm sorry.

PRESIDENT FELICIANO: Forgive me, Mr. Kirby. It might help you to understand if I give a little bit of background. We have understood your argument to be of the following tenor. You have Article 1102 and 1103.

MR. KIRBY: Uh-huh.

PRESIDENT FELICIANO: We understand you to be saying that you have made a claim under 1102. You also made a--you're saying 1103, although that is objected to or denied by the U.S. We understand you to be saying that even if we--the requirements of 1102 and 1103 have been complied with, nevertheless, this particular measure remains an arbitrary and fair and reasonable one so that it violates a standard of fair and equitable treatment

for protection and security, which is set out in 1105. We're not going to discuss that problem of interpretation and so on. We understand you can be saying that. I'm sorry if--in other words, the reference is to a claim that you have been denied the protection of 1105, even if you may have--assuming for arguendo you failed to show a violation of 1102, 1103, nevertheless you are entitled to redress because you have been denied treatment required by 1105. That's the background of the question now being posed to you.

MR. KIRBY: Just two seconds to consult with my friend to--

PRESIDENT FELICIANO: The suggestion is made by our Secretary, would you like a coffee break at this point?

MR. LEGUM: That would be lovely.

MS. LAMM: In fact, if it might help, I can tell you what the question after this is, and it's very much related, because then you can think about it during the break.

The question for you, Mr. Kirby, is you've made the argument that under 1103, you would have the benefit of a better minimum standard of treatment under the Albanian Treaty, for instance, which I guess doesn't appear to be excluded by the reservation in Annex IV because it was signed--it entered into force after NAFTA. So we understand your argument that you've got the benefit of this better standard, but we're struggling with the definition, what is the better standard? What is the substance of the better standard? We have already heard from Mr. Legum that even the minimum standard included fair and equitable treatment, denial of justice, full protection and security. What's different about this better standard? So that's the question for you.

And for Mr. Legum we have: why isn't the minimum standard of treatment in 1103, why doesn't that encompass this minimum standard? And we're not relying on the minimum standard of treatment for investors. We're not--that is articulated

under 1105. We're not relying on 1104, to read it back in there. We're just saying when you assess the treatment of investors from other countries, if there are investors that have what is arguably a higher standard in terms of the minimum standard of treatment they receive, then why, under 1103, wouldn't this investor be entitled to that better standard of minimum treatment? And we're not saying we think that there is a disparity, but assuming arguendo that there is, why under 1103 wouldn't that be the kind of treatment that you would have to give them the advantage over the Albanian Treaty standard?

PRESIDENT FELICIANO: Mr. Legum, our Secretary has just raised an interesting possibility, that perhaps considering the time it is now and considering the fact that the cafeteria or the restaurant are going to be closing soon, would you rather we have a lunch break now and come back after say an hour or so because if you have a coffee break now, it will take away all appetite

you have for lunch and so on. We can do that if that is convenient.

MR. KIRBY: Perfectly acceptable, and one hour is certainly plenty.

PRESIDENT FELICIANO: I don't think we will go very long after lunch. This is my guess.

MS. LAMM: Right. There's one other area or two after that.

MR. LEGUM: Good. No, it's always good to talk on a full stomach. Thank you. So 1:45?

PRESIDENT FELICIANO: Yes, is that all right? 1:45.

[Whereupon, at 12:45 p.m., the hearing recessed, to reconvene at 1:45 p.m. this same day.]

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

[1:47 p.m.]

PRESIDENT FELICIANO: Mr. Kirby?

MR. KIRBY: Thank you, Mr. Chairman. If I might, in fact, answer the second question first, and the second question was: If one proceeds through Article 1105 to one of these additional Bilateral Investment Treaties, is there a difference, what's the difference, what's the content of the difference? And I think--the reason I'm answering question two first is because I think the answer is there ought not to be a difference, but in any event, what we are talking about in this arbitration is fair and equitable treatment and the content of that concept of fair and equitable treatment. Whether it's reached through 1105 directly or indirectly through 1105(2) and (3), our destination is fair and equitable treatment.

Now, to try to pour content into fair and equitable treatment, we won't attempt to do it in the abstract but, rather, refer to the specific

instances of unfair and unequitable treatment in respect of this particular arbitration.

Just as a prefatory matter, I'll recall the--and it's set out in the Investor's Memorial, the history of the legislation from the highest level of Congress down through regulations and policies as administered by the Federal Highway.

We think that on that somewhat tortured road that the U.S. Government failed in its obligation to provide us with fair and equitable treatment in a number of ways.

Firstly--and this is a bird's-eye view of what happened--Congress passes legislation which is admittedly highly protectionist, designed to be highly protectionist, and of an extremely broad scope--steel, iron, and manufactured products, 100 percent U.S. origin.

[Pause.]

MR. KIRBY: In fact, the reason I looked it up is because I thought I had misstated and I had, in fact, misstated. Congress didn't require

100 percent U.S. origin. They stated steel, iron, and manufactured products must be produced in the United States.

As we work our way down into the regulations, that litany of steel, iron, and manufactured products is allowed to become steel materials--steel or iron materials, and in another portion of the regulation, it becomes materials and products, including steel and iron materials.

So, clearly, from a language consistency perspective, we're already into a fairly slippery slope in terms of what Congress wanted and what the regulations said, and then when you finally get the application of this law on the ground, you have no manufactured products. You have steel and iron. And you have a rule that every single activity conducted on that steel and iron is 100 percent.

What you have in fact is now you have the administrative officials who have delegated authority to apply the law actually writing law. They're the ones that are creating the legal

standard, and that legal standard is not what obviously appears from the governing statute. So you have the sense of arbitrariness in terms of what the final product looks like after Congress has passed its legislation. We think the Congress had a duty that it owed to investors to ensure that their laws were not applied in an arbitrary fashion, and we believe that the application of the laws in the present case were arbitrary. Basically all decisionmaking authority was not delegated in an official sense, was allowed to flow down into the hands of the administrative officials.

We have an issue--I'm sorry.

MS. LAMM: So I just want to make sure I understand it. This 1983, I think it is, regulation that was promulgated beyond the scope, as you contend, of the enabling statute was, therefore, devoid of congressional authority. Under a domestic, you know, Administrative Procedure Act one might be able to attack that. Are you saying that a fair and equitable treatment

concept would be analogous to that kind of an approach?

MR. KIRBY: That's right. There's a sense--but the arbitrary claim is not simply--it doesn't stop at the regulation. It stops--

MS. LAMM: It doesn't stop with the--

MR. KIRBY: When the administrative officials took that regulation even at the level of the administrative official--

MS. LAMM: Right, right.

MR. KIRBY: --the application was totally different than what the regulation says--

MS. LAMM: That there was no power to do what they did. They went beyond the scope of the congressional authority that you would say was deficient to begin with.

MR. KIRBY: The congressional authority--no, I'm not criticizing or challenging the authority of Congress to pass laws. They can pass laws. What I'm saying is that once they have passed laws, they have an ongoing duty to ensure

that those laws are applied in a manner in which Congress has indicated its intent, and not to allow the law-making function to float down to administrative officials.

MS. LAMM: And you think that a NAFTA claim can reach that even though it pre-dates NAFTA by decades--

MR. KIRBY: Because--

MS. LAMM: --because the U.S. should have brought their reg into compliance at the time NAFTA was--

MR. KIRBY: I'm not suggesting that you reach back into 1982. What I'm saying is we have an ongoing violation, and there is an ongoing duty on the part of Congress to rectify and not to leave that arbitrary application of the laws in the hands of the administrative officials at Federal Highway.

Federal Highway officials report regularly to Congress on what they're doing, and I don't think there's any issue did Congress know. Congress certainly can be presumed to know.

We have an issue with transparency, and transparency is set out as one of the goals of NAFTA and one of its objects and purpose in Article--I believe it's 102 of NAFTA. And I'll read--it's Article 102(1), "The objectives of this agreement, as elaborated more specifically through its principles and rules, including national treatment, most favored nation treatment, and transparency, are to"--and then there's a series of objects and purpose. So, clearly, the issue of transparency is raised to a fairly high level alongside national treatment and most favored nation treatment under NAFTA.

Now, my friends undoubtedly will tell that Mr. Justice Tysoe in the British Columbia Superior Court, sitting in appeal from the Metalclad decision, stated that transparency was not one of the objects and purposes of NAFTA. It was simply one of the tools through which NAFTA achieves its objects and purpose.

We're saying that, nonetheless, you know,

through the concept of fairness and equity, transparency of laws is a fairly fundamental concept that the person affected by laws can know precisely what he needs to do in order to bring himself within those laws.

Again, my friends will say ADF should not have had a problem with transparency, it knew exactly what it needed to do to bring itself within the law. It needed to provide 100 percent Canadian--U.S. content, and there is no issue of transparency. I suggest that the issue of transparency is not--is the violative administrative policies which are questionable in terms of are they truly an interpret--are they truly the application of congressional intent.

The fact that the rule might be transparent in an absolute sense in the way that 100 percent domestic content is transparent, we know what that rule is. But when that rule doesn't reflect what is in the statute, an issue of transparency arises.

There's also an issue of transparency in the way the contractual provisions have been drafted, and we looked at Special Provision 102C, and Ms. Lamm asked if, for example, if 102C--did ADF have a problem or did they notify their intent to fabricate in Canada, and we had this debate about why, after seeing 102C, ADF was nevertheless of the opinion that it could fabricate in Canada. 102C of the contract provision...

MS. LAMM: Are you in the Memorial? Page 4.

MR. KIRBY: Sorry. I thought I would at least have done things chronologically, but I guess not. Thank you. Which states steel products in one paragraph requires them to be produced in the United States, and then clarifies by saying that that means all manufacturing processes where raw material is changed, and because of that process is different from the original material, which, again, is non-transparent. There seems to be a sense of absolutism in the provision, but in no way can it

be said to either tell ADF clearly what its requirements are under the law, because it's, in fact, not an interpretation of the law but an interpretation or an application of what is the administrative policy. It also doesn't accurately reflect the administrative policy, which is 100 percent U.S. origin.

MS. LAMM: I'm sorry. Which sentence are you referring to in this?

MR. KIRBY: The first paragraph, 102.05 states, "Except as otherwise specified, all...steel products...shall be produced in the United States..." and then, "`Produced in the United States' means all manufacturing processes whereby a raw material...is changed, altered or transformed into an item or product which, because of the process, is different from the original material..." That must occur in the United States.

The issue here is: Does that sufficiently give notice that fabrication of steel, which is, in fact, cutting, punching, welding, and not creating

a manufactured product, does that give sufficient notice as to what ADF needs to do in order to bring itself within the four corners of that particular provision? We would suggest that it does not.

I think we've already--I'm sorry, Mr. Chairman.

PRESIDENT FELICIANO: I'm sorry to interrupt you. I'm having great difficulty appreciating your argument, Mr. Kirby. Firstly, you heard me suggest earlier, when I really wanted you to address it, you have this doctrine or rule that says that municipal law is a question of fact that must be proved to a Tribunal.

Now, what I understand you to be saying is that the U.S. law on this matter purports to have been stated by the Federal Highway Administration in the rules and regulations adopted by them. Are you questioning the status of those regulations issued by the Federal Highway's administrator as law of the United States?

MR. KIRBY: No. It clearly is law of the

United States. However, when it finds its way down into the policies of the administrative officials, it's not entitled--the policies as stated by the administrative officials is not entitled to the same deferential treatment.

PRESIDENT FELICIANO: It's not a question of deferential treatment. It's a question of--

MR. KIRBY: Of an absolute prohibition of going behind it.

PRESIDENT FELICIANO: I mean, it either is or is not the law of the United States as far as the Tribunal is concerned. That is a question of fact to be proven.

MR. KIRBY: Perhaps you missed the distinction I was trying to draw between the regulation on the books and the administrative policy printed and applied by the Federal Highways, and there is--

PRESIDENT FELICIANO: Well, that tells me that you're questioning the correctness of the regulations issued. You're saying that the

regulators have acted ultra vires. But that's--we can't pass on--

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

that administrative act--not a regulatory act, an administrative act, whether that administrative act is, in fact, an exercise of any statutory authority.

MS. LAMM: So as I understand it, your contention would be that fair and equitable treatment at an international level would encompass basically what an APA review would encompass at a domestic level, and that is, an action not in compliance with the law by an administrative official, because the law does not permit them to exclude all manufacturing processes, and so it's beyond the scope of the enabling statute.

MR. KIRBY: I understand your reluctance and your quite justified reluctance in seeking to determine the precise meaning of the municipal statute. However, the question is: Can one arrive at the point of testing the validity of an administrative act done in purported compliance with the law without at the same time casting an eye on what that law purportedly authorizes

administrative officials to do.

I would suggest that, of course, this panel has the authority to look at that administrative act, and if the defense to the act is I was simply acting under my statutory authority to act, I think you're entitled to look at what the scope of that statutory authority was. That's what brings in--there's an additional aspect which I mentioned earlier, and I don't want to lose that from it, the duty of Congress to ensure that its laws are properly administered and applied.

As I said earlier, Federal Highway goes back to Congress every year and reports on what it's doing. And I don't think my friends would deny that Congress knew exactly what was happening with its statute. And I think--

PRESIDENT FELICIANO: Mr. Kirby, you have me puzzled still. The duty of Congress that you refer to, is that a duty owed under international law, under NAFTA? Or is that a duty, a political duty owed by Congress under the Constitution of the

United States to its people?

MR. KIRBY: Within the context of fair and equitable treatment, owed by the United States to the investors of Canada, it's a duty on the Government of the United States to ensure that its laws are properly applied to investors of Canada, within the concept of fair and equitable treatment.

PRESIDENT FELICIANO: Ordinarily, one would speak of the duty of a state party to a treaty to make sure that the laws are in compliance with the requirements of the treaty and to implement the treaty. That's all.

And I'm still grappling with the problem of exactly where does transparency come in here and how has the ADF been denied fair and equitable treatment in respect of transparency as a standard.

MR. KIRBY: Transparency requires that a person affected by a particular regulation, law, policy, practice can look at that collection of instruments that is affecting him and know precisely what it is he needs to do to bring

himself within the law.

PRESIDENT FELICIANO: Do you know what that reminds me of? The doctrine of unconstitutional vagueness. Is that what you're referring to, Mr. Kirby?

MR. KIRBY: I don't think that I'm saying that this is unconstitutionally vague. What I'm saying is--what I'm trying to get at is that a reasonable actor in the steel fabrication business would look at the law, the regulation, the policy as it's applied and would say I don't know what it is that I need to do to bring myself within that framework.

Now, my friends would say of course you know; you simply provide 100 percent U.S.-origin steel. That's basically saying what you need to do is to comply with the last act in the chain. The last act in the chain, we contend, is faulty. That's the administrative policy.

That's not sufficient because our actor is not looking only at the last act in the chain. Our

actor is looking at globally the entire chain. And when he looks at that entire chain, what he sees is a very, very difficult beast to conceptualize, and he is left with either believe what the lowest official tells me and that's it, or believe that that lower official must surely recognize that what he's doing is so different to what the statute requires that we challenge him or we do something else. But the bottom line is when, for example, our actor, ADF, went to fulfill its contractual requirements, it believed at the time it could do so by fabricating the steel in Canada and looked at the provision and thought it could, was confirmed in that interpretation when it went through the statutory history and saw that the regulators, in fact, had completely removed manufactured products and were not talking about steel.

It's quite a reasonable interpretation of the entire package, the entire chain, to say we know that this legislation was enacted for steel mill protection. We don't know that it was enacted

for steel fabricator protection. We know that when you talk about steel, all steel must be U.S. origin, our investor had mill certificates which said that its steel was U.S.-origin steel. So all steel must be of U.S. origin, I qualify. But, no, he doesn't qualify. He doesn't qualify because as you move down the chain, the rules become more and more complicated. That's the lack of transparency. And it's not a defense to that lack of transparency to say all you had to do was to follow the last line, the last actor. You had to follow the instructions of the administrative official. That's not a defense to the absence of transparency because that assumes that we simply do what we're told each and every time by an administrative official without referring ever to his statutory authority for acting.

The consequence, I think we discussed it earlier in terms of the very easy regulatory device of taking out manufactured products, and thereby absolving yourself of the obligation to enact rules

to try and deal with the beast--let me go back again.

We've heard a number of times about the difference between the Buy American type rules and the Buy America rules, that the Buy America rules are 100 percent origin, the Buy American rules are different rules of origin based on percentage content and generally will affect products rather than the output of steel mills.

Here we have a mixed--at its conception, a mixed beast of steel--it's pretty easy to tell the origin of steel; iron--it's pretty easy to tell the origin of iron; and manufactured products--it's very difficult to tell the origin of manufactured products. That's what Congress wanted. That's what Congress said it wanted.

So now the choice is we either enact rules to deal with that or we take away the need for rules by taking away manufactured products, and make sure that we stretch the steel to cover steel manufactured products. I believe that that was the

intention.

The way the law was applied--once again, not challenging that that was the way it was done. That's what the regulations say. But the way it was done has an impact on ADF in that ADF doesn't get the benefit of what traditionally had been a benefit in respect of manufactured products. That is a rule of origin other than 100 percent content.

PRESIDENT FELICIANO: You seem to be complaining that the rules changed. That's what it comes down to, isn't it?

MR. KIRBY: No. What I'm--the rules did change, and we don't like it. The change in those rules had a direct impact on us in that we were denied the benefit of a rule of origin in respect of manufactured products. Or because you can well say--they could still have passed it as a rule of origin--as a 100 percent content rule. Theoretically, Congress could have said all manufactured products as well, 100 percent content. Theoretically.

I would put forward the proposition that if that were to happen, there would be no way to apply that statute--this particular statute across the board without--for a period of 20 years, I might add, without significant pressure to either adopt the rule of origin, change the law, do something. What the regulators did was basically avoid that pressure building up by saying we won't apply the statute as drafted, we'll simply apply the statute to steel manufactured products but not others.

You wish to ask a question?

MS. LAMM: Well, I'm just wondering, is your complaint--or doesn't your complaint have to be under Chapter Eleven not this promulgation of a statute and the regulation and the application up until NAFTA, but really the application post-NAFTA to your client? How can it be anything more than that? Pre-NAFTA there was nothing wrong with it in terms of--that you could make any claim about under Chapter Eleven. Was there?

MR. KIRBY: No, in the sense of Chapter Eleven doesn't reach back into history and correct past wrong.

MS. LAMM: Right. So what you have to do is say looking at the passage of NAFTA, that, according to your contention, would have become non-conforming, a non-conforming measure, and when it was then applied to your client, that's got to be the act that's not fair and equitable treatment. Doesn't it? I mean, I'm just trying--

MR. KIRBY: What happens after NAFTA is enacted is that we have a requirement to bring laws into conformity.

MS. LAMM: Right.

MR. KIRBY: And some laws are seen to be non-conforming one day and eventually the laws come into conformity.

If the claim is cast in terms of the refusal...I was going to say inability. No, there was certainly an ability to bring it in--a refusal to bring the practice into conformity, that starts

from January 1--from whenever, in fact, the impact happened. We're dealing with the impact of these measures at a particular point in time. Now, those measures did not get grandfathered. The impact happens because of a series of circumstances which happened in the past. The regulations were passed prior to NAFTA. The law was passed prior to NAFTA. And the administrative policy was developed in many respects prior to NAFTA.

The impact of all of those transgressions was felt by the investor at the time the contract was let.

MS. LAMM: It's got to be that because they couldn't have been transgressions before NAFTA. There was nothing that would have said--

MR. KIRBY: They weren't transgressions under NAFTA before NAFTA.

MS. LAMM: Right, right.

MR. KIRBY: Of course.

MS. LAMM: So we've got to focus on at the time the contract was let, the application of these

things to your investor.

MR. KIRBY: That is, I would suggest, absolutely, all you should be focusing on.

MS. LAMM: Right.

MR. KIRBY: It's the application of these measures, however they may have developed, but it's the application of these measures at a particular point in time. I don't think, however, that these measures were grandfathered by the passage of NAFTA and the passage of time.

PRESIDENT FELICIANO: Is it your suggestion, Mr. Kirby, that the failure of the NAFTA party to remove or suspend or withdraw nonconforming legislation and nonconforming regulations, from starting from the date of activity of NAFTA, or a violation of the standard of treatment, fair and equitable treatment under 1501--not--1105.

MR. KIRBY: That's a very good question. I'm not certain that I would say that any failure by a state party to correct a violation, because it

happens all the time that state parties are found to be in violation, sometimes under treaties that were enacted 20 years ago or 30 years ago.

Professor de Mestral mentioned the DeFira case yesterday. That's a very good example of a continuing violation. It was noticed much later in the day, okay. So as a general principle one cannot say that a state's failure to correct deficiencies in respect of the treaty or to correct all nonconforming measures is in and of itself a violation of the obligation to give fair and equitable treatment, because we're not saying that.

However, I think it can be quite plausibly argued that in the present instance, given the context that--and we've seen the legislation to Treaty Chapter Ten and Chapter Eleven--given the following context that there is an issue about not correcting the nonconforming measure, the context is as follows. The Federal Government negotiates procurement obligations and promises to eliminate Buy America preferences in its own procurement.

And at the same time, the state governments take on no obligations. We've seen the fact that--now we've seen the U.S. argument as to why we think that that measure is conforming, and that requires one to consider that an element of the program is procurement while the rest of the program is not, at the time all the administrative officials were describing this as a grant program. At the time the Clean Water Act was exempted under NAFTA, I think the failure to move on and deal with the federal highway program may well be a demonstration that in those circumstances, there may have been a lack of fairness.

But failure to correct nonconforming measures as a matter of principle on the record, no, that as a matter of principle is not a failure to afford fair treatment.

MS. LAMM: Is there anything else that you contend constitutes the violation of a fair and equitable treatment standard or denial of justice or full protection and full security?

MR. KIRBY: Okay. The denial of justice and--this isn't a denial of justice case. This case is based squarely on fair and equitable treatment. When you ask such a question I hesitate about going on the record to say that there is nothing else. What I will say is with the exception of what we have set out in our written materials and with the exception of what I've discussed today and in the previous days, there is nothing else on the record.

Thank you, Mr. Chairman.

MS. LAMM: Do you have any comments on both the standard, the substantive difference between the MFN standard, so to speak, and the 1106--1105 standard, I'm sorry--and then anything else that he said about what constitutes the violation?

MR. LEGUM: Sure. What I heard from Mr. Kirby was that he's not contending that there is a difference between the BIT standard in Article 1105(1), and we would agree with that. So there's

no dispute among the parties on that particular topic. On the topic of ADF's claims under Article 1105 of a denial of fair and equitable treatment, I must say that I'm a bit confused as to what it is exactly that I am responding to, since we did hear a number of different contentions, some of which seemed to have been withdrawn at various points, and therefore we'll perhaps touch upon topics that are no longer live topics, as it were.

But I'd like to start with the time bar issue. Clearly any assertion based on the process by which the FHWA promulgated its regulations in 1983 is time barred. It's not--it can't be a violation of the NAFTA. The NAFTA did not--it was not in effect at the time, and therefore there could be no breach of a NAFTA obligation with respect to what happened long before the treaty was even dreamed of.

Now, at one point I had the impression that Mr. Kirby was asserting that there was some kind of ongoing violation as a result of Congress's

failure to tell the FHWA to change its regulation, but later on in the discussion I had the impression that that was withdrawn so I'm not sure exactly where the record stands. I guess we'll read the transcript after the day is over and get a better idea then. But for the sake of good order, I will nonetheless respond to that.

First of all, there is no international administrative procedure act. The community of states is a varied community, composed of monarchies, democracies, dictatorships and a wide variety of other forms of state. There is no international consensus as to any one proper way of enacting or promulgating a law of general application. It is not a viable claim under international law that a monarch has, without consulting with anyone, promulgated a law, or that democracy has, as was done here, promulgated its law in accordance with notice and comment procedures. So there is no international administrative procedure act.

What's more, it is well recognized in public international law that the acts of a state in its municipal law system are entitled to a presumption of regularity. It is presumed that governmental action, such as the regulations that we're talking about here, are regular under municipal law unless that is conclusively demonstrated to the contrary. We would submit that we have absolutely nothing in the record here to suggest that there is anything whatsoever wrong with the regulations promulgated by the FHWA in 1983 under U.S. Law. And in fact, what Mr. Kirby noted was that the FHWA reported regularly to Congress on what it was doing in these regulations, and Congress did nothing.

Now, if anything, that to me suggests that Congress did nothing because it thought that the FHWA's regulations were in full accord with its intent in enacting the 1982 act. But again, we're talking about things that occurred in 1982 and 1983. Those could not, by definition, be a

violation of the NAFTA.

On the subject of transparency, well, of course the NAFTA does deal with transparency. There's a chapter in the NAFTA on transparency. It is Chapter Eighteen. A violation of that chapter, however, which does set forth a number of conventional obligations with respect to transparency, cannot be a violation of Article 1105(1). And if we could have on the screen subparagraph (3) of Part B of the FTC interpretation.

Subparagraph (b) reads: "A breach of another provision of the NAFTA or of a separate international agreement does not establish that there has been a breach of Article 1105(1)."

So it's certainly true that one of the objectives of the NAFTA is transparency, and there are specific provisions in the NAFTA to achieve that objective, but even if ADF could show that there had been a breach of that chapter, that could not be a violation of Article 1105(1).

What's more--and again, I reiterate that there has not been anything remotely approaching a showing of any defect in the procedure adopted by the FHWA in implementing the regulations.

Do you have a question?

MS. LAMM: In your view, is transparency a component of fair and equitable treatment?

MR. LEGUM: No. No, as I said before, there is no international consensus as to whether a state must engage in a notice in common procedure before publishing its regulations--I should perhaps be less equivocal. Certainly the allegations of a lack of transparency that we've heard here could not rise to a violation of customary international law.

Now, let's focus a little bit on what ADF alleges to be a lack of transparency, because I think that is of some importance to the issues before the Tribunal. What ADF pointed the Tribunal to was Section 102C of the main contract. That's the violation, according to ADF, of demonstrating a

lack of transparency. That's the provision that ADF claims it misread.

Two points on that. First of all, this is a provision in a procurement contract. Again, what we're talking about in this case is procurement. It is not anything else. Second point. The FHWA's regulation is a regulation that tells the states and the officials of the Federal Government, when the Federal Government will make funding available to the states. So if there were any lack of transparency, it would be of concern to those parties because those are the parties that deal with that particular regulation. What we're talking about here is a contractual provision. Section 102C is in the contract between Shirley and VDOT and that was incorporated into the subcontract between ADF and Shirley.

If ADF is right and Section 102C, as ADF viewed the contract, permitted it to supply Canadian produced steel to the project, then it would have a contract claim. It would have a

contract claim against Shirley because ADF could contend it did comply with the plain terms of the contract. And Shirley could then, should it want to, assert a claim against VDOT under the main contract, but of course Shirley waived all of its claims against VDOT under the main contract when it accepted the $10 million incentive bonus. So there is no question of a contractual claim here.

In sum, there is not the remotest evidence of any violation of Article 1105(1) in this case, and unless the Tribunal has any further questions, I will be quiet.

PRESIDENT FELICIANO: I wanted to make one final comment on transparency. Chapter Eighteen deals with publication, notification, administration of laws. Normally, you know, general information as to government legislation, regulation, measures of government. But I think you are using it in a somewhat different sense. You are using it in a due process sense, in the same sense that retroactive application of a penal

law, for instance to catch people who could not have possibly known about the requirements of a statute are penalized. But in my vocabulary, that's not generally covered by transparency. It may be a violation of fairness that's retroactivity, a retroactive application of a particular governmental measure, but it take it you are not making that argument here.

MR. KIRBY: Yes, of course there is a provision on what might be called--it's almost a guarantee of access to official documents, official records, and let's see what's on the books, and that's what Chapter Eighteen, and that's in part what caused Mr. Justice Tysoe an issue. When he was interpreting objects and purpose of the NAFTA, and he had trouble with the notion that transparency in and of itself was an object and purpose of NAFTA. He thought it wasn't an object and purpose in and of itself, but rather it was a tool by which we achieve the objects and purposes of NAFTA. And I'm suggesting--I refer to the fact

that it's mentioned in the same provision as national treatment and most favored nation treatment as an extremely important tool, and I don't think that its entire scope is described in Chapter Eleven because Chapter Eleven is simply one transparency aspect.

If I understood my friend correctly when he said one--he may have corrected himself, but he said transparency was not within fairness and equitable treatment. I would disagree with that. But using that argument, it's not in fair and equitable treatment--using that argument, and then saying a breach of another provision of NAFTA, i.e., a breach of Chapter Eleven will not in and of itself establish a breach of Article 1105. I don't think he was going so far to say that we cannot establish a breach of 1105 by demonstrating a lack of fairness and equity. We're contending that transparency is a requirement of fairness and it's a requirement of equity, that in order to fairly treat, in this case investors, one must be--the

rules of the game must be transparent, that is, readily discernible, readily understood, so that somebody may know what standard he needs to achieve.

If the provision in the interpretative note, which says that a breach of another provision does not establish a breach of 1105 mean that we cannot raise the transparency claim at all, because transparency is dealt with in Chapter Eighteen, therefore we pull transparency out of fairness and equity. Why? Because the interpretive note says a breach of one provision. That would mean that a good defense to any alleged breach of Article 1105 is that NAFTA deals with it somewhere else and it's a breach of some other provision of NAFTA. I don't think that's what the note says. I don't think it says if you breach any other provision, that automatically eliminates your right to claim a breach of 1105. I think what it says is that you cannot prove a breach of 1105 simply by proving a breach of some other provision of NAFTA. I think

that's the most that it says.

That leaves us with the question, we're not relying on a breach of Chapter Eleven--Eighteen--for the record, we are relying on a breach of Chapter Eleven. We're not relying on a breach of the transparency obligations in NAFTA. We're saying transparency is an integral part of fair and equitable treatment, long recognized. An actor must know what the rules of the game are, and in this particular case, ADF was not given that sort of transparent clear treatment of what the rules of the game were. That's our transparency claim.

MS. LAMM: Just a few more on this and then we'll be finished I think. So as I understand your response on the question that I left you with before lunch, it's really a distinction without a difference in comparing the minimum standard now under the FTC Note for 1105, and any that they would be entitled to under 1103 if they referred to the Albanian BIT, for instance. Your view is they

are essentially the same in terms of substance?

MR. LEGUM: That's correct. And if I could just illustrate this with a slide, if you could show the next one.

What you have at the top of the screen is the statement from the Canadian statement of implementation published on the day that the NAFTA went into effect in 1994, and that says: "Article 1105 provides for a minimum absolute standard of treatment based on longstanding principles of customary international law."

What you have at the bottom is the State Department letter of submittal to the United States Senate for the Albanian-U.S. BIT, which states--the paragraph in question that says "fair and equitable treatment", et cetera, sets out a minimum standard of treatment based on standards found in customary international law.

Now, of course, it's not a coincidence that the statement of the Canadian Government and the statement of the United States Government

concerning these two different treaty provisions are so similar is because the two different treaty provisions do the same thing.

MS. LAMM: Thank you very much. We have one other question that I still have a note of, and there may well be others from other Members of the Tribunal. And that is, we understand why there is the exception taken for the Clean Air Act provision. And the question--and we've seen in other annexes that the U.S. has said, for instance, in Annex IV, basically out of an abundance of caution, we're accepting these things. Why is it, do you know, that the U.S. didn't accept all of these myriad Buy America provisions from the act? Did you think it simply wasn't necessary because of the language of Chapter Eleven, or did you just--

MS. MENAKER: We did not accept the 1982 Buy America Act because it was considered to be government procurement, so it was already exempt by Article 1108. There was no need for a specific exemption.

Now, the Clean Water Act is clearly different because that act, some of it would be procurement by a party, but as we demonstrated over the past few days, that act, as quoted in the reservation, provides that grant recipients may be privately-owned enterprises. In that case that would not be government procurement and would not already be exempt by the express provisions in the treaty. So an extra reservation was necessary for that.

MS. LAMM: Okay, thank you.

PROFESSOR de MESTRAL: We have had some discussion of this point already I think from both sides. But it is an issue of some principle, and going both to NAFTA and perhaps the ICSID Special Facility Rules, so that I come back to it again. That is the issue of the admissibility of the claim under 1103. I think you've taken the position that since the claim was not set out in the original notice, it is not admissible at this point. Now, there are provisions, for instance, in the ICSID

Special Facility Rules for a certain degree of exercise of discretion.

So that at least on that matter is it your view that because of NAFTA there is no such discretion in this Tribunal to receive additional claims, or that claims so entered closely related as national treatment and MFN treatment cannot be raised during the course of a hearing, or are you doing this because there has not been a formal statement by way of a written, an additional written procedure, making the 1103 claim? So I just ask you to review again for the record your position on that and I think it might be useful to hear, Mr. Kirby, as to why he considers an 1103 claim would be admissible?

MR. KIRBY: If you could give me just one moment, please?

[Counsel conferring.]

MR. LEGUM: If I may respond, our argument is that the NAFTA does provide for express procedures that an investor must comply with before

a claim can be submitted to Chapter Eleven arbitration. I think we have demonstrated quite conclusively that ADF has not complied with those procedures, and therefore it has not submitted those claims to arbitration in accordance with the procedures set out in this agreement, which is a pre-condition to consent of the state party to the arbitration.

Of course, Article 48 does contemplate, as a general proposition in ICSID Additional Facility claims, that a party may present an additional claim, but only provided that it is within the scope of the arbitration agreement of the parties. That is not the case here.

PROFESSOR de MESTRAL: May I ask, then, how you interpret the concept that the scope of the Article 48 speaks, within the scope, what is implied by that concept of the scope of the proceeding?

MR. LEGUM: Well, I think to determine the scope of any arbitration agreement, you have to

look at the arbitration agreement, which here is set forth or reflected in the NAFTA, and the NAFTA, as I have said before, requires that a claim comply with certain procedural conditions before it may be submitted to arbitration.

ADF has complied with those conditions with respect to its other claims, claims other than Article 1103 and also other than those additional contracts, and therefore the United States has consented to the submission of those claims to arbitration. It has not complied with that with respect to its Article 1103 claim.

PRESIDENT FELICIANO: Mr. Legum, supposing--I am not suggesting it would happen necessarily--supposing a motion for leave to file an amendment of the notice to submit claim to arbitration were filed and then include the amendment consisting of including 1103 among the list of articles and with whatever appropriate, what do you think about that? Is that something that the United States Government would consent to,

agree to or not?

We are aware of the statement of the Tribunal in the Ethyl Corporation case and also we are aware that under the procedural rules of the Federal Court of Civil Procedure and under, and I believe the same thing under D.C. Rules, that amendments to pleadings are normally very liberally granted, received as a matter of course, provided, of course, that the other side is always given an opportunity to respond and due process is observed.

I am just raising it as a possible point.

MR. LEGUM: Let me respond, briefly, and then Mr. Clodfelter has the remarks that he would like to make. Of course, what we are talking about here is the arbitration agreement pursuant to which this Tribunal sits. And, of course, this Tribunal has no authority to expand the scope of the arbitration agreement between the parties. So, therefore, a motion to amend would, as a purely legal matter, not be anything that could cure the defect that we are facing here. And on that I will

let Mr. Clodfelter make some remarks.

[Pause.]

MR. CLODFELTER: I apologize, Mr. President, for that delay in answering.

We don't think you need to speculate upon whether there are circumstances in which you could entertain such a request for an amendment. We don't think any circumstances justifying granting such a request could possibly be seen to exist in this case.

We think it is very important for the orderliness of such proceedings, and not just this case, but future cases that will look back on how this and other early cases are handled, that claimants not be rewarded for their own insufficient preparations and claims.

What reasons are given for this delay here? Article 1103 has been the NAFTA as long as Article 1102 has been. No excuse has been offered for failing to raise this claim in a timely manner. Was it done promptly? Was it done within days of

the Notice of Intent? It was not. Was it done in even their Memorial? It was not. It was not until their reply to the Counter-Memorial. Such excessive delay could not, in any regime of arbitration, I think justify adding the claim.

We don't think that Ethyl supports this notion in any case. In the Ethyl case, you will recall it was a question of whether or not the claim could be maintained because the statute wasn't formally enacted until shortly after the Notice of Intent. We don't have any situation like that at all.

We would think that it is a clear case that no such amendment should be considered in this case, and we would just ask that you not even entertain the possibility.

MS. LAMM: As I understand it, the contention is that under 1122(1), this is a function of consent. Unless there is strict compliance with the terms of the agreement which would require under 1119 a 90-day notice, and then

under 1120, first, a submission of a claim that it simply can't be done, and even--there really isn't any other provision that would permit an amendment of this.

MR. CLODFELTER: Clearly, the requirement for inclusion of identification of articles that claim to be violated and the facts supporting them in the Notice of Intent is a procedure of NAFTA, and those procedures have to be complied with in order for the United States to have been deemed to have consented to arbitration. So we think they are clearly jurisdictional.

MS. LAMM: All right. Mr. Kirby, do you--

MR. KIRBY: Very briefly. Members of the panel, we don't look at Article 1119 as a jurisdictional provision. We think that it is closely linked to basically what amounts to a cooling-off period in the arbitration. Article 1118 and Article 1119 really need to be read together. What normally happens in practice is there is a Notice of Claim filed under Notice of

Intent filed under Article 1119, and then the parties are obliged, first, to attempt to settle a claim through consultation or negotiation in Article 1118, and then Article 1120 you submit the claim to arbitration.

Now, to read Article 1119, and I think the Ethyl and the Pope & Talbot cases both stand for the proposition that Article 19 is not jurisdictional, it is an element that is not critical to giving jurisdiction to the Tribunal, it's there merely to ensure that there is a time for the parties to cool off and to negotiate, and that time to negotiate is 90 days before the claim is submitted. That's in order to give the parties time to actually talk about what their difficulties are, and we took advantage of that 90-day period to talk to the representatives of the United States.

Only then can you actually submit a claim to arbitration, and that is under 1120--1120, then, now you've got the arbitration started, because the arbitration doesn't start until you submit the

claim to arbitration. The arbitration then starts under the, here, the Additional Facility Rules.

Article 1122 states that the applicable arbitration rules, the additional facility rules, will govern, except to the extent as modified by this section. That gives us the right to go into the additional facility rules.

There isn't a modification--Chapter Twenty, although it tries to reach a Code of Procedure, it's not a Code of Procedure. What it is is a very basic, bare bones, we'll give you three sets of arbitration rules, and we'll have some very limited notion of how you get to arbitration. We'll provide for the consent of the party.

Now you pick your rules and now you work the arbitration under those rules, and Article 48 of the arbitration rules clearly says that, providing it's within the scope of the agreement to arbitrate, we read the scope of the agreement to arbitrate being Chapter Eleven, what the are the--what the

United States has agreed to arbitrate is claims arising out of Chapter Eleven. Those claims that arise out of Chapter Eleven, there was, in fact, two additional claims that can arise out of Chapter Fifteen. They are not at issue here, but that is the scope of the agreement to arbitrate.

Are we within the scope? Yes, we are. And in any event, Article 34 states that a party ought to have known that a provision of the rules, 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 the right to object.

So we have the right to add ancillary claims providing they are within the scope of the agreement to arbitrate. I believe that the United States has given its consent to arbitrate Chapter Eleven claims. Article 1119 is not something that goes to jurisdiction, and therefore I believe that we are well within our rights to make that

ancillary claim, given it's within the scope, and that in any event, if we weren't, the U.S. has now foreclosed because the U.S. has deemed to waive its right to object.

[Counsel conferring.]

MR. KIRBY: I'm sorry. My friend reminds me, the particular circumstances in this case is that the notion of 1103, in respect of 1105, didn't even come into play until the FTC issued its ruling, rather, its interpretative notes, which was I seem to recall it being the day we filed, but everything seems to get accordioned, gets squeezed in time.

If it wasn't the day we filed our Memorial, it was the day before we filed our Memorial. I remember it came as quite a shock, but certainly we reacted to it in what we consider was an appropriate amount of time given that we were faced with a state act by one of the arbitration parties in this dispute, which seemed to say on its face that we are now issuing a ruling that is

binding on the party and foreclosing other avenues of approach. So we identified the possibility of making a claim under 1103 as reasonably quickly as we could, and mentioned it for the first time in our--we mentioned the possibility in our Memorial.

My friend will fill in some additional details.

MR. CADIEUX: We had mentioned it in the Memorial as not as a possibility that we would raise it, just by saying that if you read 1105 restrictively it would be self-defeating because then we could always move forward to 1103. And when we received the Free Trade Commission notes, then we felt, well, the situation now has arisen where we can move on to an 1103 claim, and parenthetically we don't see the Albanian BITs as giving the same standard as 1105. Because even though they may be based on customary international law, they are not customary international law. They are treaty standards.

So that is why we, at the time of our

reply, that's when we made the formal submission. We couldn't before because we believed that there was no 1103 claim possible. So the United States says we should have raised it in the notice two years ago in front of factual events which we did not control and could not be aware of.

MS. LAMM: I think what the U.S. is saying is that you would have to file a separate proceeding because you would actually have to give them, under 1119, the notice with the 90 days in it, and those 90 days may not just be window dressings. Sovereigns usually have some amount of time to deal with things that is not meaningless. They may have negotiated with you, for instance, to treat those things the same as whatever the award in this does with this claim and not have the burden of defending all of those things.

You know, there could be any number of things that would happen in this 90-day period, and I think what they are objecting to is not having what the treaty affords them, this 90 days to

consider with you how they might act.

MR. KIRBY: If I could just address that in terms of the importance of the 90 days, and I agree the consultation period between the parties is important, and during that period this party, the United States party, was well aware of all of the implications and what the actual fundamentals of the claim for it was. There is no suggestion that with the--the use of Article 1103 is not to introduce something that is particularly new or novel, it's simply to say, listen, if you've given minimum standard of treatment protection to other investors, we have the right to it.

Mr. Legum, in fact, and I don't think I misheard him, but he said he doesn't see any substantive difference between the 1105 in the Albanian BIT and the 1105 in NAFTA, the equivalent of Section 1105 in the Albanian BIT. He doesn't see a substantive difference.

That is interesting because in the Albanian BIT, the language sets a, in any event,

not less than full and equitable treatment, a fair and equitable treatment. So, to complain about a new claim which somehow causes difficulty, when, in fact, that new claim leads to a destination, that is no different than the destination taken under the first claim, that is, 1105. There is clearly no prejudice because if the two provisions are the same, then a violation of one will be a violation of the other.

The corollary of that is that if the two provisions, as the U.S. now states, are substantively identical, then I think that that may well be seen as an invitation for this panel to interpret Article 1105 in light of the specific language of the provision in the Albanian BIT.

MS. LAMM: I understand that position and the 1103 issue, but I guess you have got two sets of new claims. One is the addition of 1103, a different substantive claim, and the other is the three contracts. And would you take the same position as to the three contracts?

MR. KIRBY: Our position with respect to the three contracts is that there was adequate notice in--in fact, our original notice of the fact that continued application of the law, regulations, policies, administrative practices, et cetera, would continue to cause us damage and as we went forward.

To adopt the U.S. position in this respect is to do nothing but simply insist that investors become serial litigators, which is not good for investors, it is not good for state parties, it is not good for panels, it is not good for the administration of justice. It serves absolutely no purpose whatsoever. Nothing substantially will change. We are talking about a violative act which is having its impact on contractual situations. The question of what is the impact, what is the damage caused by that act, that's a question for the assessment of damages.

MS. LAMM: And given that we don't have any facts with respect to those three, are we to

assume--if we were going to consider these, are we to assume for those purposes that your allegations with respect to liability are exactly the same as they are for the first contract?

MR. KIRBY: The only difference between the claims in respect of the three bridges will be the steps taken by ADF to complete its contractual obligations in light of the constraints of the Buy America provision. By that I mean--I'm not trying to be--I'm not trying to be smart here. In each case they had to act to complete contractual obligations that called for 100 percent U.S. steel. And I think I've told you that they became better at doing it. In terms of the factual difference that is it. But in terms of how much damage was caused, that will vary. But in terms of what was the cause of the damage--

MS. LAMM: The cause, right.

MR. KIRBY: The cause is identical. It's the application of Buy America rules by essentially Federal Highway through a state to our client.

MS. LAMM: One more question, just back to the U.S., and that's on Article 48. What is your view about the applicability of either Article 48 bringing these in as ancillary claims or the waiver provision, Article 34?

MR. LEGUM: I might start with Article 34. There are several responses to that argument. Let me start with rules-based response.

Article 46 of the ICSID Arbitration Additional Facility Rules, in subparagraph (2) states that, "Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General," et cetera, "or if the objection relates to an ancillary claim, for the filing of the Rejoinder..." So Article 46(2) sets forth a quite specific rule governing these objections. It says if it's an ancillary claim, the respondent has until the Rejoinder to object to it. That's when we object to it.

So simply as a matter of application of the plain terms of the rules, there is no issue

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

As for the suggestion that the fact that the NAFTA parties unanimously interpreted Article 1105 in a manner different from ADF, as we have just heard, as the basis for its excuse for not presenting an Article 1103 claim earlier, if the Tribunal looks at the Memorial, ADF's Memorial, it will see in paragraph 213 on page 52 that ADF was well aware that the NAFTA parties unanimously viewed Article 1105(1) to incorporate--and I'm quoting from paragraph 213 of the Memorial. I'll quote the first sentence of that paragraph.

"At one end of the spectrum, State Parties have claimed that the protection afforded by Article 1105 is nothing more than the minimum standard of treatment in customary international law."

Obviously, at the time that ADF submitted its Memorial, it was well aware that the three NAFTA parties were of that view. And, therefore, we would submit there is no excuse for its delay in presenting an Article 1103 claim, contrary to what

we just heard.

I think that responds to the waiver point and the point on Article 48.

PROFESSOR DE MESTRAL: But you are saying there is no excuse or it cannot be done?

MR. LEGUM: Both, actually.

PROFESSOR DE MESTRAL: That is what I heard.

MS. LAMM: I have one more that's wholly unrelated. I see on page 8 of the Investor's Reply there's a quote--it's the last quote on the page, and it refers to the United States' Counter-Memorial at page 23. I haven't been able to find it on that page, but I'm sure it's probably just a typo. Maybe it's in there someplace. But it says, "ADF is quite correct that the federal-aid highway program provides for funding and other assistance that cannot be considered procurement under Article 1001(5)(a).

MR. CADIEUX: I'm sorry. You're at the bottom of the page.

MS. LAMM: Yes.

MR. CADIEUX: That's footnote 8, which is at page 32.

MS. LAMM: In any event, I'm just assuming that the statement there, you're talking about the funding itself, and that's really your argument, that it's the funding not necessarily the program, which might be the conditions.

MR. LEGUM: That's absolutely correct. What we're talking about is the funding, the grants that are provided--

MS. LAMM: Right.

MR. LEGUM: --and not the domestic content specifications--

MS. LAMM: Right.

MR. LEGUM: --that are required as a condition for that funding.

MS. LAMM: Okay. That's all I have.

PRESIDENT FELICIANO: Well, we seem to have come to the end of our questions at this time, and we wanted to say that we appreciate your

staying here and responding to these inquiries. We think that we needed to make those inquiries in order to enable us to understand your respective positions.

I see that the representative of the Government of Mexico raised his hand. Did you want to say something, sir?

MR. ROMERO: Thank you, Mr. President. We would like to join to our friend's request from Canada in order to make an 1128 submission. In this case, we would like to request this Tribunal to grant us the opportunity to inform this Tribunal a week from today whether we will be filing an 1128 submission.

MR. KIRBY: Mr. Chairman, if I could interject for a second, this is the second time that this has happened without notice to the--certainly without notice to the investor party that at the end of the day a representative of another state party--another state non-party--and I say this with enormous respect for the representatives

of Mexico and for the Mexican Government. However, I think that there is an important question of principle at stake here.

We have been through a fairly prolonged series of pleadings. The Government of Mexico and the Government of Canada have had access to those pleadings, and the representatives of the Government of Mexico and the Government of Canada have sat through these proceedings silently all along.

The Government of Canada and the Government of Mexico have already filed Article 1128 submissions. They requested permission and they did so.

Now, I think the question of principle, the very important question of principle, is whether 1128 comprehends permitting states that are not parties to the agreement to sit, not participate, but to sit and watch both parties fight it out during an entire week of hearings, and then to once again open the debate by filing

submissions after pleadings. I think the Tribunal should consider very, very carefully whether that ought to be established as a question of practice, and I think from the investor community--and I'll take the liberty of speaking for the investor community--I underline the seriousness with which any investor will undertake a Chapter Eleven claim or any other claim against a state government.

However, if after litigating that entire claim other parties to the agreement can come in and file post-hearing submissions, thereby reopening the debate, I think that that is placing an inordinantly difficult and heavy burden on investors. I would draw the Tribunal's attention to Article 28, which states, and I quote, "On written notice to the disputing parties, a party may make submissions to a Tribunal on a question of interpretation of this agreement."

Both state parties, Canada and Mexico state parties to NAFTA, regular parties to this arbitration, both parties have exercised their

rights under Article 28, and now at the end of the day, when the game is basically whistled closed, we have Mexico, the state party, wanting to leave the door open to a brand-new proceeding. Let's have another round of pleadings. I want to put it on the record that I seriously object to the Tribunal considering, at this stage, additional Article 1128 submissions, given that the parties have exercised their rights under that provision.

Thank you, Mr. Chairman.

MR. LEGUM: Mr. President?

PRESIDENT FELICIANO: Thank you, Mr. Kirby.

Yes, Mr. Legum?

MR. LEGUM: May I present a few brief observations by the United States on what Mr. Kirby just said?

PRESIDENT FELICIANO: Please go ahead.

MR. LEGUM: Under the plain terms of Article 1128, a nondisputing party may, as a right, make submissions to a Tribunal on a question of

interpretation of this agreement. The only requirement for that is the provision of written notice to the disputing parties. Now perhaps Mr. Kirby's copy of the NAFTA is different from mine, but mine makes no reference to a limitation on the number of submissions by the nondisputing parties.

Now Mr. Kirby is correct that there has been no written notice, although I would submit that the transcript of these proceedings should adequately suffice for that purpose.

In terms of establishing a practice, there is already a practice established in these cases, and the practice is that the nondisputing parties very often make precisely these requests. On two occasions in the Loewen case, exactly the same procedure was followed. The nondisputing parties made submissions after the conclusion of the hearings, and in practically every other case that I could think of right now in which there was a hearing, the practice was followed exactly as has been suggested in this case.

I would suggest that Mr. Kirby does not speak for the investor community, as he just purported to, because in each of these other cases the investors had no objection to the state parties exercising their right, under Article 1128, to make a submission.

Now I can also say from having observed these Chapter Eleven proceedings that the state parties generally are extremely solicitous and very much have in mind not disrupting the proceedings. The Tribunal will recall that the parties suggested, without consulting with Canada or Mexico, that the 1128 submissions in this case come in after the Counter-Memorial, but before the reply and the rejoinder, and therefore before the issues in this case were as fully developed as they are today.

It is, therefore, perhaps quite understandable that there may be issues that have been clarified. Certainly, there have been a number of issues that have been clarified during

the course of these hearings in such a manner that Canada and Mexico might wish to consider whether they would wish to exercise their right under Article 1128, and therefore we would support the requests of both Canada and Mexico to make such submissions.

Thank you.

PRESIDENT FELICIANO: Thank you, Mr. Legum.

The Tribunal has itself had an opportunity to think a little bit about this particular matter. As a matter of fact, our very efficient secretary has put together what has happened in earlier cases, Mr. Kirby, and in earlier cases representatives of state parties to NAFTA have made requests for submission of post-hearing memoranda. My understanding is that, in many cases, or in all cases, they did not make actually these submissions, but they requested for opportunity to state whether or not they were, in fact, going to make such submissions.

I must say that in 1128 we see no limitations as to the number of submissions that may be made. Ms. Lamm has just invited my attention to the fact that in the text of 1128 the word "submissions" used, which is of course plural and, secondly, there is, in fact, quite a bit of time within which they can make or they can give written notice of their intent. I interpret the request of the representative of the Government of Mexico simply as an opportunity within, say, one week, which is the same time that we gave the representative of the Government of Canada to indicate whether or not they would file a written submission in this particular case.

The only limitation under 1128 relates to submissions on a question of interpretation of the agreement, but just about everything here relates to the interpretation of the agreement.

Having said that, Mr. Kirby, I want you to be assured that if and when the Government of Mexico and the Government of Canada do, in fact,

file written submissions, you will be furnished a copy of these submissions, and you will be given an opportunity to make appropriate responses to these submissions. So, please, rest assured that the requirements of due process will be fully observed by the Tribunal.

I do not interpret the request as in any way a request for reopening the proceeding in any great big manner. As a matter of fact, the completion of the oral hearing today does not, for ourself, for the members of the Tribunal, signal a closing of the record of this case. We propose to commence our deliberations immediately. In the course of the deliberations, we may well find that, gee, we forgot something, and then there is something that we want to ask another submission from Ms. Menaker over other or from you or Mr. Cadieux.

So it will be some time before the record of this proceeding may be regarded as closed definitively, although I am anxious to be able to

start deliberations with my two distinguished colleagues here. It is not so easy to get three people from different parts of the world together, as you know. That is all we are doing, but we do propose to start deliberations right away.

My colleagues and I want to thank you for the seriousness, and the diligence and the care with which you prepared for this oral hearing. I know all of you spent a great deal of time, expended a great deal of effort in coming here and making your presentations, and in responding to our inquiries.

You probably thought some of the questions are unnecessary or maybe off-tangent or whatnot, but that is because for some of us, and that includes me, this is the first NAFTA case I sit in. I hope my learning period isn't too prolonged, Mr. Kirby.

Thank you very much, and we hope you have a safe return to your respective places of work and residence.

MR. LEGUM: Mr. President, may I ask one point of order just before we close?

PRESIDENT FELICIANO: Mr. Legum, go ahead.

MR. LEGUM: I would just like to clarify my understanding that although the proceedings have not yet been declared closed, we have, of course, completed the written procedure envisaged by the additional facility rules, and Article 35 of the additional facility rules states that if any question or procedure arises which is not covered by these rules or any rules agreed by the parties, the Tribunal shall decide the question.

I would just like to confirm our understanding that absent an agreement by the parties or a decision by the Tribunal, no further written submissions will be entertained? Is that correct?

PRESIDENT FELICIANO: I think that is correct. What I meant to say that I do not preclude the possibility that in the course of our discussion in the next few days we, meaning members

of the Tribunal, may find that there are some areas, one or more areas, that we feel we would benefit significantly from additional statements from both parties.

If that should happen, we would issue an order requesting submission on an identified point or points. But you are quite right, the formal pleading stage has been completed. So we do not propose to ask you a surrebuttal, if there is such a thing, or anything further.

If we do request any further statement, it will be on very narrow, identified points, not a full reargue of the matter. I only made that reservation, as of now I do not expect that we would need to do so, but that is all we wanted to state.

MR. KIRBY: Mr. Chairman, Mr. Legum knows the rules a lot better than I do and seemed to indicate that further written submissions wouldn't be permitted without agreement of the parties or an order of the Tribunal. I have no difficulty with

that. However, I would like the Tribunal to order that in the event Canada or Mexico files submissions, that the investor party will, as a right, be able to respond to those submissions and that that become a part of any order in respect of the right of Canada and Mexico to file such submissions.

In other words, I simply want to protect my right to file a submission to anything that is filed by the other two state parties to NAFTA.

PRESIDENT FELICIANO: I believe we can give you that assurance. The assurance is given to both parties to make any responding submission that they feel would be appropriate. So neither party should have any concern, as far as that is concerned.

Mr. Clodfelter?

MR. CLODFELTER: One last point for the written submissions. I would just refer the Tribunal to the request that we made in our Memorial for an award of costs, costs of the panel,

costs of the Secretariat, and our own costs of presenting our defense in accordance with Article 59 of the ICSID Additional Facility Rules and indicate that we stand ready to provide the written information contemplated in those rules that might be necessary to make such an award.

I would just add that one addendum to what might be requested by the Tribunal in the way of writing as well.

Thank you.

PRESIDENT FELICIANO: Thank you, Mr. Clodfelter.

Now, unless any of my colleagues would like to make any additional statement, I guess we can adjourn this.

You are finished with your statement?

MR. ROMERO: Yes, Mr. President, just to say on behalf of the Government of Mexico, thanks for this opportunity.

PRESIDENT FELICIANO: Thank you, sir.

[Whereupon at 3:33 p.m. the hearing concluded.] •