

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID CASE No. ARB(AF)/00/1**

BETWEEN:

**ADF GROUP INC.**

INVESTOR

AND

**THE GOVERNMENT OF THE UNITED STATES  
OF AMERICA**

PARTY

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MEMORIAL OF THE INVESTOR

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## 1. INTRODUCTION

1. This case involves a challenge to the Buy America measures of the United States of America with respect to the use of steel in Federal-aid highway construction projects. The challenge is based on Chapter Eleven of the *North American Free Trade Agreement* (“NAFTA”)<sup>1</sup> as a “Buy America” requirement, *per se*, runs against the very nature of the treaty, if not the specific provisions of Chapter Eleven.

## 2. STATEMENT OF FACTS

2. The **Investor**, ADF Group Inc. (or “ADF Group”), is incorporated under the laws of Canada and began operations in 1956. The **Investment**, ADF International Inc. (or “ADF International”), is a corporation organised under the laws of Florida, having its head office in Coral Springs, Florida. ADF International is a wholly-owned subsidiary of ADF Group.<sup>2</sup>

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<sup>1</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America*, December 17, 1992, Can.T.S., 1994, No. 2 (entered into force January 1, 1994) (**Vol. IIA.1; Tab A-1**).

<sup>2</sup> “Investor of a Party” is defined in Article 1139 of NAFTA as:

“**Investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such a Party, that seeks to make, is making or has made an investment” [Emphasis added]

“Enterprise” is in turn defined in Article 201(1) of NAFTA as:

“**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;”.

“Investment” is defined in Article 1139 of NAFTA as meaning, *inter alia*:

“**Investment** means:

(a) an enterprise;

(...);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor’s property in the territory of the party, including turnkey or constructions contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; (footnote continues on next page →)

3. The Investor is a North American leader in the design, engineering, fabrication and erection of structural steel for complex structures, heavy built-up steel components and related architectural and miscellaneous metal work.

## 2.1. Springfield Interchange Project

4. Early in 1999, Shirley Contracting Corporation (“Shirley”) concluded a contract (the “Main Contract”)<sup>3</sup> with the Virginia Department of Transport (“V-DOT”) for the construction of certain highways at the Springfield Interchange (the “Springfield Interchange Project”).<sup>4</sup> The Main Contract provides (at p. 3) that it “(...) shall be construed in accordance with: the plans; the *Virginia Department of Transportation Metric Road and Bridge Specifications*, dated January 1997; (...)” (the “*V-DOT’s Specifications*”)<sup>5</sup>.

5. In March, 1999, ADF International signed a sub-contract agreement with Shirley (the “Shirley/ADF Sub-Contract”)<sup>6</sup> in respect of the Springfield Interchange Project. The Main Contract contained a “Buy America” clause, Special Provision 102.05, which was incorporated by reference into the Shirley/ADF Sub-Contract.<sup>7</sup> Special Provision 102.05<sup>8</sup> states as follows:

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(...)” [Emphasis added]

The Investment includes, therefore, not only ADF International also, but also, as will become apparent below, the steel that it fabricates (being “property” “acquired in the expectation or used for the purpose of economic benefit or other business purposes”) as well as the “interests arising from the commitment of capital or other resources” under “construction contracts”.

Finally, “investment of an investor of a Party” is defined in Article 1139 of NAFTA as:

**“investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such a Party”.

As a result of the above, ADF Group (“Investor of a Party”) is entitled to claim on behalf of its Investment under Article 1117 of NAFTA since ADF International (“Investment”) is a wholly owned corporate subsidiary (“enterprise”) that is controlled directly by ADF Group (as “an investment of an investor of a Party”). Under Article 1117(4), an investment may not make a claim under Section B of Chapter Eleven of NAFTA.

<sup>3</sup> Order No.: D30; Contract ID. No.: C00000054C02 (**Vol. I; Tab B-1**).

<sup>4</sup> Details of the project may be found at: <http://www.springfieldinterchange.com/>.

<sup>5</sup> **Vol. I; Tab B-2.**

<sup>6</sup> **Vol. I; Tab B-3.**

<sup>7</sup> Section 12 of the Shirley/ADF Sub-Contract (**Vol. I; Tab B-3**) incorporates by reference Exhibit B attached thereto. Section 4 of Exhibit B indicates, in turn, that the subcontractor acknowledges Section 102C of the Special Provisions, which in turn refers to Special Provision 102.05.

<sup>8</sup> **Vol. I; Tab B-1.**

**ORDER NO.: D30**  
**CONTRACT ID. NO.: C0000054C02**

VIRGINIA DEPARTMENT OF TRANSPORTATION  
SPECIAL PROVISION FOR  
**102C - USE OF DOMESTIC MATERIAL**

May 3, 1995 c  
Reissued January 1, 1997

**Section 102.05 Preparation of Bid** of the Specifications is amended to include the following:

Except as otherwise specified, all iron and steel products (including miscellaneous steel items such as fasteners, nuts, bolts and washers) incorporated for use on this project shall be produced in the United States of America; unless the use of any such items will increase the cost of the overall project by more than 25%. "Produced in the United States of America" means all manufacturing processes whereby a raw material or a reduced iron ore material is changed, altered or transformed into an item or product which, because of the process, is different from the original material, must occur in one of the 50 States, the District of Columbia, Puerto Rico or in the territories and possessions of the United States. Raw materials such as iron ore, pig iron, processed, pelletized and reduced iron ore and other raw materials used in steel products may, however, be imported. All iron and steel items will be classified hereinafter as "domestic" or "foreign", identified by and subject to the provisions herein. In the event use of the aforementioned "domestic" iron and steel will increase the cost of the overall project by more than 25%, the Contractor may furnish either "domestic" or "foreign" items.

In the event the Contractor proposes to furnish "foreign" iron and steel and can verify a savings in excess of 25% of the overall project cost, the bid proposal (Form C-7A and Supportive Data supplement) shall be completed using the best price offer for each bid item.

Award of the contract will be made to the Bidder who submits the lowest total bid based on furnishing "domestic" iron and steel items, unless such total bid exceeds the lowest total bid based on furnishing "foreign" iron and steel items by more than 25%.

The information listed on the Supportive Data sheet will be used to provide the basis for verification of the required cost savings. In the event comparison of the prices given, or corrected as provided in Section 103.01 of the Specifications, shows that use of "foreign" iron and steel does not represent a cost savings exceeding the aforementioned 25%, "domestic" iron and steel and prices given therefor shall be used and the "100% Domestic Items Total" shall be the Contractor's bid.

In the event the total cost of all “foreign” iron and steel does not exceed one-tenth of one percent of the total contract cost or \$2,500, whichever is greater, the use of such materials will not be restricted by the requirements hereinabove. However, by signing the bid, the Bidder certifies that such cost does not exceed the limits established herein.

Prior to final payment the Contractor shall obtain from the supplier and furnish to the Department a certificate of compliance with the domestic requirements herein. The Contractor may personally certify that miscellaneous iron and steel and hardware conforms to the domestic requirements herein. [Emphasis added].

6. Special Provision 102.05 appeared in the Main Contract and was incorporated by reference in the Shirley/ADF Sub-Contract as a result of section 23 CFR 635.410 of the Federal Highway Administration Regulations (“FHWAR”),<sup>9</sup> implemented under the authority of the parent enabling Act, being the *Surface Transportation Assistance Act* of 1982 (“STAA of 1982”)<sup>10</sup> adopted by the Congress of the United States.

7. The Springfield Interchange Project is a Federal-aid highway construction project, the funding for which is provided under the *Transportation Equity Act for the 21st Century* (“TEA-21”), adopted by the Congress of the United States.<sup>11</sup> Funding for such projects is contingent upon the recipient State complying with the numerous requirements of the Federal Highway Administration, including the FHWAR.

8. Under section 107.05<sup>12</sup> of the *V-DOT’s Specifications*, it is provided that “[w]hen the U.S. government pays all or any portion of the cost of a project, the Contractor shall observe the federal laws and rules and regulations made pursuant to such laws. The work will be subject to inspection by the appropriate federal agency.” The *V-DOT’s Specifications* thus explicitly recognise that the State provisions must ultimately always bend and bow to the federally imposed *discipline*.

9. On March 15, 1999,<sup>13</sup> Shirley informed V-DOT of Shirley’s designation of ADF International to act on Shirley’s behalf in matters relating to structural steel as its structural steel fabricator for the Springfield Interchange Project, and, during the course of April, 1999, Shirley

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<sup>9</sup> Title 23 - Highways Chapter I - Federal Highway Administration, Department of Transportation - Subchapter G - Engineering and Traffic Operations - Part 635 - Construction and Maintenance - Subpart D - General Material Requirements (23 CFR, Part 635, Section 410) (**Vol. IIA.1; Tab A-7**).

<sup>10</sup> Section 165 of the STAA of 1982, Pub.L.97-424, 96 Stat. 2097, 2136, as amended in its relevant parts for the purposes of the proceedings in 1984 by section 10, Pub. L. 98-229 and section 1048(a), Pub. L. 102-240 in 1991 (**Vol. IIA.1; Tab A-3 and Tab-A-4**).

<sup>11</sup> Pub. L.105-178.

<sup>12</sup> **Vol. I; Tab B-2.**

<sup>13</sup> **Vol. I; Tab A-1.**

informed V-DOT that ADF International was proposing to perform the Shirley/ADF Sub-Contract by using U.S. produced steel and by subsequently performing certain fabrication work on that U.S. produced steel in Canada.

10. V-DOT informed Shirley by fax dated April 14, 1999, that ADF International's proposal to fabricate U.S. steel in Canada would not meet the Buy America requirements of the Main Contract.

11. On April 19, 1999,<sup>14</sup> Shirley elaborated more particularly its view to V-DOT that ADF International's plan to use steel produced in the United States and to do some fabrication on that U.S. steel in Canada was fully compliant with the Buy America provision of the Main Contract. In this respect, Shirley stressed that:

“ADF intends to use only steel produced in the United States. Such steel will be transformed from iron ore into finished steel products in the United States. This assures the protection of U.S. steel mills contemplated by the FHWA regulations and Section 102.05. (...).

ADF proposes to perform in Canada cutting, welding, punching/reaming holes, and milling on steel product produced in the United States. The fabricated U.S.-origin steel product which has been subjected to these processes will then be shipped to the construction site and will be used in construction of the I-95 Springfield Interchange.

(...)

(...). What is at issue here is the specific protection of U.S. steel mills in the production of finished steel and ADF will meet that requirement by providing finished steel produced in the United States. (...).” [Emphasis added]

12. On April 28, 1999,<sup>15</sup> V-DOT informed Shirley that:

“Based on the Department's, the Attorney General's, and the Federal Highway Administration's interpretation, Special Provision for Section 102.05 and 23 CFR 635.410 refers to all manufacturing processes involved in the production of steel or iron manufactured products. This means smelting or any subsequent process that alters the materials physical form, shape, or chemical composition. These processes include rolling, extruding, machining, bending, grinding, drilling, and the application of various types of coating.

The manufacturing process is not considered complete until all grinding, drilling, and finishing of steel or iron material has been accomplished. As proposed, the additional processes that are to be performed in Canada are necessary to turn steel

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<sup>14</sup> **Vol. I; Tab A-3.**

<sup>15</sup> **Vol. I; Tab A-4.**

into a product suitable to be installed in the project. As such, they fall under the aforementioned provision and are not allowable under this contract.”

13. On June 3, 1999,<sup>16</sup> representatives of Shirley and ADF International met with representatives of V-DOT and the Federal Highway Administration at V-DOT's offices in Richmond, Virginia.

14. During that meeting, the representatives of Shirley and ADF International explained the exact nature of the proposal by ADF International and made submissions as to why the proposed fabrication in Canada of U.S.-origin steel was perfectly in compliance with Special Provision 102.05 of the Main Contract and the Federal Highway Regulations 23 CFR 635.410.

15. The representatives of V-DOT explained that they took guidance and direction from the Federal Highway Administration (or the “FHA”) on all matters involving the interpretation and application of Buy America provisions as they applied to Federal-aid highway construction projects, including Special Provision 102.05 and 23 CFR 635.410, and that V-DOT was not in a position to change the interpretation of, or the administrative policy relating to, the contract provision of the Main Contract. The V-DOT officials stated that the authority to interpret the contract provision or to amend the administrative policy that relates to it rested exclusively with the FHA.

16. The representatives of the FHA, also present at the meeting, confirmed the V-DOT officials' statements as to which agency exercised real authority in matters of Buy America, stating that the FHA interpretation was the governing interpretation and that the FHA had the authority to make all decisions in respect of the application of Buy America in the present contract. The representatives of the FHA reiterated the position of the FHA as reflected in its various publications on the subject of Buy America, namely that if any work was performed in Canada on U.S.-origin steel, then that steel would no longer qualify as U.S. steel for the purposes of Buy America.

17. Closing the meeting, representatives of V-DOT informed the representatives of Shirley and ADF International that they understood the arguments being raised, but that V-DOT was powerless to make any determination in respect of the application of the Buy America provisions. The V-DOT officials stated that they were obliged to apply the administrative decisions made by the FHA. The representatives of V-DOT then suggested that a meeting be arranged with officials of the FHA in order that Shirley and ADF might make their case directly to the FHA.

18. On June 14, 1999, officials of Shirley and ADF International met with officials of the FHA.

19. Mr. Wilbert Baccus,<sup>17</sup> Chief, General Law, of the Office of the Chief Counsel - Program Services Division - for the U.S. Department of Transport, chaired the meeting. He opened the

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<sup>16</sup> Vol. I; Tab A-5.

meeting by stating that his interest was in the application of the FHWAR in general and the Buy America provisions of those regulations in particular. He stated that the contract for the Shirley Interchange Project was a Federal-aid highway construction project that was operated as a cost reimbursement program. He stated that the presence of the Buy America clause in the Main Contract (Special Provision 102.05) and its incorporation into the Shirley/ADF Sub-Contract was to comply with 23 CFR 635.410. He added that if V-DOT did not apply the Buy America requirement, then the federal government would not reimburse V-DOT's costs on the project. In other words, the federal government would not fund the contract. He further stated that the specific clause in question, Special Provision 102.05, had been the subject of prior review and approval by officials of the FHA. He added that if officials of the FHA had not approved the clause, the project would not have been approved for funding.

20. Mr. Baccus stated that the FHA would not change its position on the interpretation of either 23 CFR 635.410 or Special Provision 102.05, and that the FHA would continue to consider that the proposed fabrication of U.S. steel in Canada would violate Special Provision 102.05 of the contract and 23 CFR 635.410 of the FHWAR.

21. Mr. Baccus stated that the only alternative that would permit the fabrication in Canada of U.S. steel would be for the State of Virginia to apply for and receive a waiver of the Buy America requirements on the basis that the application of those requirements would be inconsistent with the "public interest".

22. On June 25, 1999,<sup>18</sup> ADF International wrote to Shirley asking that it request a waiver of the Buy America provision in accordance with 23 CFR 635.410(c). In its letter, ADF International stressed that:

"ADF cannot perform the fabrication work at its facility in Florida. While the Florida facility is large, it does not have heavy lifting capacity to handle the steel for this job. In addition, as is the case with all U.S. fabricators, the ADF facility is fully loaded.

We are unable to locate a steel fabricator who is capable of performing the work in the U.S. within the required time frame. We understand that all fabricators capable of performing the work are fully loaded."

and that:

"From a local perspective, some 375,000 vehicles use the Springfield Interchange daily. Each day, delays in the Interchange cause hundreds of thousands of dollars in lost productivity. (...).

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<sup>17</sup> In paragraphs 27, 28 and 29 of the Investor's Notice of Arbitration, the name of Mr. Baccus was incorrectly spelled as Mr. "Backus" and Mr. Baccus was inaccurately referred to as holding a different position than the one stated in this Memorial. We regret these errors.

<sup>18</sup> **Vol. I; Tab A-7.**

The Interchange straddles one of the most important North-South arteries in the country and represents one of the costliest burdens to interstate commerce. By choking the North-South movement of goods, the interchange imposes a costly burden on all businesses operating in interstate commerce.

(...).

In the present case, the steel used will be 100% U.S. steel, only fabrication work will occur in Canada. When measured against the value of the steel, the fabrication work performed in Canada is of minor importance.”

23. On June 29, 1999,<sup>19</sup> Shirley wrote to V-DOT seeking a waiver, stressing in turn that:

“(...) [T]he FHWA regulations require only that the “steel or iron materials” be of U.S. origin. In short, the statute, applicable regulations, and relevant case law all indicate that steel materials **manufactured** in the United States retains [sic.] their identity as U.S.-origin steel, thus fulfilling VDOT and FHWA Buy America requirements, regardless of subsequent fabrication elsewhere. This is not changed by Section 102.05 of the Special Provisions because no “raw materials” will be “changed, altered or transformed into an item or product” in Canada. Rather, the raw material is made into steel in the United States.” [Emphasis added].

24. On July 7, 1999,<sup>20</sup> V-DOT wrote to Shirley indicating that it had provided the information contained in Shirley’s letter of June 29, 1999 to the FHA for its consideration, and that the FHA had requested additional information, more particularly as to, *inter alia*, the capacity of U.S. steel fabricators being “fully loaded” and the cost of the work to be performed in Canada compared with that of the total cost.

25. On July 19, 1999,<sup>21</sup> Shirley responded to V-DOT’s request for information by setting out the steps Shirley had taken with respect to the Main Contract and the “great lengths which Shirley went to in seeking structural steel contractors for this project”. Further, none of the fabricators contacted by ADF could meet schedule requirements and “only 10-15 percent of the total cost of [ADF’s] operations will be in Canada. This small percentage of their [ADF’s] costs is, of course, a minute percentage of the total cost of the entire prime contract effort.”

26. By letter dated July 26, 1999,<sup>22</sup> V-DOT informed Shirley that the request for a waiver had been denied, there being “no basis” to grant such a waiver, which information was relayed in turn by Shirley to ADF International by letter dated July 30, 1999.<sup>23</sup>

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<sup>19</sup> Vol. I; Tab A-8.

<sup>20</sup> Vol. I; Tab A-9.

<sup>21</sup> Vol. I; Tab A-11.

<sup>22</sup> Vol. I; Tab A-12.

27. ADF International then proceeded to attempt to fulfil its obligations under the Shirley/ADF Sub-Contract using its own facilities and sub-contracting much of the fabrication work to other U.S. fabricators.

28. On March 1, 2000, the Investor served on the Party a Notice of Intention to Submit a claim to Arbitration under Articles 1116, 1117 and 1119 of NAFTA.

29. In light of Article 1118 of NAFTA, representatives of the Investor met with representatives of the Party on April 11, 2000 at its Office of International Claims and Investment Disputes in Washington, D.C., in order to attempt to settle the claim through consultation or negotiation. The ensuing consultations and negotiations between the Investor and the Party have not yielded a mutual agreement that is satisfactory and dispositive of the issues now raised in this Arbitration.

## **2.2. Other Projects Involving Buy America**

30. In the Investor's Notice of Arbitration, the Investor stated at paragraph (76) that "continued application of the law, regulations and administrative policies and practices referred to [in the Notice of Arbitration] will cause additional damage to ADF International, limiting its ability to fully participate in all future Federal-aid highway projects."

31. ADF has participated in the following Federal-aid highway projects since the Springfield Interchange Project:

1. The Lorten Bridge Project in the state of Virginia;
2. The Brooklyn Queens Expressway Bridge Project in the state of New York;
3. The Queens Bridge Project in the state of New York.

32. In all of these projects, the Buy America measures in question were applied resulting in the inability of ADF Group or ADF International to use U.S.-origin steel that was fabricated in Canada in the project. As a result, ADF Group and ADF International suffered damages, the extent of which will be addressed in the second phase of this arbitration pursuant to Item 13 of the minutes of the First Session of the Tribunal held on February 3, 2001.

33. Witness statements of both Mr. Pierre Pascini and Mr. Pierre Labelle, which elaborate more fully with respect to the facts related above as well as to the workings of ADF Group and ADF International, are annexed to this Memorial.

## **3. BREACH OF CHAPTER ELEVEN OBLIGATIONS BY THE PARTY**

34. As indicated in its Notice of Arbitration, the Investor claims that the Party has breached its obligations under Article 1102, Article 1105 and Article 1106 of NAFTA and, in so doing,

has caused damages to the Investor and its Investment. These provisions will be reviewed and analysed in turn. It is important, however, to first determine the application of Chapter Eleven as a whole.

**3.1. Article 1101: Application of Chapter Eleven**

35. Chapter Eleven of NAFTA applies, according to Article 1101<sup>24</sup>, as follows:

**“Article 1101: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party;  
and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. (...).

(...)” [Emphasis added]

36. The term “measure” is defined in turn in Article 201(1) of NAFTA as follows:

“**measure** includes any law, regulation, procedure, requirement or practice;”  
[Emphasis added]

37. As a prefatory matter, the Investor submits that the obligations contained in Section A of Chapter Eleven of NAFTA can be breached when they are not satisfied either by action or omission, directly or indirectly, by design or by effect,<sup>25</sup> as long as a “measure”, adopted *or*

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<sup>24</sup> **Vol. IIA.1; Tab A-1.**

<sup>25</sup> Government of Canada, *Statement on Implementation of the North American Free Trade Agreement*, (1994) *Canada Gazette*, Part I, January 1, 1994, at p. 148 (**Vol. IIA.1; Tab A-2**):

“Article 1101 states that section A covers measures by a Party (i.e., any level of government in Canada) that **affect**:

- investors of another Party (i.e., the Mexican or American parent company or individual Mexican or American Investor);

- investments of investors of another party (i.e., the subsidiary company or asset located in Canada); and

- for purposes of the provisions on performance requirements and environmental measures, all investments (i.e., all investments in Canada).” [Emphasis added].

maintained, is involved, which *includes* (but is not limited to) “any law, regulation, procedure, requirement *or* practice”. The definition of the term “measure” must therefore be taken to be viewed as a non-exhaustive definition of the ways in which governments impose *discipline*<sup>26</sup> or exert their will in their respective jurisdictions.

38. In NAFTA Chapter Eleven cases, Tribunals have recognized the broadness of the definition. For example, in *Ethyl Corporation v. Canada*,<sup>27</sup> the Tribunal stated at paragraph 66:

“In addressing what constitutes a measure, the Tribunal notes that Canada’s Statement on Implementation of the North American Free Trade Agreement, Can. Gaz. Part 1C (1, Jan 1994) (hereinafter Canadian Statement on Implementation of NAFTA) (at 80) states that:

*“The term measure is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions.”*

This is born out by Article 201(1), which provides that:

*“Measure includes any law, regulation, procedure, requirement or practice.”*

Clearly, something other than a “law”, even something in the nature of a “practice”, which may not even amount to a legal stricture, may qualify.”

39. Further, the Investor submits that, under Article 1131(1) of NAFTA, this Arbitral Tribunal shall decide the issues in accordance with NAFTA and international law. In this respect, under Article 31(1) of the *Vienna Convention on the Law of Treaties*,<sup>28</sup> the Investor submits that NAFTA must accordingly be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.

40. Under Article 102(2) of NAFTA, it is provided, in turn, that the Parties shall interpret and apply the provisions of NAFTA in light of the objectives set out in Article 102(1) and in accordance with the applicable rules of international law. Under Articles 102(1)(a) and 102(1)(b) of NAFTA, one of the principled objectives of the treaty is to, *inter alia*, “eliminate barriers to trade in, and facilitate the cross-border movement of, goods (...) between the

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<sup>26</sup> See to this effect the position taken by Canada, a party to NAFTA: *Government of Canada, Statement on Implementation of the North American Free Trade Agreement*, (1994) *Canada Gazette*, Part I, January 1, 1994, at p. 80 (**Vol. IIA.1; Tab A-2**).

<sup>27</sup> *Ethyl Corporation v. Canada*, [1999] 38 *ILM* 708, Preliminary Tribunal Award on Jurisdiction dated June 24, 1998 (**Vol. IIB.1; Tab B-4**).

<sup>28</sup> Done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331 (the “*Vienna Convention*”) (**Vol. IIA.2; Tab A-16**).

territories of the Parties” and to “*promote* conditions of *fair* competition in the free trade area.”<sup>29</sup> [Emphasis added].

41. As a necessary consequence of the above, the Investor submits that, under the terms of NAFTA and international law,<sup>30</sup> the provisions of Section A of Chapter Eleven of NAFTA shall be interpreted against the United States to the extent that the measures imposed on the Investor and its Investment do not actively eliminate, directly or indirectly, trade “barriers” and do not actively “promote”, directly or indirectly, “fair competition” in the United States.

### 3.2. The Measures in Question

42. The Investor submits that the measures in question that are in violation of obligations contained in Section A of Chapter Eleven include:

- (i) Section 165 of the *Surface Transportation Assistance Act* of 1982 (again “STAA of 1982”)<sup>31</sup>, as amended, insofar as it is interpreted to apply or is applied to impose or

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<sup>29</sup> Under Article 31(2) of the *Vienna Convention* (**Vol. IIA.2; Tab A-16**), the context for the purpose of the interpretation of a treaty “shall comprise, in addition to the text, including its preamble and annexes: (...)”. [Emphasis added]. The Preamble to NAFTA (**Vol. IIA.1; Tab A-1**) further provides in this respect, *inter alia*, that:

“The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

(...)

**CREATE** an expanded and secure market for the goods and services produced in their Territories;

**REDUCE** distortions to trade;

**ESTABLISH** clear and mutually advantageous rules governing their trade;

**ENSURE** a predictable commercial framework for business planning and investment;

(...)”.

<sup>30</sup> Under Article 102(2) of NAFTA (**Vol. IIA.1; Tab A-1**): “The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.” *See further: Ethyl Corporation v. The Government of Canada, supra.*, Award on Jurisdiction, NAFTA Chapter Eleven, 24 June 1998, at pp. 25 and ss. (**Vol. IIB.1; Tab B-4**), more particularly: “The Tribunal reads Article 102(2) [of NAFTA] as specifying that the “object and purpose” of NAFTA within the meaning of those terms in Article 31(1) of the *Vienna Convention* are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the *Vienna Convention*” (at p. 29; ¶56). *See also:* Article 55(1) of the ICSID-Additional Facility Rules (“ICSID-AFR”), which states that : “The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute” [Emphasis added].

<sup>31</sup> **Vol. IIA.1; Tab A-3 and Tab A-4.**

enforce any commitment or undertaking that prohibits ADF International from using 100% U.S.-origin steel fabricated in Canada in the Springfield Interchange Project in particular, or in any Federal-aid highway Project in general;

- (ii) Section 23 C.F.R. 635.410 of the FHWA<sup>32</sup>, as amended, insofar as it is interpreted to apply or is applied to impose or enforce any commitment or undertaking that prohibits ADF International from using 100% U.S.-origin steel fabricated in Canada in the Springfield Interchange Project in particular, or in any Federal-aid highway Project in general;
- (iii) All administrative acts, policies or practices and directives which are interpreted to apply or are applied to impose or enforce any commitment or undertaking that prohibits ADF International from using 100% U.S.-origin steel fabricated in Canada in the Springfield Interchange Project in particular, or in any Federal-aid highway Project in general;
- (iv) All administrative acts, policies, practices and directives by which the Federal Highway Administration and/or the U.S. Department of Transport assented to, or brought about the inclusion of Special Provision 102.05 in contracts relating to the Springfield Interchange Project and in instructing or advising V-DOT on the interpretation of that clause or in condoning the interpretation of that clause by V-DOT, more particularly as applied to ADF International.

43. In order to understand how the United States' measures violate the provisions of Chapter Eleven of NAFTA, it is important to first review such measures and then subject them to the standards of Chapter Eleven.

### **3.2.1. Section 165 of the STAA of 1982**

44. An analysis of the Party's measures must begin at the apex of the authority that adopted such measures in order to determine where such measures initially originated.

45. Section 165 of the STAA of 1982 (a provision of an act of Congress)<sup>33</sup>, as amended, provides for the "Buy America" requirements that are at the heart of the current proceedings.

46. Section 165 of the STAA of 1982 replaced section 401 of the *Surface Transportation Assistance Act of 1978*, Pub L. 95-599 of November 1978 (the "STAA of 1978")<sup>34</sup>, which also imposed Buy America requirements.<sup>35</sup>

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<sup>32</sup> Vol. IIA.1; Tab A-7.

<sup>33</sup> Vol. IIA.1; Tab A-3 and Tab A-4.

<sup>34</sup> Vol. IIA.1; Tab A-5.

<sup>35</sup> We will return to this provision later. See discussion of this provision below.

47. Section 165 of the STAA of 1982, as currently amended, and to which careful attention to its particular wording must be brought, states as follows.<sup>36</sup>

### **BUY AMERICA**

Section 165 of Pub. L. 97-424, as amended by Pub. L. 98-229, Sec. 10, Mar. 9, 1984, 98 Stat. 57; Pub. L. 100-17, title I, Sec. 133(a)(6), 337(a)(1), (b), (c), Apr. 2, 1987, 101 Stat. 171, 241; Pub. L. 102-240, title I, Sec. 1048, title III, Sec. 3003(b), Dec. 18, 1991, 105 Stat. 1999, 2088; Pub. L. 103-272, Sec. 4(r), July 5, 1994, 108 Stat. 1371; Pub. L. 103-429, Sec. 7(a)(3)(E), Oct. 31, 1994, 108 Stat. 4389, provides that:

(a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act or by any Act amended by this Act or, after the date of enactment of this Act (Jan. 6, 1983), any funds authorized to be appropriated to carry out this Act, Title 23, United States Code, Federal Transit Act, or the Surface Transportation Assistance Act of 1978 and administered by the Department of Transportation, **unless steel, iron, and manufactured products** used in such project are **produced** in the United States.

(b) The provisions of subsection (a) of this section shall not apply where the Secretary finds –

(1) that their application would be inconsistent with the **public interest**;

(2) that **such materials and products** are not **produced** in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) (Repealed. Pub. L. 103-272, Sec. 4(r)(2), July 5, 1994, 108 Stat. 1371.)

(4) that inclusion of **domestic material** will increase the cost of the overall project contract by more than 25 percent.

(c) For purposes of this section, in calculating components' costs, labor costs involved in final assembly shall not be included in the calculation.

(d) The Secretary of Transportation shall not impose any limitation or condition on assistance provided under this Act, the Federal Transit Act, the Surface Transportation Assistance Act of 1978 or Title 23, United States Code, **which** restricts any State from imposing more stringent requirements than this section on

<sup>36</sup>

We have consolidated the amendments into the provision for ease of understanding, and the Investor will examine the relevant stages of the evolution of the provision during the course of our analysis (**Vol. IIA.1; Tab A-3 and Tab A-4.**)

the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with such assistance or restricts any recipient of such assistance from complying with such State imposed requirements.

(e) (Repealed section 401 of Pub. L. 95-599 [STAA 1978])

(e) Report on Waivers. - By January 1, 1995, the Secretary shall submit to Congress a report on the purchases from foreign entities waived under subsection (b) in fiscal years 1992 and 1993, indicating the dollar value of items for which waivers were granted under subsection (b).

(f) Intentional Violations. - If it has been determined by a court or Federal agency that any person intentionally –

(1) affixed a label bearing a 'Made in America' inscription, or any inscription with the same meaning, to any product used in projects to which this section applies, sold in or shipped to the United States that was not made in the United States; or

(2) represented that any product used in projects to which this section applies, sold in or shipped to the United States that was not produced in the United States, was produced in the United States;

that person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to the debarment, suspension, and ineligibility procedures in subpart 9.4 of chapter 1 of title 48, Code of Federal Regulations.

(g) Limitation on Applicability of Waivers to Products Produced in Certain Foreign Countries. - If the Secretary, in consultation with the United States Trade Representative, determines that –

(1) a foreign country is a party to an agreement with the United States and pursuant to that agreement the head of an agency of the United States has waived the requirements of this section, and

(2) the foreign country has violated the terms of the agreement by discriminating against products covered by this section that are produced in the United States and are covered by the agreement,

the provisions of subsection (b) shall not apply to products produced in that foreign country. [Emphasis added].

48. The Investor believes that the salient features of the provision may be broken down into three parts and summarised as follows:

49. First: At a preliminary level, section 165(a) of the STAA of 1982 makes an initial distinction between “steel, iron”, on the one hand, and “manufactured products”, on the other;<sup>37</sup>

50. Second: The provision makes a second distinction between “steel” and “iron”, as being “materials” on the one hand, and “manufactured products” as being “products” on the other. Section 165(b)(2) of the STAA of 1982 indeed provides in this respect that : “[t]he provisions of subsection (a) of this section shall not apply where the Secretary finds (...) such materials and products are not produced in the United States(...)”, relating back to “steel, iron” and “manufactured products” referred to in s. 165(a). As a result, “steel” and “iron” are to be considered as “materials”<sup>38</sup> whereas “manufactured products” are to be considered as “products”<sup>39</sup> [Emphasis added].

51. Third: According to section 165(a), both “steel, iron”, on the one hand, and “manufactured products”, on the other, must be “produced in the United States”<sup>40</sup> [Emphasis added].

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<sup>37</sup> Initially, section 165(a) of the STAA of 1982 applied to “steel, cement and manufactured products” (s. 165 of Pub L. 97-424). By way of section 10 of the *Interstate Highway Construction; Apportionment of Funds*, Pub. L. 98-229 of March 9<sup>th</sup>, 1984 (**Vol. II.A.1; Tab A-4**), section 165(a) of the STAA of 1982 was amended by striking out: “, cement”. By way of section 1048(a) of the *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. 102-240 of December 18<sup>th</sup>, 1991 (**Vol. II.A.1; Tab A-4**), section 165(a) of the STAA of 1982 was amended by inserting : “, iron” after “steel”. This last amendment begs the question: prior to this amendment, could one use “steel” “produced” from non-U.S. (foreign produced) “iron” and yet still satisfy the requirements of s. 165(a) of the STAA of 1982? If the answer was no, one therefore could not use foreign iron in the production of U.S. domestic steel, but one could use foreign finished iron products alone (such as finished iron bars) in Federal-aid highway construction projects and not be caught by section 165 of the STAA of 1982. This would produce a policy incongruity. If the answer was yes, this means that U.S. steel could be produced from “iron” materials that were 100% foreign, and not be caught by section 165(a) of the STAA of 1982. If one needed to pass an amendment to catch “iron” upstream in the “steel” production process, would one not also be obliged to pass an amendment to catch post-production fabrication which is downstream from the production process? In the absence of such an amendment, post production fabrication of “steel” “produced in the United States” would not be covered by section 165 of the STAA of 1982. We will return to this issue when dealing with the Congressional amendment to the FHWAR relating to “coating”.

<sup>38</sup> Section 165(b)(4) also refers to “domestic materials”, whereas section 165(c) refers to “components” in “final assembly”. We interpret these provisions together as meaning that when “domestic materials” increase the cost of the “overall project” by more than 25%, one should not calculate labor costs in the “components costs” at the final assembly stage in order to make this determination. As a result, the cost of “materials” is used to determine the final cost of “components”, and “components” are to be considered as the final product that are ready for final assembly.

<sup>39</sup> Section 165(f)(2) and section 165(g)(2) also refer to “products” that are “produced”.

<sup>40</sup> Presumably, “steel, iron” are not “manufactured products” (*specialia generalibus derogant*). However, when read *noscentur a sociis*, “steel, iron” could be considered as “manufactured products” (notwithstanding that section 165(b)(2) considers that “steel” and “iron” are “materials”). Either way, “steel, iron” are to be “produced in the United States”.

### **3.2.2. Section 23 C.F.R. 635.410 implementing Section 165 of the STAA of 1982**

#### **3.2.2.1. Introduction**

52. Under the stated authority of 23 U.S.C. 315, section 165, STAA of 1982, Pub. L. 97-424, 96 Stat. 2136, and 49 CFR 1.48(b),<sup>41</sup> upon adoption of the STAA of 1982, the FHWA amended the “Buy America regulation” provided at section 23 C.F.R. 635.410 in order to “implement procedures required by section 165 of the (...) (STAA) 1982”.<sup>42</sup>

53. Section 23 CFR 635.410<sup>43</sup>, as amended and to which particular attention to its wording should also be brought here, currently states as follows:

**TITLE 23--HIGHWAYS PART 635--CONSTRUCTION AND MAINTENANCE**  
**Table of Contents Subpart D**

**General Material Requirements Sec. 635.410 Buy America requirements.**

(a) The provisions of this section shall prevail and be given precedence over any requirements of this subpart which are contrary to this section. However, nothing in this section shall be construed to be contrary to the requirements of Sec. 635.409(a) of this subpart.<sup>44</sup>

(b) No Federal-aid highway construction project is to be authorized for advertisement or otherwise **authorized to proceed unless at least one of the following requirements is met:**

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<sup>41</sup> See: 48 FR No. 228, Friday, November 25, 1983, p. 53099, at p. 53104. See also the authority stated in the final subsequent amendment found at 60 FR No. 57, Friday, March 24, 1995, p. 15478, at p. 15479, being: Pub. L. 97-424, § 165, 96 Stat. 2097, 2136, as amended by Pub. L. 98-229, § 10, 98 Stat. 55, 57, and Pub. L. 102-240, §§ 1041, 1048, 105 Stat. 1914, 1993, 1999; 23 U.S.C. 315; 49 CFR 1.48; 23 CFR 635.410 (**Vol. IIA.1; Tab A-9**).

<sup>42</sup> 48 FR 53099: “Summary” (**Vol. IIA.1; Tab A-9**).

<sup>43</sup> **Vol. IIA.1; Tab A-7**.

<sup>44</sup> Sec. 635.409(a) provides as follows (**Vol. IIA.1; Tab A-7**):

**“Sec. 635.409 Restrictions upon materials.**

No requirement shall be imposed and no procedure shall be enforced by any State highway agency in connection with a project which may operate: (a) To require the use of or provide a price differential in favor of articles or materials produced within the State, or otherwise to prohibit, restrict or discriminate against the use of articles or materials shipped from or prepared, made or produced in any State, territory or possession of the United States.”

(1) The project either:

(i) Includes no permanently incorporated steel or iron materials, or

(ii) if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.

(2) The State has standard contract provisions that require the use of domestic materials and products, including steel and iron materials, to the same or greater extent as the provisions set forth in this section.

(3) The State elects to include alternate bid provisions for foreign and domestic steel and iron materials which comply with the following requirements. Any procedure for obtaining alternate bids based on furnishing foreign steel and iron materials which is acceptable to the Division Administrator may be used. The contract provisions must

(i) require all bidders to submit a bid based on furnishing domestic steel and iron materials, and

(ii) clearly state that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials unless such total bid exceeds the lowest total bid based on furnishing foreign steel and iron materials by more than 25 percent.

(4) When steel and iron materials are used in a project, the requirements of this section do not prevent a minimal use of foreign steel and iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. For purposes of this paragraph, the cost is that shown to be the value of the steel and iron products as they are delivered to the project.

(c) (1) A State may request a waiver of the provisions of this section if;

(i) The application of those provisions would be inconsistent with the public interest; or

(ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

(2) A request for waiver, accompanied by supporting information, must be submitted in writing to the Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator. A request must be submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request. The RFHWA will have approval authority on the request.

(3) Requests for waivers may be made for specific projects, or for certain materials or products in specific geographic areas, or for combinations of both, depending on the circumstances.

(4) The denial of the request by the RFHWA may be appealed by the State to the Federal Highway Administrator (Administrator), whose action on the request shall be considered administratively final.

(5) A request for a waiver which involves nationwide public interest or availability issues or more than one FHWA region may be submitted by the RFHWA to the Administrator for action.

(6) A request for waiver and an appeal from a denial of a request must include facts and justification to support the granting of the waiver. The FHWA response to a request or appeal will be in writing and made available to the public upon request. Any request for a nationwide waiver and FHWA's action on such a request may be published in the Federal Register for public comment.

(7) In determining whether the waivers described in paragraph (c)(1) of this section will be granted, the FHWA will consider all appropriate factors including, but not limited to, cost, administrative burden, and delay that would be imposed if the provision were not waived.

(d) Standard State and Federal-aid contract procedures may be used to assure compliance with the requirements of this section. [48 FR 53104, Nov. 25, 1983, as amended at 49 FR 18821, May 3, 1984; 58 FR 38975, July 21, 1993] Editorial Note: For a waiver document affecting Sec. 635.410, see 60 FR 15478, Mar. 24, 1995. [Emphasis added]

54. As the purported implementation of Section 165 of the STAA of 1982, the regulation (again, the “FHWA Regulation”) raises several interesting issues.

55. First, the FHWA Regulation applies only to “steel and iron materials”, referring to “steel and iron materials” on at least ten occasions, but is completely silent on “manufactured

products”. That is in stark contrast to Section 165 of the STAA of 1982 which refers to both “steel” and “iron” (as “materials”) and “manufactured products”.<sup>45</sup>

56. Second, it is sufficient to also point out for the time being the incongruity between the terminology used in s. 165(a) and s. 165(b)(2) of the STAA of 1982 (read jointly: “(...) “steel, iron” “materials” (...) “produced” in the “United States” (...)”) and the terminology used in the FHWA Regulation, stating: “(...) if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States”.<sup>46</sup>

57. The Investor will demonstrate that the position of the FHWA, by its adoption of the FHWA Regulation, is not sustained by the text of section 165(a) of the STAA of 1982, nor is it sustained by the legislative history of that provision and cases that have interpreted similar provisions. However, to the extent that the FHWA is correct in considering that if “steel or iron materials are to be used, all manufacturing processes (...) for these materials must occur in the United States”, the FHWA Regulation is in compliance with section 165 of the STAA of 1982, the Investor submits that the FHWA must then accordingly act in conformity with the case law that has defined which manufacturing processes are covered by buy national policies and, consequently, exempt post production fabrication from the Buy America requirement.

58. Before pursuing the analysis of the Buy America requirement found in section 165, the Investor turns first to the position put forth by the FHWA through its adoption of the FHWA Regulation.

### **3.2.2.2.** *The FHWA Adoption of its Final Rule and its Amendments*

#### **3.2.2.2.1.** General Considerations

59. Upon initial adoption as a final rule (the “Final Rule”) on Friday, November 25<sup>th</sup>, 1983,<sup>47</sup> the FHWA made several findings in response to comments that had been submitted to the FHWA as regards its initial interim final rule<sup>48</sup> and its amendment<sup>49</sup> with respect to the initial regulatory implementation of section 165 of the STAA of 1982.

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<sup>45</sup> We will return later to the issue that arises from the distinctions.

<sup>46</sup> One should also note the incongruity in the use of the terms “steel and iron materials” in section 23 CFR 635.410(b)(3); section 23 CFR 635.410(b)(3)(i); section 23 CFR 635.410(b)(3)(ii) and section 23 CFR 635.410(b)(4) and the use of the terms “steel and iron materials/products” in section 23 CFR 635.410 (c)(1)(ii).

<sup>47</sup> 48 FR 53099; effective December 27, 1983 (**Vol. IIA.1; Tab A-9**).

<sup>48</sup> 48 FR 1946, Monday January 17, 1983 (**Vol. IIA.1; Tab A-9**).

<sup>49</sup> 48 FR 23631, Thursday May 26, 1983 (**Vol. IIA.1; Tab A-9**).

60. The FHWA observed in the Final Rule<sup>50</sup> that, even at the time of initial implementation of section 165 of the STAA of 1982, there were stakeholders who expressed philosophical opposition to the Buy America concept. In this respect, the FHWA noted that these respondents:

“(…) believed that because open trade between countries has been very beneficial in the past, it should not be ruled out completely as these provisions would do. The Canadian authorities view the Buy America provisions of the STAA as possibly in violation of the U.S. [sic.] General Agreement on Tariffs and Trade (GATT). They believe that the Buy America provisions nullify and impair trade concessions which have been agreed to during multilateral GATT negotiations which the U.S. is obliged to observe.” [at p. 53101]

61. Though the FHWA did not respond to this comment, the FHWA did indicate further in its Final Rule that:

“[a]lthough the earlier Buy America Statute, section 401 of the STAA of 1978 provided that both unmanufactured and manufactured “articles, materials and supplies” were covered under Buy America, the FHWA noted that only foreign structural steel could have significant nationwide effect on the cost of Federal-aid highway construction projects.

Therefore, FHWA determined it was in the public interest to apply section 401 only to structural steel. Section 165 of the STAA of 1982 reinforced congressional intent that Buy America should be applied to steel products. Section 165, however, also specifically cites cement products [at the time of the Final Rule; now repealed] as covered for the first time and it does not apply at all to raw materials.” [at pp. 53101-53102; Emphasis added]

62. Why “raw materials” are exempted from section 165 of the STAA of 1982 remains unknown, as the text of the provision does not make the distinction.

63. The Final Rule nevertheless stated that :

“Raw materials used in the steel and / or cement product may be imported. All manufacturing processes to produce steel and cement products must occur domestically. Raw materials are materials such as iron ore, limestone, waste products, slag used in cement / concrete, etc., which are used in the manufacturing process to produce the steel or cement products. Waste products would include scrap; i.e., steel no longer useful in its present form from old automobiles, machinery, pipe, railroad tracks and the like. Also steel trimmings from mills or product manufacturing are considered waste.” [at p. 53103; emphasis added].

64. The FHWA specifically puts emphasis here on “manufacturing processes”, an important issue that will become apparent later.

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65. When section 165 of the STAA of 1982 was amended in 1991 (Pub. L. 102-240) by inserting “, iron” after “steel”, the FHWA then made the following comment:<sup>51</sup>

“By adding the word “iron”, the Congress has expanded Buy America protection to include iron and iron products<sup>52</sup> in addition to steel and steel products, which were previously protected.”

66. The FHWA, in its comments in relation to a subsequent amendment to the FHWA Regulation<sup>53</sup> whereby the FHWA granted a nation-wide waiver from the Buy America requirements for certain iron components used in the manufacture of steel and/or iron materials (60 FR 15478, at p. 15479),<sup>54</sup> stated as follows:

“Although supportive of the waiver, several commentators questioned the need for a waiver, since they believed that pig iron and processed, palletized, and reduced iron ore were already exempt from the Buy America requirements. Their belief was based on the idea that the Buy America requirements apply only to products further along in the manufacturing process of steel and iron<sup>55</sup>. The FHWA has previously stated that products of a manufacturing process are not exempt from the Buy America requirements. On November 25, 1983, the FHWA published a final rule (48 FR 53099) of the Buy America requirements to implement procedures required by § 165 on the Surface Transportation Assistance Act (STAA) of 1982 (Pub. L. 97-424). The final rule’s discussion of manufactured materials stated that “Raw materials used in the steel \* \* \* product may be imported. All manufacturing processes to produce steel \* \* \* products must occur domestically. Raw materials are materials such as iron ore \* \* \* [and] waste products \* \* \* which are used in the manufacturing process to produce the steel \* \* \* products” (48 FR 53099, 53103). Consistent with this interpretation, pig iron and processed, palletized, and reduced iron ore are products of a manufacturing process and thus subject to the Buy America requirements.

At least one commentator questioned whether the FHWA’s Buy America regulation applies to certain alloys required in the production of steel and/or iron materials. Even though most of these alloys are unavailable from domestic sources, alloys were not addressed in the 1983 final rule. Similar to the treatment

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<sup>51</sup> 58 FR 38973, Wednesday, July 21, 1993, at p. 38974 (Vol. IIA.1; Tab A-9).

<sup>52</sup> Presumably, “iron” and “iron products” were previously not covered by Buy America in the “manufacturing process” of “steel”?

<sup>53</sup> 60 FR 15478; Friday, March 24<sup>th</sup>, 1995 (Vol. IIA.1; Tab A-9).

<sup>54</sup> Being “pig iron and processed, pelletized, and reduced iron ore manufactured outside the United States to be used in the domestic manufacturing process of steel and / or iron materials used in Federal-aid highway construction projects.” (at p. 15479).

<sup>55</sup> By then, section 165 of the STAA of 1982 had been amended to include “iron”.

of raw iron ore, alloys in their raw state may be imported for use in the domestic manufacturing process of steel and/or iron materials. Furthermore, processed alloys, alone, are not considered to be steel or iron materials under the Buy America regulation. Thus, unless alloys have been processed or refined to include substantial amounts of steel and/or iron materials, they are not subject to the Buy America requirements.” [at p. 15479; emphasis added]

67. If raw iron ore materials and alloys are excluded - upstream - from the Buy America requirements presumably because they are not, according to the FHWA, “processed or refined to include *substantial* amounts of steel and/or iron materials”, by the same token, steel “materials” - downstream - should not be covered either if the process that is done to it does not include *substantial* amounts of steel and/or iron materials also.

68. This would then only leave “steel, iron” “materials” and all “manufactured products” that are “produced” that are produced midstream in the United States (under s. 165(a)) covered by the Buy America requirements. Input of raw materials upstream (including “processed” alloys) and post production fabrication occurring downstream of the production process that does not use *substantial* amounts of steel and/or iron in the process would be excluded from the Buy America requirements. Thus downstream steel products could be fabricated outside of the United States, after having been initially “produced” in the United States, without being caught by section 165 of the STAA of 1982.

69. Moreover, the FHWA, in its Final Rule of 1983, took the following view:

“With respect to manufactured products, section 165 does not differ in its coverage from section 401 of the STAA of 1978. Since FHWA has never covered all manufactured products under its Buy America regulation and Congress did not specifically direct change in that policy in enacting section 165, FHWA does not believe that all manufactured products [other than steel and (now) iron manufactured products] must be covered.” [48 FR 53099, at p. 53102].

70. Section 165(a) of the STAA of 1982 expressly provides that “manufactured products” must be “produced in the United States”. Notwithstanding the view of the FHWA, maintaining the terms “manufactured products” as being explicitly covered by the enabling statutory provision clearly establishes Congress’ intention that the previous regulatory FHWA exemption of “manufactured products” (other than steel), under the old section 401 of the STAA of 1978, would become subject to a statutory override by the adoption of the new section 165 of the STAA of 1982.

71. This necessarily brings us to an analysis of section 401 of the STAA of 1978.

**3.2.2.2.2.** Section 401 of the STAA of 1978

72. Section 401 of the STAA of 1978,<sup>56</sup> before its repeal by s. 165(e) of the STAA of 1982, stated as follows:

**BUY AMERICA**

Sec. 401 (a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act or by any Act amended by this Act or, after the date of the enactment of this Act, any funds authorized to be appropriated to carry out this Act, Title 23, United States Code, or the Urban Mass Transportation Act of 1964 and administered by the Department of Transportation, whose total cost exceeds \$5000,00 unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States, will be used in such project.

(b) The provisions of subsection (a) of this section shall not apply where the Secretary determines-

(1) their application would be inconsistent with the public interest;

(2) in the case of acquisition of rolling stock their application would result in unreasonable cost (after granting appropriate price adjustments to domestic products based on that portion of project cost likely to be returned to the United States and to the States in the form of tax revenues;

(3) supplies of the class or kind to be used in the manufacture of articles, materials, supplies that are not mined, produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(4) that inclusion of domestic material will increase the cost of the overall project contract by more than 10 per centum. [Emphasis added]

73. From this provision, one may gather that the following were covered by the Buy America requirements of section 401 of the STAA of 1978:

- “unmanufactured articles, materials, and supplies” that were “mined or produced” in the United States.

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<sup>56</sup> As amended by section 6 of the *Federal-Aid Highway Act of 1982*, Pub. L. 97-327 of October 15<sup>th</sup>, 1982 (Vol. IIA.1; Tab A-5).

In other words, only “unmanufactured articles, materials, and supplies” could be considered as either “mined or produced”;

- “manufactured articles, materials and supplies” that were “manufactured” in the United States.

In other words, only “manufactured articles, materials and supplies” could be considered as “manufactured”;

and

- “*substantially*” all from “articles, materials, and supplies” “mined, produced or manufactured, as the case may be” in the United States.

74. From this provision, one can conclude that funding would only be allowed under section 401 of the STAA of 1978 if “unmanufactured” “articles, materials, and supplies” were “mined or produced” in the United States and if “manufactured articles, materials and supplies” were “manufactured” in the United States *substantially* all from “articles, materials, and supplies” “mined, produced or manufactured, as the case may be” in the United States.

75. Under section 401 of the STAA of 1978, it was therefore irrelevant whether “articles” were initially “mined”, “materials” were initially “produced” or “supplies” were initially “manufactured”, so long as *any* of these items or processes originated – upstream – in the United States and all of these items and processes fed – downstream – into “unmanufactured” “articles, materials, and supplies” to be “mined or produced” in the United States and “manufactured articles, materials and supplies” to be “manufactured” in the United States, *substantially* all from the upstream items and processes.

76. That “articles”, “materials” and “supplies” were then not tied as to whether they were initially “mined”, “produced” or “manufactured” is confirmed by s. 401(b)(3) of the STAA of 1978, which provided that the Secretary of Transportation could exempt from the Buy America requirement “supplies of the class or kind to be used in the manufacture of articles, materials, supplies that are not mined, produced or manufactured in the United States (...)”. Under this provision, “supplies” could be considered as either “mined, produced or manufactured”.

77. The wording of section 401 of the STAA of 1978 is obviously far different than that which is currently provided for in section 165 of the STAA of 1982 where only “steel, iron” “materials” and “manufactured products” “produced” in the United States are covered by the Buy America requirements (s. 165(a) and s. 165(b)(2)).

78. Contrary to section 401 of the STAA of 1978, there is a justification to read sections 165(b)(2) and 165(a) together so as to limit the reach of section 165 of the STAA of 1982 to “steel, iron” “materials” and “manufactured products” “produced” in the United States only. Post-“production” fabrication would thus not be covered by section 165 of the STAA of 1982.

79. Consequently, there is, upon a plain reading of the provisions and in light of their historical context, a rational basis to contend that post-production fabrication - occurring

downstream from the production process - would not be covered by the Buy America requirements.

**3.2.2.2.3.** The FHWA interpretation of Section 165 of the STAA of 1982 in light of Section 401 of the STAA of 1978 : “Substantially”

80. According to the FHWA Final Rule:<sup>57</sup>

“Previous provisions applied only to structural steel and a determination of foreign or domestic character was based upon the place of manufacture and on the origin or more than 50 percent of the components. The determination to include only structural steel was based in part on the word “substantially” in the language of Section 401 (1978-STAA).

By denoting “steel” in Section 165 (1982 STAA), Congress called attention to their intent to make coverage more encompassing. The legislative history is also clear on this point. Congressional concern that Federal money spent to improve highways should also aid U.S. industry is apparent in the first sentence of Section 165 which requires the Secretary of Transportation to ensure that funds authorized for Federal-aid highway projects would only buy U.S. made steel. The FHWA therefore, has expanded the Buy America rule to include all steel products.” [at p. 53102; emphasis added].

81. That section 165 of the STAA has removed a requirement for “substantial” content does not, however, shed light onto what exactly constitutes “steel” as covered by the Buy America requirements. Moving from “substantial” to “all” does not determine whether one reaches past the production of “steel” to include “steel” that is subsequently fabricated through a downstream process: “all” “steel” “produced in the United States” encompasses the “produced” “steel” only, but does not necessarily include the process whereby steel is subsequently fabricated after having been initially “produced”.

82. In this respect, it is submitted that section 165 of the STAA of 1982 applies only to “all” “steel, iron” “materials” and “manufactured products” which must be “produced” in the United States, which, it is further submitted, only covers the midstream production of a product, to the exclusion of raw materials – upstream – and downstream post production fabrication.

**3.2.2.2.4.** The FHWA Interpretation of Section 165 of the STAA of 1982: “Produced in the U.S.”

83. In its Final Rule<sup>58</sup>, the FHWA interpreted “produced in the United States” (s. 165(a)) as follows:

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““Produced in the United States” means that all manufacturing processes whereby a raw material is changed or transformed into an article which, because of the process, is different from the original product, must occur domestically.” [at p. 53102; emphasis added]

84. Though the FHWA was referring here to “produced in the U.S.” as regards “cement”,<sup>59</sup> the statement of position applies to “steel” as well (and now “iron” also) since “produced in the U.S.” qualifies all previously enumerated items in section 165(a).

85. Thus, the FHWA is of the view that, in order for an item to be “produced in the United States”, a “raw material” must be “changed or transformed [in the United States] into an article which, because of the process, is different from the original product”.

86. As will be seen upon review of the applicable case law under “Buy American” provisions discussed below, the Investor submits that this critical passage of the Final Rule is an essential element in the determination of the proceedings.

**3.2.2.2.5. Section 1041(a) of the ISTEA and the FHWA amendment to the FHWA Regulation**

87. That the terms “produced in the U.S.” “mean” only processes that “change” or “transform” to produce something which is strictly “different from the original product” is confirmed, *a contrario*, by the adoption of section 1041(a) of the *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. 102-240 of December 18<sup>th</sup>, 1991 (“ISTEA”)<sup>60</sup> which provides that:

**Sec. 1041. REGULATORY INTERPRETATIONS.**

**(a) Inclusion of Coating of Steel in Buy America Program.-**

Section 635.410 of title 23 of the Code of Federal Regulations and any similar regulation, ruling, decision shall be applied as if to include coating.

88. But for the adoption of this provision, by an Act of Congress no less, in order to modify the provisions of delegated legislation, the FHWA Regulation would not have been interpreted as including coating, as coating is not an activity that must occur domestically as regards the requirement of being “produced in the U.S.” for the purposes of s. 165(a) of the STAA of 1982,

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<sup>58</sup> *Ibid.*

<sup>59</sup> Section 165 of the STAA of 1982 initially applied to “cement” specifically before its amendment by way of section 10 of the *Interstate Highway Construction; Apportionment of Funds*, Pub. L. 98-229 of March 9<sup>th</sup>, 1984 (Vol. IIA.1; Tab A-4).

<sup>60</sup> Vol. IIA.1; Tab A-6.

there being nothing strictly “different from the original product” as a result of the application of the coating. If such is not the case, the amendment would have been superfluous.

89. Upon adoption of section 1041(a) of the ISTEA, the FHWA amended the FHWA Regulation<sup>61</sup> and provided the following comment :

“Section 1041(a) of the ISTEA requires that existing 23 CFR 635.410 relating to Buy America requirements for the Federal-aid highway program be applied to coating. By its action, the Congress has clarified that the activity of coating is considered a manufacturing process. The material being applied as a coating is not covered under Buy America. Coating is interpreted [by the FHWA] to mean all processes that protect or *enhance the value* of a material or a product to which it is applied, such as epoxy coating, galvanizing or painting.”

Although the subtitle for section 1041(a) addressed “coating of steel”, the text of section 1041(a) refers to “coating” without limitation. The FHWA believes that the Buy America provisions of 23 CFR 635.410 be applied to the process of coating whenever a material is subject to Buy America is covered with a coating intended to protect or enhance the value of the material that is coated. Section 1048 of the ISTEA also amended the Buy America Program to add iron to steel as covered by the program. Accordingly, the FHWA is amending section 635.410 to include the process of applying a coating to either steel or iron.” [at p. 38974; emphasis added].

90. This interpretation of the FHWA Regulation in relation to (only) coating indicates that post production fabrication or manufacturing would not normally be covered by the Buy America requirement, but for the adoption of a congressional provision destined to extend the reach of the provision – downstream – to cover such a process.

91. Indeed, but for congressional intervention as to coating, coating would not constitute a process by which a product could be considered “produced in the United States” under section 165(a). Coating is only designed to protect or enhance the value of a material or a product to which it is applied. In this way, coating differs from a process which changes or transforms an article which, because of the process, is different from the original product.

92. And again, that section 165 of the STAA of 1982 must otherwise receive a narrow textual interpretation is confirmed by the legislative history of the provision, section 165 now only applying to “iron, steel” and “manufactured products” that are “produced” in the United States, section 401 of the STAA of 1978 initially applying more comprehensively to both “unmanufactured articles, materials and supplies” “mined or produced” in the United States and “manufactured articles, materials and supplies” “manufactured” in the United States.

93. The Investor submits that, notwithstanding the narrower textual application of section 165 of the STAA of 1982, similar “Buy American” provisions have been interpreted and applied

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<sup>61</sup> 58 FR 38973, Wednesday July 21, 1993 (Vol. IIA.1; Tab A-9).

in a narrow manner so as to exclude downstream post production fabrication -- since post-production fabrication does not substantially change the metallurgical properties of the item -- even though such provisions are as wide in ambit as was section 401 of the STAA of 1978. The Investor submits that such must necessarily then be the case with respect to section 165 of the STAA of 1982 which has a narrower reach than section 401 of the STAA of 1978.

### **3.2.3. Case Law under Buy American Provisions**

94. A review of the applicable and relevant case law begins with the *Decision of the Comptroller General* (the “*Antenna Towers*” case).<sup>62</sup>

95. At issue in the *Antenna Towers* case was whether the use of United States origin structural steel that was to be fabricated in the United Kingdom for use in antenna towers to be constructed in Greece by Page Communications Engineers (“Page”) would be consistent with “buy national” provisions of the contract in dispute.

96. According to the terms of the contract, “only United States domestic construction materials” could be used for the performance of the contract. The term “construction materials” was defined according to 41 CFR 1-18.601 as meaning “any article, material, or supply brought to the construction site for the incorporation in the building (...)”. The term “domestic construction material” was defined in turn according to 41 CFR 1-6.201 as meaning “unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (...)”.

97. The similarity of the terms used in this “buy national” requirement with those found in section 401 of the STAA of 1978 are obviously striking.

98. The Comptroller General found that Page had placed an order with the United States Steel Corporation (in the United States) for the manufacture of structural steel members and that Page proposed to have these steel members delivered to a subcontractor in the United Kingdom which would then trim the ends of the steel members, where necessary, to the precise measurements set forth in the shop drawings; punch holes; attach (by welding) bolting plates, gussets, caps, etc; and galvanize to prevent rust. Structural steel produced in the United States was therefore to be fabricated in a third country. The issue was, therefore, whether the steel could be considered “manufactured” in the United States.

99. More particularly, the question presented to the Comptroller General was “whether the various structural members produced by United States Steel, and eventually delivered to the construction site, may be considered as having been manufactured in the United States in view of the operations to be conducted in the United Kingdom”.

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<sup>62</sup> B-167635 (1969 U.S. Comp. Gen. LEXIS 2267 (Vol. IIB.1; Tab B-1).

100. The Comptroller General found that, despite the fabrication that the steel was to undergo in the United Kingdom, steel was manufactured in the United States, stating :

“(…) it is our opinion that the intermediate hole punching, bolting plate attachments, and other operations performed on the structural members of the towers in the United Kingdom would not sufficiently alter those members as to change the United States as the place of their manufacture.” [Emphasis added]

101. To the extent that FHWA Regulation use the terms : “(…) if steel or iron materials are to be used, all **manufacturing processes**, (…), for these materials must occur in the United States”,<sup>63</sup> then hole punching, bolting plate attachments, and other operations performed in Canada on the structural members of 100% US steel beams would not sufficiently alter those members so as to change the United States as the place of their manufacture because the subsequent fabrication (punching, bolting, and other operations, etc.) does not form part of the “manufacturing process”.

102. In *Wright Contracting, Inc.* (“*Wright*”),<sup>64</sup> the issue was, also, albeit in a different context, whether fabrication of structural steel in one country could change the origin of that steel. Under the applicable “buy national” contract provisions, *Wright* was to use only “domestic construction materials” in the work. The terms “construction materials” were defined as “articles, materials and supplies brought to the construction site for incorporation in the work”. The term “manufactured domestic construction material” were defined as : “a construction material manufactured in the United States, if the cost of its components mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components”. The term “components” was defined as “articles, materials, and supplies incorporated directly into construction materials”.

103. The subcontractor in *Wright* proposed to use foreign steel and fabricated steel in the United States. The subcontractor claimed that the cost of fabrication in the United States would exceed the cost of the foreign steel. That argument assumed that fabrication could be considered a component, the cost of which could enter into the domestic content calculation.

104. As in the *Antenna Tower* case, post-production fabrication also involved cutting, drilling, shaping and welding structural steel plate. The Board found that the proposed fabrication could not be considered a “component” for the purposes of the domestic content calculation and that the foreign steel would have undergone no substantial metallurgical changes in being fabricated. As a result, the foreign plate and beams did not meet the “buy national” requirements since the domestic post production fabrication did not change the foreign place of manufacturing. Foreign steel did not change its country of origin as a result of fabrication in the United States.

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<sup>63</sup> 23 C.F.R. 635.410(b)(1)(ii) (Vol. IIA.1; Tab A-7).

<sup>64</sup> ASBCA Nos. 39120,39121, 91-1 B.C.A. (CCH) ¶ 23,649, 1990 WL 264583 (1990) (Vol. IIB.1; Tab B-2).

105. In *S.J. Amoroso Construction Co. Inc. v. The United States* (“*Amoroso*”),<sup>65</sup> the United States Claims Court was dealing with the “Buy American” provisions of the *Buy American Act*, 41 U.S.C. § 10a - § 10d (1987) (“BAA”).

106. The relevant provisions read in part as follows:

**Section 10a. American materials required for public use**

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

**Section 10b. Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements**

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured as the case may be, in the United States except as provided in section 10a of this title : Provided, however, That if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception....

107. It is particularly noteworthy that the language of these provisions track – almost to the exact same words – the provisions of s. 401 of the STAA of 1978.<sup>66</sup>

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<sup>65</sup> 26 Cl. Ct. 759 (1992) (Vol. IIB.1; Tab B-3).

108. As in *Wright*, the case involved the interpretation of a particular “buy national” clause, which stated as follows:

**“34. BUY AMERICAN ACT**

(a) The Buy American Act (41 U.S.C. @ 10) provides that the Government give preference to domestic construction material. “Components,” as used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

“Construction materials,” as used in this clause, means articles, materials, and supplies brought to the construction site for incorporation into the building or work.

“Domestic construction material,” as used in this clause, means (1) an unmanufactured construction material mined or produced in the United States, or (2) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to subparagraph 25.202(a)(3) of the Federal Acquisition Regulation (FAR) shall be treated as domestic.

(b) The Contractor, agrees that only domestic construction material will be used by the Contractor, subcontractors, materialmen, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in this contract. [Emphasis added]

109. In this case, Amoroso had entered into a sub-contract whereby Bostrom was to fabricate (cutting to length and punching), assemble and paint steel columns and beams to contract specifications from uncut steel beams. Bostrom intended to purchase the steel beams from a foreign source, this proposed course of action triggering the issue of the BAA requirements.

110. The Court was of the view, based on *Wright*, that a contractor “who cut, drilled, shaped and welded structural pieces from plates and beams had not manufactured the structural pieces because the fabrication process did not substantially change the metallurgical properties” (at p. 772). As a result, fabrication by Bostrom in the United States did not change the foreign origin of the steel materials. Once again, domestic fabrication did not change the foreign origin of the “manufacturing” of the steel.

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<sup>66</sup> The following terms are used verbatim :

“(…) unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured as the case may be, in the United States (…).” [Emphasis added]

111. *Amoroso* was upheld, on point, by the United States Court of Appeals.<sup>67</sup>

112. The Investor submits that the *Antenna Towers*, *Amoroso* and *Wright* cases all stand for the proposition that post-production fabrication of steel does not alter the origin of the steel, be it domestic or foreign: 100% U.S. produced steel remains U.S. steel even if some post production (cutting, bending, grinding, punching, etc.) fabrication occurs in Canada. In other words, these cases clearly stand for the proposition that post-production fabrication is not a “manufacturing” process and cannot affect the place of manufacture or production of steel.

113. Even if section 165(a) of the STAA of 1982 is more restrictive than section 401 of the STAA of 1978 and the “buy national” requirements found in the applicable case law, then post-production fabrication is nevertheless still not caught by these provisions. The fact that Congress purportedly chose to single out and focus on “iron” and “steel” from all the other “manufactured products” in terms of Buy America preference does not change how “iron” or “steel” are “manufactured” in the first place.

#### **3.2.4. Congressional Intent**

114. During the process leading to the adoption of the Final Rule, the FHWA indicated that it was implementing the FHWA Regulation so as to give effect to legislative [Congressional] intent sustaining section 165 of the STAA of 1982.

115. According to the FHWA, the initial Buy America requirement and regulations made thereunder by the FHWA under section 401 of the STAA of 1978 applied only to structural steel since “only foreign structural steel could have a significant nationwide effect on the cost of Federal–aid highway construction projects.”<sup>68</sup> According to the FHWA, “by denoting ‘steel’ in section 165 (1982 STAA), Congress called attention to their intent to make the coverage more encompassing”<sup>69</sup>:

“The legislative history is also clear on this point. Congressional concern that Federal money spent to improve highways should also aid U.S. industry is apparent in the first sentence of Section 165 which requires the Secretary of

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<sup>67</sup> 12 F. 3d 1072 (1993), at p. 1078 (**Vol. IIB.1; Tab B-2**).

<sup>68</sup> 48 FR 53099, at p. 53102 (**Vol. IIA.1; Tab A-9**).

<sup>69</sup> *Ibid.* Curiously, as indicated above, the FHWA found in its Final Rule (**Vol. IIA.1; Tab A-9**, at p. 53102) that “[s]ection 165 of the of the STAA of 1982 does not differ in its coverage from section 401 of the STAA of 1978. Since FHWA has never covered all manufactured products under its Buy America regulation and Congress did not specifically direct a change in that policy in enacting section 165, FHWA does not believe that all manufactured products are covered”. And yet, as also indicated above, section 165(a) of the STAA of 1982 specifically provides that “manufactured products” must be “produced in the United States”. As a result, it is not Congress that denoted steel to be subject to a “more encompassing” coverage, it is the FHWA that selectively extended the reach of the statute in the case of “steel” (and now “iron”) by conspicuously deciding to ignore all other “manufactured products” that are also covered by section 165 of the STAA of 1982.

Transportation to ensure that funds authorized for Federal-aid highway projects would only buy U.S. made steel. The FHWA therefore, has expanded the Buy America rule to include all steel products” [at p. 53102; emphasis added]

116. The only legislative history and Congressional concern referred to by the FHWA was cited earlier in the Final Rule as being found in 128 Cong. Rec. H8984-8990 [daily ed. December 6, 1982].

117. A perusal of that record<sup>70</sup> reveals nothing to suggest that Congress wanted the production of “steel products” to include post-production fabrication of such products, particularly if one is dealing with 100% U.S. origin steel in the first place (and obviously one cannot fault the Congress if it did not address this issue in a context where there did not exist a free trade agreement between the United States, Canada and Mexico).

118. What the record cited by the FHWA does reveal is that the Buy America provision of section 165 of the STAA of 1982 was adopted by a slim majority of 54/46 and the only record cited by the FHWA as supportive of this initiative reveals that the debate centred mainly on the issue of determining whether there should be included a Buy America provision in the first place (as opposed to what should be the real reach of such a provision).

### **3.3. Article 1102: The National Treatment Obligation**

119. The Investor first submits that it and its Investments, both ADF International and fabricated steel owned by either of them, are subject to measures imposed by the Party that violate Article 1102 of NAFTA.

120. The Buy America measures in question, and the U.S. requirement that those provisions be applied by State governments, are designed to favour U.S domestic steel, U.S. manufacturers and U.S. steel fabricators over non-U.S. steel, steel manufacturers and steel fabricators. By definition, they treat national investments more favourably than non-national investments.

121. Article 1102 of the NAFTA<sup>71</sup> provides, in part, as follows:

#### **“Article 1102: National Treatment**

1. Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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<sup>70</sup> **Vol. IIA.1; Tab A-10.** The House Report (No. 97-555, May 17, 1982, United States Code - *Congressional and Administrative News* - 97<sup>th</sup> Congress, Second Session, 1982, Vol. 4, p. 3639, at pp. 3682-3683) and the House Conference Report (No. 97-987, December 21, 1982, *id.*, p. 3692, at p. 3744) otherwise offer no insight as to legislative intent on this issue. There was no Senate Report submitted with the legislation (*id.*, at p. 3639) (**Vol. IIA.1; Tab A-11, Tab A-12, Tab A-13, Tab A-14**).

<sup>71</sup> **Vol. IIA.1; Tab A-1.**

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part.

(...).”

### **3.3.1. *Scope of the National Treatment Obligation***

122. Under Article 1102(1) of NAFTA, the United States must accord to ADF Group treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

123. Under Article 1102(2), the United States must accord to ADF International treatment no less favourable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

124. Under Article 1139 of NAFTA, “investment means”, *inter alia*:

“(a) an enterprise;

(...)

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor’s property in the territory of the party, including turnkey or constructions contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

(...).” [Emphasis added]

125. As a consequence, the United States is obliged under Article 1102(1) to accord national treatment to the ADF Group with respect to :

- (i) the sale of steel;<sup>72</sup> and
- (ii) the expansion, management, conduct and operation of ADF International<sup>73</sup>.

126. In addition, the United States is also obliged under Article 1102(2) to accord national treatment to ADF International with respect to:

- (i) the sale of steel;<sup>74</sup>
- (ii) the expansion, management, conduct and operation of ADF International<sup>75</sup> in general; and in particular
- (iii) the expansion, management, conduct and operation of ADF International's interests arising from the commitment of capital or other resources under the Shirley/ADF Sub-Contract.<sup>76</sup>

127. ADF Group is an "investor of a Party", being an enterprise organized under the laws of Canada.<sup>77</sup> ADF International is in turn an "investment", being an "enterprise" and an "investment of an investor of a Party", being owned by an investor of a Party.<sup>78</sup>

128. All fabricated steel that is acquired by ADF International or ADF Group is an "investment", being tangible property "acquired in the expectation or used for the purpose of economic benefit". Interests arising from the commitment of capital or other resources under the Shirley/ADF Sub-Contract are also investments.

### 3.3.2. "Like Circumstances"

129. In each paragraph of Article 1102, the national treatment required by the provision is the treatment afforded by the Party to its own investors and to their investments "in like circumstances".

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<sup>72</sup> Being "property" under Article 1139 - Investment - definition (g).

<sup>73</sup> Being an "enterprise" under Article 1139 - Investment - definition (a).

<sup>74</sup> Being again "property" under Article 1139 - Investment - definition (g).

<sup>75</sup> Being again an "enterprise" under Article 1139 - Investment - definition (a).

<sup>76</sup> Article 1139 - Investment - definition (h)(i).

<sup>77</sup> Article 1139 - definition of "investor of a Party".

<sup>78</sup> Under Article 1139: "**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such a Party".

130. The phrase “like circumstances” is open to a wide variety of interpretations both in the abstract and in the context of a particular dispute. The Investor will examine this concept below, from the standpoint of international law (3.3.2.1.), domestic law (3.3.2.2.), and the NAFTA provisions with relevant case law (3.3.2.3.) in order to better understand the application of the relevant rules to the instant proceedings (3.3.2.4.).

### 3.3.2.1. *International Law*

131. WTO dispute resolution panels and the Appellate Body have been required to interpret the concept of “like products” and, it is submitted, that the approach to determining “like circumstances” can be informed by the conclusions on “like products”.

132. The case law on “like products” has emphasized that the interpretation of “like” must depend on all the circumstances of each case. In the Appellate Body’s decision in *Japan – Taxes on Alcoholic Beverages*<sup>79</sup>, the Board stated:

“No one approach to exercising judgement will be appropriate for all cases. (...) [T]here can be no one precise and absolute definition of what is “like”. The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered, as well as by the context and the circumstances that prevail in any given case in which the provisions may apply.”<sup>80</sup> [Emphasis added].

133. In addition, all three NAFTA Parties belong to the OECD. The OECD’s practice suggests that an evaluation of “like situations” in an investment context should take into account policy objectives in determining whether enterprises are in “like circumstances”<sup>81</sup>. The June 27, 2000 revision of the OECD *Declaration on International Investment and Multinational Enterprises* states:

“That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as “Foreign-Controlled Enterprises”) treatment under their laws, regulations and administrative practices, consistent

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<sup>79</sup> *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, dated 4 October 1996 (Vol. IIB.2; Tab B-9).

<sup>80</sup> *Ibid.*, at pp. 22-23 (Vol. IIB.2; Tab B-9).

<sup>81</sup> *S.D. Myers Inc. v. Government of Canada*, Partial Award, November 13, 2000, at ¶248 (Vol. IIB.1; Tab B-6).

with international law and no less favourable than that accorded in like situations to domestic enterprises.<sup>82</sup> [Emphasis added].

134. In 1993, the OECD reviewed the “like situation” test in the following terms<sup>83</sup> :

“As regards the expression ‘in like situations’, the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible in as much as those objectives are not contrary to the principle of national treatment”. [Emphasis added] ”.

135. Article 1102 of NAFTA has extended the principle against discrimination in the trade in goods to cover investors and their investments. It does so to shelter foreign investments from the discrimination arising out of domestic political processes over which they have little influence. It seeks to protect investors and their investments from the political influence of their competitors which can capture the regulatory process to favour national interests at the expense of the investor and its investments. The Buy America measures in issue are the gold standard of what can be achieved when the State’s regulatory machinery is captured by politically strong domestic competitors.<sup>84</sup> It is precisely that kind of legislative initiative that Article 1102 prohibits.

### 3.3.2.2. *Domestic Law*

136. The Supreme Court of Canada has explored the complexity of making comparisons in developing a line of authority concerning discrimination against individuals. In the *Andrews* case, the Court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test to determine whether similarly situated individuals are treated in the same manner.<sup>85</sup> Whether individuals are “similarly situated”, and have been treated in a substantively equal manner, depends on an examination of the context in

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<sup>82</sup> *Declaration on International Investment and Multinational Enterprises*, OECD/GD (97) 36, dated June 27, 1976 (**Vol. IIA.2; Tab A-18**).

<sup>83</sup> As quoted in *S.D. Myers Inc. v. Government of Canada*, Partial Award, November 13, 2000, at ¶248 (**Vol. IIB.1; Tab B-6**).

<sup>84</sup> The Congressional Record cited in the FHWA Final Rule, as reviewed above in the section dealing with Congressional Intent behind the adoption of the Buy America measures, undoubtedly establishes the determinative role of the United States’ steel industry lobby group as being the true proponents behind the adoption of section 165 of the STAA of 1982.

<sup>85</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 163-176 (**Vol. IIB.2; Tab B-14**). There were, of course, many cases that followed in the wake of the *Andrews* decision. The Investor does not intend to review all the subsequent case law and limits itself to simply stating that the *Andrews* precedent was really the first to firmly capture the new meaning of “discrimination” to be applied in equal rights cases in Canada.

which a measure is established and applied in the specific circumstances of each case. Such a context admits that equality rights provisions can come in aid to those who, like Mr. Andrews, have little political power or who can exert little political influence.

137. If, initially, Canadian Courts would apply a law “equally” and, as a result, blindly<sup>86</sup>, the Supreme Court has now firmly embraced the concept of “adverse effect” discrimination.<sup>87</sup> A law applied “equally” may adversely affect one group more than another with consequent “unequal” detrimental impact. As a result, one must not only look at the purpose of a measure, but also its true “effects” so as to achieve and ensure true equality.

### 3.3.2.3. *NAFTA Provisions and Case Law*

138. In considering the meaning of “like circumstances” under Article 1102 of the NAFTA, and consistent with Article 31 of the *Vienna Convention*, it is necessary to keep in mind the overall context of Article 1102 and the object and purpose of NAFTA.<sup>88</sup> The context of Article

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<sup>86</sup> For example, a regulation forcing, when required, airline pilots to speak English only was held not to be discriminatory against pilots who speak French, because the regulation applied equally to both English and French speaking pilots, irrespective of the language of the pilot. *Association des gens de l'air v. Lang*, [1978] 2 F.C. 371 (C.A.), at p. 378 (**Vol. IIB.2; Tab B-12**).

<sup>87</sup> For example, a regulation that obliges that commercial advertising in Quebec on signs and posters be in the French language is discriminatory as regards those who wish to advertise in the English language, notwithstanding that the regulation applies equally to everybody, irrespective of the language of the advertiser. *Devine v. Québec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 817 (**Vol. IIB.2; Tab B-13**).

<sup>88</sup> In *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, dated 4 October 1996 (**Vol. IIB.2; Tab B-9**), the Appellate Body formulated the following rules with respect to the interpretation of a treaty, which are worthy of being reproduced *in extenso* (at pp. 10-12):

“Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other “covered agreements” of the *WTO Agreement* “in accordance with customary rules of interpretation of public international law”. Following this mandate, in *United States - Standards for Reformulated and Conventional Gasoline*, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation “has attained the status of a rule of customary or general international law”. There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status.

(...)

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: “interpretation must be based above all upon the text of the treaty”. The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*). In *United States - Standards for Reformulated and Conventional Gasoline*, we noted that “[o]ne of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free

1102, is in part placed within a chapter of NAFTA devoted to encouraging the free flow of investments within the NAFTA territory. The context of Article 1102 is that of a free trade agreement designed to encourage the free flow of goods, services and investments within the NAFTA territory. Thus, Article 1102 is designed to protect NAFTA investors and their investments against discrimination, that is, to protect investors and their investments from being treated less favorably than the Party's own investors and their investments.

139. This context is also informed by the fact that the United States agreed not to apply its Buy America provisions in Federal procurements (Article 1001 of NAFTA) and, by way of the measures in question, is forcing the States to apply those same provisions in Federal-aid highway programs.

140. The object and purpose of NAFTA, which also informs the interpretation of Article 1102, are found in its Preamble and in Article 101.

141. The Preamble to NAFTA provides, *inter alia*, that :

“The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

(...)

**CREATE** an expanded and secure market for the goods and services produced in their Territories;

**REDUCE** distortions to trade;

**ESTABLISH** clear and mutually advantageous rules governing their trade;

**ENSURE** a predictable commercial framework for business planning and investment;

(...)”.

142. In the Preamble to NAFTA, the Parties resolved to reduce barriers to trade and create an expanded and secure market for the goods and services produced in the NAFTA territory. Any interpretation of NAFTA should give effect to these resolutions.

143. Article 101(1) of NAFTA sets out the objectives of NAFTA, in part, as follows:

**“Article 102: Objectives**

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:

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to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.” [Emphasis added; all footnotes omitted].

- (a) eliminate barrier to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
  - (b) promote conditions of fair competition in the free trade area;
  - (c) increase substantially investment opportunities in the territories of its Parties.
- (...).”

144. In Article 101(2), the NAFTA Parties are obliged (“shall”) to “interpret and apply” its provisions in light of the foregoing objectives and in accordance with applicable rules of international law. Thus, NAFTA itself directs that its provisions are to be interpreted in a manner which fosters the development of trade in goods and services and a substantial increase in investment opportunities. Its provisions are to be interpreted in a manner that eliminates barriers to trade in goods and services in order to attain the stated objectives. The provisions of Article 1102 of NAFTA must therefore be read purposefully and in a large and liberal manner so as to defeat the barriers that the objectives of NAFTA are designed to overcome. The provision must be “read up” to the task of attaining the stated objectives.

145. In the case of *S.D. Myers*,<sup>89</sup> the Tribunal addressed the “like circumstances” issue in the following way :

“250. The Tribunal considers that the interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of “like circumstances” invite an examination of whether a non-national investor complaining of less favorable treatment is in the same “sector” as the national investor. The Tribunal takes the view that the word “sector” has a wide connotation that includes the concept of “economic sector” and “business sector”.

(...)

252. The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:

- Whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;
- Whether the measure, on its face, appears to favor its nationals over non-nationals who are protected by the relevant treaty.

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<sup>89</sup> *S.D. Myers, Inc. v. Government of Canada*, Partial Award, November 13, 2000, at ¶¶ 250-254 (Vol. IIB.1; Tab B-6).

253. Each of these factors must be explored and the context of all the facts to determine whether there actually has been a denial of national treatment.

254. Intent is also important. Measures which are drafted and applied with a clear protectionist intent to favor nationals over non-nationals are a *per se* violation of national treatment. As a result, such measures could only be saved by clear, unequivocal exempting language. The Investor submits that no such exempting provision exists in the present case.” [Emphasis added].

### 3.3.2.4. *Application of the Principles to the Instant Proceedings*

#### 3.3.2.4.1. *De Jure* Discrimination

146. As an introductory point, the Investor wishes to make it clear that it is not challenging the procurement practices of the State of Virginia in particular, or any other state of the United States. Its challenge is aimed squarely at the U.S. measures which force states to impose Buy America measures.

147. As previously set out in the section of the Investor’s Memorial dealing with Congressional intent in the adoption of section 165 of the STAA of 1982, the Congressional intent is unequivocal: it is to favor the output of U.S. enterprises over non-U.S. enterprises and thereby to favor U.S. enterprises over non-U.S. enterprises. Once that is established, it falls squarely upon the United States to demonstrate that the measures in question are somehow exempt from NAFTA discipline.

148. The United States itself clearly considers that “buy national” policies are discriminatory practices. The Buy America measures in question in the instant proceedings are clearly “buy national” policies. In the 2001 “National Trade Estimate Report on Foreign Trade Barriers”, the United States Trade Representative described the “buy national” policies of Canadian provincial governments in the following terms:

“Canadian provinces maintain “Buy Canada” price preferences and other discriminatory procurement policies that favor Canadian suppliers over U.S. and other foreign suppliers.”<sup>90</sup> [Emphasis added].

149. The Report considered buy national programs to be “trade barriers”. The Report defines “trade barriers” as “government laws, regulations, policies, or practices that either protect domestic products from foreign competition or artificially stimulate exports of particular domestic products”.<sup>91</sup> Obviously, buy national policies would be the former.

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<sup>90</sup> 2001 National Trade Estimates Report on Foreign Trade Barriers, U.S.T.R. at page 36, [http://222.ustr.gov/html/2001\\_contents.html](http://222.ustr.gov/html/2001_contents.html) (Vol. IIA.2; Tab A-19).

<sup>91</sup> *Ibid.*, at page v.

150. The Buy America measures in question, in their design and architecture, are *de jure* discriminatory, treating non-U.S. investors and their investments less favorably than U.S. investors and their investments. Measures that, as such, are *de jure* discriminatory, treating non-U.S. investors and their investments less favorably than U.S. investors and their investments, violate Article 1102.

151. The Arbitral Tribunal in *Pope & Talbot*<sup>92</sup> noted that Canada admitted in its pleadings of that case that if a measure is *de jure* discriminatory, it will violate Article 1102 and it is only when a measure is “facially neutral” does one need to examine whether “behind that neutrality, the measure disadvantages foreign owned investments”.

**3.3.2.4.2.** Do the U.S. measures violate Article 1102(1) by failing to accord national treatment to ADF Group with respect to the sale of steel and with respect to the management and conduct of the operation of ADF International?

**3.3.2.4.2.1.** Do the U.S. measures violate Article 1102(1) by failing to accord national treatment to ADF Group with respect to the sale of steel?

152. When committing to the Shirley/ADF Sub-Contract, ADF Group committed to the purchase of U.S.-origin steel from Bethlehem Steel. In proposing to fabricate that U.S.-origin steel, it was proposing to do what any U.S. steel fabricator would do, that is, to cut the steel, punch holes in it and deliver it to the job site.

153. ADF Group was informed by the U.S., both directly and through the intermediary of V-DOT, that if it fabricated the steel in its facilities Canada, it would be unable to sell the steel to Shirley for incorporation in the Springfield Interchange Project.

154. The U.S. investors who were in “like circumstances” to ADF Group were, and are, all U.S. steel fabricators.

155. U.S. steel fabricators operate in the same sector, sell the same product, and compete for the same customers as ADF Group. They buy the same input (U.S. steel), treat that input the same way and deliver the same fabricated steel to the same clients. The only difference between ADF Group and U.S. steel fabricators is the physical location of their facilities.

156. The different location of the Investor’s facilities do not provide the basis to hold that ADF Group and U.S. steel fabricators are not in “like circumstances” so as to justify differential treatment of ADF Group and U.S. investors. To do so would render Article 1102(1) meaningless.

157. Article 1102(1) assumes that an investor will be located outside of the territory of the Party faced with the obligation of providing national treatment. The obligation contained in

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<sup>92</sup> *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 by the Arbitral Tribunal, April 10, 2001, at p. 23, ¶ 56 (Vol. IIB.1; Tab B-5).

Article 1102(1) is imposed on a Party and is owed to an “investor of another Party”. If national treatment is owed to an investor of another Party, the fact that the investor is foreign cannot be used as a basis to deny national treatment.

158. As was reaffirmed in *United States – Standards for Reformulated and Conventional Gasoline*:<sup>93</sup> “[o]ne of the corollaries of the “general rule of interpretation” in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the Treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.<sup>94</sup> To put it simply, when faced with an obligation to treat foreign investors as favorably as domestic investors, one cannot justify a failure to do so on the basis that one is foreign and the other is not.

159. The Investor purchased steel from Bethlehem Steel in order to fulfill the Shirley/ADF Sub-Contract. That steel was therefore an investment of the Investor.

160. The Investor, to whom national treatment was owed, proposed to fabricate that steel in Canada and sell it to ADF International. It was prohibited from doing so because its facilities in Canada were treated less favorably than any like facilities in the United States.

**3.3.2.4.2.2.** Do the U.S. measures violate Article 1102(1) by failing to accord national treatment to ADF Group with respect to the management and conduct of the operation of ADF International?

161. ADF Group was denied national treatment with respect to the sale of its investment which consisted of U.S. origin steel, as discussed above, but also with respect to the management and conduct of the operation of its investment, ADF International.

162. A measure which requires investors of another Party to use domestically produced goods only and effectively prohibits the use of imported goods in certain contracts involving its investments is a measure which directly and negatively impacts the management, conduct and operation of the investment. It is also a measure which discriminates between national and non-national enterprises, favoring the former, in a way that is in violation of the fundamental values and goals of NAFTA.

163. Under the Buy America measures in question, national investors are free to rationalize their production efforts in a multi-plant environment in a way that ADF Group is not. The measures in question send a clear message to investors of a non-Party. That is, in order to have market access, they must locate production facilities in the U.S. because only U.S. production facilities have been granted access.

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<sup>93</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WTS/DS2/9, adopted 20 May 1996 (Vol. IIB.2; Tab B-10).

<sup>94</sup> *Ibid.*, at p. 22.

164. The measure negatively impacts the Investor “with respect to the ... expansion management conduct and operation” of the Investment ADF International by denying ADF International access to the full range of goods and services produced by its parent corporation, the Investor ADF Group.

165. The ability to freely transfer goods and services between the parent corporation and its subsidiary is an essential attribute of the parent corporation’s management, conduct and operation of its investment. Any restriction on an investment’s ability to integrate its operations with those of the investor, such as the ability to import goods from the investor, is a restriction on the investor’s management, conduct and operation of the Investment. Such restrictions violate the national treatment obligation of Article 1102 of NAFTA.

166. As noted above, the United States cannot justify a violation of national treatment to an investor of another Party on the grounds that such investor is not a U.S. investor.

167. Article 1102 requires the United States to abstain from any measure that treats investors of another Party less favorable than its own investors. The practical effect of that article is that the Buy America measures in question cannot be imposed on NAFTA investors because to do so would be to establish a separate, less favorable regime for such investors.

**3.3.2.4.3.** Do the U.S. measures violate Article 1102(2) by failing to accord national treatment to ADF International with respect to the sale of steel, the management and conduct of the operation of its investments, including interests arising out of the Shirley / ADF Sub-Contract?

168. ADF International has three relevant investments: (i) the steel it was to supply to Shirley in fulfillment of the Shirley/ADF Sub-Contract; (ii) the expansion, management, conduct and operation of ADF International; and (iii) the expansion, management, conduct and operation of ADF International’s interest arising from commitment of capital or other resources under the Shirley/ADF Sub-Contract.

169. ADF International was denied national treatment in respect of all three Investments.

**3.3.2.4.3.1.** Do the U.S. measures violate Article 1102(2) by failing to accord national treatment to ADF International with respect to the sale of steel?

170. First, the measures in question impact ADF International’s ability to sell steel by denying it the ability to sell U.S. origin steel that has been fabricated by its Canadian parent.

171. The measures in question limit the Investment’s ability to import fabricated steel and put ADF International at a competitive disadvantage vi-à-vis domestic fabricators.

172. Equality of competitive opportunity is a cornerstone of national treatment, and the denial to ADF International of its ability to sell an imported product (U.S. origin steel fabricated in Canada) is a denial of that equality.

173. It is no answer to claim that all U.S. steel fabricators are similarly situated because for those other fabricators, the ability to fabricate in Canada is irrelevant. Only ADF International faces the choices of either expanding its U.S. facility, subcontracting work to its competitors or abandoning significant contract opportunities.

**3.3.2.4.3.2.** Do the U.S. measures violate Article 1102(2) by failing to accord national treatment to ADF International with respect to the management and conduct of the operation of its investments?

174. Second, ADF International is in “like circumstances” to all U.S. steel fabricators. U.S. steel fabricators operate in the same sector, sell the same product, and compete for the same customers as ADF International as they by the same input (U.S. steel), treat that input in the same way and deliver the same fabricated steel to the same clients. The only difference between ADF International and U.S. Steel fabricators is the physical location parent facilities.

175. The measures in question directly interfere with, and render more onerous, the management, conduct and operation of ADF International in a way that does not affect ADF International competitors, being other U.S. steel fabricators. The measures ensure that ADF International cannot rely on its parent corporation’s facilities in Canada to access contracts for federally funded highway projects. The measures send a clear message to ADF International to expand its U.S. operations, sub-contract to its U.S. competitors or not participate in significant contract opportunities.

176. In the instant case, the measures meant that ADF International was obliged to incur significant expense and time in helping to coordinate the activities of five (5) competitors in order to fulfill its contract obligations.

177. National treatment of ADF International requires that no “buy national” policies be applied to it.

**3.3.2.4.3.3.** Do the U.S. measures violate Article 1102(2) by failing to accord national treatment to ADF International with respect its interests arising out of the Shirley / ADF Sub-Contract?

178. Third, and finally, the measures in question impact ADF International’s interest arising from the commitment of capital or other resources to economic activity in the U.S. such as under a construction contract.

179. ADF International’s interest in the Shirley / ADF Sub-Contract is a investment within the terms of Article 1139 - **investment** - definition (h)(i).

180. Under the Buy America measures in question, any U.S. steel fabricator would have been able to profit from the same interest by fabricating the steel in question under the same measures. ADF International was prevented from profiting from its interest, and was in fact required to suffer a substantial loss.

#### 3.3.2.4.4. Violation of National Treatment by Refusal to Follow Constant Case Law

181. In addition to the violations of Article 1102 referred to above, the U.S. courts and administrative agencies have previously addressed issues similar to those raised by ADF International's proposal, namely, the extent to which post-production fabrication work on U.S.-origin steel or foreign steel will have the effect of changing the country of origin of steel so as to disqualify that steel under buy national requirements.

182. As is clear from the case law cited above, the Party's own authorities have consistently held that post-production fabrication of steel products does not change the origin of that steel for purposes of buy national requirements. If the steel was manufactured outside of the United States, it remains foreign steel even if it is fabricated in the U.S. Likewise, if U.S.-origin steel is fabricated abroad, it remains U.S. origin steel.

183. While the legislative provisions in those cases may be slightly different from the Buy America provisions at issue in the instant case, the fundamental rationale is identical.

184. The *Antenna Towers* case<sup>95</sup>, as reviewed above, requires revisiting for the purposes of Article 1102. It involved U.S. structural steel to be fabricated in the United Kingdom for erection into a tower in Greece. The issue was described as "whether the various structural members produced in by United States Steel, and eventually delivered to the construction site, may be considered as having been "manufactured" in the United States (...) in view of the [fabrication] operation performed on these members in the United Kingdom." The Comptroller General held that the "intermediate hole punching, bolting plate attachment, and other operations performed on the structural members (...) would not sufficiently alter those members as the place of their manufacture".

185. Under the measures in issue in the instant case, "steel, iron and manufactured products" must be "produced in the United States" under section 165 of the STAA of 1982. Under the FHWA Regulations issued in order to implement that requirement, "manufactured products" were ignored and only "steel" and "iron" were addressed. If "steel or iron materials are to be used, all manufacturing processes, including the application of a coating, for these materials must occur in the United States".<sup>96</sup>

186. The *Wright* case<sup>97</sup> involved foreign plates and beams to be fabricated in the United States. The issue was whether the steel would qualify as a "manufactured domestic material" which was in turn defined as a construction material manufactured in the United States. The Administrative judge concluded that the fabrication work to be performed in the United States was not manufacturing of steel plate and beams.

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<sup>95</sup> **Vol. IIB.1; Tab B-1.**

<sup>96</sup> 23 CFR 635.410 (b)(1)(ii) (**Vol. IIA.1; Tab A-7**).

<sup>97</sup> **Vol. IIB.1; Tab B-2.**

187. In the *Amoroso* case, which again involved fabrication in the United States of foreign beams, the court stated:

“Preparing and assembling a steel beam to make it suitable for incorporation into a structure is materially different from manufacturing cabinets out of plywood and delivering them fully assembled to the construction site. Plaintiff does, not nor could it successfully contend that it should be considered to have manufactured the structural beams in this case [citing the *Wright* case; reference citation omitted] (finding that contractor who cut, drilled, shaped and welded structural pieces from plates and beams had not manufactured the structural pieces because the fabrication process did not substantially change the metallurgical properties)”.<sup>98</sup>

188. While the particular “buy national” requirements may differ from those in the instant case, the principle that emerges from the cases is clear. That is, that fabrication of a completed steel beam does not constitute production (manufacture) of a new product or material and does not change the country of origin of the beams.

189. The refusal of the United States authorities to follow and apply the principles of these cases is in itself a violation of national treatment.

190. ADF Group and ADF International were told that fabrication of U.S. origin steel constituted manufacturing or production so as to change the country of origin of the steel from U.S. to Canada. The fabricators in *Antenna Towers*, *Wright* and *Amoroso* were all told the opposite, that fabrication was not manufacturing and did not change the country of origin of the Steel.

#### **3.3.2.4.5. The *S.D. Myers* Case**

191. The decision of the Chapter Eleven Tribunal in the case of *S.D. Myers Inc. v. Canada*<sup>99</sup> is interesting because that case is almost the mirror image of the present case.

192. In *S.D. Myers*, the investor S.D. Myers Inc. (“SDMI”) challenged a Canadian ban on the export of PCB’s which effectively denied the access to Canadian PCB waste for treatment in the United States.

193. SDMI operated a waste treatment facility in Ohio while engaged in the treatment of, *inter alia*, PCB waste.

194. In the early 1990’s, it entered into the Canadian market through the creation of Myers Canada Inc. (“MCI”). MCI did not treat PCB waste but collected it in Canada for exportation to

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<sup>98</sup> *Amoroso, supra.*, at pp. 772 (Vol. IIB.1; Tab B-3).

<sup>99</sup> Partial Award, November 13, 2000 (“*S.D. Myers*”) (Vol. IIB.1; Tab B-6).

the United States and treatment by SDMI. SDMI's reason for entering the Canadian market was to extend the usefulness of its U.S. facility in light of declining business in the United States.

195. In late 1995 and early 1996, Canada issued an Interim and Final Order in Council ("OIC") prohibiting the commercial export of PCB waste for disposal. The border remained closed to PCB exports for sixteen months.

196. SDMI claimed that the OIC discriminated against SDMI in favour of Canadian waste treatment facilities in violation of Article 1102. It claimed that the export ban curtailed its operations and its investment in Canada and favoured Canadian-based companies who were able to continue their business in Canada without interference.

197. Canada argued that there was no violation of Article 1102 because the export ban "merely established a uniform regulatory regime under which all are treated equally".<sup>100</sup> It claimed that as no one was permitted to export, there was no discrimination.<sup>101</sup>

198. SDMI claimed that the export ban in question had "the aim and effect of protecting and promoting the market share of producers who were Canadian and who performed the work in Canada".<sup>102</sup>

199. The Tribunal first concluded that SDMI and MCI were in "like circumstances" as Canadian undertakings that operate waste treatment facilities. They were all involved in providing PCB waste remediation services: "SDMI was in a position to attract customers that might otherwise have gone to Canadian operations because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Canadian waste treatment facility operators lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border".<sup>103</sup>

200. The Tribunal then concluded that the intent of the Canadian measure was protectionist: "Canada was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCB's within Canada in the future."<sup>104</sup>

201. The Tribunal found that the export ban violated the national treatment obligation of Article 1102 of NAFTA.<sup>105</sup>

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<sup>100</sup> *S.D. Myers*, at ¶ 241 (Vol. IIB.1; Tab B-6).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*, at ¶ 251.

<sup>104</sup> *Ibid.*, at ¶ 255.

<sup>105</sup> *Ibid.*, at ¶ 256.

202. In a separate opinion, Dr. Brian Schwartz also concluded that the export ban violated Article 1102 stating: “The export ban did not, on its face, expressly discriminate in favour of Canadian operators and against U.S. operators. Both were prohibited from engaging in exports. The intent and practical effect of the measure, however, make clear that it was discriminatory and inconsistent with Article 1102(1) and 1102 (2) of NAFTA.”<sup>106</sup>

203. The parallels between *S.D. Myers* and the instant case are significant as one is in many respects, a mirror image of the other, for reasons which will be explored below.

204. *S.D. Myers* involved an export ban. The present case involves a measure which amounts to an import ban for purposes of federally funded highway contracts.

205. In *S.D. Myers*, the impact of the export ban could have been eliminated had SDMI or MCI chosen to expand its Canadian operations or sub-contract the work to its competitors. In the present case, the effect of the measure could be eliminated if ADF International expanded its facility or subcontracted the work.

206. In both cases, the measures complained of are designed and applied to afford domestic protection to domestic investors and their investments and to discriminate against foreign investors and their investments.

207. In *S.D. Myers*, the claim that the export ban affected all equally was dismissed on the ground that the impact truly fell on the U.S. investor and its Canadian investment. In the present case, while the Buy America provisions are applicable to all, the impact falls upon Canadian investors and their investment.

208. While the cases have significant parallels, there are also, however, significant differences. In *S.D. Myers*, the Canadian export ban was, on its face, neutral. In the present case, the measures are clearly, on their face, discriminatory and protectionist.

### **3.3.3. Conclusion on Article 1102**

209. The Buy America requirements that are imposed are, in their design and architecture, discriminatory and protectionist and a clear violation of Article 1102 of NAFTA.

210. By forcing States to purchase exclusively the industrial output of U.S. facilities, the Party is obliging the States to grant more favourable treatment to U.S. investors and their investments than that accorded to non-U.S. investors and their investments.

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<sup>106</sup> Opinion of Dr Schwartz, at ¶ 184 (Vol. IIB.1; Tab B-6).

### 3.4. Article 1105: The Minimum Standard of Treatment Obligation

#### 3.4.1. Introduction : The Interpretative Debate Surrounding Article 1105

211. Article 1105(1) of the NAFTA<sup>107</sup> provides, in its relevant parts for the purposes of the instant proceedings, as follows :

##### “Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. (...).

(...).”

212. In every NAFTA Chapter Eleven arbitration decided to date, there has been a discussion of the scope and meaning of Article 1105. It is fair to say that much of the arguments have revolved around the precise scope of the Article.

213. 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. At the other end of the spectrum, investors have claimed that Article 1105 reaches all of the international obligations of a State, including its treaty obligations. Consequently, a breach by a State of any of its treaty obligation would be a breach of the minimum standard of treatment in international law.

214. Examples of this debate may be found in *Pope & Talbot*<sup>108</sup> and in the British Columbia Supreme Court decision in *Metalclad*.<sup>109</sup> In *Pope & Talbot*, the Tribunal noted that all parties to the dispute agreed that “the language of Article 1105 grew out of the provisions of bilateral investment treaties negotiated by the United States and other industrialized countries”<sup>110</sup> and were “a ‘principle source’ of the general obligations of States with respect to their treatment of foreign investment.”<sup>111</sup> The Tribunal then stated:

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<sup>107</sup> Vol. IIA.1; Tab A-1.

<sup>108</sup> *Pope & Talbot v. The Government of Canada*, Award on the Merits of Phase 2, April 10, 2000 (“*Pope & Talbot*”) (Vol. IIB.1; Tab B-5).

<sup>109</sup> *The United Mexican States v. Metalclad*, [2001] BCSC 664 (“*Metalclad*”) (Vol. IIB.1; Tab B-7).

<sup>110</sup> *Pope & Talbot*, at ¶110 (Vol. IIB.1; Tab B-5).

<sup>111</sup> *Ibid.*

“These treaties evolved over the years into their present form, which is embodied in the Model Bilateral Investment Treaty of 1987. Canada, the U.K., Belgium, Luxembourg, France and Switzerland have followed the Model. It provides as follows:

‘Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall, in no case be accorded treatment less than that required by international law.’

The Tribunal interprets that formulation as expressly adopting the additive character of the fairness elements. Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.”<sup>112</sup>

215. The Tribunal then went on to interpret Article 1105 as consistent with the language of the Bilateral Investment Treaties (“BITs”), that is, as considering the fairness and full protection elements as additive to the requirements of international law.

216. In *Metalclad*,<sup>113</sup> the Honourable Justice Tysoe SCJ examined the Tribunal’s decision in *S.D. Myers* stating (at ¶ 62) :

“What the *Myers* tribunal correctly pointed out is that in order to qualify as a breach of Article 1105, the treatment in question must fail to accord to international law. Two potential examples are ‘fair and equitable treatment’ and ‘full protection and security’, but those phrases do not stand on their own. For instance, treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment not in accordance with international law. In using the words ‘international law’, Article 1105 is referring to customary international law which is developed by common practice of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11)”.

217. Tysoe SCJ then turned to an examination of the Tribunal’s decision in *Pope & Talbot* as follows (at ¶ 65) :

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<sup>112</sup> *Pope & Talbot*, at ¶111 (Vol. IIB.1; Tab B-5).

<sup>113</sup> We review this decision (Vol. IIB.1; Tab B-7) mainly as it is the first judicial review decision of a Chapter Eleven panel decision by a national court concerning Article 1105 of NAFTA. The decision sums up the case law under Article 1105 issued up until then and explores the conflicting views expressed with respect to the provision.

“With respect, I am unable to agree with the reasoning of the *Pope & Talbot* tribunal. It has interpreted the word ‘including’ in Article 1105 to mean ‘plus’ which has a virtually opposite meaning. Its interpretation is contrary to Article 31 of the *Vienna Convention*, which requires that terms of treaties be given their ordinary meaning. The evidence that the NAFTA Parties intended to reject the ‘additive’ character of bilateral investment treaties is found in the fact that they chose not to adopt the language used in such treaties and I find it surprising that the tribunal considered that other evidence was required. The NAFTA Parties chose to use different language in Article 1105 and the natural inference is that the NAFTA Parties did not want Article 1105 to be given the same interpretation as the wording of the provisions in the Model Bilateral Investment Treaty of 1987.”

218. Clearly, and with great respect, there are deficiencies in both decisions. While Mr. Justice Tysoe may well be correct in his criticism of the *Pope & Talbot* Tribunal’s reasoning to reach the conclusion that the fairness elements were additive, his Lordship commits, it is humbly submitted, the same sin when he concludes that the reference to “principles of international law” in Article 1105 is a reference to “customary international law”.

219. There is nothing in the language of Article 1105 which even hints at such a conclusion and there is no rationale for the conclusion set out in his reasons.

### **3.4.2. Textual, Contextual and Purposeful Interpretation of Article 1105**

220. It is submitted that the scope of Article 1105 of NAFTA is dictated by the wording, context and purpose of the provision in much the same way as one should interpret Article 1102. Let us deal first with the issue of “customary international law” before moving on to, it is submitted, the proper interpretation of Article 1105 in terms of its textual, contextual and purposeful interpretation.

#### **3.4.2.1. Customary International Law**

221. Neither the wording nor the context suggests that reference to “international law” in Article 1105 is a reference to “customary international law”, and even less to its historic and narrow meaning.

222. In this respect, one may begin by indicating that, first, there is much to suggest that, on a plain reading of Article 1105, the reference in Article 1105 to “principles of international law” is not a reference to “customary international law” at all.

223. Indeed, and most obviously, if the negotiators had wanted to establish a “customary international law” (“base line” or other) standard, they could have easily done so by the inclusion of the word “customary”. They simply did not do so.

224. Second, and perhaps even more telling, is the fact that, from a contextual perspective, any attempt to introduce and apply a “customary international law” standard in Article 1105 would

be ineffective. NAFTA Article 1103 imposes a “most favoured nation” (“MFN”) standard on a Party’s treatment of investors. Thus, NAFTA investors benefit from the better of the treatment afforded to (i) NAFTA investors under Article 1105 *or* (ii) the treatment afforded to any non-Party investor.<sup>114</sup> Thus, given the MFN requirement in Article 1103, if any U.S. BIT offered a treatment better than “customary international law”,<sup>115</sup> any inclusion of “customary international law” in Article 1105 would be ineffective. The NAFTA investor would benefit from the better treatment set out in the BIT.

225. For example, in the BIT between the Government of the United States and that of the Government of the Republic of Albania, the comparable investor protection provision reads as follows:

“Article II

(...)

3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.”<sup>116</sup>

226. The language in the *U.S.-Albania* BIT clearly contemplates separate obligations of “fair and equitable treatment” and “full protection and security” (they are explicitly cited) and establishes a floor, treatment “required by international law”, below which the first two elements cannot fall.

227. Given that standard of protection, and given the existence of the MFN obligation in Article 1103, one cannot assume that the negotiators were seeking to establish a level of protection based merely on the minimum protection of “customary international law”.

228. Additionally, it is inconceivable to consider that the NAFTA Parties deliberately sought to give NAFTA investors a level of protection *lower* than that could be offered to investors of other countries or, if they had truly wanted to do so, would have used language so clearly unsuited to the task.

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<sup>114</sup> Article 1103 of NAFTA extends the MFN treatment to investors of another Party than it accords to investors of “any other Party *or* of a non-Party”.

<sup>115</sup> That is, after the coming into force of NAFTA. See the United States’ Annex IV to NAFTA (**Vol. IIA.1; Tab A-1**).

<sup>116</sup> THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ALBANIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, WITH ANNEX AND PROTOCOL, SIGNED AT WASHINGTON ON JANUARY 11, 1995, in force January 4, 1998 (**Vol. IIA.2; Tab A-17**).

**3.4.2.2 .**        *Text, Context and Purpose of Article 1105*

**3.4.2.2.1.**      General Principles

229. In this respect, it is submitted, therefore, that the proper approach to determining the meaning of Article 1105 is to return to a textual interpretation of that provision aided by the interpretative tools set out in NAFTA. In accordance with Article 31 of the *Vienna Convention*, that analysis must take also into account the overall context of Article 1105 and the object and purpose of NAFTA<sup>117</sup>. In both instances, it by this approach that one will be able to embrace the full meaning of international law in which NAFTA, as a free trade agreement, participates.

230. The context of Article 1105 is in part its place within a NAFTA chapter devoted to encouraging the free flow of investments within the NAFTA territory. The context of Article 1105 is also its place within a free trade agreement designed to encourage the free flow of goods, services and investments within the NAFTA territory. In that context, Article 1105 is designed to protect NAFTA investors and their investments by affording fair and equitable treatment and full protection and security, all within the appropriate international law context.

231. The context is also informed by the fact that the United States agreed not to apply its Buy America provisions in Federal procurements (Article 1001 of NAFTA) and, by way of the measures in question, is forcing the States to apply those same provisions in Federal-aid highway programs.

232. The object and purpose of NAFTA, which also inform the interpretation of Article 1105, are found in its Preamble and in Article 101.

233. The Preamble to NAFTA provides, *inter alia*, that :

“The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

(...)

**CREATE** an expanded and secure market for the goods and services produced in their Territories;

**REDUCE** distortions to trade;

**ESTABLISH** clear and mutually advantageous rules governing their trade;

**ENSURE** a predictable commercial framework for business planning and investment;

(...)”.

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<sup>117</sup>

Reference is made here again to the case of *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, dated 4 October 1996 (**Vol. IIB.2; Tab B-9**), where the Appellate Body formulated rules with respect to the interpretation of a treaty, referred to above in the discussion with respect to Article 1102.

234. Article 101(1) of NAFTA sets out the objectives of NAFTA, in part, as follows:

**“Article 102: Objectives**

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:

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

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

(c) increase substantially investment opportunities in the territories of its Parties.

(...).”

235. In Article 101(2), the NAFTA Parties are obliged (“shall”) to “interpret and apply” its provisions in light of the foregoing objectives and in accordance with applicable rules of international law. Thus, NAFTA itself directs that its provisions are to be interpreted in a manner which fosters the development of trade in goods and services and a substantial increase in investment opportunities. Its provisions are to be interpreted in a manner which eliminates barriers to trade in goods and services in order to attain the stated objectives. The provisions of Article 1105 of NAFTA must therefore be read purposefully and in a large and liberal manner so as to defeat the barriers that the objectives of NAFTA are designed to overcome. The provision must, here also, be “read up” to the task of attaining the stated objectives.

236. In the Preamble to NAFTA, the Parties resolved to reduce barriers to trade and create an expanded and secure market for the goods and services produced in the NAFTA territory. Any interpretation of NAFTA should give effect to these resolutions. The objectives of NAFTA mirror those resolutions and NAFTA seeks to obtain the elimination of barriers to trade, the promotion of conditions of fair competition and a substantial increase in investment opportunities.

237. Any reading of Article 1105 which seeks to constrain and limit the protection afforded to investments runs directly contrary to the fundamental objectives of NAFTA. Conversely, an interpretation which seeks to give investments real protection and security and truly fair and equitable treatment fosters those objectives in the way that Article 1105 requires.

238. To read “full protection and security” and “fair and equitable treatment” as mere examples of the meager protection provided under “customary international law” would be to change the meaning of those terms to “protection and security from the most egregious of government action” and “full protection and security from actions that would shock the international community”. That is not what the language of Article 1105 says and that is not what NAFTA requires in order to attain its objectives.

239. If one had a legislative provision that permitted administrative officers “to regulate the terms of sale of the following fruits: apples, oranges and peanuts”, a problem with terminology would be immediately apparent. Either the legislator had in mind a more expansive definition of

fruit that one might normally envision, or the inclusion of peanuts was a mistake. Similarly, if Article 1105 is read as “treatment in accordance with *customary* international law including fair and equitable treatment and full protection and security” then either the expression “customary international law” is wrong or the inclusive reference to “fair and equitable treatment and full protection and security” is wrong. The two cannot cohabit. Customary international law does not provide “fair and equitable security and full protection and security”. If there was a settled customary international law granting fair and equitable treatment and full protection and security to investors, there would be no need for the multitude of BITs which are now in force.

#### 3.4.2.2.2. The Content of “Law”

240. How then do we reconcile “treatment in accordance with international law” and the requirements of “fair and equitable treatment” and “full protection and security”? We do so by allowing the latter expressions to inform the former.

241. In *Principles of Public International Law*,<sup>118</sup> Professor Brownlie discusses a category of international law known as “General Principles of International Law”. He states:

“The rubric [General Principles of International Law] may refer to rules of customary law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice] or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies. What is clear is the inappropriateness of rigid categorization of the source. Examples of this type of general principle are the principles of consent, reciprocity, equality of states, finality of awards and settlement, the legal validity of agreements, good faith, domestic jurisdiction and the freedom of the seas. In many cases, these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice.”<sup>119</sup> [Emphasis added].

242. The “General Principles of International Law” can easily accommodate the duties of “fair and equitable treatment” and “full protection and security”. This is particularly so in the context of investor protection provisions such as Chapter Eleven of NAFTA and the Model Law on BITs which seek to introduce investors into realms of the law previously reserved to States. Article 38(1)(c) of the *Statute of the International Court of Justice* refers to “the general principles of law recognized by civilized nations”<sup>120</sup>. In this respect, it is submitted that one may turn to these general principles in order to inform the content of “fair and equitable” treatment and “full protection and security”.

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<sup>118</sup> Ian Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 5<sup>th</sup> Edition, 1998 (Vol. IIB.2; Tab B-17).

<sup>119</sup> *Ibid.*, at p. 18.

<sup>120</sup> Vol. IIA.2; Tab A-15.

243. As a result, it is submitted that the Tribunal need only look at the treatment and determine itself whether or not such treatment - on its own - is in itself “fair” and “equitable” and provides also “full protection and security”. The provision is in no way limited to egregious conduct alone and applies to *any* treatment that is not in itself “fair” and “equitable” or which does not provide “full protection and security”.

244. The requirement that the treatment be in itself “fair” and “equitable” can in turn include, but without limitation, that it must be clear and accessible, must not be vague or arbitrary and must provide a reasonable opportunity to know the law so that one may reasonably be allowed to rely and act according to its tenets; such treatment must not, in turn, arbitrarily defeat established legitimate expectations through “unfettered discretion”. There must be “law” in the first place, which implies fairness, equity, adequate accessibility, sufficient precision, reasonable predictability and reasonable stability in treatment.<sup>121</sup>

245. Subsidiarily, the treatment must then also be *applied* in a manner that provides “full protection” and “security”: there must be measures to ensure fair and equitable treatment and, in its application, the treatment must not be applied in a manner so as to encourage, allow or tolerate, by action or omission, unfair and inequitable treatment. Only then can one thus “fully” be entitled to benefit from the “protection” and “security” which stem from there being “law” in the first place.

246. In both instances, one is invoking “law” and the concept of “law” used here is the one which receives universal understanding. The idea that the law must strive to achieve justice by the use of, *inter alia*, the concept of “fairness” and rules against “arbitrariness”, “unfettered discretion” and “vagueness” is clearly found in Europe, Canada and the United States, to name but a few.<sup>122</sup>

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<sup>121</sup> Under the authority of Article 31(2) of the *Vienna Convention* (**Vol. IIA.2; Tab A-16**), the Investor reminds that the Preamble to NAFTA provides, *inter alia*, that:

“The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

(...)

**ENSURE** a predictable commercial framework for business planning and investment;

(...)”. [Emphasis is ours].

<sup>122</sup> See: *R. v. Morales*, [1992] 3 S.C.R. 711 (where the statutory term “public interest” was ruled invalid by the Supreme Court of Canada as being “void for vagueness”) (**Vol. IIB.2; Tab B-15**). Waiver based on “public interest” is also found in section 165(b)(1) of the STAA of 1982, and sustains the inapplicability of the FHWAR to all “manufactured products”. See also: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 632 and ss. (**Vol. IIB.2; Tab B-16**), citing United States and European precedents (the famous *Sunday Times* case as just one example) as well as numerous authorities from both the civil and common law, more particularly with respect to the concepts of “fair notice” and “limitation of enforcement discretion.” The Court makes a remarkable review of the relevant authorities and the decision constitutes to this day the best judicial authority in Canada that has the most thoroughly explored the concepts.

247. This is the principle of “international law” that informs the concepts of “fairness” “equity, “protection” and “security” for the purposes of Article 1105 of NAFTA and the instant proceedings.

248. In our case, the following words of Gonthier J. of the Supreme Court of Canada, in *R. v. Nova Scotia Pharmaceutical Society*,<sup>123</sup> are apt when considering section 165 of the STAA of 1982 and the FHWA Regulation:

“What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the [European Commission on Human Rights] reasons in *Malone, supra*, at pp. 32-33, and the *Leander* case, judgment of 26 March 1987, Series A No. 116, at p. 23.” [at p. 642; emphasis added].

### **3.4.2.3.**        *Application of the “Law” to the Instant Proceedings*

#### **3.4.2.3.1.**        Arbitrary Application of Section 165 of the STAA of 1982 by the FHWA

249. Notwithstanding that the Buy America provision of section 165 of the STAA is *per se* unfair and inequitable within the context of NAFTA, under the present circumstances, section 165 of the STAA of 1982 also does not give to the FHWA a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. The provision fails to give direction as to how to exercise this discretion, so that this exercise may be controlled. The provision does not accord *full* protection and security because it delivers investors into the hands of the FHWA which applies the law as it sees fit, irrespective of the text of section 165.

250. The FHWA considers itself entirely free in this respect to ignore past administrative and judicial pronouncements in order to stretch section 165 of the STAA of 1982 to cover post-production fabrication of “steel” -- beyond the text of section 165 -- and to exempt all “manufactured products”. The FHWA thereby selectively ignores that the coverage of “manufactured products” was expressly maintained under section 165 of the STAA of 1982 in order to justify its position that one must accordingly, after statutory pruning, focus coverage on “iron” and “steel”. Consequently, the FHWA can thus artificially extend the coverage of Buy America on “steel” to post-production fabrication all the while completely ignoring the free trade context that nullifies the policy considerations for enacting “buy national” policies in the first place.

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<sup>123</sup> [1992] 2 S.C.R. 606 (Vol. IIB.2; Tab B-16).

### 3.4.2.3.2. Disregard of Precedents by the FHWA

251. With respect to the *application* of the “buy national” policy by the FHWA, applying the Party’s measures to the Investor and its Investment in the instant case arbitrarily defeats unfairly and inequitably the legitimate expectations that have been created by previous actions of the United States, including, but without limitation, decisions of the U.S. courts of law and administrative agencies reviewed above with respect to “buy national” policies. The United States is now applying a new rule to others, a new standard, a double standard.

252. Within the context of a “free trade” agreement, this is neither fair nor equitable nor, in the manner in which the measures are applied, does this afford full protection and security.

253. By imposing new rules on to others that which the United States hitherto applied to itself, there entails a radical and arbitrary shift in the law that defeats its reasonable stability and predictability and the reasonable attempts to comply with it, which, in turn, defeats the reasons for there being “law” in the first place.

254. In short, the relevant statutory and regulatory provisions and administrative decisions and conduct that have been applied to the Investment in this case have become a means to deny it “fair” and “equitable” treatment with “full protection” and “security”.

255. Finally, from a structural viewpoint, after agreeing to exclude Buy America from Federal procurement under Chapter 10 of NAFTA, the United States should not, indirectly, force states to apply those provisions. There is a difference between allowing states to pursue such policies on the one hand, and actively forcing them to do so on the other. That is particularly true when the project is federally funded and the federal government dictates the content of requirements. As a result, the United States is simply not fulfilling its NAFTA obligations in “good faith”.

### 3.5. Article 1106: The Obligation not to Impose or Enforce Performance Requirements

256. NAFTA Article 1106<sup>124</sup> provides, in its relevant parts, as follows:

#### **“Article 1106: Performance Requirements**

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

- (a) (...);
- (b) to achieve a given level or percentage of domestic content;

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<sup>124</sup>

- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; (...).”

257. Article 1106(1)(b) and 1106(1)(c) prohibit the imposition or enforcement of domestic content requirements or domestic preference requirements in connection with the management conduct or operation of an investment. The Buy America measures of the Party violate Article 1106(1)(b) and Article 1106(1)(c) by imposing domestic content (100% U.S. steel) and domestic preference requirements to goods produced in the United States (U.S. “produced”<sup>125</sup> steel) on ADF International.

258. The Buy America measures at issue are unquestionably domestic content requirements, requiring ADF International to supply to Federal-aid highway contracts only U.S. steel which has been 100% produced and (according to the FHWA) fabricated in the U.S.

259. Those measures are also domestic preference requirements. In order to sell fabricated steel in Federal-aid highway projects, ADF is obliged to purchase only U.S. steel and to either fabricate that steel in the U.S. itself or to subcontract the fabrication to U.S. steel fabricators. Given the limitations on the size of steel beams that can be fabricated in ADF International’s facility, the measures amount to an effective requirement on ADF International to use U.S. sub-contractors instead of using its Canadian parent.

260. The U.S. has recognized that Buy America provisions similar to the ones in question are prohibited performance requirements and have listed them as “existing non-conforming measures” in accordance with Article 1108.

261. Article 1108(1) provides in this respect, in part, as follows

“1108 (1). Articles 1102, 1103, 1106 and 1107 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I or III,  
(...).”

262. In the Schedule to Annex I of the United States (final item)<sup>126</sup>, one may find the following measure:

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<sup>125</sup> Article 1106(1)(c) of NAFTA (“produced”) and section 165(a) of the STAA of 1982 (“steel (...) produced in the United States”).

<sup>126</sup> **Vol. IIA.1; Tab A-1.**

“Sector: Waste Management  
Sub-Sector:  
Industry  
Classification: SIC 4952 – Sewerage System

Type of Reservation: Performance Requirements (Article 1106)

Level of Government: Federal

Measures: *Clean Water Act*, 33 U.S.C. §§ 1251 et seq.

Description: Investment

The *Clean Water Act* authorizes grants for the construction of treatment plants for municipal sewage or industrial waste. Grant recipients may be privately-owned enterprises. The Act provides that grants shall be made for treatment works only if such articles, materials and supplies as have been manufactured, mined or produced in the United States will be used in the treatment works. The Administrator of the Environmental Protection Agency has authority not to apply this provision, for example, if the cost of the articles in question is unreasonable (33 U.S.C. § 1295).

Phase-Out: None”

[Emphasis added]

263. The *Clean Water Act*, 33 U.S.C. § 1295,<sup>127</sup> provides, in turn, as follows:

**“Sec. 1295. Requirements for American materials**

Notwithstanding any other provision of law, no grant for which application is made after February 1, 1978, shall be made under this subchapter for any treatment works unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States, substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States will be used in such treatment works. This section shall not apply in any case where the Administrator determines, based upon those factors the Administrator deems relevant, including the available resources of the agency, it to be inconsistent with the public interest (including multilateral government procurement agreements) or the cost to be unreasonable, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.” [Emphasis added]

<sup>127</sup>

The “*Clean Water Act*” (Vol. IIA.1; Tab A-8).

264. The language of this Buy America requirement in the *Clean Water Act* provision is strikingly similar to the “buy national” provision involved in the *Amoroso*<sup>128</sup> and *Wright*<sup>129</sup> decisions reviewed above, as well as to section 401 of the STAA of 1978<sup>130</sup>, the predecessor to section 165 of the STAA of 1982<sup>131</sup>, also reviewed above. The Intent of the *Clean Water Act* measure is identical to the Buy America measures at issue in the present case.

265. The United States admits that the Buy America requirements of the *Clean Water Act*<sup>132</sup> is an “existing non-conforming measure”, under Article 1108(1)(a), since it is listed as such in its Schedule to Annex I. The only material difference between that provision and the Buy America measures at issue in the instant case is that the latter measures are stricter.

266. Indeed, as indicated above, the FHWA is of the view that section 165 of the STAA of 1982 was designed to be “more encompassing” than section 401 of the STAA of 1978 and, consequently, more restrictive as a trade barrier, thereby justifying that the Buy America rule be “expanded [by the FHWA] (...) to include all steel products.”<sup>133</sup>

267. If the United States listed the less restrictive Buy America requirement of the *Clean Water Act* as an “existing non-conforming measure” in the area of performance requirements in its Schedule to Annex I, then surely the more restrictive (according to the FHWA) Buy America requirement found in section 165 of the STAA of 1982 is also a non-conforming measure in the area of performance requirements.

268. The measures at issue are enforced in law and in practice by the U.S. government and its administrative agencies. The application of the Buy America measures in the contracts relating to the Springfield Interchange Project is the direct result of the federal requirement that such a provision appear in such contracts. Special Provision 102.05 appeared in the Main Contract (and was incorporated by reference in the Shirley/ADF Sub-Contract) at the insistence of the FHWA and as a condition of the cost reimbursement of the V-DOT Springfield Interchange Project.

269. Special Provision 102.05<sup>134</sup> was subject to prior approval of the Federal Highway Authority before it could be inserted into the Main Contract and in fact received such approval from the FHWA. Any interpretation of the scope and meaning of Special Provision 102.05 was,

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128 **Vol. IIB.1; Tab B-3.**

129 **Vol. IIB.1; Tab B-2.**

130 **Vol. IIA.1; Tab A-5.**

131 **Vol. IIA.1; Tab A-3 and Tab A-4.**

132 33 U.S.C. § 1295 (**Vol. IIA.1; Tab A-8**).

133 FHWA Final Rule, at p. 53102 (**Vol. IIA.1; Tab A-9**).

134 **Vol. I; Tab B-1.**

according to both V-DOT and FHWA officials, the exclusive jurisdiction of FHWA. As Mr. Baccus, Counsel for the U.S. Department of Transportation stated, if V-DOT did not apply the Buy America measures, then the federal government would not reimburse V-DOT's costs for the project.

270. The application of the Buy America measures in the Springfield Interchange Project is but a particular example of the manner in which these measures are imposed by the Party generally.

271. The Federal authorities also directly enforce the measures vis-à-vis contractors and sub-contractors such as ADF International. Section 165 of the STAA of 1982, the enabling statutory provision in question, contains its own enforcement mechanism at section 165(f)<sup>135</sup> which provides as follows:

(f) Intentional Violations. - If it has been determined by a court or Federal agency that any person intentionally –

(1) affixed a label bearing a 'Made in America' inscription, or any inscription with the same meaning, to any product used in projects to which this section applies, sold in or shipped to the United States that was not made in the United States; or

(2) represented that any product used in projects to which this section applies, sold in or shipped to the United States that was not produced in the United States, was produced in the United States;

that person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to the debarment, suspension, and ineligibility procedures in subpart 9.4 of chapter 1 of title 48, Code of Federal Regulations.

272. Thus, any contractor who fails to abide by the requirements of the Buy America provisions faces significant civil consequences for that violation: by becoming ineligible to receive any further contract or subcontract, the contractor's capacity to contract with the federal authorities suffers from *capitis diminutio*.

273. As a result, in every respect, the Buy America measures in issue in the instant proceedings were and are imposed and enforced by the Party.

274. The measures are requirements "in connection with the (...) management, conduct or operation" of the investment because they directly impact the daily activities, operations and sales of the investment, ADF International. The measures are directly targeted at investments such as ADF International and are aimed at influencing their economic activity, including the

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<sup>135</sup>

Vol. IIA.1; Tab A-3 and Tab A-4.

choice of what inputs to use, where the work will be performed and what contracts the investment can reasonably bid for.

275. As a result, the Party's Buy America measures are a performance requirement that is prohibited by Article 1106(1)(b) and Article 1106(1)(c) of NAFTA.

### 3.6. Exceptions

#### 3.6.1. *Preliminary observations*

276. The Investor submits that once it has established a *prima facie* case of a violation of any of the obligations incumbent upon the Party, the burden shifts to the Party to establish that the measures complained of were otherwise authorized under NAFTA.

277. In that respect, the Investor adopts the following position taken by the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*:<sup>136</sup>

“(…) it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.”<sup>137</sup>

The forgoing is also applicable to any claim for exceptions, the Party claiming the exception has the burden of proving its applicability.<sup>138</sup>

278. Consistent with these principles, the Investor would not normally have addressed in its Memorial issues relating to any affirmative defense that might be available to the U.S., including any possible exempting provisions that might save the measures. Instead, the Investor would have waited until such affirmative defenses were raised to address them.

279. However during the Preliminary Conference held by videoconference on February 3, 2001, the Tribunal asked the Investor to address issues related to potential exceptions in its Memorial. We are, therefore addressing those issues, noting however that the U.S. carries the burden of demonstrating that any affirmative defense is available.

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<sup>136</sup> *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R., AB-1997-1, 25 April 1997, Report of the Appellate Body (**Vol. IIB.2; Tab B-11**).

<sup>137</sup> *Ibid.*, at p.14.

<sup>138</sup> *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the Panel, October 16, 1989, CDA 89-1807-01, 1989 WL 250302 (U.S.-Can. F.T.A. Binational Panel), at ¶ 7.02, p. 20 (**Vol. IIB.1; Tab B-8**).

280. As a further preliminary matter, this Tribunal should construe exceptions strictly in accordance with the edict set out in Article 101(2) to interpret and apply the provisions of NAFTA “in the light of its objectives (...) and in accordance with international law.” Those objectives include,

- The elimination of barriers to trade;
- The facilitation of the cross-border movement of goods and services between the territories of the Parties;
- The promotion of conditions of fair competition in the free trade area; and
- The substantial increase of investment opportunities in the territories of the Parties.<sup>139</sup>

281. In addition, and consistent with Article 31 of the *Vienna Convention*<sup>140</sup>, NAFTA should be interpreted in light of its object and purpose which can in turn be informed by the Preamble of NAFTA which indicates that the NAFTA Parties are resolved to:

- Create an expanded and secure market for the goods and services produced in their territories;
- Establish clear and mutually advantageous rules governing their trade; and
- Ensure a predictable commercial framework for business planning and investment.

282. The Investor will not, in anticipation of possible defences that the United States will undoubtedly attempt to establish, answer all conceivable arguments that can be put forth, but will limit itself to commenting on the exceptions that are most likely to be invoked, based on past discussions with representatives of the United States.

### **3.6.2. Article 1108(1): Exceptions and Reservations – General**

283. Article 1108(1) provides, in part, as follows:

“1108 (1). Articles 1102, 1103, 1106 and 1107 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I or III, (...).”

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<sup>139</sup> NAFTA Article 101(1) (Vol. IIA.1; Tab A-1).

<sup>140</sup> Vol. IIA.2; Tab A-16.

284. The Buy America measures in question are not listed in the Schedule of the United States to Annex I or Annex III. Consequently, the measures in dispute are not saved by Article 1108(1).<sup>141</sup>

**3.6.3. Article 1108(7) and Article 1108(8): Procurement and Subsidies**

285. Article 1108(7) provides as follows:

“1108(7). Articles 1102, 1103 and 1107 do not apply to:

(a) procurement by a Party or a state enterprise; or

(b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.” [Emphasis added].

286. Article 1108(8) provides, in turn, as follows:

“1108(8). The provisions of:

(a) Article 1106(1)(a), (b) and (c), and (3)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and (...).” [Emphasis added]

**3.6.3.1. Article 1108(7)(a) and Article 1108 (8)(b): Procurement by a Party**

287. Consistent with Article 1108(7)(a) and Article 1108(8)(b), the obligations respecting, *inter alia*, national treatment and certain performance requirements do not apply to “procurement by a Party” or a “state enterprise”.<sup>142</sup>

288. Some preliminary observations, which color and inform any interpretation of the exempting provisions, are in order.

289. It must first be noted that this case is not a procurement case and the Investor is not complaining about the conduct of any procurement. The Investor is complaining about Federal

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<sup>141</sup> The Tribunal will recall that the U.S. listed the Buy America provisions of the *Clean Water Act* (33 U.S.C. § 1295) as “existing non-conforming measures “ in the area of performance requirements (**Vol. IIA.1; Tab A-8**).

<sup>142</sup> Given the absence of involvement of any “state enterprise” as defined in Article 201, we will not further discuss “state enterprises”.

measures which are imposed and enforced by the Federal government which in turn cause damage the Investor.

290. While the activities of V-DOT in purchasing construction goods and services did constitute procurement, the Investor is not complaining about those activities. V-DOT was a mere instrumentality through which the Federal government acted. It is the acts of the Federal government that caused damage to the Investor.

291. Chapter Ten of NAFTA provides a code for the conduct of covered procurements. It establishes rules governing how procurements are to be conducted and the consequences for failure to follow those rules. Chapter Ten contains its own national treatment and most favored nation obligations (Article 1003) and its own prohibition against performance requirements (Article 1006).

292. The Federal government, and all of the Federal agencies involved in this arbitration, are prohibited from applying the relevant Buy America measures in their own procurements. Article 1006 prohibits any covered entity from imposing or considering “conditions (...) that encourage local development (...) by means of requirements of local content”. No exception to that provision has been taken that would allow any of those Federal agencies to apply the Buy America measures in issue in their own procurement.

293. The Tribunal should also be aware that states in general, and the State of Virginia in particular, have assumed no procurement obligations under Chapter Ten of NAFTA. Pursuant to Article 1024, the NAFTA Parties were to “commence further negotiations no later than December 31, 1998, with a view to further liberalization of their procurement markets”. In those negotiations, the NAFTA Parties were to “review all aspects of their government procurement practices”. Prior to the review, they were to “endeavor to consult with their state and provincial governments with a view to obtaining commitments (...) to include within this Chapter procurement by state and provincial government entities and enterprises”. No such commitments were obtained. As a result, no state or provincial government entity or enterprise is subject to Chapter Ten.

294. Consequently, if the Buy America measures in question are procurement, they would violate Chapter Ten because the United States government has agreed not to apply such measures in its procurements.<sup>143</sup> If they are not procurement, they are not saved by an exception that covers procurement.

295. Consequently, in order for the measures at issue to benefit from the exempting provision, one would need to enlarge the definition of “procurement” to cover measures which were not procurement. That would take the measures out of Chapter Eleven, where they are prohibited, to put them into Chapter Ten, where the Party has agreed not to apply them. One would then presumably argue that the measures are state procurement measures, for which no duties exist and are, therefore, NAFTA compliant.

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<sup>143</sup> The United States did maintain the right to apply some offsets such as minority business preferences which are not relevant here.

296. Procurement is defined in Article 1001(5) as follows :

“**1001 (5).**Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include :

(a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; and

(b) the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.” [Emphasis added]

297. The Buy America measures in question are components of the Federal-aid highway program. As such, they are not procurement because procurement is specifically defined as excluding “any form of government assistance (...) to persons or state, provincial and regional governments.”<sup>144</sup>

298. The Department of Transport has also recognized that the measures in question are not procurement within the meaning of Chapter Ten of NAFTA. In its publication *Quick Facts about “Buy America” requirements for Federal-aid highway construction*,<sup>145</sup> the FHWA states:

“NAFTA does not apply. There is a specific exemption within NAFTA (article 1001) for grant programs such as the Federal-aid highway program. Similarly, the GATT and EEC agreements do not apply.”

299. Consequently, the Federal-aid highway program, and the Buy America provisions which form part of that program, are not procurement, and cannot benefit from any exemption for “procurement by a Party”.

300. If the measures are not procurement, may they otherwise benefit from the exemption?

301. The exempting provision in question refers simply to “procurement by a Party”. There is no language to support any extension of that definition to include measures that are not procurement. If the measures in question are not “procurement”, they cannot benefit from the exemption.

302. Where the NAFTA negotiators have wanted to cast wide net to cover, not just a particular activity, but acts and measures connected to it, they have used clear language to do so. For example, Article 1102 (national treatment) refers to treatment “*with respect to*” various activities.

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<sup>144</sup> Article 1005(1) (Vol. IIA.1; Tab A-1).

<sup>145</sup> <http://www.fhwa.dot.gov/infrastructure/progadmin/contracts/b-amquck.htm> (Vol. IIA.2; Tab A-20)

Similarly, Article 1106 refers to commitments or undertakings “*in connection with*” certain activities. The absence of similarly expansive language in Article 1108(7)(a) and Article 1108(8)(b) is evidence that negotiators intended the exception to be limited to procurement and nothing more.

**3.6.3.2.** Article 1108(7)(b): Subsidies and Grants

303. Article 1108(7)(b) states that:

“Articles 1102, 1103 and 1107 do not apply to (...) (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance”. [Emphasis added]

304. Assuming, for purposes of argument, that funding under the Federal-aid highway program constitutes a grant or subsidy, the imposition of Buy America requirements in the context of that program is not saved by Article 1108(7)(b).

305. Article 1108(7)(b) is designed to permit a Party to depart from the national treatment obligation when making grants and subsidies. It does not go so far as to permit a Party to continue *ad infinitum* to require that grant recipients in turn violate the national treatment obligation when they spend any funds received. The effect of Article 1108(7)(b) is exhausted once the grant or subsidy is made and that Article does not permit the imposition of an obligation on the grant recipient to violate the national treatment obligation.

306. As a result, in the instant case, the United States may provide a subsidy or grant to V-DOT for the purposes of the Springfield Interchange Project, without violating Article 1102, but it cannot thereafter insist that V-DOT impose measures that violate Article 1102 once the subsidy or grant is spent.

307. The money spent by V-DOT in the Springfield Interchange Project was not a “grant or subsidy” so as to benefit from the exception provided by Article 1108(7)(b). While spending the funds provided, V-DOT was purchasing goods and services and paying market rates for them. It was not making a grant or subsidy.

308. In other words, the United States may discriminate between nationals and non-nationals in deciding to whom it will provide a “subsidy or grant”, but it cannot, once the “subsidy or grant” is provided otherwise impose, directly or indirectly, “measures” that run against Article 1102. It cannot seek to impose on the recipient an obligation to continue discriminating.

309. And again, if the NAFTA drafters wanted to allow conditions attached to subsidies or grants to violate national treatment obligations, they would have used a more expansive language such as the one found in Article 1108(8)(a) and Article 1108(8)(c): “qualification requirements for goods” [on the ability to benefit from the “subsidy or grant”] or a “requirement imposed by a (...) Party *relating to* the content of goods” [on the ability to benefit from the “subsidy or grant”]. No such expansive language is found in the exception and, as all exceptions, it must be carved out narrowly so as not to defeat the objects and purposes of NAFTA.

### **3.6.4. Conclusion on the Exceptions and Exemptions**

310. We have endeavoured, at the request of the Tribunal, to address the more obvious claims for exceptions and exclusions. Our selection of those claims should in no way be considered an endorsement of their applicability. Quite the opposite, we believe that we have demonstrated that there are no applicable exceptions or exclusions that would save the measures at issue in the instant proceedings.

311. Violations of national treatment and the imposition of some performance requirements may be saved if the measures complained of are procurement. The measures complained of are not procurement. In fact, the Party has recognised that proscribed performance requirements, such as the measures in question, will not be saved by an exception for procurement<sup>146</sup>. Hence the need to specifically exempt the Buy America provisions of the *Clean Water Act* as “existing non-conforming measures” in the area of performance requirements under Article 1108(1)(a)(i) of NAFTA.

312. Grants and subsidies may be given in a discriminatory fashion in violation of the national treatment standard. That does not mean, however, that the Party maintains any authority to insist that the recipients of grants and subsidies discriminate when they spend all funds received.

## **4. CONCLUSION**

313. On the basis of all of the forgoing, the Investor respectfully asks that this Tribunal :

- a) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF Group treatment no less favorable than it accorded in like circumstance to its own investors with respect to the management, conduct and operation of its investments in violation of Article 1102(1);
- b) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF International treatment no less favorable than it accorded in like circumstance to investments of its own investors with respect to the management, conduct operation and sale of its investments in violation of Article 1102(2);
- c) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF International, treatment in accordance with international law, including fair and equitable treatment and full protection and security in violation of Article 1105(1);

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If such had been the case, the Buy America requirement of the *Clean Water Act* (33 U.S.C. § 1295) would have been exempted under Article 1108(8)(b), making its listing in the United States’ Schedule to Annex I under Article 1108(1)(a)(i) superfluous.

- d) Find that in applying and enforcing the Buy America measures in question, the Party imposed performance requirements in connection with the expansion, management, conduct and operation of ADF International in violation of Article 1106(1)(b) and and Article 1106(1)(c); and
- e) Order that the parties now to proceed to the second stage of the arbitration, being an assessment of damages, as per Item 13 of the Minutes of the First Session of the Tribunal held on February 3, 2001.

314. The whole with costs.

**Signed at Montreal, this 1<sup>st</sup> day of August, 2001.**

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