

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

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

**REJOINDER OF
RESPONDENT UNITED STATES OF AMERICA
ON COMPETENCE AND LIABILITY**

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In accordance with Article 38 of the ICSID Arbitration (Additional Facility) Rules and paragraph I(2) of Attachment 1 to Procedural Order No. 1, respondent United States of America respectfully submits this Rejoinder on the competence of the Tribunal and the question of whether any act of the United States has breached the obligations of Section A of Chapter Eleven of the NAFTA.¹

PRELIMINARY STATEMENT

In its Counter-Memorial, the United States demonstrated that ADF's claims under Articles 1102 and 1106(1) were barred in their entirety by the government procurement

¹ Terms defined in the United States' Counter-Memorial have the same meaning in this Rejoinder.

exception in NAFTA Article 1108. It showed that ADF's national-treatment claim failed in any event because ADF could identify no U.S. investor or investment in like circumstances that had received more favorable treatment with respect to investments. It further established that Article 1105(1)'s obligation of "treatment in accordance with international law" was one that incorporated the customary international law minimum standard of treatment of aliens. Because ADF had identified no customary international law standard even implicated by the measures at issue, it had not stated a claim under Article 1105(1).

In its Reply, ADF does not dispute that its only connection to the Springfield Interchange Project is through a government contract calling for the procurement of structural steel. Nor does it dispute that the sole basis for its complaint concerning the Project is a clause in that procurement contract specifying that all steel procured must be produced entirely in the United States. ADF concedes that that specification in that contract is indeed within Article 1108's exceptions for "procurement by a Party." Its Reply's principal contention is that, while the specification in the contract *is* within the exception for "procurement by a Party," a federal statute and federal regulation that required that specification to be in that procurement contract are not.

ADF's arguments are baseless. *First*, the ordinary meaning of "procurement by a Party" on its face encompasses a specification as to what, precisely, is being procured by the government. ADF erroneously attempts to circumvent this conclusion by examining the federal law and regulation in isolation from the state purchases conducted in accordance with that same law and regulation. For purposes of ADF's claims, however, the federal law and regulation and the state purchases are inseparable – because only when a state agrees to accept federal funds

for a specific highway project can there be any governmental action that accords treatment or imposes requirements with respect to investments, as is necessary even to implicate Articles 1102 or 1106(1). Moreover, the ordinary meaning of “procurement by a Party” in Article 1108 reaches procurement by *all* governmental entities in the territory of the State Party, whether federal, state, local or an intergovernmental collaboration.

Notably, ADF does not dispute that the NAFTA Parties determined to except procurement such as that at issue here from the national-treatment and performance-requirement obligations that specifically address procurement – those set forth in Articles 1003 and 1006 of the NAFTA. ADF’s elaborate attempt to create a loophole in the NAFTA’s coverage of procurement where none exists is without merit and should be rejected.

Second, ADF fails to offer any support for its assertion that it was accorded less favorable treatment with respect to investments than its U.S. counterparts in like circumstances, as required by Article 1102. ADF agrees that the measures at issue here are non-discriminatory on their face and have consistently been applied in a non-discriminatory manner. Its failure to offer any evidence to substantiate its claim of adverse treatment disposes of its national-treatment claim.

Moreover, ADF’s lengthy contention that Chapter Eleven contains no exclusion for measures relating to trade in goods or services attacks an argument the United States never made. ADF has no answer to the argument the United States did make: that Article 1102 requires a showing of adverse treatment with respect to *investments*; a claimant cannot establish a violation of that article merely by asserting that a measure treats *goods* produced or *services* supplied in the territory of another Party less favorably than those produced or

supplied in its own territory. Because ADF offers no evidence to show adverse treatment *with respect to investments*, as opposed to goods or services, its national-treatment claim fails.

Third, ADF makes no effort to establish a claim under Article 1105(1) as that provision has been conclusively interpreted by the NAFTA Free Trade Commission. It identifies no rule of customary international law even arguably implicated by the measures at issue. Those measures in any event were promulgated in a manner fully consistent with the United States' legal system and international law.

Fourth, ADF offers no principled basis for this Tribunal to assert jurisdiction over its new claims concerning projects other than that for the Springfield Interchange. ADF does not dispute that the NAFTA expressly requires an investor to specify the factual basis for its claims in its notice of intent. Nor does ADF contest that a Party's consent to investor-State dispute resolution is limited to "arbitration *in accordance with the procedures set out in this Agreement.*" NAFTA art. 1122 (emphasis added). ADF's suggestion that its notice complied with the NAFTA's procedures as to these other projects – without even mentioning a single such project by name – is without merit.

Finally, ADF's new and novel claim of denial of most-favored-nation treatment under Article 1103 and certain treaties between the United States and Albania and Estonia must be rejected for several reasons. First, the Tribunal lacks jurisdiction over an Article 1103 claim asserted for the first time in ADF's Reply, for much the same reasons that it lacks jurisdiction over ADF's new claims concerning projects other than that for the Springfield Interchange. Second, the Article 1103 claim is expressly barred by the government procurement exception of Article 1108 in any event. Third, ADF has shown no substantive difference between the

standard of treatment under the provisions of the treaties with Albania and Estonia and the standard under Article 1105(1) of the NAFTA. Indeed, the United States Department of State expressly advised the United States Senate in submitting those treaties for advice and consent that the provisions referenced customary international law standards – the same standards incorporated into Article 1105(1), as the Free Trade Commission has conclusively confirmed. ADF’s new claim under Article 1103 should be dismissed.

I. ARTICLE 1108 BARS ADF’S ARTICLE 1102 AND 1106 CLAIMS

In its Counter-Memorial, the United States demonstrated that, pending the results of further negotiations, the NAFTA Parties did not intend to subject procurement by sub-central governments to any of the provisions of Chapter Ten, entitled “Government Procurement.” Counter-Mem. at 20, 24-25. ADF agrees with this conclusion. Reply ¶¶ 59, 60, 70. Despite having been challenged to do so, Counter-Mem. at 35-36, ADF offers no persuasive reason why the Parties to the NAFTA would have exempted state procurement from the current coverage of Chapter Ten and yet – as ADF contends – subjected that same procurement to similar requirements contained in Chapter Eleven. This failure is not surprising since there is no plausible explanation why the NAFTA would be so drafted. The Agreement as a whole cannot be read to have the effect ADF ascribes to it without violating its terms and disregarding the intent of the NAFTA Parties.

ADF contends nonetheless that its unreasonable construction of the NAFTA is compelled by the “ordinary meaning” of the exception for “procurement by a Party.” Reply ¶¶ 39-50. ADF further offers a variety of arguments as support for its attempt to challenge the

federal law and regulation in isolation from Virginia's procurement of structural steel for the Project. *See, e.g., id.* ¶¶ 29, 38, 65, 107. As demonstrated below, the ordinary meaning of "procurement by a Party" conclusively establishes the applicability of that exception and ADF's various other arguments are without merit.

A. The Ordinary Meaning of "Procurement By A Party" Includes The Specifications At Issue Here

The pleadings of the parties reflect much common ground on the issues relating to Article 1108. The parties concur that the ordinary meaning of the term "procurement," as used in Article 1108, encompasses all governmental purchases of goods and services.² The parties agree that when the Commonwealth of Virginia purchased steel for the Project, it was engaged in procurement.³ The parties also agree that the federal government's provision of funding to Virginia was not procurement.⁴

The principal issue in dispute is whether Virginia's purchase for the Project of steel manufactured, fabricated and coated in the United States, in accordance with federal specifications where federal funds are used for the Project, falls within the exception for "procurement by a Party."

It is, the United States submits, self-evident that the provisions incorporated into ADF's sub-contract specifying what to buy for the Project were an integral part of the procurement for the Project. In its Reply, however, ADF devotes considerable attention to the "ordinary

² *See, e.g.,* Reply ¶ 47 ("procurement includes procurement by such methods as purchase") (quoting NAFTA art. 1001(5)); Counter-Mem. at 22 & n.63.

³ *See, e.g.,* Reply ¶ 27 (referring to "Virginia's procurement").

meaning” of the term “procurement,” urging that the decision to purchase only U.S. steel for the Project was not within the ordinary meaning of “procurement by a Party.” As demonstrated below, ADF’s contention is without merit.

1. What To Buy Is An Integral Part Of Procurement

As noted above, it is common ground that the ordinary meaning of “procurement” encompasses purchasing. Purchasing entails a number of integral activities. Among those activities are deciding what to buy, from whom to buy it, what to pay and how to pay for it. As one might expect in a chapter addressing procurement, Chapter Ten of the NAFTA regulates a number of these activities: it includes specific provisions on the characteristics of what is to be purchased (*see* NAFTA art. 1007 (“Technical Specifications”)), the qualifications of those from whom the purchase will be made (*see id.* art. 1009 (“Qualification of Suppliers”)) and the manner in which the purchase is to be made (*see id.* art. 1008 (“Tendering Procedures”)), among other things. Each of these activities is so fundamental to purchasing that it is necessarily encompassed within the ordinary meaning of the term procurement.⁵

Here, both the Main Contract’s provision on “Use of Domestic Material” and the 1982 Act’s domestic-content provision specify what to buy for use in the Project. Each specifies that only steel produced, fabricated and coated in the United States may be purchased for

⁴ *See, e.g.*, Reply ¶ 47 (“‘procurement’ . . . does not include ‘any form of government assistance.’”) (quoting NAFTA art. 1001(5)); Counter-Mem. at 32 (“Along with the other items listed in Article 1001(5)(a), a federal grant to a state is an example of a financial arrangement that is not, in itself, a procurement measure.”).

⁵ *See also* BLACK’S LAW DICTIONARY 1208 (6th ed. 1990) (defining “procurement contract” as “[a] government contract with a manufacturer or supplier of goods or machinery or services *under the terms of which* a sale or service is made to the government.”) (emphasis added).

incorporation into the Project.⁶ This specification of what to purchase is an intrinsic part of the purchase itself.

Indeed, ADF would appear to agree, as it does not dispute that decisions by state or provincial governments to purchase only domestic products fall within the procurement exception contained in Article 1108.⁷ A given activity, however, either is within the procurement exception or it is not; the nature of the activity as procurement does not depend on the identity of the actor. By admitting that state or provincial governments engage in procurement when they specify what to buy, ADF concedes the obvious: that such specifications are an intrinsic part of a procurement made according to those specifications. The specifications at issue here thus clearly fall within the ordinary meaning of the term “procurement.”

2. The Decision As To What Steel To Buy For The Project Was Made By A Party To The NAFTA

ADF errs when it argues that “procurement *by a Party*” is not at issue here because “[t]here was no procurement or procurement contract between the U.S. and any supplier of goods and services.” Reply ¶ 43. ADF’s contention is based on a distinction between federal

⁶ See Counter-Mem. at 10 (“all iron and steel products . . . incorporated for use on this project shall be produced in the United States of America “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”) (quoting Main Contract); *id.* at 15 (“the Secretary of Transportation shall not obligate any funds authorized to be appropriated . . . unless steel, iron and manufactured products used in such project are produced in the United States”) (quoting Section 165 of the 1982 Act); *id.* at 16-17 (“[n]o Federal-aid highway construction project is to be authorized . . . unless at least one of the following requirements is met: . . . 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”) (quoting 23 C.F.R. § 635.410(b)(2)).

⁷ See Reply ¶ 65 (“states are unconstrained by any obligations [regarding their procurement].”).

and state governments that finds no support in the text of Article 1108's exclusion for "procurement by a Party."

The Parties to the NAFTA are three States under international law: Canada, the United States of America and the United Mexican States. The State in international law is responsible for the ensemble of governmental activity within the territory of the State, regardless of how governmental authority is divided within the State under its internal law. As Professors Patrick Daillier and Alain Pellet note in their recent treatise on public international law:

[A State's] "government," from the perspective of public international law, includes not only the executive authorities of the State, but the ensemble of its "public powers." It is the entirety of the internal political, judicial and administrative order that is envisaged.⁸

Article 4(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission last summer, states this accepted principle of customary international law as follows:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and *whatever its character as an organ of the central government or of a territorial unit of the State.*⁹

The use of the term "Party" in Chapter Eleven reflects an understanding that is consistent with that of the State in international law: the term "Party" encompasses state, federal and local governments, whether acting independently or in concert. Article 1102(1), for

⁸ NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 413 ¶ 272 (Patrick Daillier & Alain Pellet eds., 6th ed. 1999) ("Appartiennent au 'gouvernement', au sens du droit international, non seulement les autorités exécutives de l'État, mais l'ensemble de ses 'pouvoirs publics'. C'est tout l'ordre politique, juridictionnel et administratif interne qui est visé.") (citation omitted) (translation by counsel).

⁹ REPORT OF THE INTERNATIONAL LAW COMM'N, 53rd sess., U.N. Doc. A/56/10, at 84 (2001) (emphasis added).

example, requires that a “Party” accord national treatment with respect to investments. As Article 1102(3) explicitly makes clear, however, the “Party” that bears that national treatment obligation includes the states and provinces.¹⁰ Similarly, although other obligations in Chapter Eleven are also imposed on a “Party,” Article 1108(1) sets forth varying exceptions to those obligations for federal, state and local measures – exceptions that would be unnecessary if the term “Party” did not include states, provinces, localities and other governmental subdivisions.¹¹ Contemporaneous statements made by Canada in implementing the NAFTA confirm this view: in its Statement of Implementation, Canada observed that “section A [of Chapter Eleven] covers measures by *a Party (i.e., any level of government in Canada)*.”¹²

Thus, as noted in the U.S. Counter-Memorial, while distinctions between different levels of government *are* expressly relevant to the scope of Chapter Ten of the NAFTA, such distinctions are not relevant to the scope of Article 1108’s exclusion for “procurement by a Party.” By the use of the term “Party,” Articles 1108(7) and 1108(8) make clear that any form of government procurement at *all* levels of government are encompassed within the exception.

Here, the specification that U.S. steel be used in the Project – whether viewed as a specification of the Commonwealth of Virginia, the federal government or as a federal/state

¹⁰ See NAFTA art. 1102(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 the investments of investors, of the Party of which it forms a part.”).

¹¹ See NAFTA art. 1108(1)(a)(i) (specifying that certain articles do not apply to “a Party at the federal level”); NAFTA art. 1108(1)(a)(ii) (specifying that certain articles do not apply to measures maintained by “a state or province”); NAFTA art. 1108(1)(a)(iii) (specifying that certain articles do not apply to measures maintained by a local government). See also generally NAFTA art. 105 (“The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”).

governmental collaboration – clearly emanates from the United States of America. The United States is a Party to the NAFTA. Under the plain meaning of Article 1108, therefore, the procurement at issue here is that of a Party.¹³

B. ADF Errs In Asserting That The Specification At Issue Is Not Within The Exception For “Procurement By A Party”

ADF errs in contending that the specification in the 1982 Act requiring the use of U.S. steel can be separated from Virginia’s procurement for purposes of ADF’s claims. *See Reply ¶¶ 27-28, 110.* The only way in which ADF was affected by the 1982 Act was the incorporation of that Act’s specifications into Virginia’s procurement contract with Shirley and its subsequent incorporation into ADF’s sub-contract. Those specifications form an integral part of the procurement. Virginia’s motivation in adopting those specifications is irrelevant to a determination that those specifications are part of the procurement. Moreover, ADF’s invocation of various reservations and exceptions in the NAFTA and other international agreements does not support its attempt to avoid application of the exception for “procurement by a Party.”

1. The Only Treatment Of ADF Or Its Investment Was Through Virginia’s Purchase Of Steel

ADF’s arguments are founded on a false premise: that the domestic-content specifications for federally-funded state highways may be considered, for purposes of ADF’s Article 1102 and 1106(1) claims, in isolation from the procurement actually conducted by

¹² Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in Canada Gazette 68, 148 (Jan. 1, 1994) [hereinafter CSI] (emphasis added).

¹³ *Cf.* Article 1128 Submission of the United Mexican States (Jan. 18, 2002) at 2 (“this Tribunal has no jurisdiction to consider what is in reality a complaint about U.S. government procurement practices.”).

Virginia with those funds and in accordance with those specifications. The specifications cannot be so considered for such purposes.

By its nature, the federal-aid highway program, standing alone, does not and cannot implicate Articles 1102 or 1106(1) – the only articles under which ADF has asserted claims subject to the government procurement exception.¹⁴ Article 1102 applies only where a Party “accords treatment” to investors or investments of another Party. Article 1106(1) applies only where a Party “impose[s] or enforce[s]” a “requirement,” “commitment” or “undertaking” “in connection with . . . an investor of a Party or of a non-Party.”

The federal-aid highway assistance program is a conditional intergovernmental arrangement that has no impact on private persons like ADF – unless and until a state determines to apply for funding for a specific project, the federal government agrees to grant it and the state takes action based on that arrangement. *Only* where a state puts the machinery of that program into motion and contractually implements a specific, coordinated project with federal funding can an investor claim that it has been subject to treatment actionable under Articles 1102 and 1106(1). Before a state accepts federal funding and imposes the procurement specifications in the 1982 Act, there is and can be no “treatment” of any investor or investment under that Act and no “requirement,” “commitment” or “undertaking” that can be “impose[d] or enforce[d]” “in connection with . . . an investment of an investor of a Party or of a

¹⁴ The United States notes that, although ADF referenced both Articles 1106(1) and 1106(3) in its Notice of Arbitration, in its Memorial and Reply it appears to rely exclusively on Article 1106(1). Because the government procurement exception bars claims under both paragraphs of Article 1106, the Tribunal need not decide whether (absent the exception in Article 1108) ADF’s claim would properly arise under Article 1106(1) or Article 1106(3).

non-Party,” as is required for those articles even arguably to apply. NAFTA arts. 1102(1)-(2), 1106(1).

The facts here illustrate this point. The cooperation between the federal government and Virginia with respect to the Springfield Interchange Project was an entirely internal arrangement which in no way affected ADF. Only when Virginia imposed domestic-content specifications in its contract for the purchase of goods and services for the Project was ADF indirectly affected. The inclusion of that specification in Virginia’s contract with Shirley is the only manner in which ADF arguably was “accorded treatment” and the only undertaking even arguably “in connection with” ADF’s investment in the United States.

2. The Buy America Specifications Of The 1982 Act Are An Integral Part Of “Procurement” When A State Adopts Them For A Highway Project

ADF errs in asserting that no part of the federal-aid highway program is within the exception for “procurement by a Party.” That program is massive and multi-faceted. Certain aspects of that program form a part of the procurement when a state implements them in a highway project, and certain aspects do not.

The federal-aid highway program funds billions of dollars of highway construction each year. At the same time, the program uses the incentive of that funding to encourage states to promote a number of policies in the national interest. Some of those policies have little or nothing to do with procurement. For example, the federal government withholds federal financial assistance for state highway construction if a state does not prohibit persons younger

than 21 years of age from purchasing alcoholic beverages.¹⁵ Provisions implementing these conditions on the receipt of funds (but not on their use), like the financial assistance itself, are not procurement.

By contrast, other provisions, such as the domestic-content specifications at issue here, directly address procurement, as demonstrated above. Those aspects are an integral part of the procurement the states perform with the funds provided and are encompassed within the exception for “procurement by a Party.”¹⁶

Indeed, the text of Article 1108 confirms that the Parties had in mind precisely domestic-content specifications such as these in providing for the government procurement exception. Article 1108(8)(b) excepts government procurement from six of the obligations concerning performance requirements stated in Article 1106.¹⁷ Of those six, four of the excepted obligations address domestic-content specifications.¹⁸ Two of the excepted

¹⁵ See 23 U.S.C. § 158; *see also, e.g., id.* § 159 (conditioning federal financial assistance on the states’ requiring the revocation or suspension of drivers licenses of individuals who have been convicted of certain drug offenses).

¹⁶ ADF’s attempt to avoid this result by relying on the letter written by Rodney E. Slater, Administrator, FHWA, to Mr. T. Peter Ruane, President and Chief Executive Officer, American Road & Transportation Builders Assoc. (Mar. 17, 1994), should be disregarded. That letter is indeed significant as it demonstrates that the United States has consistently maintained that the 1982 Act was not subject to NAFTA’s requirements. ADF’s contention that Mr. Slater took a position contrary to the legal position advanced by the United States in these proceedings is unfounded. Mr. Slater’s letter is far too cursory to enable a reader to ascertain on what grounds Mr. Slater believed the 1982 Act to be exempt from the NAFTA’s obligations. In any event, even if, as ADF erroneously urges, Mr. Slater’s letter could be read to reflect a mistaken legal conclusion, that conclusion would be of no consequence to the issues for decision before this Tribunal. *See Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21) (summarily rejecting “the assertion of the Swiss Government that the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts,” even though acknowledging that “[i]t is true that the representatives of the Government of the United States expressed this opinion on several occasions . . . This opinion was based upon a view which has proved unfounded.”) (internal quotations omitted).

¹⁷ See NAFTA art. 1108(8)(b) (“Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party . . .”).

¹⁸ See NAFTA art. 1106(1)(b) (setting forth obligations with respect to requirements, commitments or undertakings “to achieve a given level or percentage of domestic content”); *id.* art. 1106(3)(a) (same for

obligations address requirements or conditions “to purchase . . . goods produced or services provided in [a Party’s] territory.”¹⁹ The NAFTA Parties explicitly made reference to those provisions in the exception for “procurement by a Party” precisely because buy-national specifications such as these were intended to be excepted as “procurement by a Party.”

3. A State’s Motivation In Adopting Procurement Specifications Is Immaterial

Contrary to ADF’s suggestion, the domestic-content specifications at issue fall within Article 1108’s exception for “procurement by a Party” regardless of whether Virginia voluntarily adopted the 1982 Buy America Act restrictions or was compelled to adopt them. ADF’s contention that the provisions of the NAFTA in question here were intended to promote the rights of state or provincial governments *vis à vis* those of national governments is without support in the NAFTA’s text or its object and purpose.

As a preliminary matter, ADF errs in asserting that the federal government coerced Virginia in its procurement for the Springfield Interchange Project. No federal requirement obligates Virginia or any other state to apply Buy America provisions in its procurement. To the contrary, the federal Highways Code expressly provides as follows:

[th]e authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.²⁰

conditions for the receipt of an advantage); *id.* art. 1106(1)(c) (setting forth obligation with respect to requirements, commitments or undertakings “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”); *id.* art. 1106(3)(b) (same for conditions for the receipt of an advantage).

¹⁹ *Id.* art. 1106(1)(c); *id.* art. 1106(3)(b).

²⁰ 23 U.S.C. § 145(a).

As is clear, Virginia voluntarily chose to apply the Buy America provisions in exchange for obtaining federal funding for the Project. Virginia was free either to accept such assistance and apply the provisions, or reject the assistance and procure goods without regard to the 1982 Act's Buy America provisions.²¹ ADF is thus incorrect when it states that the Buy America provisions in the 1982 Act amount to a federal requirement that the states are forced to administer. *See* Reply ¶¶ 28, 64, 107.

ADF's argument rests on the false assumption that preserving and promoting states' and provincial rights is one of the NAFTA's objectives.²² Nowhere, however, does the NAFTA suggest as an object and purpose a desire that the NAFTA Parties' federal governments refrain from encouraging sub-central governments to adopt policies deemed to be in the national interest. Contrary to ADF's contentions, the existence and extent of sub-central governments' policy-making independence from the NAFTA Parties' central governments is not a concern of the NAFTA. Indeed, it would be odd for the NAFTA Parties to enter into an international agreement for the purpose of effecting changes to the relationships between their own central and sub-central governments. And, most importantly, the language of Article 1108 belies any such purported purpose – it does not differentiate between procurement by different levels of the government of the Party in its exclusion of all “procurement by a Party.”

²¹ *See* Rejoinder Statement of C. Frank Gee ¶ 6 (“Virginia voluntarily decided to seek federal funding for the Project and to conduct its procurement for the Project in accordance with [the 1982 Act's] specifications and requirements.”).

²² *See, e.g.*, Reply ¶ 38 (“Rather than permitting the state governments to make their own policy decisions respecting what is appropriate in their trading relations, the federal government seeks to impose a choice for them and a choice that runs directly contrary to the stated object and purpose of NAFTA.”); *id.* at ¶ 64 (“the Parties did not want to bind states or provinces against their will.”).

Nor, contrary to ADF's suggestion, is there any rule of treaty interpretation that authorizes a tribunal to broaden or expand a treaty's terms in order to advance goals that the Parties reserved for *future* decision. Yet, this is precisely what ADF advocates in relying on Article 1024 to justify an extension of national-treatment and performance- requirement obligations to federally-funded state procurement.²³ ADF is correct that the NAFTA Parties indicated in Article 1024 an intent to engage in future negotiations to attempt to reach agreement to extend these and other obligations to sub-central procurement. That statement of intent, however, does not mean that a tribunal may substitute its decision for the negotiated resolution the Parties agreed to attempt in Article 1024. The Parties have not yet agreed to expand their Agreement to reach sub-central procurement. It is the Agreement as written that this Tribunal must apply.²⁴

Consequently, ADF is incorrect when it dismisses as irrelevant the expert reports submitted by the United States. *See* Reply ¶¶ 108-11, 113-14. Those reports demonstrate that sub-central governments in both Mexico and Canada impose buy-national requirements in procurements that are federally funded. ADF attempts to dismiss that State practice on the ground that the reports did not indicate that the federal governments in Mexico or Canada *required* the sub-central governments to impose buy-national requirements in exchange for receiving federal funding. As demonstrated, however, the NAFTA does not restrict sub-central

²³ *See* Reply ¶ 93 (stating that the United States' position "runs directly contrary to the object and purpose of NAFTA but also to the express obligation that the Parties have undertaken 'to commence negotiations . . . with a view to the further liberalization of their respective government procurement markets' and to seek 'to expand the coverage' of Chapter Ten.") (quoting NAFTA art. 1024).

²⁴ *See* NAFTA art. 1131(1) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with *this* Agreement . . .") (emphasis added); *see also* Article 1128 Submission of the United

governments from imposing buy-national requirements in their procurement: those governments' reasons for doing so are immaterial.

4. ADF's Reliance On Various Reservations And Exceptions Is Misplaced

In an attempt to bolster its arguments, ADF refers to various reservations and exceptions set forth in the annexes to the NAFTA and the WTO Agreement on Government Procurement ("GPA"). ADF's reliance on these annexes is misplaced.

First, ADF errs in relying on Mexico's Schedule to NAFTA Article 1001.2b. That schedule provides that Chapter Ten shall not apply to procurements made "pursuant to loans from regional or multilateral financial institutions to the extent that different procedures are imposed by such institutions." ADF erroneously concludes that this schedule supports its claim that procurement restrictions that are attached to loans are not an integral part of the procurement but, rather, are "conditions . . . tied to the loans, [and] not the procurement." *See* Reply ¶¶ 80-82.

The NAFTA Parties, however, had other reasons for excluding such conditions on loans from the application of Chapter Ten. Loans from regional or multilateral financial institutions often are made for use by the Mexican federal government in its procurement. An example found on the website of the World Bank illustrates this point. In 2000, the World Bank agreed to provide a \$218 million loan to a Mexican state bank for a highway construction

Mexican States, *supra* n.13, at 2 ("the Tribunal has no jurisdiction to supplement or otherwise expand upon the rights and obligations contained in the NAFTA.").

project.²⁵ The procurement carried out for the project was to be performed by the Secretariat of Communications and Transport, a federal ministry.²⁶ The works were to be procured according to methods specified by the World Bank.²⁷ Those methods might, or might not, be consistent with the procedures specified in NAFTA Chapter Ten. Absent the provision in Mexico's schedule that such procurement is not covered by Chapter Ten, Mexico's use of a tendering method specified by the World Bank, for example, might be inconsistent with Mexico's Chapter Ten obligations, since the Mexican Secretariat of Communications and Transport is an entity whose procurement is generally subject to Chapter Ten.²⁸

Consequently, in order for Mexico's government entities covered by Chapter Ten to continue conducting procurement funded by loans from regional or multilateral institutions in accordance with procedures imposed by such institutions that differ from Chapter Ten's prescriptions, it was necessary for the NAFTA Parties to exclude such procurements from Chapter Ten's coverage, as was done in Mexico's schedule. Such an exclusion in no way supports the theory that procurement specifications attached to federal funding are not an integral part of the procurement.

²⁵ See, e.g., WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LOAN IN THE AMOUNT OF US \$218 MILLION TO THE BANCO NACIONAL DE OBRAS Y SERVICIOS PUBLICOS, S.N.C. (BANOBRAS) WITH THE GUARANTEE OF THE UNITED MEXICAN STATES FOR THE FEDERAL HIGHWAY MAINTENANCE PROJECT (Nov. 17, 2000) available at http://www-wds.worldbank.org/servlet/WDSContentServer/-WDS/IB/2000/12/19/000094946_0012010530351/Rendered/PDF/multi_page.pdf.

²⁶ See *id.* at 46 ("the Secretariat of Communications and Transport (*Secretaría de Comunicaciones y Transportes-SCT*) through its SCTs Centers will carry out all procurement activities for the project.").

²⁷ See *id.* at 45 ("Major contracts for these works . . . will be procured following International Competitive Bidding procedures (ICB), using Bank Standard Bidding Documents (SBDs).").

²⁸ See NAFTA annex 1001.1a-1, Mex. sch., ¶ 5.

Second, ADF errs in relying on the Schedule of the United States to Annex 1001.2b to attempt to explain away the recognition in Canada’s Statement of Implementation that the 1982 Act’s domestic-content specifications were not covered by the NAFTA. It was not to that schedule that Canada’s Statement on Implementation (“CSI”) referred in stating that “the Government will use the further negotiations called for in the Agreement to negotiate Canadian access to . . . transportation procurements currently restricted under Buy America programs.”²⁹

ADF’s argument is that the phrase “transportation procurements currently restricted under Buy America programs” in the CSI refers not to programs such as the 1982 Act at issue here but, instead, refers to an exclusion for “procurement of transportation services that form a part of, or are incidental to, a procurement contract” listed in a note to the Schedules to Annex 1001.2b of each of the Parties, including that of the United States. Reply ¶¶ 104-105. The annex, however, refers to restrictions on the procurement of *transportation services*, not to the “transportation procurements” referenced in the CSI. The restrictions referenced in the annex include those contained in the Cargo Preference Act, for example, which requires that, when certain government agencies buy goods, a certain percentage of those goods be carried on U.S.-flag commercial vessels.³⁰ That Act and similar programs pertaining to the procurement of incidental transportation services, however, are not generally referred to as “Buy America” programs. Indeed, it would make little sense to refer to such programs as “Buy American”

²⁹ CSI, *supra* n.12 at 146-47; *see also* Counter-Mem. at 27-28.

³⁰ *See* 46 U.S.C. app. § 1241(b)(1) (“Whenever the United States shall procure, contract for, or otherwise obtain . . . any equipment, materials, or commodities, within or without the United States, . . . the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials or commodities . . . which may be transported on ocean vessels, shall be transported on privately owned United States-flag commercial vessels”); *see*

because, as the schedule itself makes clear, “American” transportation services are not the principal item being “bought.”³¹

That the annex refers to programs other than procurements for transportation infrastructure projects is further evidenced by the fact that other procurement agreements list the two types of programs separately.³² Furthermore, Canada’s acknowledgment in its CSI that the 1982 Buy America Act was not affected by the NAFTA is fully consistent with its current advice on its website to Canadian-owned companies that, when participating in state or local highway projects in the United States that are funded by the FHWA, those companies “cannot rely on NAFTA provisions for equal treatment in this market.”³³ The reference in the CSI to “transportation procurements currently restricted under Buy America programs” does, indeed, refer to the Buy America program at issue in this case.

Third, ADF errs in relying on a reservation pertaining to the Clean Water Act’s domestic-content requirements for purchases by certain grant recipients. That reservation states that “[g]rant recipients may be privately owned enterprises.” *See* Counter-Mem. at 34. The

also 10 U.S.C. § 2631 (“Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps.”).

³¹ *See* NAFTA annex 1001.2b, U.S. sch. ¶ 2 (“This Chapter does not apply to the procurement of transportation services that *form a part of*, or *are incidental* to, a procurement contract.”) (emphasis added). It is noteworthy that, pursuant to a different annex, Chapter Ten does not apply at all where transportation services are the subject of the procurement. *See* NAFTA art. 1001(1)(b) & annex 1001.1b-2, § B, Can. sch. ¶ V, U.S. sch. ¶ V; annex 1001.1b-2-B, Mex. sch. ¶ 1.

³² *See, e.g.*, Agreement on Government Procurement, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organisation, Annex 4(b), n.5 to annex 2, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, *available at* http://www.wto.org/english/tratop_e/gproc_e/argument_e.htm (“The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects”); *id.* Annex 4 ¶ 1 note (“Transportation services, where incidental to a contract for the procurement of supplies, are not subject to this Agreement.”).

³³ Buy American and Highway Projects, *available at* <http://Canadianembassy.org/english/business/library/highway.asp>, *accompanying* Counter-Mem. at Vol. I, Tab 16, at 2.

United States noted in its Counter-Memorial that the reservation was needed because purchases made by private enterprises, necessarily, cannot be “procurement by a Party” excepted by Article 1108, but that no such reservation was necessary for the 1982 Act because only government entities may receive grants of financial assistance under that Act.

In response, ADF goes to great lengths to argue that the statement in the reservation that “[g]rant recipients may be privately owned enterprises” is factually incorrect and, therefore, there is no difference between the 1982 Act and the Clean Water Act programs. It then contends that because there is no reservation for the 1982 Act, it, unlike the Clean Water Act, is subject to Articles 1102 and 1106.

According to well-established principles of treaty interpretation, however, supplementary means to interpret a treaty may only be resorted to when the treaty terms are ambiguous or obscure.³⁴ As the language in the reservation is neither ambiguous nor obscure, there is no justification for this Tribunal to resort to supplementary means – such as provisions in domestic legislation³⁵ – to interpret the plain meaning of the reservation in the NAFTA. In any event, even if ADF’s allegation were true, it would prove nothing. Whether grants may in fact be made to private entities pursuant to the Clean Water Act is immaterial: what is material is the fact that the drafters of the NAFTA who negotiated the United States’ reservation obviously believed that they could, as the reservation unambiguously recites that grants may be made to

³⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (“Vienna Convention”), art. 32(a). ADF does not argue that applying the plain meaning of the reservation itself would lead to manifestly absurd or unreasonable results, nor does it have any basis to so argue. Accordingly, the Vienna Convention’s standard providing that one may use supplementary means of interpretation when application of the plain meaning of the treaty’s terms would lead to such results, Vienna Convention art. 32(b), is inapplicable here.

private entities. If ADF is correct and the drafters were mistaken in their beliefs, this simply means that the United States negotiated a reservation where none was needed. Such action in no way implies that the application of the 1982 Act does not fall within the exception for “procurement by a Party.”

Finally, ADF offers no reasoned response to the United States’ observation that an exception to the GPA, which imposes obligations on procurement by certain states, confirms that the measure challenged by ADF falls within the exception for “procurement by a Party.” That exception provides that the GPA does not cover “restrictions attached to Federal funds for mass transit and highway projects.” *See* Counter-Mem. at 33. This exception demonstrates that the restrictions on federally-funded state procurement such as the 1982 Act at issue here are an integral part of the procurement: if they were not, there would have been no need to exempt such restrictions from coverage in an agreement governing procurement. ADF’s response that the “exception does not make the Federal restrictions procurement [,] [i]t merely ensures that they will be effective,” Reply ¶ 137, is tautological: without the exception, the restrictions would be ineffective precisely because those restrictions are an integral part of the procurement and the GPA governs how procurement may be conducted.

As noted in the United States’ Counter-Memorial, given the fact that the majority of the world’s nations discriminate in their government procurement, if the NAFTA Parties had intended so greatly to broaden their obligations, they would have done so in a clear and

³⁵ ADF urges this Tribunal to review the following domestic legislation, none of which is a part of the NAFTA: 33 U.S.C. §§ 1281(h)(1)-(3), 1284(d)(1), 1295; 40 C.F.R. §§ 30, 31, 35. *See* Reply ¶¶ 143-49.

unambiguous manner.³⁶ This they have not done – as ADF tacitly recognizes in repeatedly calling upon this Tribunal to “read up” the terms of the NAFTA in order to achieve the result it desires.³⁷

II. ADF’S NATIONAL TREATMENT CLAIM IS WITHOUT MERIT

ADF fails to offer either evidence or argument to support its claim that it and its investment received less favorable treatment than that accorded to U.S. investors and investments in like circumstances. Instead, it devotes the national-treatment section of its Reply to attacking an argument the United States never made. ADF’s Article 1102 claim should be denied.

A. ADF Fails To Establish Any Adverse Treatment With Respect To Investments

ADF’s Reply does nothing to remedy the complete lack of evidence in its Memorial to support its claim that it was denied national treatment “with respect to . . . investments,” as Article 1102 requires. ADF concedes that the measures at issue are on their face non-discriminatory.³⁸ ADF further acknowledges that the FHWA has applied its regulations implementing the 1982 Act consistently and without regard to the nationality of the investor or the investment at issue. Reply ¶¶ 200, 260. It nonetheless asserts that a national-treatment

³⁶ It was for this reason that the United States made reference to the majority of States that discriminate in their procurement practices and not, as ADF contends, to suggest that such discriminatory practices amounted to a rule of international law. *See* Counter-Mem. at 30-31; Reply ¶ 120.

³⁷ *See* Mem. ¶¶ 144, 235; *see also* Reply ¶ 270; *cf.* Article 1128 Submission of the United Mexican States, *supra* n.13, at 1 (“Claimant’s assertions that provisions of the NAFTA must ‘be read purposefully and in a large and liberal manner’ and ‘read up’ to the task of obtaining the stated objectives’ is without foundation under the Vienna Convention on the Law of Treaties and general international law.”).

violation can be found based on its speculation as to more favorable treatment of U.S. investors and investments.

ADF's assertion fails for two reasons. First, the assertion utterly fails to meet ADF's burden of coming forward with evidence to support its claim.³⁹ Where, as here, all parties agree that the measures are non-discriminatory on their face, a claimant must, at a minimum, present *evidence* to sustain a claim of a national treatment violation. ADF presents none. It has not attempted even to identify a U.S. investor, U.S.-owned investment or class of U.S.-owned investments that supposedly received treatment more favorable than that accorded to ADF with respect to the Springfield Interchange Project. Instead, ADF offers only its unsupported speculation as to the choices that unidentified U.S. investors or investments might face in the abstract. Such speculation cannot discharge its burden of proof. Its claim fails on this ground alone.⁴⁰

Second, ADF's speculation is without merit in any event. ADF baldly asserts as follows:

³⁸ Compare Counter-Mem. at 39 ("There is no dispute that the measures at issue here on their face apply to all investors and investments, regardless of nationality.") (citing Mem. ¶ 207) with Reply ¶ 186 (asserting in response only that "[f]ormally identical treatment is no defence" under certain circumstances).

³⁹ See, e.g., *Tradex Hellas S.A. (Greece) v. Albania*, 14 ICSID REV. - FOREIGN INV. L.J. 197, 219 (Final Award of Apr. 29, 1999) ("it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim. . . . A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.") (internal quotations omitted).

⁴⁰ As noted in the United States' Counter-Memorial, the evidence that is of record refutes ADF's allegation of disparate impact in any event. See Counter-Mem. at 40-41. It was for this purpose that the United States introduced the letter from Pierre Paschini, ADF Group's president and chief operating officer and ADF International's president, to the president and chief executive officer of Shirley. In that letter, Mr. Paschini acknowledged that ADF was only seeking the waiver because of alleged insufficient capacity in the United States and *not* because ADF would gain any cost advantage by fabricating the steel in Canada.

The measure in question forces ADF to make choices which U.S. investors and investments do not have to make. Those choices are to participate in the market by increasing all investments in the U.S. or by sub-contracting the work it acquires to U.S. investments or to abandon the market to U.S. investors and their investments.⁴¹

It is simply not the case, however, that the 1982 Act requires “an investor [to] expand its U.S. production facilities to equal those of a[] U.S. investor.” Reply ¶ 206. U.S. investors and U.S.-owned investments are faced with precisely the same choices as are ADF Group and ADF International. Any investor or investment that lacks the capacity in the United States to fabricate steel for large projects, or that lacks the fracture-critical certifications for such jobs, is similarly required either to expand its U.S. facilities or to subcontract out the work. Moreover, those U.S. and U.S.-owned steel suppliers that do have such capacity similarly are denied any benefit that they might gain by shipping steel outside of the United States to be fabricated – since they too would be prohibited from supplying such steel to the Project. Nothing in the 1982 Act restricts in any way the ability of a Canadian-owned fabricator to invest in the United States or to establish, maintain or operate a fabrication facility in the United States. In short, the 1982 Act grants no privileges to U.S.-owned fabricators that are not similarly bestowed on foreign-owned fabricators in the U.S.

In an effort to divert attention from the lack of evidence, or even logic, to support its national-treatment claim, ADF attacks an argument the United States never made. It mischaracterizes the United States’ position as one that “if a NAFTA *investment* claim involves damage caused to trade in goods or services, that claim must necessarily fail.” Reply ¶ 162 (emphasis added). The United States, however, has never contended that Chapter Eleven

⁴¹ Reply ¶ 209.

contains an exception for measures relating to trade in goods or services. The United States does not dispute, for purposes of this case, that a measure relating to trade in goods or services may be the subject of a claim under Article 1102.

The United States' point, rather, is a simple one: in order to make out an Article 1102 claim, ADF must prove the elements required by that Article. Article 1102 requires a showing of less favorable treatment "with respect to . . . *investments*," not with respect to trade in goods or services. NAFTA art. 1102(1) & (2) (emphasis added). Article 1102 does not prohibit discrimination against goods of different national origin: instead, the text of that Article only prohibits treating *investors* and *investments of investors* less favorably than U.S. investors and U.S. investments in like circumstances.

The Article's focus on investment rather than goods was no oversight. Article 1003(1), by contrast, expressly requires national treatment of "the *goods* of another Party, [of] the *suppliers* of such goods and [of] service suppliers of another Party." (Emphasis added.) The drafters of the NAFTA thus clearly understood how to craft a provision addressing national treatment of goods and suppliers. Their use of different language in Article 1102 confirms that that article addresses a different topic.

The text of the NAFTA thus provides no support for ADF's claim of an Article 1102 violation. ADF's assertion that the 1982 Act discriminates against Canadian steel in favor of U.S. steel, even if proven true, cannot establish a violation of Article 1102's national-treatment obligation – because that obligation addresses different treatment of *investments*, not goods.⁴²

⁴² See also Article 1128 Submission of the United Mexican States, *supra* n.13, at 2 ("Mexico agrees with the United States that the measures complained of by the Claimant relate to the treatment of goods in a

Nor can ADF establish a violation of Article 1102 by suggesting, as it does repeatedly, that the measure treats *suppliers* of Canadian-fabricated steel or their steel differently than suppliers of U.S.-fabricated steel.⁴³ ADF, rather, must demonstrate that it has received less favorable treatment than U.S. *investors* or U.S.-owned *investments*. This it has failed to do.⁴⁴

ADF further errs in characterizing as an “artificial distinction” that between “the services provided by the investor, which are, necessarily, outside of the territory in which the investment is located, and those provided by its investments” Reply ¶ 204. This distinction between services provided by an investor and those provided by an investment is not, as ADF suggests, “artificial,” but is, rather, one drawn by the express terms of Chapter Eleven. The scope of application of Chapter Eleven is limited, in pertinent part, to “measures . . . relating to . . . *investments* of investors of another Party *in the territory of the Party.*” NAFTA art. 1101(1) (emphasis added). Article 1102(1) requires a comparison between the treatment accorded domestic and foreign *investors* with respect to investments. Article 1102(2) requires one between the treatment accorded domestically-owned and foreign-owned *investments* with respect to investments. *No* provision in Chapter Eleven authorizes a national treatment

government procurement context, not investments, and therefore are not within the scope of Chapter Eleven.”).

⁴³ See, e.g., Reply ¶ 184 (asserting that the measure “modif[ied] the condition of competition in favour of domestic suppliers compared to non-national suppliers”); *id.* ¶ 211 (“The Buy America provision in question is effectively a bar to the importation of fabricated steel for certain markets.”).

⁴⁴ Thus, ADF cannot demonstrate an Article 1102 violation even if it could prove that ADF Group was unable to supply steel from its Canadian plant to the Project. In this respect, ADF Group is no different from any other Canadian or Mexican supplier of steel that is not an investor and does not have an investment in the United States. No one would argue that those suppliers could challenge under NAFTA Article 1102 their inability to supply steel to a project due to the application of the 1982 Act. ADF lacks standing to submit a claim for effects that the 1982 Act may have on it that are in no way based on the United States’ treatment of it as an investor in the United States.

comparison between investors and investments. The express terms of the NAFTA thus provide no support for ADF's claim of a national-treatment violation.

B. The Case Law Relied On By ADF Is Inapposite

ADF concedes that it and ADF International are in like circumstances with U.S. investors and U.S.-owned investments that supply steel to state highway projects funded in accordance with the 1982 Act. Reply ¶ 208. Notwithstanding this admission, ADF inexplicably continues to rely on the treatment accorded to U.S. investors and U.S.-owned investments under the *1933 Act* – a “completely different” statutory and regulatory regime, as the Government of Canada notes on an official website.⁴⁵

Those investors and investments, however, are *not* in like circumstances with ADF Group or ADF International, because they received treatment under a distinct legal regime. It is thus immaterial for purposes of an Article 1102 analysis what treatment those investors and investments were accorded. Rather, what is pertinent is the treatment accorded to U.S. investors and U.S.-owned investments under the regime established by the 1982 Act. As set forth in the United States' Counter-Memorial, that treatment is no more favorable than that which has been accorded to ADF Group and ADF International. *See* Counter-Mem. at 39-43. ADF offers no evidence to the contrary.

Indeed, ADF's theory appears to be that, in agreeing to Article 1102, the NAFTA Parties relinquished their authority to establish different governmental programs with different rules that address different aspects of the same policy issue. ADF's argument boils down to

one that, having established one Buy American program for *direct federal procurement* with its own rules, the United States was prohibited by Article 1102 from establishing a different Buy America program for *federally-funded state highway procurement* with a different set of rules. Nothing in the NAFTA supports such a startling and far-reaching contention.⁴⁶

C. ADF’s Reliance On Provisions Found In Certain BITs Cannot Support An Article 1102 Claim

In a curious supplement to ADF’s new claim under Article 1103, ADF now also contends that it is “entitled to the same treatment given to all United States’ investors seeking to make investments in Albania and Estonia with respect to the protection of their investments.” Reply ¶ 245. That argument, however, finds no support in the plain text of the NAFTA and thus cannot support a national-treatment claim.

ADF can only establish an Article 1102 violation if it can demonstrate that the treatment accorded it or its investment was less favorable than that which the *United States* accords its own investors and investments. *See* NAFTA art. 1102(1)-(2) (imposing obligation only on a “Party” to the NAFTA). Treatment accorded U.S. investors or investments by Albania or Estonia is not relevant to the national-treatment analysis under the NAFTA. ADF’s view that one may compare the treatment accorded to U.S. nationals and U.S.-owned investments in

⁴⁵ Buy American and Highway Projects, *supra* n.33, at 2 (“Buy America [the 1982 Act] is a separate and distinct program from Buy American [the 1933 Act]. Buy American applies to federal direct procurements; it covers approximately 100 products and has *completely different* rules.”) (emphasis added).

⁴⁶ ADF’s allegation that the FHWA has been “consistent in its refusal to follow constant case law,” Reply ¶ 200, is both wrong and irrelevant. ADF does not dispute that the FHWA has consistently applied and interpreted the 1982 Act over the last two decades. ADF’s unsupported statement that in doing so the FHWA has acted in a “consistently . . . arbitrary” manner, Reply ¶ 260, is nonsensical. Furthermore, the FHWA is bound by neither U.S. nor international law to apply the interpretation and reasoning of U.S. judicial and administrative bodies interpreting a statute different from the one at issue. ADF cites no authority to suggest the contrary.

Estonia or Albania with that accorded to ADF and its investments cannot be squared with the plain text of Article 1102.

III. ADF HAS FAILED TO ESTABLISH A VIOLATION OF NAFTA ARTICLE 1105(1)

ADF's claim of a violation of Article 1105(1)'s requirement of "treatment in accordance with international law" is without support in law or in fact. In its Reply, as in its Memorial, ADF identifies no rule of customary international law even implicated by the measures at issue. Indeed, ADF does not appear seriously to contend that it can state a claim under Article 1105(1) as interpreted by the NAFTA Free Trade Commission ("FTC"). Instead, in a puzzling series of paragraphs, ADF appears to rest its Article 1105(1) claim solely on the hope that Chapter Eleven tribunals in certain other arbitrations will disregard the FTC's binding interpretation of that article. As demonstrated below, ADF's contentions are without merit.

A. ADF Has Failed To Identify Any Customary International Law Standard That Applies Under The Circumstances Presented Here

ADF does not dispute that it cannot establish a claim under Article 1105(1) as interpreted by the FTC. *See* Reply ¶¶ 213-220. As noted in the Counter-Memorial, the FTC interpreted Article 1105(1) to "prescribe[] the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." Counter-Mem. at 50 (quoting FTC Interpretation of July 31, 2001, ¶ B(1)). Customary international law standards such as those may be established only by the familiar showing of a general and consistent practice of States followed by them from a

sense of legal obligation. The burden of establishing the existence and content of a rule of customary international law rests on the party asserting the existence of the rule.⁴⁷

ADF has not purported to identify any customary international law rule implicated by the measures at issue here. Indeed, ADF cites no customary international law authority, and offers no evidence of State practice, to support its claim that the measures at issue here constitute a breach of Article 1105(1). Nor does ADF even attempt to address the overwhelming evidence of State practice indicating that customary international law, in fact, does *not* bar such measures. *See* Counter-Mem. at 51 n.107. ADF's Article 1105(1) claim fails as a matter of law, as, indeed, no law supports it.⁴⁸

In any event, there is no merit to ADF's attack on the FHWA regulations as "a *new* rule . . . a *new* standard, a double standard." Reply ¶ 260 (emphasis added). This supposed "new rule" was promulgated in 1983 – and ADF does not dispute that for the past nineteen years the regulations have been interpreted and applied consistently.

⁴⁷ *See Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20)); NGUYEN QUOC DINH, *DROIT INTERNATIONAL PUBLIC* 330 § 214 (Patrick Daillier & Alain Pellet eds., 6th ed. 1999) (burden on party "who relies on a custom to establish its existence and exact content") ("c'est à [la partie] qui s'appuie sur une coutume d'en établir l'existence et la portée exacte") (translation by counsel); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 11 (5th ed. 1998) ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.").

⁴⁸ The only discussion of a principle of customary international law in ADF's Article 1105(1) argument is its assertion that the "United States [in its Counter-Memorial] is not interpreting the Treaty in 'good faith'" in violation of "the obligation of Article 31(1) of the Vienna Convention." Reply ¶ 253-54. Aside from lacking any foundation in fact (*see supra* n.16), this fanciful assertion has nothing to do with the measures at issue in this arbitration and in any event can provide no basis for a claim of a violation of Article 1105(1)'s requirement of "treatment in accordance with international law." In addition, NAFTA Articles 1119(c) and 1120 would bar any claim based on a legal position taken in a pleading. *See infra* Part IV.

Nor does ADF dispute that the FHWA adopted its regulations in full compliance with the system of administrative rule-making in place in the United States, which permits agencies to interpret statutes unless Congress has spoken directly to the issue. *See* Counter-Mem at 15-16. ADF may not like the U.S. system of administrative rule-making, and it may not like the regulations promulgated by the FHWA as contemplated by that system. But ADF offers no support for its erroneous assertion that the FHWA's action was *ultra vires* under United States law. *See* Reply ¶ 260. Even if it had presented a credible challenge to the means by which the FHWA adopted its regulations under U.S. law (which it has not), ADF offers no basis for a finding of a violation of any rule of customary international law. Its Article 1105(1) claim lacks foundation in fact as well as in law.

B. The FTC's Interpretation Of The Terms Of Article 1105(1) Is Binding

In an odd series of paragraphs, ADF “invites the Tribunal to review materials available on the United States Department of State web-site concerning [other] Chapter Eleven claims against the United States,” particularly those submitted in “the *Methanex* and *Loewen Group* case [sic].” Reply ¶ 214. “In these materials,” ADF suggests, “the Tribunal will find an ongoing debate as to the effect of the FTC Notes” *Id.* ¶ 215. ADF further notes that “[t]o the extent that [the pending decisions in *Methanex* and *Loewen*] reaffirm the strength of Article 1105 as the provision stood unamended,” it “intends to rely on them, and reserves the right to comment [sic] them.” *Id.* ¶ 218. ADF does not, however, affirmatively assert on its own behalf the arguments made by the claimants in those proceedings.

ADF's submissions on the FTC Interpretation, on their face, do not advance an argument requiring a response. Instead, ADF invites the Tribunal to review unspecified

submissions by parties to other Chapter Eleven tribunals and purports to reserve a right to request post-hearing submissions in the event that issues purportedly pending before the *Methanex* and *Loewen* tribunals are decided in a certain way.

With the limited scope of ADF's submissions in mind, the United States limits its observations here on the FTC Interpretation to the following. The meaning of Article 1105(1) is no longer open to debate, "ongoing" or otherwise. The FTC has issued an interpretation of that Article. That interpretation is binding on this Tribunal, as the plain text of Article 1131(2) explicitly provides.⁴⁹ The FTC's binding interpretation forms part of the governing law for these proceedings.

With respect to ADF's invitation to the members of the Tribunal to peruse materials on the website of the United States Department of State,⁵⁰ the United States observes as follows. The Department of State has, of course, published certain materials on its website because they are of interest to members of the public. The United States encourages the members of the Tribunal to review these and other materials on the site, bearing in mind that no argument has been advanced in these proceedings questioning the binding nature of the FTC Interpretation. If the members of the Tribunal do engage in such a review, they will note that, in *Loewen*, there is *no* "ongoing debate as to . . . whether or not the FTC Notes are a valid retroactive amendment to NAFTA." Reply ¶ 215. The claimants in *Loewen* have withdrawn any claim that the FTC

⁴⁹ See Submission of the Government of Canada Pursuant to NAFTA Article 1128, (Jan. 18, 2002) at 2 ("An interpretation by the Commission is the full expression of what the NAFTA Parties intended, and its effect is clear: it is binding."); Article 1128 Submission of the United Mexican States, (Jan. 18, 2002) at 1 ("paragraph 2 of [Article 1131] requires the Tribunal to apply an interpretation of any provision rendered by the Free Trade Commission (FTC).").

⁵⁰ <http://www.state.gov./s/l/c3439.htm>

Interpretation was *ultra vires*.⁵¹ The members of the Tribunal will also find that the arguments of the claimant in *Methanex* are baseless, as conclusively demonstrated in the written submissions of the United States, Canada and Mexico.⁵²

With respect to ADF's reservation of a right to request post-hearing submissions in the event that it is pleased with the or *Loewen* or *Methanex* awards, at this time, the United States simply notes the potential applicability of Article 45(2) of the Arbitration (Additional Facility) Rules to any such request made after the closure of proceedings.

For the reasons set out in the United States Counter-Memorial and those above, none of ADF's complaints regarding the challenged measures is cognizable under the customary international law obligations incorporated into Article 1105(1). ADF's Article 1105(1) claims should be rejected in their entirety.

IV. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMS OTHER THAN THOSE CONCERNING THE SPRINGFIELD INTERCHANGE PROJECT

In its Reply, ADF erroneously insists that it gave proper notice of claims relating to projects other than the Springfield Interchange Project. Reply ¶¶ 265-268. As demonstrated in the United States Counter-Memorial (at 54-55) and below, new claims, such as these, are

⁵¹ See Response of the United States of America to the November 9, 2001 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA Article 1128 (Dec. 7, 2001) at 2 & n.2 *submitted in Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3.

⁵² See, for example, the following submissions in *Methanex*: Article 1128 Submission of the United Mexican States (Feb. 11, 2002); Third Submission of Canada Pursuant to NAFTA Article 1128 (Feb. 8, 2002); Rejoinder of Respondent United States of America to Methanex's Reply Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation (Dec. 17, 2001); Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, (Oct. 26, 2001).

not within the scope of the disputing parties' consent to arbitrate and must therefore be dismissed.

ADF's contention that in its notice of intent "the U.S. was given specific notice of ADF's intention to claim damages in respect of all future contracts" is without merit. Reply ¶ 267. Under NAFTA Article 1119(c), a disputing investor's notice "*shall specify . . . the issues and the factual basis for the claim . . .*" (Emphasis added.) The supposed "specific notice" of other claims that ADF asserts was neither specific, nor did it provide any notice: not only did it fail to specify any factual basis for claims connected to the other projects, it failed even to name a single other project.⁵³

By operation of Article 1122, however, the United States consented to ADF's submission to arbitration based on the facts specified in its notice of intent, and only those facts. That article provides in part that "[e]ach Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement.*" NAFTA art. 1122(1) (emphasis added). The United States did not consent to arbitrate claims based on other facts, such as those concerning the projects to which ADF vaguely alludes for the first time in its Memorial.

The decision of the International Court of Justice in *Certain Phosphate Lands in Nauru (Nauru v. Australia)* is instructive in this regard. 1992 I.C.J. 240. In that case, Nauru filed an application instituting proceedings against Australia "in respect of a 'dispute . . . over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan

⁵³ See Notice of Intent ¶¶ 3-28 (Feb. 29, 2000) (stating in its section labeled "C. FACTUAL BASIS FOR THE CLAIM," factual allegations concerning only the Springfield Interchange Project and no others).

independence.” 1992 I.C.J. at 242 ¶ 1 (quoting Nauru’s application). Nauru later attempted to add a claim in its memorial concerning the *overseas* assets of the British commissioners who had managed the phosphate industry in Nauru during the trusteeship period. “There was no reference to the disposal of the overseas assets of the British Phosphate Commissioners . . . in Nauru’s Application either as an independent claim or in relation to the claim for reparation submitted” *Id.* at 265 ¶ 64.

The I.C.J. found that it lacked competence to hear Nauru’s new claim because that claim concerned a different set of operative facts from those described in the application. *See id.* at 267 ¶ 70. Just as the I.C.J., if it had entertained Nauru’s new claim, would have had to “consider a number of questions that appear[ed] to it to be extraneous to the original claim,” *id.* at 266 ¶ 68, this Tribunal would be forced to consider a completely different set of factual allegations (which ADF has yet to specify) if it were to allow ADF’s new claims.

Furthermore, ADF’s speculative claim for “damages in respect of all *future* contracts” is precluded by the NAFTA in any event. Reply ¶ 267 (emphasis added). NAFTA investor-State arbitration is inherently retrospective in application. Articles 1116 and 1117, which allow for the submission of claims only “that another Party has *breached* an obligation . . . and that the [investor/enterprise] has *incurred* loss or damage by reason of, or arising out of, that breach,” are drafted in the past tense. NAFTA arts. 1116(1), 1117(1) (emphasis added). Similarly, under Article 1120, six months must elapse from the events giving rise to the claim before a claim may be submitted to arbitration. NAFTA art. 1120(1). No claim based on speculation as to future breaches may be submitted consistent with these provisions. Thus, as Chapter

Eleven allows a disputing investor to submit claims only for breaches that have actually occurred, ADF may not submit a claim for possible future breaches.

V. THE TRIBUNAL LACKS JURISDICTION OVER ADF'S MOST-FAVORED-NATION TREATMENT CLAIM, WHICH IS WITHOUT MERIT IN ANY EVENT

ADF's Article 1103 claim should be dismissed for several reasons. First, the United States never consented to arbitrate this claim, which was asserted in neither ADF's Notice of Intent nor any subsequent pleading prior to the Reply. Second, Article 1108's exception for "procurement by a party" explicitly bars ADF's claim. Finally, ADF errs in any event in suggesting that the "fair and equitable treatment" and "full protection and security" obligations of the Albania-U.S. and Estonia-U.S. bilateral investment treaties ("BITs") are different in substance from the customary international law obligations of Article 1105(1).

A. The Tribunal Lacks Jurisdiction Over ADF's New Article 1103 Claim

For much the same reason stated above in Part IV, the Tribunal lacks jurisdiction over the claim based on NAFTA Article 1103 that ADF asserts for the first time in its Reply. *See* Reply ¶ 219. Under NAFTA Article 1119(b), a disputing investor's notice "*shall specify . . . the provisions of this Agreement alleged to have been breached and any other relevant provisions . . .*" (Emphasis added.) ADF's notice of intent did not allege that Article 1103 had been breached, nor did it anywhere even mention Article 1103.⁵⁴ Again, by operation of Article 1122, the United States consented to ADF's submission to arbitration only of the claims

⁵⁴ *See* Notice of Intent ¶ 2 (listing the following NAFTA articles in the section labeled "BREACHES OF OBLIGATIONS": 1102, 1105 and 1106); *id.* at 15 (listing the same articles in the section labeled "Relief Sought").

specified in the notice and no others. As a result, the scope of the arbitration agreement of the parties was limited to those claims.

There is no merit to ADF's effort to salvage its new 1103 claim by reference to the so-called "basket clause" in its notice of intent, which purported to "reserv[e] its right to request 'such further relief that counsel [for ADF] may advise and the Arbitral Tribunal may permit.'"⁵⁵ As demonstrated above, Article 1119 requires *specification* of the provisions alleged to have been breached. Neither the decisions of international tribunals, nor even the irrelevant Canadian case ADF cites, support ADF's attempt to undermine the plain intent of this provision by the use of a vague "basket clause."⁵⁶

Furthermore, ADF's assertion that its 1103 claim was "already announced in its Memorial" and that the United States is now estopped from making an objection is false. Reply ¶ 219. Nowhere in its Memorial did ADF invoke Article 1103 as an independent basis for relief, leaving nothing for the United States to respond to in its Counter-Memorial.⁵⁷ ADF's

⁵⁵ Reply at 36-37 n.45 (quoting ADF's Notice of Arbitration).

⁵⁶ See, e.g., *AMCO v. Indonesia*, 1 ICSID Rep. 509, 521 (1993) (Decision on the Application for Annulment of May 16, 1986) (explaining, in the context of an annulment application, that a procedural requirement of specificity "is not successfully avoided by coupling a recital of the subparagraphs invoked with a general reservation of a 'right to supplement (a) presentation . . . with further written submissions'").

ADF's reliance on Canadian law as its sole support for this argument is not only irrelevant (*see* NAFTA art. 1131(1)), but it also offers no support for ADF's "basket clause" argument. *See* Reply at 36-37 n.45. The Canadian case ADF cites merely stands for the proposition that it is within a Canadian appeals court's discretion to award *remedies* not pleaded when (1) a basket clause appears in a prayer for relief; (2) the law violated provides for such remedy; and (3) the remedy was based on a violation "specifically argued" in the lower court. *See Native Womens' Ass'n v. Canada*, [1994] 3 S.C.R. 627, 629, 647 (finding it appropriate for an appellate court to award a declaration in a case where the claimant only sought an order of prohibition because "[n]othing different could have been argued by the parties had the declaration been specifically sought."). In no way does this case, nor any of the cases cited therein, support the proposition that additional *claims* may be submitted where a basket clause is present.

⁵⁷ See, e.g., Mem. ¶ 34 (entitled "BREACH OF CHAPTER ELEVEN OBLIGATIONS BY THE PARTY": "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

Memorial merely referenced Article 1103 as additional support for its flawed argument that Article 1105(1) incorporated standards not found in customary international law. *See* Mem. ¶¶ 224, 227. The United States could not have waived, and did not waive, an objection to a claim ADF did not make.⁵⁸ ADF’s new Article 1103 claim should be dismissed.

B. The Government Procurement Exception Bars ADF’s Article 1103 Claim Just As It Bars ADF’s Claims Under Articles 1102 and 1106

Under Article 1108(7), “Article[] . . . 1103 do[es] not apply to: (a) procurement by a Party” Thus, for the reasons articulated in Part I, ADF cannot avoid the inescapable conclusion that its Article 1103 claim – just like its Article 1102 and 1106 claims – fall within Article 1108’s exception for “procurement by a Party.” ADF’s Article 1103 claim should be dismissed in its entirety as precluded by that exception.

C. The BITs Do Not Reflect A Standard Different From That Of Article 1105(1) As Interpreted By The FTC

In any event, ADF errs in suggesting that the standards of the provisions it invokes in the United States’ BITs with Albania and Estonia are different from the customary international law standards incorporated into Article 1105(1). Indeed, the United States Department of State’s statements in submitting the Albania-U.S. treaty to the United States Senate for advice and consent make clear that the relevant paragraph of the treaty “sets out a minimum standard of

and its Investment.”); *cf.* Reply ¶ 286(e)(ii)-(iii) (requesting the Tribunal to find that respondent United States of America failed to provide treatment required by provisions of the Albania and Estonia BITs in violation of Article 1103).

⁵⁸ And, in any event, the Additional Facility rules expressly permit jurisdictional objections to ancillary claims to be made in the respondent’s rejoinder. *See* Arbitration (Additional Facility) Rules art. 46(2).

treatment based on standards found in customary international law.”⁵⁹ The Department of State’s statements in submitting the Estonia-U.S. BIT for Senate advice and consent similarly state that the relevant paragraph “sets out a minimum standard of treatment based on customary international law.”⁶⁰

These statements are hardly unique: the State Department has repeatedly advised the Senate over the past decade that the BIT paragraph containing the provisions concerning “fair and equitable treatment” and “full protection and security” is intended only to require a minimum standard of treatment based on customary international law.⁶¹ At no time since the NAFTA

⁵⁹ See Dep’t of State, Letter of Submittal for U.S.-Alb. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 104-19 at vii (1995) (“Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord ‘fair and equitable treatment’ and ‘full protection and security’ are explicitly cited . . .”).

⁶⁰ See Dep’t of State, Letter of Submittal for U.S.-Est. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-38 at ix (1994) (“Paragraph 3 guarantees that investment shall be granted ‘fair and equitable’ treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph sets out a minimum standard of treatment based on customary international law.”).

⁶¹ See Dep’t of State, Letter of Submittal for U.S.-Arm. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-11 at viii (1993) (“Paragraph 2 further guarantees that investment shall be granted ‘fair and equitable’ treatment in accordance with international law. . . . This paragraph sets out a minimum standard of treatment based on customary international law.”); Dep’t of State, Letter of Submittal for U.S.-Mold. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-14 at ix (1993) (same); Dep’t of State, Letter of Submittal for U.S.-Mong. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 104-10 at viii (1995) (same); Dep’t of State, Letter of Submittal for U.S.-Jam. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-35 at viii (1994) (same); Dep’t of State, Letter of Submittal for U.S.-Ukr. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-37 at ix (1994) (same); Dep’t of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 103-15 at ix (1993) (same); Dep’t of State, Letter of Submittal for U.S.-Uzb. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 104-25 at viii (1996) (same); Dep’t of State, Letter of Submittal for U.S.-Trin. & Tobago Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 104-14 at viii-ix (1995) (same); Dep’t of State, Letter of Submittal for U.S.-Geor. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. TREATY DOC. NO. 104-13 at viii-ix (1995) (same).

entered into force has the United States stated that foreign investors under its BITs should be treated better than under the NAFTA with respect to “fair and equitable treatment.”

The United States’ view that “fair and equitable treatment” and “full protection and security” reference customary international law obligations accords with consistent State practice concerning the content of those terms. From the use of those terms in the 1967 OECD Draft Convention on the Protection of Foreign Property to the present, State practice has consistently viewed “fair and equitable treatment” as referring to the customary international law minimum standard of treatment of aliens.⁶² Thus, State practice supports the view that “fair and equitable treatment,” as used in investment treaties, refers to the customary international law minimum standard of treatment of aliens. ADF offers no evidence of State practice to support a contrary view.

What ADF does offer are the views of academics. See Reply ¶¶ 224-232.

Academics, of course, cannot create international law. International tribunals may consider the

⁶² See, e.g., OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, reprinted in 7 I.L.M. 117, 120 (1968) (“The phrase ‘fair and equitable treatment’ . . . indicates the standard set by international law The standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law.”); *Intergovernmental Agreements Relating to Investment in Developing Countries*, Committee on International Investment & Multinational Enterprises, OECD Doc. No. 84/14, at 12 ¶ 36 (May 27, 1984) (reporting on response to survey of OECD member states: “According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated”); see also UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 54 (1998) (“The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.”); Swiss Department of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT’L 174, 178 (1980) (“On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du ‘standard minimum’ international, c’est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.”) (“One thus references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international ‘minimum standard,’ that is, to accord them a minimum of personal, procedural and economic rights.”) (translation by counsel); CSI, *supra* n.12 at 149 (Jan. 1, 1994) (“Article 1105 . . . provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law.”); FTC Interpretation of July 31, 2001, ¶

“teachings of the most highly qualified publicists of the various nations” only as a “subsidiary means for the determination of rules of law.”⁶³ Academic writings may appropriately be considered for determining rules of law when they are based firmly on the practice of States – which can create international law. Such writings may not appropriately be considered for determination of the law when they are merely a statement of the author’s personal views as to what the law might or should be.⁶⁴ The writings of academics relied upon by ADF either merely represent the personal views of certain authors⁶⁵ or do not support its position.⁶⁶ Thus, these

B(1) (“prescrib[ing] the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”).

⁶³ STATUTE OF INT’L CT. OF JUSTICE art. 38(1)(d) *accompanying* Mem. at Vol. IIA, Tab 15.

⁶⁴ *See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 38 ¶ 62 (Feb. 20) (article, in multilateral convention, proposed by International Law Commission “on an experimental basis [was] at most *de lege ferenda*, and not at all *de lege lata* or [] an emerging rule of customary international law. This is clearly not the sort of foundation on which [the subject article] could be said to have reflected or crystallized such a rule.”).

⁶⁵ *See* KENNETH J. VANDELDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 76-78 (1992) (presenting views on interpretation of “fair and equitable treatment” in U.S. bilateral investment treaties without citing any support in State practice); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT’L L. 241, 243 (1981) *accompanying* Reply at Vol. I, Tab 8 (presenting views on interpretation of term “fair and equitable treatment” in British investment treaties without citing any support in State practice); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, (1999) BRIT. Y.B. INT’L L. 99, 139, 163, *accompanying* Reply at Vol. II, Tab 12. (reviewing “a number of sources . . . indicat[ing] that the fair and equitable treatment standard is, in fact, equivalent to the ‘international minimum standard,’” but based primarily on F.A. Mann’s dissenting view, reaching the “tentative conclusion[] . . . against the view that fair and equitable treatment is simply synonymous with the international minimum standard.”).

⁶⁶ Notably, ADF errs in its reliance on the writings of Kenneth J. Vandavelde to suggest that the “fair and equitable treatment” obligation in the BITs “must . . . be viewed as ‘self contained’ from that of customary international law” in order for the “principles [to] mutually ‘reinforce’ each other.” *See* Reply ¶ 228 (paraphrasing Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 221-22 (Summer 1988), *accompanying* Reply at Vol I., Tab 9). Mr. Vandavelde says nothing of the kind. Rather, he views customary international law and the BIT provisions as capable of mutually reinforcing one another because “[t]he BITs rely on international law to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts.” Vandavelde, *supra*, at 222. He further notes that “[t]he incorporation of international law into the BITs allow investors or their states to enforce international legal norms” using the platform of investor-State and State-to-State dispute resolution provided by the BITs. *Id.* Contrary to ADF’s mischaracterization of them, none of these observations is remotely inconsistent with the understanding of “fair and equitable treatment” reflected in the FTC interpretation of Article 1105(1).

writings are not suited for the “determination of the rules of law,” and certainly do not overcome the consistent evidence of State practice referenced above.

Similarly unavailing is ADF’s reliance on *dicta* in Justice Tysoe’s decision in *Metalclad* repeating the *Pope* tribunal’s term “additive” in describing BIT language.⁶⁷ This *dicta* was penned without the benefit of the views of the parties in *Metalclad* or the Government of Canada, none of which briefed the issue of the meaning of BIT language. Justice Tysoe thus did not have before him the evidence of State practice presented above regarding the U.S. BIT program. The *Pope* tribunal, whose conclusions regarding Article 1105 Justice Tysoe rejects, clearly did not base its decision on such evidence.⁶⁸ To the extent that Justice Tysoe considered the obligations of “‘fair and equitable treatment’ and ‘full protection and security’ [under the 1987 Model BIT] as distinct from the floor standard of customary international law,” Reply ¶ 233, he is incorrect.

For the reasons stated above, this Tribunal should reject ADF’s Article 1103 claim in its entirety.⁶⁹

VI. OBSERVATIONS ON ADF’S PRESENTATION OF FACTS

⁶⁷ *United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (May 2, 2001) at 24 ¶ 64 *accompanying* Reply at Vol. II, Tab 7.

⁶⁸ Rather, according to Judge Tysoe, the *Pope* tribunal “relied solely on the language of Article 1105 and . . . not . . . [on] any other evidence that the NAFTA Parties intended to reject the ‘additive’ character” of the BITs.” *Id.*

⁶⁹ The United States also notes its disagreement with ADF’s suggestion that Article 1103 permits this Tribunal to apply as a rule of decision in this case provisions of treaties between the United States and Albania and Estonia concerning “fair and equitable treatment.” The Tribunal need not address this issue to dispose of ADF’s Article 1103 claim, however, because that claim is not within the Tribunal’s jurisdiction, is barred by the government procurement exception of Article 1108 and, as demonstrated above, there is no substantive difference between the standard of treatment under the BIT provisions ADF seeks to invoke and the standard under NAFTA Article 1105(1).

ADF claims that it “stands by the statement of facts as set out in its own Memorial,” Reply ¶ 2, but its Reply does not dispute the view of the facts presented in the United States’ Counter-Memorial. The Tribunal, therefore, should endorse the United States’ uncontested view of the facts in this case.

As the United States noted in its Counter-Memorial, Shirley’s timely completion of the work on the Project, including the steel fabrication subcontracted to ADF, entitled Shirley to a \$10 million “no excuses” incentive award. Counter-Mem. at 13. Since that time, Shirley has “elect[ed] to be paid the No Excuse Incentive of Ten Million Dollars (\$10,000,000).”⁷⁰ Shirley’s election required that it formally release VDOT from any claims it had under the contract, including those it raised on ADF’s behalf.⁷¹ Thus, it is now clear that ADF’s earlier claims that all local fabricators were “fully loaded” and unable to complete the steel fabrication for the Project have been withdrawn.

The United States also observes that, despite the United States’ challenge to ADF to demonstrate any adverse treatment, ADF omits any specific information regarding ADF’s costs. Nevertheless, ADF presents various conflicting qualitative characterizations of its costs in its submissions to the Tribunal. In its Memorial, ADF represented that, relative to the value of the

⁷⁰ See Letter from Michael E. Post, President/CEO, Shirley to C. Frank Gee, Chief Engineer, VDOT (Jan. 18, 2002) (ex. A to Rejoinder Statement of C. Frank Gee).

⁷¹ See Rejoinder Statement of C. Frank Gee ¶ 3 (“As was required for Shirley to receive the no-excuse incentive bonus, Shirley signed a form releasing VDOT from any and all claims it may have had under the Main Contract, including those it raised on ADF’s behalf.”); *id.*, ex. B (letter and release executed by Shirley’s Michael E. Post on Feb. 13, 2002); *see also* Affidavit of Pierre LaBelle, (Feb. 4, 2002) ¶¶ 28-30 (transmitted under cover of letter from Peter Kirby, dated February 4, 2002, to replace version originally submitted with Memorial); Letter from Pierre Paschini, ADF International, to Mr. Michael E. Post, President & CEO, Shirley, (Aug. 20, 1999), *accompanying* Mem. at Vol. I, Tab A14 (presenting to Shirley “pursuant to section 105.16 of the Contract” ADF’s notice of claim that “V-DOT’s requirement that all fabrication work be performed in the United States and its rejection of a waiver to constitute a constructive change in the Contract . . .”).

steel, the cost of the steel fabrication it proposed in Canada was “of minor importance.”⁷² ADF asserts in its Reply that the costs “associated with” that same fabrication work completed in the United States “were enormous.”⁷³ Reply ¶ 15. ADF, however, offers no particulars. For example, ADF does not provide the price ADF paid for the steel in question, nor its fabrication costs, either as proposed in Canada, or those it incurred in the United States. Notwithstanding, because “fabrication of steel does not change its origin,” Reply ¶ 197, ADF urges the Tribunal to deem the cost of fabrication irrelevant to its claims, and to accept on faith that ADF received treatment less favorable than its U.S. counterparts. On the facts before this Tribunal, no such conclusion can be drawn.

⁷² See Mem. ¶ 25 (“only 10-15 percent of the total cost of [ADF’s] operations will be in Canada.”). See also Letter from Pierre Paschini, President and CEO, ADF International, to Michael E. Post, President and CEO, Shirley (June 25, 1999), *accompanying* Mem. at Vol. I, Tab A7, at 7 (“[w]hen measured against the value of the steel, the fabrication work performed in Canada is of minor importance.”); Counter-Mem. nn.26-28 and accompanying text.

⁷³ See also Affidavit of Pierre Paschini, (Feb. 12, 2002) ¶ 53 (“Fabricating the steel at five (5) different subcontracting facilities had the inevitable result of massively increasing our costs on the Project.”) (transmitted under cover of letter from Peter Kirby, dated February 12, 2002, to replace version originally submitted with Memorial).

CONCLUSION AND SUBMISSIONS

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against ADF, dismissing ADF's claims in their entirety and with prejudice; and (b) pursuant to Article 59 of the Arbitration (Additional Facility) Rules, ordering that ADF bear the costs of this arbitration, including the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the United States in connection with the proceeding.

Respectfully submitted,

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