

ICSID Case No. ARB(AF)/00/1 - **Award**  
International Centre for Settlement of Investment Disputes ICSID

**Award**

**ICSID Case No. ARB(AF)/00/1 (Award)**  
**ADF Group Inc. (Claimant) v United States of America (Respondent)**

**Industry: Highway and street construction; Bridge, tunnel, & elevated highway**

**Case Type: International**

**Award Amount: 0**

**Claimant's Attorney: Peter E. Kirby; René Cadieux; Stacey Pinchuk; Diane Bertrand; Pierre Labelle**

**Respondent's Attorney: James H. Thessin; Ronald J. Bettauer; Mark A. Clodfelter; Barton Legum; Andrea J. Menaker; Laura A. Svat; David Pawlak; Jennifer Toole**

**Award Date: 9 January 2003**

**Arbitrator: Florentino P. Feliciano (President); Armand deMestral; Carolyn B. Lamm**

**Country: United States of America**

**Award history:**

- Procedural Order No. 1, 3 May 2001
- Procedural Order No. 2, 11 July 2001
- Procedural Order No. 3

**ADF GROUP INC.**

Represented by:

**Fasken Martineau DuMoulin LLP**

Mr. Peter E. Kirby

Mr. René Cadieux

Ms. Stacey Pinchuk

Ms. Diane Bertrand

Mr. Pierre Labelle

**CLAIMANT**

*and*

**UNITED STATES OF AMERICA**

Represented by:

Office of the Legal Adviser of the

United States Department of State

Mr. James H. Thessin

Mr. Ronald J. Bettauer

Mr. Mark A. Clodfelter

Mr. Barton Legum

Ms. Andrea J. Menaker

Ms. Laura A. Svat

Mr. David Pawlak

Ms. Jennifer Toole

**RESPONDENT**

**I. PROCEDURAL HISTORY**

**Notice of Intent and Notice of Arbitration**

1. On 1 March 2000, ADF Group Inc. (ADF or the Claimant or the Investor), a company established under the laws of Canada, delivered to the Government of the United States of America (U.S. or the Respondent), a Notice of Intention to Submit a Claim to Arbitration pursuant to Articles 1116, 1117, 1120(1)(b) and 1137(1)(b) of the North American Free Trade Agreement (NAFTA). On 21 July 2000, the Centre (ICSID) received a Notice of Arbitration dated 19 July 2000 from the Claimant against the Respondent with application for approval by the Secretary-General of access to the Additional Facility under Article 4 of the ICSID Arbitration (Additional Facility) Rules. The Notice was

supplemented by a letter of 1 August 2000.

### **Registration of the Notice of Arbitration**

2. On 25 August 2000, the Acting Secretary-General of ICSID, pursuant to Article 4(5) of the ICSID Arbitration (Additional Facility) Rules, notified the parties that the Claimant's application for access to the Additional Facility was approved. The Acting Secretary-General, on the same day, issued and dispatched to the parties, a Certificate of Registration of the Notice of Arbitration, as amended.

### **Appointment of Arbitrators**

3. Article 1123 of the NAFTA provides that, unless otherwise agreed by the disputing parties, the Arbitral Tribunal shall be composed of three arbitrators, one appointed by each party, and the third, who shall be the presiding arbitrator, appointed by agreement of the parties.

4. There was no agreement by the parties to depart from the provisions of Article 1123 of the NAFTA. The Notice of Arbitration contained a notification of the Claimant's appointment of Professor Armand deMestral, a national of Canada, as arbitrator. The Respondent appointed Ms. Carolyn B. Lamm, a national of the US, as arbitrator and the parties, by agreement, appointed Judge Florentino P. Feliciano, a national of the Philippines, as the third arbitrator to serve as the President of the Tribunal.

5. By letter of 11 January 2001, the Secretary-General of ICSID notified the parties that all the arbitrators had accepted their appointment and the Arbitral Tribunal was therefore deemed to have been constituted, and the proceeding deemed to have begun, on that date.

### **First Session of the Tribunal with the Parties: Procedural Order No. 1**

6. On 29 January 2001, the Tribunal held its first session with the Parties, by video conference, which was devoted to preliminary procedural matters. In respect of the place of arbitration, the parties had not been able to reach agreement. Nevertheless, they agreed that they would make written submissions to the Tribunal in accordance with an agreed schedule, that no hearing

would be necessary with respect to this issue, and that the Tribunal should render its decision on the place of arbitration on the basis of their written submissions. Following a request by the parties for guidance on the issue of the schedule for the production of documents, the Tribunal on 7 March 2001 invited the parties to seek agreement on a schedule on the basis that production of documents by the parties would proceed concurrently with the time periods for filing of the parties' written pleadings.

7. By a joint letter of 4 April 2001, the parties communicated to the Tribunal, their agreement on the schedule of proceedings, the production of documents, treatment of trade secrets and confidential information and the submission of evidence. The Tribunal on 3 May 2001 issued Procedural Order No. 1 adopting the agreement of the parties in their joint letter of 4 April 2001, and instructing the ICSID Secretariat to inform the Governments of Canada and the United Mexican States (Mexico) that any submission they may wish to make pursuant to NAFTA Article 1128, should be filed within forty days after the service upon the Claimant of the Respondent's Counter-Memorial.

### **Place of Arbitration: Procedural Order No. 2**

8. On 26 February 2001, the Claimant filed written submissions on the issue of the place of arbitration, requesting the Tribunal to designate Montreal, in the province of Quebec, Canada, as the place of arbitration. On 19 March 2001, the Respondent filed a submission on place of arbitration, asking the Tribunal to designate Washington, D.C., USA, as the place of arbitration. The Claimant on 2 April 2001, filed a reply to the submission of the Respondent on the place of arbitration and on 16 April 2001, the Respondent filed its final observations on this matter.

The Tribunal considered the submissions of the parties including specifically their reference to:

(a) Article 1130(a) of NAFTA that requires the arbitration to be held in the territory of a Party to the New York Convention.

(b) Articles 20 and 21 of ICSID Arbitration (Additional

Facility) Rules that require, *inter alia*: the arbitration to be held in a State Party to the New York Convention; and the Tribunal to determine the place of arbitration after consultation »with the Secretariat and parties.«

(c) Article 16 of the UNCITRAL Rules including paragraph 22 of the related UNCITRAL Notes on Organizing Arbitral Proceedings (»UNCITRAL Notes«) that enumerate factual and legal factors which »influence the choice of the place of arbitration« although the importance of each »varies from case to case.« These factors are (1) suitability of the law on arbitral procedure of the place of arbitration; (2) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (3) convenience of the parties and the arbitrators, including the travel distances; (4) availability and cost of support services needed; and (5) location of the subject-matter in dispute and proximity to evidence.

10. The Tribunal considered each of the above factors. On the suitability of the law on arbitral procedure of (a proposed) place of arbitration, the Claimant argued that an appropriate place of arbitration must provide a legal environment that sets out »clear, predictable and limited procedures for challenging an award along with an effective mechanism for recognition and enforcement of an award.«<sup>[FN1]</sup> The United States argued that its commitment to facilitating international arbitration and favoring arbitral dispute resolution makes it the more appropriate place for the arbitration.<sup>[FN2]</sup>

11. The Tribunal observed in its Procedural Order No. 2 that suitability of the law on arbitral procedure of a suggested place of arbitration has multiple dimensions, including the extent to which that law:

»(i) protects the integrity of, and gives effect to, the parties' arbitration agreement;

(ii) accords broad discretion to the parties and to the arbitrators to determine and control the conduct of arbitration proceedings;

(iii) provides for the availability of interim measures of protection and of means of compelling the production of documents and other evidence and the attendance of reluctant witnesses;

(iv) consistently recognizes and enforces international arbitral awards, in accordance with the terms of widely accepted conventions concerning the enforcement of such awards; and

(v) insists on principled restraint in establishing grounds for reviewing and setting aside international arbitral awards.«

12. The Claimant also argued the distinction between two aspects of *lex arbitri*: (a) recognition and enforcement of arbitral awards and (b) review by courts of the *locus arbitri* of such awards in actions to modify or set aside and vacate those awards. According to the Claimant, Article 1136(7) of NAFTA that deems Chapter 11 arbitration as »commercial« for purposes of Article 1 of the New York Convention, might not reach actions to set aside Chapter 11 awards where the domestic review remedies were limited to awards in commercial arbitration.<sup>[FN3]</sup> While the Canadian Federal Commercial Arbitration Act was specifically amended to provide for such, the U.S. had not made any similar amendment to its own statute. Accordingly, the Claimant characterized the U.S. law in the matter as unclear and uncertain with respect to post-award litigation rendering U.S. arbitration laws unsuitable.

13. The United States responded that it was impossible at this stage of Chapter Eleven's evolution for any party to have absolute »certainty as to the legal regime governing review of a Chapter Eleven award« whether such review takes place in Canada or the U.S.<sup>[FN4]</sup> Moreover, the U.S. noted that the Attorney General of Canada had gone on record in *United Mexican States v. Metalclad* contending that »in interpreting NAFTA Chapter Eleven Tribunals should not attract extensive judicial deference and should not be protected by a higher standard of judicial review.«<sup>[FN5]</sup>

14. The Tribunal noted that both Canada and the United States, in their respective reservations to the New York

Convention, determined that they would apply the convention only to arbitral proceedings arising out of disputes considered »commercial« under their respective national laws. Accordingly, both parties agreed that the laws of both the U.S. and Canada are equally suitable as far as recognition and enforcement of awards are concerned.

15. The Tribunal noted that, after the parties' submissions, the case of *United Mexican States v. Metalclad* was decided on 2 May 2001 by the Supreme Court of British Columbia. That Court held that the applicable standard of review was that obtaining under the British Columbia International Commercial Arbitration Act (»ICAA«) which closely follows the UNCITRAL model law. In considering that standard, the Supreme Court of British Columbia referred to *Quintette Coal Ltd. v. Nippon Steel Corp.*[1991] 1 W.W.R. 219 (BCCA). In that case, decided under the ICAA Section 34, the majority of the court commented on the standard of review in the following terms:

»It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the case discussed above for restraint in the exercise of judicial review are highly persuasive. The 'concerns of international comity, respect for the capacities of foreign and international Tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' spoken of by Blackman J. [in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United States or elsewhere. It is needed therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia (p. 229).«

The U.S. stressed that suitable procedures for review of Chapter 11 awards are available under both U.S. federal and District of Columbia laws regardless of whether or not the award is deemed commercial. The U.S. specific-

ally stated that Section 10 of the U.S. Federal Arbitration Act (9 U.S.C. 208, Chapter 1 of the FAA) governing vacature of awards, would apply to Chapter 11 awards made in the United States.<sup>[FN6]</sup>

16. The Tribunal observed that in the United States, in case of enforcement of an arbitral award against a foreign state (e.g., if Mexico or Canada were involved) under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (a-6), the foreign state would not have immunity from suit and the FSIA favors enforcement of the award. The standard applicable to enforcement of NAFTA arbitral awards against the United States is similar as the U.S. has waived its sovereign immunity with respect to the enforcement of NAFTA arbitral awards under the Tucker Act, 28 U.S.C. 1491(a) in conjunction with NAFTA 19 U.S.C. 3311(a).

17. After extensive consideration of the submissions of both parties, the Tribunal was not persuaded that it must characterize the U.S. Federal Arbitration Act as an unsuitable *lex arbitri* or as a less suitable *lex arbitri* than Canadian or Quebec law on international arbitration. In the absence of U.S. case law directly addressing the specific issue raised here by the Claimant, the Tribunal did not consider that the Claimant had adequately demonstrated that the relevant U.S. law was infected by a »lack of clarity« which undermines the authority of the Tribunal and its eventual award and promises to multiply post award litigation.«<sup>[FN7]</sup>

18. The Tribunal also noted that the distinction heavily stressed by the Claimant between an action to review and set aside a Chapter 11 award and an action for recognition and enforcement of such an award may not, in certain situations, be as important as might be supposed. The grounds for vacating an arbitral award under 9 U.S.C. chapter 1, Section 10 and those for setting aside an award under Article 34 of the UNCITRAL model law on one hand, and the grounds specified in the New York Convention for resisting an action for recognition and enforcement of an award on the other hand, exhibit overlapping to a significant degree. An action for recognition and enforcement may frequently be expected to be resisted by pleading the existence of grounds similar to those for vacating the award. The Tribunal did not

believe that the Claimant had provided it with a sufficient basis for refusing to join the Tribunals in the *Methanex* and the *Ethyl* cases in holding that Canadian law and U.S. law relating to international arbitration are equally »suitable« for purposes of determining an appropriate place of arbitration.<sup>[FN8]</sup>

19. In respect of the factor of existence of a multilateral or bilateral treaty on enforcement of arbitral awards, the Tribunal observed that both the United States and Canada are parties to the New York Convention.

20. The factor of convenience or relative inconvenience of the arbitrators offered no real guidance in this case. Two of the three arbitrators reside outside the United States and similarly two of the three arbitrators reside outside of Canada. Thus, whether the place of arbitration be in Canada or the United States, two arbitrators would have to travel to one or the other state.

21. The parties' relative inconvenience of traveling to Montreal or to Washington, D.C., may not be as finely balanced. The Tribunal was uncertain as to how many officials, counsel, representatives and witnesses of one party would have to travel to Montreal or Washington, D.C. The U.S. contended that, given the numerous agencies involved (*i.e.*, at least 7) all of which are based in Washington, D.C., and therefore would have to travel to Montreal, the balance of inconvenience favored Washington, D.C. The Claimant was concerned that some of its officials and representatives are based in Virginia and others may be located in Quebec or elsewhere in Canada and they would have to travel. The Tribunal noted that it could meet at the parties' request in Montreal or any other place to hear particular witnesses and facilitate the presentation of evidence upon prior notice to and agreement of both parties. On balance, in the circumstances of this case, the Tribunal believed that the submission of the United States on this point was not unreasonable even though the relative inconvenience of a state as a party, is not necessarily compelling.

22. In principle, the Tribunal found that there was not any significant difference between Montreal and Washington, D.C., in respect to the availability of arbitration

support services. The Tribunal, however, solicited the opinion of ICSID which noted that overall costs of providing arbitration support are likely to be substantially less in Washington, D.C., than in Montreal because ICSID headquarters (including excellent facilities to accommodate the hearing) and staff are in Washington, D.C.

23. The subject matter of the dispute, when examined in terms of ordinary meaning, refers to »the issue presented for consideration; the thing in which or in respect of which a right or duty has been asserted; the thing in dispute.« (Black's Law Dictionary, Seventh Edition, 1999, page 1439). The Tribunal regarded the Notice of Intent to Submit a Claim to Arbitration by Claimant as presenting the »subject matter« of the present dispute consisting of its claims concerning the consistency or lack of consistency of certain measures (or applications thereof) taken by the United States with certain provisions of Chapter 11 of NAFTA.

24. To the extent the claims have a »location,« the Tribunal considered that, for purposes of determining an appropriate place of arbitration, they may be deemed to be located in the place where the U.S. authority to which they were addressed are based, such location being a sufficient, real and substantial basis. The physical construction project in respect of which the claims are made is in relative geographic proximity to Washington, D.C.

25. The Tribunal found that Washington, D.C., is properly regarded as a neutral place of arbitration notwithstanding that it is the capital of the Respondent party. ICSID is, and is widely perceived to be, a neutral forum and institution. The policy imperatives which drives parties proceeding to international arbitration to seek a neutral forum are, in the Tribunal's opinion, satisfied by choosing the city in which ICSID is located.

26. On 11 July 2001, the Tribunal, for the foregoing reasons, issued Procedural Order No. 2 Concerning the Place of Arbitration, designating Washington, D.C., as the place of arbitration in this case, without prejudice to the Tribunal being able to meet in Montreal or any other place, when necessary or appropriate, to hear particular

witnesses and facilitate the presentation of evidence, upon the request of either party and with notice to and agreement of both parties.

**Motion for Production of Documents: Procedural Order No. 3**

27. On 6 August 2001, the Claimant filed a Motion for Production of Documents and on 17 August 2001, the Respondent filed Objections to the Claimant's Request for Documents. The Claimant's Response to the Objections Raised by the Respondent was filed on 27 August 2001, while the Respondent's Final Observations was filed on 4 September 2001.

28. The Claimant asked the Tribunal to require the Respondent to produce and communicate certain documents grouped under nine categories best presented in the Claimant's own words:

»(A) The administrative file held by the United States and those held by Virginia relating to the supply of steel to the Springfield Interchange Project by ADF Group Inc. and ADF International Inc. ('Investment'), including, but without limiting the generality of the foregoing:

1) All records relating to the 'Main Contract', and the 'Shirley/ADF Sub-Contract,' as those terms are defined in the Notice of Arbitration filed by the Investor ('Notice');

2) All records prepared by or on behalf of the United States or by or on behalf of Virginia relating to the scope and meaning of the Buy America provisions found at Section 165 of the STAA (1982), Pub. L. 97-424, 23 CFR 635.410 and to the scope and meaning of Special Provision 102.5 of the Main Contract;

3) All records (including correspondence between the United States and the State of Virginia) relating in whole or in part to the supply of steel to the Springfield Interchange Project;

4) All correspondence between the United States and Virginia relating in whole or in part to the Special Provision 102.5 of the Main Contract.

(B) The administrative files held by the U.S. Depart-

ment of Transport or the Federal Highway Administration relating to the consideration, development, drafting, approval and adoption of the Final Rule of the Federal Highway Administration concerning Buy America Requirements (23 CFR Part 635) which was published in Volume 48, No. 228 of the Federal Register dated November 25, 1983.

(C) All records prepared by or on behalf of the Office of the United States Trade Representative, the Department of State or the Department of Transport, or any agencies thereof relating in whole or in part to the impact of the North American Free Trade Agreement ('NAFTA') on Buy America requirements, including, but without limiting the generality of the foregoing.

1) All records relating to the Buy America and Buy American requirements and policies and laws as those requirements and policies and laws relate or are affected by NAFTA;

2) All records relating to the impact of the implementation of NAFTA on Tea-21, Pub. L. 105-178, Section 165 of the STAA (1982), Pub. L. 97-424 and 23 CFR 635.410.

(D) The administrative file in the following cases, including all the administration records in all appeals taken from these cases and all pleadings submitted by the parties:

1) [S. J. Amoroso Construction Co., Inc. v. The United States](#), 26 Cl. Ct. 759 (1992), aff. 12 F. 3d 1072 (United States Court of Appeals);

2) [Wright Contracting, Inc., ASBCA Nos. 39120, 39121](#), 91-1 B.C.A. P23, 649 (1990); and

3) Decision of the Comptroller General, B-167635 (1969) U.S. Comp. Gen. Lexis 2267;

(E) All records relating to every instance within the last ten years wherein federal funding for a highway project (including bridges and tunnels) has been withheld from or denied to a Department of Transport of any State of the United States ('State') or any agency thereof as a result of the application of any Buy America provisions.

(F) All documents used to report to or inform members of Congress, the President of the United States on the application of Buy America provisions to federally funded highway contracts and the impact of NAFTA on those provisions.

(G) A complete list of highway contracts and/or highway projects, listed by State, which have been approved for funding under Tea-21, Pub. L. 105-178 or which are currently under consideration to receive funding under Tea-21, Pub. L. 105-178, along with a list of the amount of the funding for each such contract or project.

(H) A list of all national and regional waivers of the provisions of Buy America requirements which have been granted within the last ten years under 23 CFR 635.410(c), along with the record which provides the administrative rationale for granting such a waiver and the reports to Congress made during the last ten years in compliance with Section 165(e) of the *Surface Transportation Assistance Act* of 1982.

(I) All pleadings filed by the United States in NAFTA Chapter 11 proceedings to date.« (Motion, pp. 9-10)

29. The Tribunal set out the general considerations of principle which, in its view, underlie the appropriate resolution of the Motion for production of document. The fundamental principle is embodied in Article 41(2) of the ICSID Arbitration (Additional Facility) Rules which authorizes a Tribunal, »if it deems it *necessary*, at any stage of the proceeding, [to] call upon the parties to produce documents, witnesses and experts.« (Emphasis added) The Tribunal considered that there are at least two main aspects of »necessity« in the context of a request for document production:

»The first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category by category basis.

»The second aspect concerns a procedural inquiry into the effective and equal availability of the documents re-

quested to both the requesting party and the party requested. Where only one party has access to requested documents relevant to the proceeding at hand, we consider that the party with access should be required to make the documents available to the other party. Where, however, the documents requested are in the public domain and equally and effectively available to both parties, we believe that there would be no necessity for requiring the other party physically to produce and deliver the documents to the former for inspection and copying. Where, however, the requesting party shows it would sustain undue burden or expense in accessing the publicly available material, the other party should be required to produce and deliver the documents.«

30. The Tribunal then sketched out the application of the above principles to the Claimant's motion:

»In the present case, where the Respondent identifies the particular government office at which the documents are in fact available to the Claimant or its representatives, as members of the general public, the Respondent will, in principle, have produced the documents requested within the meaning of Article 41(2) of the ICSID [Arbitration (Additional Facility)] Rules. The Respondent should also provide the document reference numbers, and any other data, necessary to enable the official custodians of the documents to identify and locate them physically or in electronic data bases, with reasonable dispatch. There may be other administrative details that may need to be attended to by the Respondent (e.g., phone calls to the document custodians) to ensure the Claimant's effective and prompt access to the documents. The Respondent would be reasonably expected to provide such necessary and appropriate assistance, without having to deliver the documents physically to the Claimant. The appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party.«

31. The principles which the Tribunal outlined are in line with the procedure and practice in the District of

Columbia and the caselaw under the U.S. Federal Rules of Civil Procedure (FRCP), both of which form part of the *lex arbitri* in the present case:

»Under Rule 34(b) of the FRCP, the requirement to produce a document is a requirement to make the requested document available for inspection and copying at a reasonable time and place. Federal courts in the United States have held that a court may refuse to order production of documents of public record that are equally accessible to all parties (See Moore's Federal Practice (Third Edition) at 34-46; e.g., *Dushkin Publishing Group, Inc. v. Kinko's Service Corporation*, 134 FRD 334, 335 (DDC); *SEC v. Samuel H. Sloan & Co.*, 369 Fed. Supp. 994, 995-6 (SDNY 1973); *Hoffman v. Charnita*, 17 Federal Rules Service 2D 1215, 1217 (W.D. Penn. 1973). It has also been held that production from the adverse party may be ordered if the requesting party could demonstrate that it would be 'excessively burdensome for financial and other reasons' for the requesting party to obtain documents from a public source other than from the opposing party who has them in their files (e.g., *Snowden v. Connaught Laboratory, Inc.*, 137 FRD 325, 333 (D. Kan., 1991).«

32. The Tribunal found that the request for *Category A documents* did refer with sufficient specificity to the subject of the files sought: »relating to the supply of steel to the Springfield Interchange Project by the ADF Group, Inc. and ADF International Inc.« The four sub-categories under Category A added further clarity by specifying records relating to the »Main Contract« and the Shirley/ADF Sub-Contract« and to »Special Provision 102.5 of the Main Contract.« The relevancy of these documents to the subject matter of the present case was not disputed by the Respondent. Accordingly, the Tribunal held that the Respondent should produce those documents by making them available in the manner indicated above.

33. While the Claimant had not shown how the *Category B documents* bear upon the subject matter, *i.e.*, the issues raised or likely to be raised, in the present case, the Respondent stated that those documents are »publicly available« and that the U.S. was willing to make them available to the Claimant under the same

conditions as they are available to the general public. Hence, the Tribunal held that the Respondent should make those documents available to the Claimant in the manner indicated above.

34. The *Category C documents* and *Category F documents* were held to be described in »overly broad terms« which makes their identification very problematic. Further, the Claimant had not shown how those kinds of documents relate to the subject matter of the present case. The Tribunal denied the request for *Category C documents*. It also held that *Category F documents* need not be made available to the Claimant »save publicly available statutorily mandated agency reports to the U.S. Congress or the U.S. President.«

35. As to *Category D documents*, the Claimant failed to show how »administrative files« and »administration records« of judicial cases and administrative adjudications would shed *additional* light on the manner in which »buy national« policies have been addressed by such agencies. The Tribunal held that such documents need not be made available by the Respondent to the Claimant, save to the extent they are publicly available in the U.S.

36. The Tribunal found that the request for *Category E documents* was rendered moot, the Claimant having in effect accepted the Respondent's declaration that no such documents existed. Similarly, the Tribunal held that the request for *Category G documents*, relating to the issue of damages, was deemed withdrawn, without prejudice to re-submission, the Claimant having expressed willingness to defer its request to a subsequent phase of these proceedings. As to the request for *Category H documents*, the parties reached agreement on which documents would be produced and made available to the claimant by the Respondent.

37. In respect of *Category I documents*, the Claimant did not show what pleadings filed by the U.S. in which Chapter 11 proceedings were pertinent to the issues raised, or expected to be raised, in this case. The Tribunal held that such documents need not be made available by the Respondent to the Claimant, except to the extent they are publicly available in the U.S.



38. Finally, the Tribunal noted the general objection entered by the Respondent to the extent the documents are »protected from disclosure by applicable law, including without limitation, documents protected by the attorney-client and government deliberative and pre-decisional privileges.« The Tribunal ruled that for it to be able to determine the applicability of the privileges adverted to, the Respondent will have to specify the documents in respect of which one or more privilege is claimed and the nature and scope of the particular privilege claimed, and show the applicability of the latter to the former. This was a matter for future determination, should the Respondent decide actually to withhold, under claim of privilege, particular documents it should otherwise make available to the Claimant.

#### **Interpretation of 31 July 2001 by the Fair Trade Commission**

39. On 31 July 2001, the Tribunal received from the Respondent a copy of an Interpretation issued on the same day by the Free Trade Commission established under Article 2001 of NAFTA, concerning certain provisions of Chapter 11 of the NAFTA, including in particular Article 1105, entitled »Minimum Standard of Treatment.«

#### **Exchange of Pleadings on Competence and Liability**

40. In compliance with the agreed schedule, on 1 August 2001, the Claimant filed its Memorial on competence and liability; the Respondent's Counter-Memorial was filed on 29 November 2001. The Claimant's Reply to the Counter-Memorial was submitted on 29 January 2002; and the Rejoinder of the Respondent on 29 March 2002.

#### **Hearing on Competence and Liability**

41. The hearing on competence and liability took place in Washington, D.C., from 15 to 18 April 2002. The Claimant was represented by Mtre. Peter E. Kirby, Mtre. René Cadieux and Mtre. Jean-François Hébert of Fasken Martineau Du Moulin LLP. Mr. Pierre Paschini, President and Chief Operating Officer, and Mtre. Caroline Vendette, General Counsel, respectively, of ADF Group were also present. The Respondent was represented by Mr. Mark A. Clodfelter, Mr. Barton Legum, Ms. Andrea J. Menaker, Mr. David Pawlak and Ms. Jennifer

Toole, all of the Office of the Legal Adviser to the United States Department of State.

42. Representatives of the Governments of Canada and Mexico were also in attendance: Ms. Sylvie Tabet for Canada; Mr. Maximo Romero, Mr. Salvador Bejar and Mr. Sanjay Mullick for Mexico. During the hearing, representatives of Canada and Mexico reserved the rights of their respective Governments to file post hearing submissions. After the hearing, however, they informed the Tribunal by letters of 24 April 2002 and 25 April 2002, respectively, that they would not be filing any such submissions.

#### **Exchange of Post-Hearing Submissions**

43. By a letter dated 4 June 2002, the Claimant forwarded to the Tribunal a copy of the Award in respect of Damages issued on 31 May 2002 by the Tribunal in the NAFTA Chapter 11 case of *Pope and Talbot v. Government of Canada (Pope and Talbot Damages Award)*. The Claimant stated that the Award »speaks for itself« on the matter of Article 1105(1). The Respondent considered that the Claimant had thereby made an »unauthorized« submission and asked for an opportunity to make its own submission with respect to Article 1105(1) and the *Pope and Talbot Damages Award*. The Tribunal gave the parties the opportunity to make final submissions on Article 1105(1). The other NAFTA Parties requested the Tribunal to give them the opportunity to comment, under Article 1128, on the parties' submissions on Article 1105(1). In the event, the Respondent filed its Post-Hearing Submission on 27 June 2002 while the Claimant filed its Post-Hearing Submission on 11 July 2002. Canada and Mexico filed their submissions, pursuant to Article 1128, on 19 July 2002 and 23 July 2002, respectively. Thereafter, the Claimant and the Respondent simultaneously filed their second and final Post-Hearing Submissions on Article 1105(1) on 1 August 2002. These Post-Hearing Submissions are summarized in a later part of this Award.

#### **II. BACKGROUND OF THE DISPUTE: BASIC FACTS**

44. The underlying facts of the dispute in this case relate to the construction of the Springfield Interchange Project (Springfield Project or Project). The Springfield

Interchange is a heavily-used and accident-prone highway junction, located in Northern Virginia approximately 20 kilometers south of Washington, D.C. The junction brings together three inter-state highways and a Virginia state highway (including I-95, the principal north-south highway on the east coast of the United States) and an important Virginia state highway, in the immediate vicinity of which are located a large shopping mall and extensive office and other development. The result is the mixture of interstate, state and local traffic. The original design of the Springfield Interchange dated from the 1960's. As traffic volumes increased during subsequent decades, the original design generated conditions which gave rise to increased incidence of accidents and traffic bottlenecks.<sup>[FN9]</sup>

45. Starting in the early 1990's, Virginia state officials and U.S. federal officials held a series of meetings and hearings relating to changing the original design of the Interchange. In 1998, the Commonwealth of Virginia applied to and received approval from, the Federal Highway Administration (FHWA) of the U.S. Department of Transportation for federal funding assistance for the construction of a multi-phased project designed to improve the safety and efficiency of the Interchange. Phases II and III of the Project, which are the phases involved in the present case, entailed the addition of a series of new lanes, ramps (long bridges curving above the highways below) and lane dividers to the section of the Springfield Interchange where the Virginia highway 644 intersects I-95. These bridges required long steel girders, »custombuilt to exacting specifications,« to support them. In addition, Phases II and III involved the construction of a number of conventional bridges which too necessitated support by structural steel girders. In short, the Springfield Interchange Project involved major changes to the original design of the structures and highways comprising the Interchange and the construction of new and additional structures, approaches and highways on several levels, all intended to increase the carrying capacity, safety, efficiency and convenience of the Interchange.

46. In September 1998, the Department of Transportation of the Commonwealth of Virginia (VDOT) issued

an invitation for bids to construct and deliver Phases II and III of the Project. Shirley Contracting Corporation (Shirley) submitted the lowest bid and was awarded the contract for the Project (Main Contract).<sup>[FN10]</sup> Shirley's bid included an estimated USD 16.8 million for the structural steel requirements of the Project.<sup>[FN11]</sup>

47. Shirley, as main contractor, in turn issued a request for bids covering certain parts of the Project Phases **awarded** to Shirley, including the supply of the structural steel requirements of those parts of the Project. **ADF International Inc. (ADF International)** submitted the lowest bid and Shirley and **ADF International**, on 19 March 1999, signed a Sub-Contract for the supply and delivery by the latter of »all structural steel components for nine (9) bridges« (Sub-Contract). »Structural steel components« are described in this Sub-Contract as »includ[ing] but--not limited to continuous plate girders, cross frames, diaphragms, splice plates, loose angles and plates, connection angles and plates, galvanized bolts for field erection, galvanized bolts for steel to steel connections required for completing the work.«<sup>[FN12]</sup> The Sub-Contract provided *inter alia* that:

»All materials supplied by ADF International Inc. to be in accordance with the Plans, Specifications, Contract Documents and Supplemental Specifications. Subcontractor specifically acknowledges Section 102c of the Special Provisions regarding the Use of Domestic Material.«<sup>[FN13]</sup>

The Subcontract also referred to the materials to be supplied by ADF International as »fabricated structural steel and accessories«<sup>[FN14]</sup> which had to include a shop primer coat of paint at each bearing location.<sup>[FN15]</sup> The Sub-Contract further required that, before payments are made therefore, »the structural steel materials and fabricated units« shall have been tested or certified and found acceptable.<sup>[FN16]</sup>

48. The process of fabricating structural steel has been described by the Respondent in terms the accuracy of which has not been disputed by the Claimant:

»Structural steel fabrication for bridges principally involves the production of custom steel girders. Fabrica-

tion transforms functionally unusable flat plate shapes into load-carrying structural plate girders. The fabricator begins with long, flexible sheets of steel produced by a steel mill. Using special equipment, the fabricator cuts the steel into plates of the specified length. It then welds the plates into the familiar »I« shape, which transforms the wobbly plates into a rigid girder capable of carrying massive loads. Virginia, like many other places, approves only flawlessly welded girders for use in highway projects. The fabricator then custom-fits the girder for its intended use, bolting or welding elements to hold it securely in place atop piers or abutments at the bridge site. The girders to be painted are then blast-cleaned to remove rust and dirt, inspected and coated to protect the structural steel from weather and other conditions.«<sup>[FN17]</sup>

49. On 19 April 1999, Shirley informed VDOT that ADF International was proposing to perform its obligations under the Sub-Contract by using U.S.-produced steel and by subsequently carrying out certain fabrication work on that U.S.-produced steel in Canada, in facilities owned by the parent ADF Group. Shirley stated that:

»ADF [International] proposes to perform in Canada cutting, welding, punching/reaming holes, and milling on steel product produced in the United States. The fabricated U.S.- origin steel product which has been subjected to these processes will then be shipped to the construction site and will be used in construction of the I-95 Springfield Interchange.«<sup>[FN18]</sup>

50. On 28 April 1999, VDOT advised Shirley that the proposed operations of ADF International were not in compliance with the provisions of the Special Provision for Section 102.05 and 23 CFR 635.410 which formed part of the VDOT-Shirley Main Contract and which were incorporated by reference into the Shirley-ADF International Sub-Contract:

»Based on the Department's, the Attorney General's, and the Federal Highway Administration's interpretation, Special Provision for Section 102.05 and 23 CFR 635.410 refers to all manufacturing processes involved in the production of steel or iron manufactured

products. This means smelting or any subsequent process that alters the materials physical form, shape or chemical composition. These processes include rolling, extruding, machining, bending, grinding, drilling, and the application of various types of coating.

The manufacturing process is not considered complete until all grinding, drilling and finishing of steel or iron material has been accomplished. As proposed, the additional processes that are to be performed in Canada are necessary to turn steel into a product suitable to be installed in the project. As such, they fall under the aforementioned provision and are not allowable under this contract.«<sup>[FN19]</sup>

51. On 3 June 1999, representatives of Shirley and ADF International met with representatives of VDOT and the Federal Highway Administration (FHWA) in Richmond, Virginia. The former explained their reading of Special Provision for Section 102c »Use of Domestic Material«, and the bases of such reading, to the latter. The representatives of VDOT stated that the interpretation given by the FHWA to the contractual provisions involved was the controlling interpretation that VDOT could not change. The representatives of the FHWA confirmed that the interpretation given to the provisions involved and conveyed by VDOT to Shirley, was the governing interpretation rendered by the FHWA which had exclusive authority to interpret the contract provisions at stake.<sup>[FN20]</sup>

52. On 14 June 1999, Shirley and ADF International officials met with FHWA officials. The latter officials explained that the Springfield Interchange Project was a Federal-aid highway construction project operated as a cost reimbursement program. It was stated that the Buy America clause in the Main Contract (Special Provision 102.05) and the incorporation thereof in the Sub-Contract were necessary to comply with 23 CFR 635.410, the Federal Highway Administration Regulations. It was also made clear to the Shirley and ADF International officials that the U.S. Federal Government would not reimburse VDOT's project costs unless the Buy America clause was applied and complied with, in accord with the FHWA interpretation of that clause already conveyed to VDOT, Shirley and ADF Interna-

tional. The FHWA officials advised that the fabrication in Canada of U.S.-produced steel would be allowed only if the Commonwealth of Virginia sought and received a waiver of the Buy America requirements under 23 CFR 635.410(c) on the basis that application of those requirements would be inconsistent with the »public interest.«<sup>[FN21]</sup>

53. On 25 June 1999, ADF International requested Shirley to seek a waiver from VDOT of the Buy America requirements. ADF International wrote that

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

We are unable to locate a steel fabricator who is capable of performing the work in the U.S. within the required time frame. We understand that all fabricators capable of performing the work are fully loaded.«<sup>[FN22]</sup>

ADF International also stressed the public interest in completing the Project on time, urging that the interstate highway system--of which the Springfield Interchange was an important part--served »local needs, interstate commerce and national and civil defense.« These interests, in the view of ADF International, »will be promoted by permitting the timely completion of the [P]roject through the grant of a waiver« and »prejudiced by any delay in the [P]roject caused by a refusal to grant a waiver.«<sup>[FN23]</sup>

54. Shirley complied with ADF International's request and wrote to VDOT seeking a waiver.<sup>[FN24]</sup> By a letter dated 26 July 1999, VDOT informed Shirley that the application for a waiver had been denied, there being »no basis« for granting a waiver.<sup>[FN25]</sup> In that same letter, VDOT also advised Shirley that the National Steel Bridge Alliance (NSBA) »is available to assist in locating domestic sources for your consideration.« In a letter of 8 July 1999 to the FHWA, the NSBA had written that there was »ample steel bridge fabrication capacity available in the United States« and attached a list of nearly 50 certified major steel bridge fabricating firms »...a

large number [of which] can effectively meet the needs of the Springfield interchange bypass project.«<sup>[FN26]</sup> Shirley conveyed that information to ADF International a few days later.

55. ADF International then proceeded to attempt fulfilling its obligations under the Sub-Contract partially by using its own facilities located in the State of Florida, but mostly by sub-contracting the fabricating work to structural steel fabricators in the U.S. According to ADF's president, Pierre Paschini, ADF had to fabricate its steel at five different subcontracting facilities with the result of »massively increasing« the cost of the project.« According to Mr. Paschini the costs increased due to: (1) hiring the five U.S. fabricators; (2) testing, equipment rental, transport and demurrage; (3) significant additional time in project management, engineering work, transport and demurrage shop to field were required; (4) separate systems of control, coordination and logistics to ensure steel was properly delivered to five fabricators, fabricated in accordance with the contract and quality requirements and delivered to the site in accordance with the delivery schedule.<sup>[FN27]</sup> Shirley in turn completed its work on the Project in a timely manner and VDOT, it appears, offered Shirley its USD 10 million incentive bonus.<sup>[FN28]</sup>

### **III. THE UNITED STATES MEASURES AT STAKE**

56. The United States measures about which the Claimant complains in the present case comprise three tiers of legal provisions: (a) legislative statutory provisions promulgated in 1982; (b) implementing administrative regulations promulgated in 1983; and (c) contractual provisions embodying the administrative regulations and applying them in a particular highway construction or improvement project, e.g., the Springfield Project. The first tier consists of Section 165(a) to (d) of the Surface Transportation Assistance Act of 1982 (Section 165, STAA of 1982) as it stood on the filing of the Notice of Intention to Submit a Claim to Arbitration dated 29 February 2000. Section 165 provides in pertinent part:

»(a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds

authorized to be appropriated by this Act, or by any Act amended by this Act or, after the date of enactment of this Act, any funds authorized to be appropriated to carry out this Act, Title 23, United States Code, Federal Transit Act, or the Surface Transportation Assistance Act of 1978 and administered by the Department of Transportation, *unless steel, iron, and manufactured products used in such project are produced in the United States.*

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

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

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

(3) [repealed];

(4) that inclusion of domestic material will increase the cost of the overall project contract by more than 10 percentum in the case of projects for the acquisition of rolling stock, and 25 percentum in the case of all other projects; ...«<sup>[FN29]</sup> (Emphases added)

57. The second tier of provisions consists primarily of 23 CFR Section 635.410, entitled »Buy America requirements,« the regulations issued by the FHWA, Department of Transportation, for the implementation of Section 165, the first tier statutory provisions. The portions of 23 CFR 635.410 pertinent for present purposes are the following:

»Sec. 635.410 *Buy America requirements.*

...

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

(1) The project either: (i) includes no permanently incorporated steel or iron materials, or (ii) *if steel or iron*

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

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

...

(4) When steel and iron materials are used in a project, the requirements of this section do not prevent a minimal use of foreign *steel and iron materials*, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2500, whichever is greater. For purposes of this paragraph, the cost is that shown to be the value of the iron and steel products as they are delivered to the project.

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

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

(ii) *Steel and iron materials/products* are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality....«<sup>[FN30]</sup> (Emphases added)

58. The third tier of provisions consists of »Special Provision for 102C--Use of Domestic Material« (Section 102.05) which is a contractual provision, being (as noted earlier) built into the Main Contract between VDOT and Shirley and incorporated by reference into the Sub-Contract between Shirley and ADF International. The pertinent part of Section 102.05 is quoted below:

»Section 102.05.

... Except as otherwise specified, *all iron and steel products* (including miscellaneous steel items such as fasteners, nuts, bolts and washers) *incorporated for use on this project shall be produced in the United States of*

America; unless the use of any such items will increase the cost of the overall project by more than 25%. 'Produced in the United States of America' means all manufacturing processes whereby a raw material or a reduced iron ore material is changed, altered or transformed into an item or product which, because of the process, is different from the original material, must occur in one of the 50 States, the District of Columbia, Puerto Rico or in the territories and possessions of the United States. Raw materials such as iron ore, pig iron, processed, pelletized and reduced iron ore and other raw materials used in steel products may, however, be imported. All iron and steel items will be classified hereinafter as 'domestic' or 'foreign', identified by and subject to the provisions herein. In the event use of the aforementioned 'domestic' iron and steel will increase the cost of the overall project by more than 25%, the Contractor may furnish either 'domestic' or 'foreign' items....«<sup>[FN31]</sup> (Emphases added)

The Investor explicitly stated, and the Respondent has not disputed, that Section 102.05 formed part of the Main Contract and the Sub-Contract because of the force and effect of 23 CFR 635.410, the FHWA regulation implementing Section 165 of the 1982 STAA of the U.S. Congress.<sup>[FN32]</sup> VDOT included special provision 102C in VDOT's »Road and Bridge Specifications« as of 3 May 1995; and those »Road and Bridge Specifications« as of 1 January 1997 also required, under paragraph 107.01, that all federal and state laws be observed. Further, the Shirley/ADF Sub-Contract provides that the subcontractor »specifically acknowledges Section 102C of the special provisions regarding the use of domestic material.«<sup>[FN33]</sup> The Commonwealth of Virginia has no statute or regulation of its own prescribing any preference for domestic (U.S. or Virginia) steel materials and products in Virginia highway construction projects.

59. It will be seen below that the Claimant in fact complains about a fourth tier measure of the Respondent—the interpretation and application by the FHWA and VDOT of Section 102.05 as well as the pertinent statutory and administrative provisions (the first two tiers of legal provisions) to the facts of this case in such a

manner as to include within the scope of the term »all manufacturing processes« required to take place in the United States of America the operations which ADF Group designates as »post-production fabrication of structural steel products« out of steel materials which had been previously manufactured in the United States of America.<sup>[FN34]</sup> The Claimant argues below that such interpretation and application are inconsistent with the obligations of the Respondent set out in NAFTA Articles 1102(1) and (2) and 1105(1) to accord »National Treatment« and »fair and equitable treatment [and] full protection and security,« respectively. On 19 March 1999, at or shortly before signing its Sub-Contract with Shirley, the Claimant had received a legal opinion from its U.S. lawyers<sup>[FN35]</sup> to the effect that its proposed fabrication operations in Canada were consistent with the Buy America clause in its Sub-Contract.

#### **IV. THE PRINCIPAL CLAIMS AND SUBMISSIONS OF THE PARTIES**

60. It is useful at this stage to summarize, in broad strokes, the principal claims and submissions of the Investor on the one hand, and of the Respondent on the other hand. These claims and submissions are examined in detail at a later portion of this Award in the light of the facts of this case and of the requirements of the applicable law.

##### **1. The Investor's Principal Claims and Submissions** **(a) Article 1102: The National Treatment Obligation**

61. The Investor claims, firstly, that the Buy America provisions here in question, coupled with the U.S. requirement that those measures be applied by State governments, are »designed« to favor U.S. domestic steel, U.S. steel manufacturers and U.S. steel fabricators over non-U.S. steel, steel manufacturers and steel fabricators. The Investor submits that »by definition,« the U.S. measures »treat national investments more favorably than non-national investments,« and as such are inconsistent with the requirements of Article 1102 of the NAFTA.<sup>[FN36]</sup>

62. Article 1102 states in relevant part:

»Article 1102: National Treatment

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

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

63. It is claimed by the Investor that **ADF Group** is an »investor of a Party,« Canada, within the meaning of Article 1102(1), being an »enterprise« organized under the laws of a Party. The Investor also states that **ADF International** is an »enterprise« and an »investment of an investor of a Party« for purposes of Article 1102(2) since **ADF International** is owned by an investor (**ADF Group**) of a Party. Accordingly, the Investor argues, the United States of America is obliged to accord »national treatment« to **ADF Group** under Article 1102(1), and to **ADF International** under Article 1102(2), with respect to the sale of steel and the expansion, management, conduct and operation of **ADF International**. The »investments« of **ADF Group** are identified as including (a) the fabricated steel acquired by **ADF Group** or **ADF International**, and (b) the »interests« [of **ADF Group** or **ADF International**] arising from the commitment of capital or other resources in or under the Sub-Contract. [FN37]

64. It is further claimed by the Investor that **ADF Group** and **ADF International** are »in like circumstances,« but are discriminated against, as compared with U.S. steel manufacturers and fabricators. U.S. steel fabricators operate in the same sector, sell the same product and compete for the same customers as **ADF Group**. They buy the same input (U.S. steel), treat that input the same way and deliver the same fabricated steel to the same clients. The »only difference,« in the Investor's view, between **ADF Group** and U.S. steel fabricators is »the physical location of their facilities.« [FN38] But Article 1102(1) assumes that »an investor will be located out-

side the territory of the Party« which is bound to provide national treatment. [FN39] The Investor was prohibited from fabricating the steel (part of its investment) in Canada and selling to **ADF International**, »because its facilities in Canada were treated less favorably than any like facilities in the United States.« [FN40]

65. Article 1102, the Investor argues, »has extended the principle against discrimination in trade in goods to cover investors and their investments.« [FN41] Article 1102 must be viewed in its context which consists of a free trade agreement designed to encourage the free flow of goods, services and investments within the NAFTA area. [FN42] Upon the other hand, the Congressional intent underlying the U.S. measures in question is »unequivocal: it is to favor the *output* of U.S. enterprises over [that of] non-U.S. enterprises and thereby to favor U.S. *enterprises* over non-U.S. enterprises.« (Emphasis and brackets added) [FN43] The U.S. measures are, in the Investor's submission, »*de jure* ('on their face') discriminatory,« and »protectionist,« treating non-U.S. investors and their investments less favorably than U.S. investors and their investments.« [FN44]

66. The Investor elaborates by arguing that the U.S. measures, by requiring investors of another NAFTA Party to use domestically produced goods only and effectively prohibiting the use of imported goods in certain contracts, adversely affect the »management, conduct and operation« of the investment. [FN45] The measures here in question restrict the »ability to freely transfer goods and services between a parent corporation and its subsidiary,« and diminishes the investment's capacity »to integrate its operations with those of the investor.« [FN46] Thus, in the view of the Investor, the U.S. measures place **ADF International** at a competitive disadvantage vis-à-vis domestic fabricators. [FN47] For steel fabricators in the U.S., the ability to fabricate in Canada is »irrelevant.« Upon the other hand, **ADF International** alone is confronted with the necessity of choosing from three options: expanding its U.S. facility; or subcontracting work to its U.S. competitors; or abandoning significant business opportunities. [FN48]

67. Finally, the application of the U.S. measures to the Sub-Contract between Shirley and **ADF International**

constituted a refusal of U.S. authorities to follow their own consistent caselaw to the effect that »post-production fabrication« of steel products does not change the origin of that steel for purposes of »buy national« requirements.<sup>[FN49]</sup> The rule applied to the Investor was that fabrication in Canada of U.S.-origin steel constituted manufacturing or production that *does* change the country of origin of the steel from U.S. to Canada. Such refusal to follow the applicable caselaw was »in itself a violation of [the] national treatment [obligation].«<sup>[FN50]</sup>

(b) Article 1105: The Minimum Standard of Treatment Obligation

68. Article 1105, in its pertinent portion, provides:

»Article 1105: Minimum Standard of Treatment.

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

69. The Claimant begins by recalling the provisions of Article 102(2) which direct Parties to interpret and apply NAFTA provisions »in the light of [NAFTA] objectives set out in Article 102(1) and in accordance with applicable rules of international law.« Thus, the Claimant submits that Article 1105(1) is to be interpreted »in a manner which eliminates barriers to trade in goods and services in order to attain the--objectives [of NAFTA]« and read »purposefully and in a large and liberal manner so as to defeat the barriers [to trade] that the objectives of NAFTA are designed to overcome.«<sup>[FN51]</sup>

70. The Claimant goes on to make a textual argument: »full protection and security,« the words actually used in Article 1105(1), should not be recast as »protection and security *from the most egregious of government action*, « or as »full protection and security *from actions that would shock the international community*. « (Emphasis added)<sup>[FN52]</sup> Neither may »international law« as used in Article 1105(1) be read as »customary international law,« since »customary international law does not provide fair and equitable [treatment] and full

protection and security« to investors.(Emphasis added) If it did so provide, the Investor argues, there would have been no need for the multitude of bilateral investment treaties (BITs) which are now in force.«<sup>[FN53]</sup>

71. To the Claimant, Article 1105(1) does not simply prohibit treatment of investments of another Party's investors which constitutes »egregious conduct,« but rather prohibits »any treatment that is not in itself 'fair' and 'equitable' or which does not provide 'full protection and security'.«<sup>[FN54]</sup> The international law referred to in Article 1105(1) establishes and projects »fair and equitable treatment« and the providing of »full protection and security« as positive legal requirements, against which the treatment accorded by the United States to the Investor and its investments may be evaluated by the Tribunal.

72. The Investor contends that the U.S. measures here in question fail to come up to those legal requirements in a variety of ways. First, the Buy America provision in Section 165 of the STAA of 1982 as amended is »per se unfair and inequitable within the context of NAFTA.«<sup>[FN55]</sup> Second, the Buy America provision fails adequately to control the discretionary authority of the FHWA, which agency »applies the law as it sees fit, irrespective of the text of Section 165.« Section 165 hence does not accord »full protection and security« to investors of another Party.<sup>[FN56]</sup> Third, the application of the Buy America provision to the Investor arbitrarily dissolves the »legitimate expectations« created by previous decisions of U.S. courts and administrative agencies »with respect to 'buy national' policies.«<sup>[FN57]</sup> The Investor also complains about »the procedures used by the U.S. to adopt the [administrative] regulations in question« as violative of the requirements of Article 1105(1) and the Albanian and Estonian BITs with the U.S.<sup>[FN58]</sup> It is less than clear, however, whether this complaint is not already covered by the second or the third specification of the Investor. Finally, after having undertaken to exclude the Buy America provision from Federal Government procurement under Chapter 10 of NAFTA, the U.S. should not »indirectly force states to apply [that provision].« Allowing states to pursue Buy America policies is one thing; it is quite another thing



actively to »forc[e] them to do so.«<sup>[FN59]</sup>

73. On 31 July 2001, a day before the submission by the Claimant of its Memorial dated 1 August 2001, the NAFTA Free Trade Commission (FTC) issued its »Notes of Interpretation of Certain Chapter XI Provisions« (FTC Interpretation), signed for their respective Governments by the United States Trade Representative, the Mexican Secretary of Economy and the Canadian Minister for International Trade. The FTC Interpretation, which was also on 31 July 2001, forwarded to the Tribunal by the Respondent,<sup>[FN60]</sup> addressed certain articles of the NAFTA, including Article 1105(1):

»B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).«

74. The Investor's response to the issuance of the FTC Interpretation, set out in its Reply to the Counter-Memorial of the Respondent, was two fold: firstly, the Investor reiterated the several arguments made in its Memorial that we have already noted;<sup>[FN61]</sup> secondly, it brought within the focus of its submissions the provisions of Article 1103.

(c) Article 1103: Most-Favored-Nation Treatment Obligation

75. Article 1103 reads as follows:

»Article 1103: Most-Favored-Nation Treatment.

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

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

76. The Investor submits that one effect of Article 1103 is that investors of a Party to NAFTA are entitled to benefit from the better of the treatment afforded to (i) NAFTA investors under Article 1105, or (ii) the treatment afforded to investors of a non-NAFTA Party under Article 1103.<sup>[FN62]</sup> If a bilateral investment treaty (BIT or treaty) entered into by the United States of America with any non-NAFTA Party offered treatment to investors more favorable than the treatment provided for by »customary international law,« a NAFTA investor is, in the view of the Investor, entitled to the treatment required under that treaty.

77. The Investor goes on to adduce Article II(3)(a) and (b) of the BIT between the Respondent and the Republic of Albania which went into effect on 4 January 1998 and which provides:

»Article II

...

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

(b) Neither Party shall in any way impair by unreasonable and discriminatory measures the conduct, operation and sale or other disposition of covered investments.«<sup>[FN63]</sup>

78. To the Investor, the text of Article II(3)(a) of the U.S.-Albania BIT contemplates »*separate obligations* of 'fair and equitable treatment' and 'full protection and security'« and establishes a »floor, 'treatment required by international law,' below which the first two elements cannot fall.«<sup>[FN64]</sup> Article II(3)(a) requires, in other words, »fair and equitable treatment« and »full protection and security« to be accorded to covered investments, a standard of treatment »separate« or »distinct« from, and more favorable than, the treatment required by customary international law minimum standard of treatment incorporated in Article 1105(1) of NAFTA as interpreted by the FTC Interpretation.<sup>[FN65]</sup>

79. The Investor also submits that Article II(3)(b) of another treaty--the U.S.-Estonia BIT which entered into force on 16 February 1997--establishes--via Article 1103 of NAFTA-- another »self-contained« standard of treatment of investors and investments of a NAFTA Party:

»Article II

3 (b) *Neither Party shall in any way impair by arbitrary or discriminatory measures* the management, operation, maintenance, use or enjoyment, acquisition, expansion, or disposal of investment. For purpose of dispute resolution under Articles VI and VII [the arbitration provisions], a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.«<sup>[FN66]</sup> (Emphasis added)

80. A final contention of the Investor is that the »separate,« »distinct« and »self-contained« standards of treatment projected by the U.S.-Albania and U.S.-Estonia BITS, considered by the Investor to be more favorable than the minimum standard of treatment associated with the customary international law by the FTC, are in any case available to the Investor under the »national treatment« provisions in Article 1102 of the NAFTA. Invoking certain statements made by the Arbitral Tribunal in the *Maffezini* case,<sup>[FN67]</sup> the Investor urges that »national treatment« covers not just the treat-

ment of foreign investors in the territory of a NAFTA Party, but also the treatment demanded by that NAFTA Party for its own investors outside its own territory. Under this view, the Investor is entitled by virtue of NAFTA Article 1102 to the treatment accorded to U.S. investors by Albania and Estonia in their respective territories under the U.S.-Albania and U.S.-Estonia treaties.<sup>[FN68]</sup>

(d) Article 1106: The Obligation Not to Impose or Enforce Performance Requirements

81. The next principal claim of the Investor is that the United States measures here at stake are inconsistent with the requirements of NAFTA Article 1106. The Investor cites the following portions of Article 1106:

»Article 1106: Performance Requirements

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

(a) ...

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

(c) to purchase, use or *accord a preference to goods produced or services provided in its territory*, or to purchase goods or services from persons in its territory; ...« (Emphases added)

82. The Buy America measures of the Respondent, the Investor argues, violate Article 1106(1)(b) by imposing a 100% domestic (United States) content requirement, and Article 1106(1)(c) by requiring preference to be given to United States-produced steel materials and products, if the Investor is to provide fabricated steel products to Federal-aid highway projects.<sup>[FN69]</sup> In the present case, ADF International is obliged to purchase only U.S. steel and either to fabricate that steel in the U.S. itself, or to subcontract the fabrication to U.S. steel fabricators rather than to its Canadian parent.<sup>[FN70]</sup> The Respondent's measures impose performance require-

ments relating to or connected with the »management, conduct or operation« of ADF International within the meaning of the *chapeau* of Article 1106 since those measures »directly impact the daily activities, operations and sales« of ADF International. <sup>[FN71]</sup>

83. To document the non-conforming nature of the Buy America measures, the Investor adverts to the part of Article 1108(1) of NAFTA which provides:

»Article 1108: Reservations and Exceptions

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

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

»Sector:

...

Type of Reservation:

Level of Government:

Measures:

Â

Description:

Waste Management

Â

Performance Requirements (Article 1106)

Federal

Clean Water Act, 33 USC

secs. 1251 et seq.

The Clean Water Act authorizes grants for the construction of treatment plants for municipal sewage or industrial waste. Grant recipients may be privately owned enterprises. The Act provides that grants shall be made for treatment works only if such articles, materials and supplies as have been manufactured, mined or produced in the U.S. will be used in the treatment works. The Administrator of the Environmental Protection Agency has authority not to apply this provision for example, if the cost of the articles in question is unreasonable (33 U.S.C. sec. 1295).« -- FN72

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

(b) continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); ...« (Emphasis added)

84. The Investor further points to the United States Schedule to Annex I, entitled »Reservations for Existing Measures and Liberalization Commitments,« which Schedule includes the following item:

Table footnote <sup>[FN72]</sup>

85. The Investor believes that the United States has admitted that the »Buy America« provisions of the Clean Water Act are inconsistent with the requirements of Article 1106 and hence needed to be saved under Article 1108(1) and the U.S. Schedule to Annex I. The »Buy America« provisions of Section 165 of the STAA Act of

1982 as amended are more stringent than the comparable provisions of the Clean Water Act, since the former (as interpreted by the FHWA) requires that the steel products used in a Federal-aid highway project be wholly manufactured and fabricated in the United States, while the latter is satisfied if the products involved had been manufactured in the United States »substantially all« from articles manufactured in the United States. Since the U.S. measures here in question

have not been saved under Article 1108(1), it follows, the Investor submits, that those measures are *a fortiori* inconsistent with Article 1106(1)(b) and (c) and may no longer be applied in respect of investments of investors of a NAFTA Party. <sup>[FN73]</sup>

(e) Non-applicability of Exceptions to Articles 1102, 1103 and 1106: Effect of Article 1108(7) and (8)--Procurement by a Party

86. The Investor turns to Article 1108(7) and (8) of NAFTA which the Respondent in its Counter-Memorial invokes as a principal defense against the principal claims of the Investor. The pertinent portions of Article 1108 follow:

»Article 1108: Reservations and Exceptions

...

7. Articles 1102, 1103 and 1107 do *not* apply to:

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

(b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.

8. The provisions of:

...

(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) *do not apply to procurement by a Party* or a state enterprise; ...« (Emphases added)

87. The Investor seeks to avoid the thrust of Article 1108(8)(b) by stating that the present case is *not* a procurement case and that the Investor is not complaining about the conduct of any Federal procurement. The Investor complains, rather, about the Respondent's measures imposed and enforced by the Federal Government upon the purchase of goods and services by the VDOT in connection with the Springfield Interchange Project. Had the Federal Government not imposed its measures on VDOT, the Claimant would have been able to supply to VDOT steel products fabricated in Claimant's facilities in Canada. The activities and operations of VDOT,

the Investor concedes, did constitute procurement by the Commonwealth of Virginia. The Federal Government did not purchase or otherwise acquire any goods and services for the Springfield Interchange Project; the VDOT did, for the Commonwealth of Virginia. However, unlike the U.S. Federal Government, the Commonwealth of Virginia is not subject to the disciplines of Chapter 10 and has not voluntarily assumed any obligations in respect of procurement under Chapter 10. Thus, in the view of the Investor, if the Respondent's measures here in question do constitute procurement, they would constitute violation by the United States Government of the prohibitions of Chapter 10, including in particular Article 1006. If, on the other hand, the Respondent's measures do not constitute procurement by the Federal Government, then they are not saved by Article 1108(8)(b). <sup>[FN74]</sup>

88. The Investor concedes that Article 1108(7)(b) permits a Party to derogate from the national treatment obligation when making grants and subsidies. Article 1108(7)(b), however, does not »permit a Party to continue ad infinitum to require that grant recipients in turn violate the national treatment obligation when they spend [the grant or subsidy] funds...« <sup>[FN75]</sup> The Respondent may, in other words, discriminate between nationals and non-nationals in selecting the grantee of a »subsidy or grant,« but may not impose on the grantee »an obligation to continue discriminating.« <sup>[FN76]</sup>

(f) Claims Concerning Projects Other than the Springfield Interchange Project

89. In its Notice of Arbitration» paragraph 76, the Investor stated that the »[c]ontinued application of the [United States measures] will cause additional damage to ADF International, limiting its ability to fully participate in all future Federal-aid highway construction projects.« In its Memorial, the Investor builds upon the above sentence and alleges that it has participated in certain other Federal-aid highway projects, namely: (a) the Lorton Bridge Project in Virginia; (b) the Brooklyn Queens Expressway Bridge Project in the State of New York; and (c) the Queens Bridge Project also in the State of New York. <sup>[FN77]</sup>

90. In the above-mentioned projects, the Investor

claims, the United States measures here in question were applied, with the result that ADF International or ADF Group was unable to use in those projects U.S.-origin steel that was fabricated in Canada. The Investor alleges it sustained damages, the extent of which it proposes to address at the second phase of this arbitration.<sup>[FN78]</sup>

## 2. The Respondent's Principal Defenses and Submissions

### (a) Concerning Article 1102: The National Treatment Obligation, and Article 1106: The Obligation Not to Impose or Enforce Performance Requirements

91. A basic defense of the Respondent is that the Investor's claims based on Articles 1102 and 1106 are foreclosed by the exceptions set out in Article 1108(7)(a) and (8)(b) for »procurement by a Party.«<sup>[FN79]</sup>

92. It is stated, firstly, by the Respondent that, as the Investor has conceded, the Commonwealth of Virginia, in purchasing steel and services from Shirley (which in turn contracted with the Investor), was engaged in »procurement.«<sup>[FN80]</sup> Virginia being one of the States of the United States, there was, in the present case, procurement by a »governmental unit of the United States.« The purchase of steel and services by a governmental unit of the United States is »plainly 'procurement by a Party'« within the meaning of Article 1108.<sup>[FN81]</sup>

93. The second argument of the Respondent relates to the coverage or scope of application of NAFTA Chapter 10, entitled »Government Procurement.« Notwithstanding the comprehensiveness of the title of Chapter 10, not all government procurement, in fact, was intended to be subjected directly to the disciplines of Chapter 10. At present, Chapter 10 applies only to measures »relating to procurement«<sup>[FN82]</sup> by *specified U.S. Federal Government entities* listed in Annex 1001.1a-1 under the rubric »Schedule of the United States« which lists 56 United States Government agencies or entities (including, it may be noted, the Department of Transportation). Thus, while Article 1108 excludes from the provisions of Chapter 11 »any and all government procurement« (whether by the Federal Government or by

sub-federal governmental agencies), Chapter 10 in fact reaches only procurement by certain listed Federal Government agencies. More specifically, in the view of the Respondent, state and provincial government procurement is not subjected to any national-treatment and performance-requirement obligations, whether under Chapter 11 or under Chapter 10.<sup>[FN83]</sup>

94. To document the limited scope of application of Chapter 10, the Respondent cites the United States' Statement of Administrative Action<sup>[FN84]</sup> and Canada's Statement of Implementation.<sup>[FN85]</sup> In addition, it is contended by the Respondent that all three NAFTA Parties, after the NAFTA had gone into effect, continue to maintain federal assistance programs for state and provincial government procurement.<sup>[FN86]</sup> The Federal Government of Canada, for instance, provides heavy financial assistance to the provinces for highway construction and many of the provinces receiving this assistance enforce domestic preference regulations in their procurement. In Mexico, too, federal law prescribes preferences for Mexican goods and services in procurement by states wholly or partially funded by the federal Mexican government.<sup>[FN87]</sup> Finally, it is submitted by the Respondent that, in point of fact, domestic requirements for government procurement are in place »in most, if not all, countries.« Even where countries have accepted limited obligations not to impose domestic content or preference requirements for domestic goods and services, they have commonly exempted local government procurement from such obligations.<sup>[FN88]</sup>

95. The third argument of the Respondent is that the Investor's assertions concerning Article 1108(7) and (8) lead to a conclusion that makes »no sense.«<sup>[FN89]</sup> Procurement by a state or provincial government is exempt from the national-treatment and performance-requirement obligations imposed by Chapter 10 which expressly addresses government procurement. Nevertheless, according to the Respondent, the Investor claims that state-level procurement is subject to the disciplines of Chapter 11 because domestic-content requirements and preferences for domestic products are in themselves »protectionist,« »discriminatory« and »unfair.« The

NAFTA Parties simply have not agreed to subject state-level procurement to the requirements and prohibitions of either Chapter 10 or Chapter 11. Only federal-level procurement by certain identified federal government agencies and entities have been brought by the NAFTA Parties under the coverage of Chapter 10 and disputes arising with respect to such procurement fall within the ambit of the State-to-State dispute resolution procedures of Chapter 20,<sup>[FN90]</sup> that is, *outside* the Investor-to-State dispute settlement framework set up in Chapter 11.

96. The next principal defense of the Respondent against the Investor's claims of violation of Articles 1102 and 1106 presents multiple layers of argument. The Respondent submits, firstly, that Article 1102 requires national treatment in respect of *investors* and investments of one Party, located in the territory of another Party, *not* in respect of *trade in goods and services* originating from the territory of a Party. The latter is regulated, not by Chapter 11 and its Investor-State dispute resolution system, but rather by other Chapters of NAFTA and other dispute resolution procedures.<sup>[FN91]</sup>

97. Secondly, the Respondent stresses that, by virtue of the Buy America provision in the VDOT-Shirley Main Contract, every steel fabricator in the United States--whether of U.S. or Canadian or Mexican or other nationality--faces precisely the same constraints that ADF International faced. None may subcontract work to fabricators outside the United States and use the resulting steel products in a federal-aid highway project like the Springfield Interchange Project. In other words, ADF International was not, with respect to its »facilities in Canada« or the sale of its investment consisting of U.S.-origin steel or otherwise, accorded treatment less favorable than the treatment that would have been given to any steel fabricator of U.S. nationality.<sup>[FN92]</sup> More fundamentally, ADF's facilities *in Canada* were neither »an investor« nor an »investment« within the meaning of Chapter 11 and therefore, in the view of the Respondent, they cannot be subject of an Article 1102 national treatment violation.<sup>[FN93]</sup>

98. The Respondent argues, thirdly, that Article 1102 does not guarantee a parent and its subsidiary corpora-

tion an »ability to freely transfer goods and services between [them *inter se*].« Neither does Article 1102 restrain a Party from limiting an investor's management, conduct or operation of its investment, so long as its own investors and their investments in like circumstances are not given treatment, in respect of the same matters, more favorable than that accorded to the investors of another Party and their investments.<sup>[FN94]</sup>

99. To the Respondent, the judicial and administrative caselaw cited by the Claimant is simply not on point. That caselaw deals with the interpretation of the 1933 Buy American Act which is concerned only with direct federal procurement, while the Buy America provisions of the 1982 STAA Act relates only to federally-funded state procurement for highway projects. The U.S. statutory provisions applicable to direct federal procurement are different from those bearing upon federally-funded state highway procurement. The former require only the use of »articles, ... manufactured in the United States substantially all from articles, ... manufactured, ... in the United States.« In contrast, the latter (1982) provisions require the use of »steel, iron and manufactured products ... produced in the United States,« a requirement read by the FHWA as meaning »wholly produced in the United States.«<sup>[FN95]</sup> The difference in statutory language is reflected in differences in the implementing regulations. The regulations implementing the 1933 direct federal procurement law provide that »materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percentum or more of the cost of all the products used in such materials.« In contrast, the regulations implementing the 1982 statute dealing with federally-funded state highway projects require that »if steel or iron materials are to be used, *all manufacturing processes*, including application of a coating, for those materials *must occur in the United States*.«<sup>[FN96]</sup>

100. It is, further, submitted by the Respondent that the interpretation given by the FHWA to the Buy America provision of the 1982 STAA has been consistently maintained.<sup>[FN97]</sup> The Investor has not shown that a different construction of the same Buy America provision has been rendered by the FHWA in respect of an

investor of the United States and its investment, situated in like circumstances as the ADF Group.<sup>[FN98]</sup>

101. In respect of the Investor's Clean Water Act argument, the Respondent explains<sup>[FN99]</sup> that, as the reservation made by the U.S. in its Schedule to Annex 1 of the NAFTA expressly states, that Act authorizes grants for the construction of treatment plants for municipal sewage and industrial waste, and that »[g]rant recipients may be privately owned enterprises.« The procurement involved would not therefore be regarded as »governmental procurement« or »procurement by a Party« saved by the exception provided in Article 1108(7)(a) and (8)(b). Accordingly, the U.S. negotiators found it necessary, or at least desirable, to save such federal-aid construction under another paragraph of Article 1108, that is, under Article 1108(1)(a)(i), which saves certain existing non-conforming measures listed in a NAFTA Party's Schedule to Annex 1.

(b) Concerning Article 1105(1): Minimum Standard of Treatment of Foreign Investors and Their Investments and the FTC Interpretation of 31 July 2001

102. To the Respondent, the Investor's claim that the measures here in question are inconsistent with the requirements of Article 1105(1) rests on the supposition that Article 1105(1) projects »a subjective and intuitive standard [of treatment of foreign investors and their investments] unknown to customary international law.«<sup>[FN100]</sup> The Respondent relies upon the FTC Interpretation<sup>[FN101]</sup> to the effect that »Article 1105(1) prescribes 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.« The Respondent stresses that under Article 1131(2) of NAFTA, the FTC interpretation is binding on this Tribunal, as on other NAFTA Chapter 11 tribunals.

103. Building on the FTC Interpretation, the principal submission of the Respondent is that the Investor, if it is to sustain its claim of violation of Article 1105(1), must demonstrate that the measures here in question are incompatible with »a specific rule of customary international law.«<sup>[FN102]</sup> The Respondent contends that the Investor has not identified, and cannot identify any,

»rule of customary international law« forbidding the United States from imposing domestic content requirements in respect of government procurement.<sup>[FN103]</sup> Similarly, the Investor has not adduced any »rule of customary international law« violated by the administrative process by which the FHWA promulgated its Buy America clause interpretation requiring that all manufacturing processes used in the production of steel products, including »post-production« fabrication, occur in the United States. The Respondent concludes that the Investor has not shown any breach of »customary international law obligations incorporated into Article 1105(1).«<sup>[FN104]</sup>

(c) Concerning Article 1103: Most-Favored-Nation Treatment

104. As earlier noted, it was in its Reply to the Counter-Memorial that the Investor for the first time made a specific claim based on Article 1103, the FTC Interpretation having been issued shortly before the Investor's Memorial was filed. Thus, the Respondent's first opportunity to traverse the Investor's Article 1103 claim was in the Rejoinder. The United States' response to the Article 1103 claim has three parts.

105. The Respondent contends, in the first part, that this Tribunal has no jurisdiction to deal with the Article 1103 claim. Article 1119(b) of NAFTA states that the notice of intention to submit a claim to arbitration shall specify, *inter alia*, »the provisions of [NAFTA] alleged to have been breached and any other relevant provisions.« But ADF International's notice of intent did not allege breach of Article 1103 and in fact did not mention that Article. By virtue of the provisions of Article 1122, the United States' consent to the submission to arbitration did not encompass the Investor's Article 1103 claim. Accordingly, the arbitration agreement of the parties to this case does not include an agreement to refer to arbitration the Article 1103 claim.<sup>[FN105]</sup> This flaw is not cured by the omnibus relief clause (the Investor's »basket clause«) in the notice of intention in which the Investor »reserv[ed] its right to request 'such further relief that counsel [for the Investor] may advise and the Arbitral Tribunal may permit.«<sup>[FN106]</sup>

106. The Respondent argues, in the second part, that the

Article 1108 exception for »procurement by a Party« includes the Article 1103 claim--along with the Articles 1102 and 1106 claims--of the Investor. Accordingly, all three claims should be dismissed under Article 1108(7)(a) and 1108(8)(b).<sup>[FN107]</sup>

107. In the third place, and in any event, the Respondent submits that the U.S.-Albania and the U.S.-Estonia treaties, invoked by the Investor as projecting more favorable standards of treatment than that set out in Article 1105(1) as interpreted by the FTC, do not in fact do so. To the contrary, in the view of the United States, the relevant provisions of the two treaties »set[-] out a minimum standard of treatment based on standards found in customary international law.« or »based on customary international law« simply.<sup>[FN108]</sup> At no time since the NAFTA came into force has the United States considered that the treatment to be accorded to foreign investors by virtue of the »fair and equitable treatment« clauses of treaties of the United States is more favorable to investors than the treatment required under Article 1105(1) of NAFTA. Still further, according to the Respondent, state practice »has consistently viewed 'fair and equitable treatment' as referring to the customary international law minimum standard of treatment of aliens.«<sup>[FN109]</sup>

*(d) Concerning Investor's Claims Relating to Projects Other Than the Springfield Interchange Project*

108. The Respondent rejects the Investor's claims concerning »other projects,« that is, projects other than the Springfield Interchange Project. The Respondent questions the jurisdiction of the Tribunal to consider those claims upon the ground that the United States has not given its consent to submission of those other claims to arbitration. Under Article 1122(1), the United States maintains that its consent is limited »to the submission of a claim to arbitration in accordance with the procedures set out in [the NAFTA].« The Investor's Notice of Intent to Submit a Claim to Arbitration made no mention of highway construction projects other than the Springfield Interchange Project and the Investor is accordingly precluded from asserting claims relating to such other projects.

**3. The Post-Hearing Submissions of the Parties and**

**the Other NAFTA Parties on Article 1105(1)**

109. It was noted earlier that the issuance of the 31 May 2002 *Pope and Talbot* Damages Award, and the Investor's act of providing a copy thereof to the Tribunal and the Respondent, occasioned the filing of a series of Post-Hearing Submissions from the parties and from Canada and Mexico, all focusing on NAFTA Article 1105 and the reading thereof by the *Pope and Talbot* Tribunal. The Tribunal had asked the parties to provide it with their comments on »what factors, or kinds of factors, a Chapter Eleven tribunal applying in a concrete case the 'fair and equitable treatment and full protection and security standard' referred to in Article 1105(1), NAFTA, may take into account.« We summarize below, in very condensed terms, the principal Posthearing submissions made by the parties and Canada and Mexico in respect of Article 1105(1).

*(a) The Disputing Parties' Post-Hearing Submissions on Article 1105(1)*

110. The *Respondent* in its first Post-Hearing Submission of 27 June 2002 submits that the factors that a tribunal applying the »fair and equitable treatment and full protection and security« standard depend upon the rule of the customary international law minimum standard of treatment implicated by the claims asserted. The Claimant, however, has not identified any rule of customary international law embodied in Article 1105(1) that has been violated by the conduct of the Respondent about which the Claimant complains. The »international minimum standard« embraced by Article 1105(1) is, according to the Respondent, »an umbrella concept incorporating a set of rules« which »have crystallized into customary international law in specific concepts.«<sup>[FN110]</sup> The term »fair and equitable treatment« refers to »the customary international law minimum standard of treatment« which encompasses rules such as »those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law.«<sup>[FN111]</sup> On the other hand, the term »full protection and security« refers to the »minimum level of police protection against criminal conduct« required as a matter of customary international law.<sup>[FN112]</sup> The pertinent rules of the customary



international law minimum standard of treatment of aliens, according to the Respondent, are »specific ones that address particular contexts. There is no single standard applicable to all contexts.«<sup>[FN113]</sup>

111. The Respondent goes on to stress that a Chapter 11 tribunal may not disregard an interpretation of a NAFTA provision by the NAFTA Parties acting through the FTC, or interpret that provision in a manner inconsistent with an FTC interpretation, by characterizing that interpretation as an »amendment.« The authority of a Chapter 11 tribunal with respect to the interpretation of the NAFTA is expressly made subject to decisions taken by the FTC. The FTC's authority to issue binding interpretations »ensures the consistent and uniform interpretation of the NAFTA.« A Chapter 11 tribunal which disregards an interpretation of the FTC, exceeds thereby the scope of its authority under the NAFTA.<sup>[FN114]</sup>

112. At the same time, however, the Respondent expressly reiterates that »customary international law, including the minimum standard of treatment of aliens, may evolve over time.«<sup>[FN115]</sup> The *Pope and Talbot* Tribunal did not examine the mass of existing BITs to determine whether those treaties represent concordant state practice and whether they constitute evidence of the *opinio juris* constituent of customary international law. Thus, in the Respondent's view, that Tribunal was not in a position to state whether any particular BIT obligation has crystallized into a rule of customary international law.<sup>[FN116]</sup>

113. On 11 July 2002, the *Investor* filed its first Post-Hearing Submission and there, in response to the Respondent's Post-Hearing Submission, sets out a series of observations. The first is that a Chapter 11 tribunal must of course regard an interpretation by the FTC of a NAFTA provisions as binding upon it.<sup>[FN117]</sup> At the same time, a NAFTA tribunal is obliged under Article 1131(1) to interpret NAFTA provisions in accordance with »the applicable rules of international law,« including the customary international law rules on treaty interpretation. Thus, a tribunal must consider FTC interpretations »alongside the objects and purposes of the NAFTA and the plain and ordinary meaning of the terms in

the context in which they appear.«<sup>[FN118]</sup> The second observation of the Claimant relates to the evolving nature of customary international law, including the portion thereof embodying the minimum standard of treatment of aliens. The Investor notes that the Respondent has expressly accepted that the customary international law standards are not »frozen in time« but instead »do evolve,« and that the FTC when it issued its interpretation of Article 1105(1) had in mind »customary international law as it exists today.«<sup>[FN119]</sup> The Investor rejects, thirdly, the basic submission of the Respondent that violation of a specific rule of customary international law must be shown by the Investor. To the Investor, this is like suggesting that there is no law of tort, but only »a large group of unconnected wrongs, each with its own name« into one of which a plaintiff must fit the defendant's acts and the resulting harm before a remedy will be judicially granted.<sup>[FN120]</sup> Customary international law, in the Claimant's view, does not establish such a requirement. The Investor goes on to list what it calls »factors« that this Tribunal should take into account but which, it appears to us, are in fact what the Investor believes are the differing courses of action open to us in resolving its claim of violation of Article 1105(1).

114. The Investor, in its first Post-Hearing Submission, adduces what is arguably a new contention to sustain its claim of violation of NAFTA Article 1105(1). The Investor contends that the Respondent violated its Article 1105(1) obligation by »failing to perform its NAFTA obligations in good faith.«<sup>[FN121]</sup> The Buy America requirement is »not good faith performance of the NAFTA obligations« of the U.S. and the interpretation submitted by the U.S. of the relevant NAFTA terms falls short of »a good faith interpretation of the treaty.«<sup>[FN122]</sup> The principle of good faith performance is part of customary international law and is »subsumed« in Article 1105(1).<sup>[FN123]</sup> This new emphasis on the »principle of good faith« is in line with the Investor's contention, asserted in its pre-hearing pleadings, that the Respondent »abused its discretion« in administering its Buy America program which results in »effective discrimination against foreign investors such as ADF.«<sup>[FN124]</sup>

115. On 1 August 2002, the *Respondent* filed a Final Post-Hearing Submission in which it states that all three NAFTA Parties have confirmed that »the NAFTA does not permit a Chapter Eleven tribunal to review an interpretation of the NAFTA Parties, sitting as members of the FTC,« and disregard it on the basis that interpretation is in fact an »amendment.«<sup>[FN125]</sup> The Respondent also notes that Canada and Mexico have joined the U.S. in its rejection of key arguments or positions taken by the *Pope and Talbot* Tribunal in respect of Article 1105(1). Thus, the NAFTA Parties are one in stating that Article 1105(1), read together with the FTC Interpretation, clearly prescribes the customary international law minimum standard of treatment.

116. In its Final Post-Hearing Submission, the Respondent also confronts the Investor's arguments that the U.S. measures constitute arbitrary and discriminatory conduct inconsistent with Article 1105(1) on the one hand, and violative of the principle of good faith performance incorporated in customary international law, on the other hand. The Respondent contends that the Investor has failed to sustain »its assertion that there exists a general international obligation to refrain from 'arbitrary' conduct.«<sup>[FN126]</sup> Similarly, the Respondent construes the Investor's argument about the principle of good faith performance as an assertion that customary international law prescribes »a *general* obligation of 'good faith ... subsumed in Article 1105(1),« and rejects the notion that such »a general obligation of 'good faith' exists.«<sup>[FN127]</sup> The Respondent does recognize that customary international law rules, like the rule of *pacta sunt servanda*, may impose obligations of good faith performance, but points out that the Buy America provisions were not issued to implement NAFTA obligations. The Claimant did not prove that a »specific obligation of good faith« had been violated by the U.S.<sup>[FN128]</sup> Finally, it is stressed that, in any event, the Claimant has not presented any evidence of acts on the part of the Respondent that constitute »arbitrary« or »bad faith« conduct.

117. On 1 August 2002, the *Investor* filed its Second (and final) Post-Hearing Submission responding to the Respondent's first Post-Hearing Submission and to the

Article 1128 Submissions of Canada and Mexico. The Investor at the outset reiterates that FTC interpretations issued under NAFTA Article 2001(2)(c) are indeed binding on this and other Chapter Eleven tribunals.<sup>[FN129]</sup> At the same time, the Investor insists that there is a threshold issue this Tribunal must address: »whether the FTC statement of 31 July 2001 is an interpretation by the Commission within the meaning of article 1131 such that it is binding on this Tribunal.«<sup>[FN130]</sup> In addressing that issue, the Tribunal, according to the Investor, would simply be exercising its authority, indeed, its duty »to determine the governing law« that it must apply. Otherwise, the FTC »would be empowered to amend NAFTA, at least ... Chapter Eleven [thereof],« which »result« would fly in the face of Article 2202 which prescribes the procedure for »amendment« of NAFTA provisions.<sup>[FN131]</sup>

118. The Investor also suggests that Canada and Mexico do not go the full length to which the Respondent goes. In the view of the Investor, Canada and Mexico have not supported »the pigeonhole approach to international claims put forward by the U.S.«<sup>[FN132]</sup> Canada and Mexico begin with the position that a »wrong committed by a state in respect of an investor is actionable [provided] that wrong is of a sufficient magnitude.« Their disagreement with the Investor concerns the »magnitude of the wrong which will trigger liability.«<sup>[FN133]</sup> The Investor reads Mexico's position in its Submission to be that »the substitution of arbitrary act for the rule of law« indicates the kind of action that »in appropriate circumstances attract State responsibility.«<sup>[FN134]</sup> The Investor affirms that such is precisely the kind of arbitrary action it is complaining about.

(b) The Submissions of the Other NAFTA Parties Pursuant to Article 1128 of NAFTA

(i) The Submissions of Canada

119. Canada made two submissions to the Tribunal pursuant to NAFTA Article 1128, the first on 18 January 2002 before the oral hearing of 15-19 April 2002, and the second on 19 July 2002 after that oral hearing.

120. In its first (*i.e.*, Pre-Hearing) Submission, the Government of Canada affirmed that the 31 July 2001 FTC Interpretation is binding on this Tribunal and constitutes

the proper basis for interpreting NAFTA Article 1105(1). The FTC, Canada stresses, »is the Parties to the NAFTA acting collectively under that treaty.« Further, »in acting through the [FTC], the Parties act through a single body with decision-making power under the NAFTA.« The FTC is vested with »the prime and final authority as the interpreter of the NAFTA,« and an interpretation by the FTC is »the full expression of what the NAFTA Parties intended.«<sup>[FN135]</sup>

121. In its Second (*i.e.*, Post-Hearing) Submission, Canada rejected the assertion of the *Pope and Talbot* Damages Award that the »fair and equitable treatment« and »full protection and security« standards in Article 1105(1) were »additive« to the customary international law minimum standard of treatment. Further, Canada states that the FTC interpretations are not themselves subject to interpretation by a Chapter Eleven tribunal since it is FTC's mandate to resolve interpretation disputes with finality.<sup>[FN136]</sup> The view expressed by the *Pope and Talbot* Tribunal that the FTC 31 July 2002 Interpretation was an »amendment« and not a true interpretation, is explicitly rejected by Canada. The statement by the *S. D. Myers* Tribunal that »a breach of 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective,« is, in the view of Canada, consistent with the FTC Interpretation.<sup>[FN137]</sup> In Canada's view, the standard set in Article 1105(1) is a minimum standard, well captured by the *Neer* decision, but by no means static or frozen in time.<sup>[FN138]</sup> Canada expresses skepticism that a customary law standard can be derived from the many hundreds of BITs existing today.<sup>[FN139]</sup> As to the standard for characterizing a measure as »arbitrary,« Canada believes that has been best expressed in the *ELSI* case by a chamber of the International Court of Justice as »a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.« Canada submits that the threshold for designating a measure as »arbitrary« »remains high.«<sup>[FN140]</sup>

(ii) The Submissions of Mexico

122. Mexico, like Canada, made two submissions to the

Tribunal: a prehearing one on 18 January 2002 and a post-hearing one on 22 July 2002.

123. Mexico, in its Pre-Hearing Submission, stated that Article 1105(1) must be read in the light of the FTC Interpretation of 13 July 2001, and not expansively as urged by the Claimant.<sup>[FN141]</sup> The U.S. measures in question should be construed as applying to goods in a procurement context and not to investment; in other words, the Investor's claims do not properly fall within the scope of Chapter 11 Article 1105 must be interpreted in the light of international customary law and thereunder, there has been no state practice to accord national treatment to foreign goods in governmental procurement transactions.<sup>[FN142]</sup> Finally, it is stressed by Mexico that the Tribunal, while called upon to interpret NAFTA, is not called upon to sit as a »court of appeal« in respect of national law.<sup>[FN143]</sup>

124. In its Post-Hearing Submission, Mexico stresses that the three NAFTA Parties are one on two key interpretative issues: (a) they agree that fair and equitable treatment was to be found »within international law;« and (b) they agree that the reference to international law was a reference to »the international minimum standard at customary international law.«<sup>[FN144]</sup> Mexico also noted that it had earlier expressly adopted a central point of the U.S. that the plain language of Article 1105(1) describes fair and equitable treatment »as part of customary international law,« not as a »additive requirement that might be derived from other BITs.«<sup>[FN145]</sup> Mexico goes to substantial lengths to demonstrate that, in its Article 1128 submission in the *Pope and Talbot* case, it had clearly stated that »the threshold to establish a breach of customary international law continues to be high; one which requires conduct of a very serious nature, amounting to a significant departure from internationally accepted legal norms.« It had there concurred in Canada's statement that »only egregious conduct should be seen to offend Article 1105.«<sup>[FN146]</sup> In the *ELSI* case, the key point, according to Mexico, was that the Chamber accorded deference to the respondent's (Italy's) legal system in applying the standard in the relevant (U.S.-Italy Friendship, Commerce and Navigation) Treaty, finding that though the

mayor's requisition of the factory was unlawful under Italian law as an excess of power, »mere domestic illegality did not equate to arbitrariness at international law.«<sup>[FN147]</sup>

125. Mexico also records its agreement with the U.S. submission in *Pope and Talbot* that the Tribunal had no authority to »second-guess the FTC.« The jurisdiction of a Chapter 11 tribunal is confined to the subject matter set out in Articles 1116 and 1117: it is authorized »to determine whether a NAFTA Party (in the singular) violated one of the NAFTA obligations listed in those two articles.« That jurisdiction does not include »look[ing] behind the governing law which, under Article 1131(2), ... include[s] [an] [FTC] interpretation ... 'binding upon a Tribunal'.«<sup>[FN148]</sup> Mexico goes on to note that given the absence of »a careful analysis of state practice and *opinio juris*,« the sheer number of extant BITs today does not suffice to show that conventional international law has become customary international law. Similarly, the simple antiquity of the *Neer* decision does not show that it is no longer »a leading case on the customary international law standard.«<sup>[FN149]</sup> Finally, Mexico observes that, save for the WTO Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS), WTO law does not address foreign investment disciplines,<sup>[FN150]</sup> and that work on the relationship of trade and investment is at an early stage.

## V. FINDINGS AND CONCLUSIONS

126. Canvassing the issues raised in this case, we note that there are two issues which relate to the jurisdiction of this Tribunal or the admissibility of certain claims submitted by the Claimant, while the rest of the issues are concerned with the merits of the Claimant's claims about the consistency or inconsistency of the U.S. measures with certain NAFTA provisions. We address first the issues relating to jurisdiction or admissibility.

### **1. Jurisdiction to Consider the Investor's Claim Concerning NAFTA Article 1103.**

127. The first jurisdictional or admissibility issue raised by the Respondent concerns the Investor's claim that the U.S. measures here in question are inconsistent with the Respondent's obligations under NAFTA Article 1103.

The Respondent submits that this Tribunal is bereft of jurisdiction to consider and pass upon the Investor's claim brought under Article 1103. The Respondent points to the fact that the Investor's Notice of Intention to Submit a Claim to Arbitration, dated 29 February 2000, did not allege any breach of Article 1103 on the part of the Respondent. We note that the Investor's Notice of Intention does not mention Article 1103; neither does the Investor's Notice of Arbitration dated 19 July 2000.

128. NAFTA Article 1119 provides that the disputing Investor's written notice of its intention to submit a claim to arbitration shall specify, *inter alia*, »the provisions of [the NAFTA] alleged to have been breached and any other relevant provisions.« At the same time, Article 1122(1) states that »each party [to NAFTA] consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.«

129. The basic submission of the Respondent is that since the Investor failed to comply with the requirements of Article 1119, the United States' consent to the Investor's submission to arbitration did not include consent to the bringing of the Investor's claim based on Article 1103. In the absence of such consent, the Respondent denies that the Tribunal has jurisdiction to consider the Article 1103 claim of the Investor.

130. We begin by examining the meaning of Article 1122(1) and inquire whether the phrase »in accordance with the procedures set out in this Agreement« was intended to condition the effectivity or validity of the consent of a NAFTA Party to the submission of claims to arbitration, and the jurisdiction *ratione materiae* of a Chapter 11 tribunal, upon the strict and literal compliance of a disputing Investor with every single procedure set out in Section B of Chapter 11 of the NAFTA.

131. In this connection, it should be noted that Article 1122 goes on to say that

»2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) *Chapter II of the ICSID Convention* (Jurisdiction of the Centre) and the *Additional Facility Rules for written consent of the parties*;

(b) Article II of the New York Convention for *an agreement in writing*; and

(c) Article I of the Inter-American Convention for *an agreement*.« (Emphases added)

132. It should further be noted that Article 1121(1) and (2) use exactly the same phrase »in accordance with the procedures set out in this Agreement« in respect of the consent of the investor and of the enterprise owned or controlled by the investor:

»1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration *in accordance with the procedures set out in this Agreement*; and

...

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and ....« (Emphases added)

133. When Articles 1122 and 1121 are read together, they appear to us to be saying essentially that the standing consent of a NAFTA Party constituted by Article 1122(1), when conjoined with the consent of a disputing investor given in a particular case, generate the agreement to arbitrate required under the ICSID Convention and the Additional Facility Rules, the New York Convention and the Inter-American Convention. We see no logical necessity for interpreting the »procedures set out in the [NAFTA]« as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor.

134. Turning back to Article 1119(b), we observe that the notice of intention to submit to arbitration should

specify not only »the provisions of [NAFTA] alleged to have been breached« but also »*any other relevant provisions [of NAFTA]*.« Which provisions of NAFTA may be regarded as also »relevant« would depend on, among other things, what arguments are *subsequently* developed to sustain the legal claims made. We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of »other relevant provisions« in its Notice of *Intention* to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute.

135. It is also instructive to note that the notice to be given by a claimant »wishing to institute arbitration proceedings« under the ICSID Arbitration (Additional Facility) Rules is required merely to »contain *information concerning the issues in dispute* and an indication of the amount involved, if any.« (Article 3[1][d], ICSID Arbitration (Additional Facility) Rules) The generality and flexibility of this requirement do not suggest that failure to be absolutely precise and complete in setting out that »information« must necessarily result in diminution of jurisdiction on the part of the Tribunal. While the ICSID Convention is not applicable to Additional Facility cases (like the instant case), it is useful to observe that a similar negative inference may be seen to arise from the specification of the contents of the Request for Arbitration required under Article 36(2) of the ICSID Convention to be filed by a Contracting State or a national of a Contracting State with the ICSID Secretary-General who must send a copy to the other party:

»(2) The request shall contain *information concerning the issues in dispute*, the identity of the parties and *their consent to arbitration in accordance with the rules of procedure* for the institution of...arbitration proceedings.« (Emphases added)

136. We turn to certain circumstances specific to the present case which bear upon the Article 1103 claim of the Investor. The Investor made its Article 1103 claim not in its Memorial but rather in its Reply to the Respondent's Counter-Memorial. We consider that this circumstance was principally the result of the issuance of the FTC Interpretation of 31 July 2001 relating to, *inter*

*alia*, Article 1105(1) a day before the filing of the Investor's Memorial. The Investor, in making its Article 1103 claim and adducing certain provisions of certain bilateral investment treaties of the Respondent--the U.S.-Albania and the U.S.-Estonia treaties--, was responding to and seeking to mitigate what it perceived to be the impact of the FTC Interpretation upon the Investor's Article 1105 claim. In other words, we do not believe that in failing to mention Article 1103 in its Notice of Intention to Submit a Claim to Arbitration and failing to discuss it in its Memorial, the Investor was seeking unfairly to inflict tactical surprise upon the Respondent. There was no reason for the Investor, at the time of its Notice, to regard Article 1103 as a »relevant provision« given that the substance of its later Article 1103 claim, in fact, was already asserted under its Article 1105 claim.

137. There is another aspect of this Article 1103 issue which the Tribunal needs to consider: the pertinence of Article 1104 which provides as follows:

»Article 1104: Standard of Treatment.

Each Party shall accord to investors of another Party and to investments of investors of another Party *the better of the treatment required by Articles 1102 and 1103*.  
« (Emphasis added)

As we read it, an investor of another NAFTA Party is entitled to claim the benefit of the best standard of treatment which the NAFTA party affords to its own nationals under Article 1102 and even to a non-party under Article 1103 (2). Moreover, the investor is entitled to the benefit of the »better treatment« by virtue of Article 1104 without having to allege and prove breach by the respondent Party of its obligations under both Articles 1102 and 1103. It is sufficient for the investor to allege and seek to prove breach of Article 1102 in order to be entitled to claim the benefit of Article 1104 by seeking to show that more favorable treatment is accorded to investors of another Party, or even investors of a non-Party (such as Albania and Estonia). In our view, that is precisely what the Investor here was trying to show.

138. Finally, we observe that the Respondent has not

shown that it has sustained any prejudice by virtue of the non-specification of Article 1103 as one of the provisions allegedly breached by the Respondent. Although the Investor first specified its claim concerning Article 1103 in its Reply to the Respondent's Counter-Memorial, the Respondent had ample opportunity to address and meet, and did address and meet, that claim and the Investor's supporting arguments, in its Rejoinder.

139. For the foregoing reasons, the Tribunal believes and so holds that it has jurisdiction to pass upon the Article 1103 claim of the Investor.

## **2. Jurisdiction to Consider the Investor's Claims Concerning Certain Federal-aid Construction Projects Other than the Springfield Interchange Project**

140. A second jurisdictional or admissibility objection was raised by the Respondent in respect of claims made by the Investor concerning certain Federal-aid construction projects other than the Springfield Interchange Project. In its Notice of Intention to Submit a Claim to Arbitration, the Investor referred only to the application of the U.S. measures here at stake to the Springfield Interchange Project. At the same time, the Investor did allege in its Notice that the »continued application« of the U.S. measures »will cause additional damage« to ADF International, limiting its ability to participate fully »in future Federal-aid highway construction projects.«

141. In its Memorial, the Investor stated »since the Springfield Interchange Project,« the ADF Group or ADF International has participated in three named projects said to be also Federal-aid highway projects: another bridge project in the Commonwealth of Virginia and two other bridge projects in the State of New York. The Investor alleged that the U.S. measures applied in the Springfield Interchange Project were also applied in all of the three »other projects,« resulting in inability to supply and use U.S.-origin steel fabricated in Canada and the incurring of damages by the Investor. The extent of those damages the Investor proposed to address in the second phase of these proceedings.

142. The Tribunal is bound to observe that no evidence

of any kind was submitted at any time by the Investor in respect of these »other projects« to support its exceedingly general statements in its Memorial. In the present proceedings which have related solely to the Springfield Project, the Investor made no visible effort to show the factual bases of its claims about those »other projects,« something which, under NAFTA Article 1119(c), should have been set out as early as in its Notice of Intention to Submit a Claim to Arbitration. Neither did the Investor try to show the legal regime governing its asserted participation therein. No contract documents and no correspondence with anyone relating to the Investor's involvement in those »other projects« have been submitted to the Tribunal. The Investor offered no demonstration at all that the U.S. measures have in fact been applied or enforced in respect of the »other projects.«

143. Under the above circumstances, the failure of evidence on the part of the Investor relates not simply to the quantum of damages said to have been sustained by reason of breaches of NAFTA Chapter 11 provisions by the Respondent. The failure of proof relates to both the *factual basis* of the Investor's claims about the »other projects« and the fundamental aspect of *liability* of the Respondent, that is, whether the Respondent had breached any of its NAFTA obligations in connection with any of the »other projects.« This kind of failure of proof of liability cannot be sought to be remedied at any subsequent phase of these proceedings as the Respondent would have been denied the opportunity to present its case against liability--if any--that is, to controvert the Claimant's proof. This could amount to a denial of due process.

144. The Investor's claims concerning »other projects« are not properly regarded as »incidental or additional« claims within the meaning of Article 48(1) of the ICSID Arbitration (Additional Facility) Rules. This Article does not define or elaborate on »incidental or additional« claims. Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules do provide some elaboration on »incidental or additional« claims, and while these two instruments are not applicable to Additional Facility cases, like the instant case, they often do supply, in our opinion, relevant, and even close,

analogues for terms used in the Additional Facility Rules. Rule 40 of the ICSID Arbitration Rules, entitled »Ancillary Claims« essentially tracks the language of Article 46 of the ICSID Convention and requires, *inter alia*, that ancillary claims, that is--incidental claims and additional claims--»aris[e] directly out of the subject matter of the dispute.« It is not necessary to distinguish between »incidental claims« and »additional claims;« both must satisfy the requirement of a close relationship with or connection to the original or primary claim. We consider that an incidental or additional claim in the instant case must arise directly out of the Investor's claims about the Springfield Interchange Project. But the Investor's claims about its »other projects« clearly do not arise directly out of the Springfield Interchange Project. They are specifically alleged to be claims arising out of construction projects »other than« the Springfield Project. Thus, there was no allegation or proof that the »other project« said to be also located in the Commonwealth of Virginia, and the Springfield Project are, for instance and as a matter of fact, integral parts of one, larger, project. So far as the record of the present case shows, the other Virginia project (and *a fortiori* the two New York projects) is physically distinct from and totally unrelated to the Springfield Interchange Project. [FN151]

145. Putting the matter in slightly different terms, the Investor has presented to the Tribunal no bases, factual or legal, for passing upon the Respondent's liability for breaches of any provision of NAFTA Chapter 11, Section A in the »other projects.« There has been, therefore, nothing for the Respondent to controvert and disprove or rebut. There was, moreover, no dispute or controversy to consult and negotiate about, during the 90-day »cooling-off« or waiting period prescribed in Article 1119. Finally, to permit, under these circumstances, the claims relating to the »other projects« to stand in the present proceedings could impose material prejudice upon the Respondent.

146. For the foregoing reasons, the Tribunal believes and so holds that all claims of the Investor relating to any construction project other than the Springfield Interchange Project must, accordingly, be dismissed as in-

admissible.

**3. Articles 1102, 1106 and 1108: National Treatment  
Obligation and Prohibition of Local Content and  
Performance Requirements in the Context of Gov-  
ernmental Procurement**

*(a) Preliminary interpretive considerations*

147. Before commencing detailed consideration of the Investor's claims under particular NAFTA provisions and the Respondent's defense against those claims, it appears appropriate to note certain aspects of the task of interpreting provisions of NAFTA. The Investor has urged the Tribunal to bear in mind the directive of Article 102(2) that the Parties shall interpret and apply NAFTA provisions »in the light of [NAFTA's] objectives set out in [Article 201(1)] and in accordance with applicable rules of international law.« NAFTA's objectives, together with the statements set out in the Preamble of NAFTA, are necessarily cast in terms of a high level of generality and abstraction. In contrast, interpretive issues commonly arise in respect of detailed provisions embedded in the extraordinarily complex architecture of the treaty. We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph.<sup>[FN152]</sup> This is in line with Article 102(1) which states that *NAFTA's objectives are »elaborated more specifically through its principles and rules«* such as »national treatment, most-favorednation treatment and transparency.« The provision under examination must of course be scrutinized in context; but that context is constituted chiefly by the other relevant provisions of NAFTA. We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*. The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter.

148. Clearly, NAFTA is a complex document, arguably the most complex free trade agreement currently in existence. Virtually every Chapter contains its own articles on definitions. Annexes, beginning with Annex 201.1 attached to Chapter 2, are used to create further definitions, or may contain their own definitions applicable to those annexes alone. Some Chapters, such as Chapter 15 on Competition, stand virtually alone, while others, such as Chapter 3 on Goods, contain general rules and principles which run through much of the treaty text. There is a separate Chapter 21 dealing in a general way with exceptions, such as in Article 2101 which relates to the incorporation, to a certain extent, of provisions of Article XX of the GATT, in respect of most of NAFTA, and Article 2106 excepting cultural industries for Canada alone. Additional exceptions are to be found throughout the NAFTA. Five major Schedules list different types of non-conforming measures maintained by each of the Parties. State, provincial and local government measures, in several important areas, have not as yet actually been subjected to the disciplines of NAFTA, due to failure to agree within two years from entry into force of NAFTA as originally contemplated.

149. Thus, the specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of NAFTA if a treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck by the three sovereign Parties.<sup>[FN153]</sup>

*(b) Appraising the Investor's Articles 1102 and 1106  
Claims and the Exception in Article 1108(7)(a) and  
(8)(b)*

150. We turn to consideration of the Investor's claims based on NAFTA Articles 1102 and 1106. These two claims are most conveniently examined together if only because the Respondent's defense based on Article 1108 is directed against, and seeks to repel, both claims.

151. Article 1102 needs to be quoted again in its pertinent parts:

»Article 1102: National Treatment

1. Each Party shall accord to *investors* of another Party



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

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

152. The beneficiaries of Article 1102(1) and (2) are both investors and their investments. The broad scope of application of Article 1102 is indicated by the breadth of the definitional scope of the critical term »investment.« Article 1139 defines »investment« as embracing not just the more familiar »enterprise,« and the traditional »equity security« or »debt security« of an »enterprise,« but also the following:

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

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

(i) *contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or*

(ii) *contracts where the remuneration depends substantially on the production, revenues or profits of an enterprise; ...« (Emphases added)*

153. »Enterprise« itself is given an equally capacious meaning by NAFTA Article 201(1) in relation to Article 1139: » *any entity constituted...under applicable law whether or not for profit, and whether or not privately-owned or governmentally owned...*« (Emphases added) Another indicator of the extensive reach of Article 1102 is the range of the »treatment« which must be accorded to the beneficiary »investor« and »investment«: that is, »treatment« »with respect to the establishment, acquisi-

tion, expansion, management, conduct, operation and sale or other disposition of investments.« Thus, it appears to us that a NAFTA Party must accord to the investors of another Party and their investments treatment no less favorable than that it accords to its domestic investors and their investments in like circumstances not only with respect to the »*establishment*« of investments, but also with respect to the »*acquisition*« of additional investments, the »*expansion*« of already established investments, the »*management,*« »*conduct*« and »*operation*« of investments once established or acquired and the »*sale or other disposition*« of investments, e.g., liquidation of assets and repatriation of net proceeds. In slightly different terms, Article 1102 entitles an investor of another Party and its investment to equal (in the sense of »no less favorable«) treatment, in like circumstances, with a Party's domestic investors and their investments, from the time of entry and »*establishment*« or »*acquisition*« of the investment in the territory of that Party, through the »*management,*« »*conduct*« and »*operation*« and »*expansion*« of that investment, and up to the final »*sale or other disposition*« of the same investment.

154. We agree with the Investor that ADF Group is an investor of another Party while ADF International is both an »*enterprise*« and an »*investment*« of an investor of another Party, within the meaning of Article 1102, Article 1139 and Article 201(1). This has not been controverted by the Respondent. We also agree that the U.S.-origin steel materials purchased by the Investor in the U.S., which the Investor sought unsuccessfully to bring to Canada to ADF Group's steel facilities for the carrying out of fabrication operations thereon prior to incorporation into the Springfield Interchange Project, also constituted an investment of the Investor for purposes of Article 1102.

155. As noted earlier, the U.S. measures here in question essentially require that steel materials be 100% produced and fabricated in the U.S., if such materials are to be used in the construction of the Springfield Interchange Project. The Investor's Article 1102 claim is that the U.S. measures are incompatible with the requirements of Article 1102. The Respondent, in approaching

this issue, suggests somewhat obliquely, that the Investor is in effect claiming that Canadian-produced and Canadian-fabricated steel is being discriminated against in the U.S., so far as concerns Federal-aid construction projects and that that claim is properly brought under another portion of NAFTA, Chapter 3 and not Chapter 11, and is not properly cognizable in the Investor-State dispute settlement process established by Chapter 11. In other words, the Respondent suggests that the Investor's claim is effectively a claim relating to the national treatment of »goods« and not of »investments.« a suggestion that Mexico apparently agrees with. <sup>[FN154]</sup> The correctness of this approach is not self-evident to us, in view of the many and comprehensive areas with respect to which the investment of a Canadian investor may claim national treatment under Article 1102. Those areas include the »management, conduct and operation« of a Canadian »enterprise« in the U.S. and the goods produced by such enterprise in the territory of the U.S. can be regarded as investments of the Canadian investor and are closely related to, and are the results of, the »management, conduct and operation« of the enterprise. Thus, it may be recalled that the Investor stressed the »impact« of the U.S. measures on the operations of ADF International. Fortunately, as the Respondent itself recognized, it is not absolutely necessary to try to resolve this question. What Article 1102 requires is that we assess whether these investments of the Investor ( *e.g.*, its steel in the U.S.) are treated differently than the U.S.-origin steel of U.S. investors is treated--in like circumstances.

156. It was vigorously argued by the Respondent that, even upon the assumption that the Investor's claim was properly brought under Article 1102, the Investor in any event failed to prove that the U.S. measures constitute a violation of Article 1102. For the same U.S. measures, the Respondent explicitly stated, were applied to U.S. steel manufacturers and U.S. steel fabricators bidding for the Springfield Interchange Project and other Federal-aid highway construction projects. Both steel of the Canadian Investor and of a U.S. investor must be fabricated in the United States. Moreover, steel fabricated in the United States is *not* treated differently, depending on the nationality of the investor owning such steel. In-

deed, the Canadian investor's steel and a U.S. investor's steel, if fabricated in Canada, are treated in the same manner and both are excluded from use in the Springfield Interchange Project. U.S. steel manufacturers and fabricators are confronted with the same constraints or limitations of options that the Investor had to address: (a) expand their fabricating facilities in the U.S., if they wanted to carry out the fabrication operations themselves; or (b) sub-contract out the fabricating operations to other U.S. steel fabricators; or (c) forgo bidding on Federal-aid highway construction projects. The Tribunal is bound to note that the Investor presented no evidence at all to overcome the Respondent's defense. The Investor did not identify a U.S. steel manufacturer or fabricator which, by virtue of its nationality, had been exempted from the requirements of the »Buy America« provisions and allowed to supply to the Springfield Interchange Project, or some other Federal-aid state construction project, structural steel materials that had been manufactured or fabricated in Canada or elsewhere outside the U.S. In other words, the Investor did not try to show that some U.S. construction and fabrication company, similarly situated as the Investor, had been accorded treatment different from and more favorable than that given to the Investor, in respect of the provision and use of structural steel products in Federal-aid highway construction projects. <sup>[FN155]</sup>

157. The question may be raised whether the equality of treatment accorded by the Respondent to the Investor and to U.S. steel manufacturers and steel fabricators was more apparent than real, and whether less favorable treatment was *de facto* (though not *de jure*) being meted out to ADF International. Can a U.S. steel manufacturer or fabricator be expected to want to source its structural steel requirements in Canada, or China, or Korea? Would it not be »natural« for a U.S. steel manufacturer or fabricator to carry out the fabricating operations in the U.S., in its own plant if possible? It appears to us that the Investor was trying to raise these questions, albeit obliquely or indirectly, when it argued, as was noted earlier, that the only difference between the ADF Group and U.S. steel fabricators is »the physical location of their facilities.« The Investor also submitted that Article 1102 assumes that an investor of another NAF-

TA Party entitled to invoke Article 1102 will have its facilities »located« outside the territory of the host Party and that for a U.S. steel fabricator, the ability to fabricate structural steel in Canada was »irrelevant.« Evidence of discrimination, however, is required. For instance, it appears to the Tribunal that specific evidence concerning the comparative economics of the situation would be relevant, including: whether the cost of fabrication was significantly lower in Canada; whether fabrication capacity was unavailable at that time in the United States and whether transportation costs to Canada were sufficiently low to make up the differential. We note the U.S. did submit evidence of available capacity<sup>[FN156]</sup> and Mr. Paschini referred to massive increases in costs due to fabrication in the U.S.<sup>[FN157]</sup> This scant evidence is, however, not sufficient to show what the relevant competitive situation of Canadian fabricators and U.S. fabricators was in general, nor was it evidence of the comparative costs of steel fabrication in the U.S. and Canadian facilities, in particular. The Investor did not sustain its burden of proving that the U.S. measures imposed (*de jure* or *de facto*) upon ADF International, or the steel to be supplied by it in the U.S., less favorable treatment *vis-à-vis* similarly situated domestic (U.S.) fabricators or the steel to be supplied by them in the U.S.

158. The Tribunal finds that the Investor has failed to show that the U.S. measures are inconsistent with the requirements of NAFTA Article 1102.

159. Turning to the NAFTA Article 1106 claim of the Investor, the U.S. measures here at stake appear, by their own terms, to be requirements of local content and other performance requirements. The Respondent did not dispute that the U.S. measures constitute a requirement of domestic content within the sense of Article 1106(1)(b), and a requirement to accord preference to goods produced or services provided in the U.S. for purposes of Article 1106(1)(a). The Respondent instead focused on the applicability to the present case of certain provisions of Article 1108 which exclude the operation of, *inter alia*, Article 1106 in cases of »procurement by a Party.«

160. We therefore turn again to NAFTA Article 1108

which reads in pertinent part as follows:

»Article 1108: Reservations and Exceptions

...

7. Article 1102, 1103 and 1107 do not apply to:

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

(b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.

8. The provisions of:

...

(b) *Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b)* do not apply to *procurement by a Party* or a state enterprise; ...« (Emphases added)

The pertinent issue is whether or not the Springfield Interchange Project constituted or involved »procurement by a Party.« We approach this issue by inquiring, first, into the meaning of »procurement,« and second into the appropriate reference of the term »Party,« both as used in Article 1108.

161. »Procurement« is not defined in NAFTA Chapter 11; but it is defined in NAFTA Chapter 10. Chapter 10 is entitled »Government Procurement« simply, and deals *only* with procurement by *governmental* entities or offices. It does not purport at all to address procurement by private sector companies. Article 1001(5) provides a description in the following terms:

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

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

In its ordinary or dictionary connotation, »procurement« refers to the act of obtaining, »as by effort, labor or purchase.« To procure means »to get; to gain; to come into possession of.«<sup>[FN158]</sup> In the world of commerce and industry, »procurement« may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth.<sup>[FN159]</sup> Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery. What is *excluded* from the scope of procurement is the governmental assistance to the public entity or agency engaged in procurement, especially assistance in the form of financing or funding of the procurement activity by providing »grants, loans, equity infusions, guarantees, fiscal incentives.« In other words, the government entity or agency providing or arranging for funds for the purchase of goods, supplies, materials, etc. used or to be used in the construction of a government project, is not itself thereby engaged in procurement.

162. Applying the above reading of Article 1001(5) to the facts of the present dispute, it is clear to the Tribunal that the construction of the Springfield Interchange Project constituted or involved governmental procurement for purposes of Article 1001(5) and of Chapter 10 as a whole. It is equally clear to us that the government entity which carried out the procurement of goods or services for the Project was the Commonwealth of Virginia. The Virginia Department of Transportation (VDOT) is designated as »Owner« of the Springfield Interchange Project, both in the Main Contract between Shirley Contracting Corporation (Shirley) and VDOT, and in the Sub-Contract between Shirley and ADF International.<sup>[FN160]</sup> The U.S. Federal Government did provide federal funds for the construction of the Project, but that did not result in the U.S. Federal Government, or any agency thereof, being itself engaged in procurement. It may be observed in this connection that the Investor did not deny that the procurement activity in respect of the Project had been carried out by the VDOT. Neither did the Investor claim that the U.S. Federal Government had, by its funding activity, itself engaged in procurement.

163. We consider next whether, in the present case, there was »procurement by a Party« in the sense of Article 1108(7)(a) and (8)(b). »Party,« in the first instance, refers to a sovereign state which has adhered to and become bound by the NAFTA. Where a Party is a federal state (and all three Parties are federal states), the question arises whether »Party« encompasses both the federal government and the several state or provincial governments, or only the former.

164. Article 1001(1), describing the scope and coverage of the NAFTA Chapter on »Government Procurement,« states that Chapter 10 applies to *measures* adopted or maintained »by a Party relating to procurement: (a) by a federal government entity set out in Annex 1001.1a-1, ... or a state or provincial government entity set out in Annex 1001.1a-3 in accordance with Article 1024, ....« This Article thus provides clear textual basis for holding that »government procurement« embraces both procurement by a federal government entity and procurement by a state or provincial government entity, *so long as such agency is listed by a Party in its Schedule attached to the appropriate Annex to Article 1001(1)*. Further, we consider that »government procurement« is appropriately read as having the same scope and coverage as »procurement by a Party.« While »procurement by a Party,« the term on which we presently focus, is found in Article 1108(7) and (8), and »government procurement« is the term used in Article 1001(1), in our opinion, and in present context, no sensible distinction can be drawn between the two terms. We note that neither party has suggested that such a distinction was intended to be projected by the NAFTA Parties.

165. Article 1108 itself supplies support for the above reading. Article 1108(1) states that Articles 1102, 1103, 1106 and 1107 do not apply to any »existing non-conforming measure« maintained »by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or] (ii) a state or province, for two years after the date of entry into force of [NAFTA] ..., or (iii) a local government; ....« Thus, an »existing non-conforming measure« of a »Party« saved by Article 1108(1) may not only be a federal government measure but also a state or provincial government measure and even a measure of a

local government.

166. The view taken above by the Tribunal is in line with the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units. This rule is now formulated in Article 4 of the Articles on State Responsibility of the International Law Commission, in the following terms:

»Article 4

#### Conduct of Organs of a State

1. *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.*

2. An organ includes *any person or entity which has that status in accordance with the internal law of the State.*« (Emphases added)<sup>[FN161]</sup>

167. It is important to stress, firstly, that although both »procurement by a Party« and »government procure-ment« embrace, in principle, procurement measures by a federal government entity as well as procurement measures by a state or provincial government, federal procurement measures are actually, at this time, subjected to the disciplines of NAFTA Chapter 10 *only if and to the extent that such measures are issued by a federal government entity listed in the negotiated Schedule of a NAFTA Party attached to Annex 1001.1a-1.* The U.S. Schedule lists 56 Federal Government entities, including the U.S. Department of Transportation, while the Canadian Schedule enumerates 100 federal entities and the Mexican Schedule lists the entities forming part of 22 Federal Government Ministries. A procurement measure issued by an unlisted U.S. Federal Government entity would not be subject to the Chapter 10 disciplines and detailed procedures.

168. It is equally important to note that under Article 1001, state or provincial government entities of a NAFTA Party are in fact subjected to Chapter 10 disciplines *only if and to the extent that such entities are listed in a Party's Schedule attached to Annex 1001.1a-3* »in accordance with Article 1024.« Annex 1001.1a-3 states, tersely:

»State and Provincial Government Entities

*Coverage under this Annex will be the subject of consultations with State and provincial governments in accordance with Article 1024.*« (Emphases added)

Article 1024, entitled »Further Negotiations,« contemplates that the Parties »shall commence further negotiations no later than 31 December 1998, with a view to the further liberalization of their respective government procurement markets ...« So far as the Tribunal has been able to determine, the negotiations envisaged have not to date been commenced, or if commenced, have not been completed. In the event, no Schedules have to date been attached by any of the Parties to Annex 1001.1a-3. It is also instructive to note Article 1024(3) which speaks of the Parties »endeavor[ing] to consult with their state and provincial governments« on obtaining commitments »on a voluntary and reciprocal basis« to include within Chapter 10 procurement by state and provincial government entities and enterprises. If any such voluntary commitment has been obtained by the U.S. from the Commonwealth of Virginia, neither the Investor nor the Respondent has brought such a critical fact to the attention of the Tribunal. Finally, so far as the Tribunal has been able to determine, there has been no voluntary assumption of the procurement disciplines of Chapter 10 by any sub-federal governmental entity of any of the NAFTA Parties.

169. We consider, lastly, the Investor's argument that the U.S. measures here involved set out performance requirements similar to those found in the U.S. Clean Water Act with respect to federal-aid construction of municipal sewage and industrial waste treatment plants. Such construction is saved in the U.S. Schedule to Annex 1 of NAFTA. Since the U.S. measures have not been similarly saved in that Schedule, the Investor urges us to in-

fer that they are non-conforming and violative of Article 1106.<sup>[FN162]</sup> We have already noted the Respondent's response that the pertinent reservation in the U.S. Schedule states that »grant recipients may be privately owned enterprises,« and that therefore the U.S. negotiators thought it necessary or advisable to protect such federal-aid construction by an express reservation.<sup>[FN163]</sup> The Investor controverts the U.S. response as »inaccurate« and quotes detailed provisions of the Clean Water Act seeking to show that grants under this Act are made to a »public body.«<sup>[FN164]</sup> We have examined with care the statutory provisions adduced by the Investor and we are satisfied that there are important differences between the federal-aid state highway construction projects contemplated in the U.S. measures and the federal-aid construction of municipal sewage and industrial waste treatment plants envisaged in the Clean Water Act. The »*public body*« referred to by the Investor *makes an application* for a federal grant under the Act »*on behalf of*« the private owners of »*principal residences*« and »*commercial establishments*« that would benefit from the existence of the treatment facility.<sup>[FN165]</sup> More importantly, such application is allowed *only when that »public body« certifies that »public ownership of such works is not feasible.«*<sup>[FN166]</sup> In other words, the treatment plant constructed with federal funds is or becomes, in the words of the Act, »*privately owned.*« The flow of federal funds may be coursed through a »public body« but brings about a »privately owned« facility. The operation and maintenance of the facility upon construction become the responsibility of its private owner(s). We consider that the propriety of characterizing such a fact situation as »governmental procurement« or »procurement by a Party« is at least open to serious doubt. We decline, therefore to draw the inference of NAFTA-inconsistency of the Buy America requirement of the U.S. measures that the Investor requests.

170. Our findings set out in the preceding paragraphs may be economically summed up in the context of this case in the following propositions. Firstly, by virtue of Article 1108(7)(a) and (8)(b), the provisions of Articles 1102, 1103, 1106 and 1107 are not applicable in respect of procurement by a Party, whether the procurement is

carried out by an office or entity of the U.S. Federal Government or by an office or entity of the Commonwealth of Virginia. In other words, the exclusionary effect of Article 1108(7)(a) and (8)(b) operates on both federal and state governmental procurement. Secondly, by granting Federal-aid funds to the VDOT to enable the latter to construct the Springfield Interchange Project, the FHWA of the U.S. Department of Transportation did not constitute itself as the procuring entity in that Project, and did not itself engage in procurement. Thirdly, the procurement carried out by the Commonwealth of Virginia through its VDOT in the Springfield Interchange Project was not subject to the restraints imposed in NAFTA Chapter 10 because the Commonwealth of Virginia is not listed in a U.S. Schedule which has yet to be negotiated and attached to Annex 1001.1a-3; nor has VDOT voluntarily subjected itself to the restraints of Chapter 10.

171. It may be recalled that the Investor recognized that the Commonwealth of Virginia was, in the Springfield Interchange Project, engaged in governmental procurement. The Investor in fact explicitly stated that it was not complaining about the procurement by the VDOT. It appears to the Tribunal that the Investor was aware that the Commonwealth of Virginia was not subject to the disciplines of Chapter 10--including the national-treatment and non-discrimination obligations (Article 1003) and the prohibition of national content and other performance requirements (Article 1006)--and that Virginia could have enacted its own statute imposing domestic content and performance requirements in respect of steel materials or products for use in state construction projects without colliding with either NAFTA Chapter 10 or Chapter 11. The Tribunal also observes that the Investor acknowledges that the U.S. Federal Government itself had not undertaken procurement in connection with the Springfield Interchange Project.

172. Given the above circumstances, the real gravamen of the Investor's claim that the U.S. measures here at stake are in breach of Article 1106 appears to be that the Respondent had »forced« the Commonwealth of Virginia to impose and enforce the Buy America measures upon Main Contractor Shirley and Sub-Contractor ADF

International. The Investor concedes that the U.S. could, without breaching NAFTA Chapters 10 and 11, restrict the grant of Federal-aid funding to entities like the VDOT. The Investor, however, insists that the U.S. could not require VDOT to enforce those measures downstream, in the course of spending the federal funds. The Investor appears, in effect, to be contending that the Respondent was doing indirectly what it could not, consistently with Article 1106, do directly. If the Respondent, in other words, had engaged in direct *federal* procurement in respect of the Springfield Interchange Project, through the U.S. Department of Transportation, it could not have enforced the U.S. measures here in question without breaching Articles 1003 and 1006 of Chapter 10. What the Respondent did was to impose upon the VDOT the task of enforcing the Buy America provisions as a condition for the grant of Federal-aid funding to VDOT for the Springfield Project.

173. We do not find the Investor's argument persuasive. The Investor has not shown that the Commonwealth of Virginia was »forced« to adopt the Buy America measure. In the first place, so far as the evidence of record shows, Virginia chose on its own to undertake and implement the Springfield Interchange Project in view of its obvious importance for both inter-state and intrastate traffic. Thereupon, Virginia approached the FHWA for funding and assistance in designing the complex Project. In the second place, Virginia could have, as already noted, enacted its own Buy America statute and regulations identical in terms with Section 165 of the 1982 STAA and with 23 CFR 635.410, the FHWA Regulations, without violating either Chapter 10 or 11 of NAFTA. In the present case, the Commonwealth of Virginia in effect adopted and applied the U.S. measures as its own, for purposes of the Springfield Interchange Project. In fact, as noted earlier, VDOT incorporated special provision 102C into its »Road and Bridge Specifications«. Thirdly, we consider that the U.S. measures are not reasonably regarded as amounting to circumvention of the Respondent's obligations under NAFTA Chapter 10; the U.S. measures were enacted in 1982 and were in effect long before the NAFTA came into force in 1994. To the contrary, Article 1001(5)(a) appears expressly designed to separate the financing or

funding of construction or other projects from the procurement operations necessarily entailed by such projects, and thus precisely to make possible the continuation of federal government funding of state or provincial government procurement. Finally, with the deferment of negotiations between the Parties on the Schedules to be attached to Annex 1001.1a-3, state and provincial governments have simply not been brought under the procurement disciplines of Chapter 10.

174. For the foregoing reasons, the Tribunal believes, and so holds, that the Investor has not shown that the U.S. measures here in question are inconsistent with the requirements of NAFTA Article 1106.

#### **4. Article 1105(1): Minimum Standard of Treatment under Customary International Law**

##### *(a) General Considerations*

175. Before addressing the Investor's claims relating to the consistency of the U.S. measures with the requirements of NAFTA Article 1105(1), certain general aspects of those requirements and of the FTC Interpretation of 31 July 2001 may usefully be considered.

176. We begin by noting that the Free Trade Commission (FTC) created under Article 2001 consists of cabinet-level representatives of the NAFTA Parties and its mandate includes the »[resolution of] disputes that may arise regarding [the] interpretation or application of [NAFTA].« An interpretation of a NAFTA provision rendered by the FTC is under Article 1132(2) binding on this and any other Chapter 11 Tribunal.

177. We have noted that the Investor does not dispute the binding character of the FTC Interpretation of 31 July 2001. At the same time, however, the Investor urges that the Tribunal, in the course of determining the governing law of a particular dispute, is authorized to determine whether an FTC interpretation is a »true interpretation« or an »amendment.« We observe in this connection that the FTC Interpretation of 31 July 2001 expressly purports to be an interpretation of several NAFTA provisions, including Article 1105(1), and not an »amendment,« or anything else. No document purporting to be an amendment has been submitted by either the Respondent or the other NAFTA Parties. There is,

therefore, no need to embark upon an inquiry into the distinction between an »interpretation« and an »amendment« of Article 1105(1). But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement in respect of which the Parties' respective internal constitutional procedures necessary for the entry into force of the amending agreement have been taken, or an interpretation rendered by the FTC under Article 1131(2), we have the Parties themselves--all the Parties--speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible. Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an »amendment« which presumably may be disregarded until ratified by all the Parties under their respective internal law. We do not find persuasive the Investor's submission that a tribunal is impliedly authorized to do that as part of its duty to determine the governing law of a dispute. A principal difficulty with the Investor's submission is that such a theory of implied or incidental authority, fairly promptly, will tend to degrade and set at naught the binding and overriding character of FTC interpretations. Such a theory also overlooks the systemic need not only for a mechanism for correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain.

178. The FTC Interpretation of 31 July 2001 specifies that the »treatment in accordance with international law« referred to in Article 1105(1) is the minimum standard of treatment of aliens prescribed in customary international law. Thus, it clarifies that so far as the three NAFTA Parties are concerned, the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed.<sup>[FN167]</sup> It also makes clear that the grant of equality of treatment between nationals and non-nationals, or between nationals of third states, does not necessarily exhaust the international law obligations of

the host state *vis-à-vis* the home states of non-nationals. Where the treatment accorded by a State under its domestic law to its own nationals falls below the minimum standard of treatment required under customary international law, non-nationals become entitled to better treatment than that which the State accords under its domestic law.

179. In considering the meaning and implications of the 31 July 2001 FTC Interpretation, it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not »frozen in time« and that the minimum standard of treatment does evolve.<sup>[FN168]</sup> The FTC Interpretation of 31 July 2001, in the view of the United States, refers to customary international law »as it exists today.«<sup>[FN169]</sup> It is equally important to note that Canada<sup>[FN170]</sup> and Mexico<sup>[FN171]</sup> accept the view of the United States on this point even as they stress that »the threshold [for violation of that standard] remains high.« Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.

180. In the very recent Award rendered 11 October 2002 in *Mondev International Ltd. v. United States of America*,<sup>[FN172]</sup> a copy of which was forwarded to the Tribunal by the Respondent on 17 October 2002, the Tribunal made certain observations which appear to us to be both important and *à propos*:

»It has been suggested, particularly by Canada, that the meaning of those provisions in customary international law is that laid down by the Claims Commission of the inter-war years, notably that of the Mexican Claims Commission in the *Neer* case. That Commission laid down a requirement that, for there to be a breach of international law, 'the treatment of an alien ... should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insuffi-



ciency.'

*The Tribunal would observe, however that the Neer case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien.*

Moreover the *specific issue in Neer was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico.* In general, the State is not responsible for the acts of private parties, and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus *there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the Neer principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the Neer standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.*

Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, *both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms--had they been current at the time--might have meant in the 1920s when applied to the physical security of an alien.* To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, *a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.*<sup>[FN173]</sup> (Emphases added)

181. It may be added that the Claims Commission in the *Neer* case did not purport to pronounce a general standard applicable not only with respect to protection

against acts of private parties directed against the physical safety of foreigners while in the territory of a host State, but also in any and all conceivable contexts. There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State.

182. In the present case, the issue may be seen to relate to the normative structure and content of the customary international law minimum standard of treatment, pertinent to foreign investors and their investments. The Investor claims that the customary international law minimum standard of treatment includes a *general obligation* to accord »fair and equitable treatment« and »full protection and security« to investors and their investments. The Respondent appears to reject the notion that the customary international law minimum standard of treatment prescribes such a comprehensive duty upon a territorial sovereign to give »fair and equitable treatment« and »full protection and security« to aliens and their property, including in principle investors and their investments. The Respondent insists that the Investor, if it is to succeed in its claim based on NAFTA Article 1105(1), must show a violation of *a specific rule of customary international law relating to foreign investors and their investments.*

183. The Tribunal considers that the issue relating to the structure and content of the customary international law minimum standard of treatment has not been adequately litigated, and that neither the Investor nor the Respondent has been able persuasively to demonstrate the correctness of their respective contentions. We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their

current state, neither concordant state practice nor judicial or arbitral caselaw provides convincing substantiation (or, for that matter, refutation) of the Investor's position. It may also be observed in this connection that the Tribunal in *Mondev* did *not* reach the position of the Investor, while implying that the process of change is in motion:

»Thirdly, the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres inter se. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. *It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer Tribunal (in a very different context) meant in 1927.*« [FN174] (Emphases added)

184. At the same time, *Mondev* went on to say that:

»... *At the same time, Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case.* While possessing a power of appreciation, the United States stressed, the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law.« [FN175] (Emphasis added)

We understand *Mondev* to be saying--and we would respectfully agree with it--that any general requirement to accord »fair and equitable treatment« and »full protection and security« must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law.

185. The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts. It does not appear inappropriate, however, to note that it is not necessary to assume that the customary international law on the treatment of aliens and their property, including investments, is bereft of more general principles or requirements, with normative consequences, in respect of investments, derived from--in the language of *Mondev*--»established sources of [international] law.« [FN176]

186. We adopt the prudential approach of *Mondev* that, for purposes of resolving the dispute before this Tribunal, there is no need to resolve all issues raised, directly or impliedly, by one or the other party either in oral argument or in written pleadings, concerning the allegation of violation of Article 1105(1). Without expressing a view on the Investor's thesis, we ask: are the U.S. measures here involved inconsistent with a *general* customary international law standard of treatment requiring a host State to accord »fair and equitable treatment« and »full protection and security« to foreign investments in its territory?

*(b) Appraising the Investor's claim based on Article 1105(1) as Interpreted by the FTC Interpretation of 31 July 2001*

187. We recall that the Investor submitted a series of arguments to sustain its claim that the U.S. measures are inconsistent with the requirements of Article 1105(1). The arguments have tended to vary in some measure as this case proceeded on its course. We examine the principal arguments *seriatim*.

188. The first submission of the Investor is that the U.S. measures are in themselves »unfair and inequitable within the context of NAFTA.« We find this *per se* argument unconvincing. It was observed by the Respondent, and not controverted by the Investor, that domestic content and performance requirements in governmental procurement by both federal and sub-federal (state or

provincial) entities are common to all three NAFTA Parties.<sup>[FN177]</sup> It was also noted that although governmental procurement by the federal agencies or entities specifically identified and listed by the NAFTA Parties in their respective Annexes to NAFTA Chapter 10 have been subjected to the disciplines (including prohibition of domestic content and performance requirements) of Chapter 10, governmental procurement by state or provincial entities (like the Commonwealth of Virginia in the Springfield Interchange Project) has yet to be brought under those disciplines.<sup>[FN178]</sup> Finally, domestic content and performance requirements in governmental procurement are by no means limited to the NAFTA Parties. To the contrary, they are to be found in the internal legal systems or in the administrative practice of many States.<sup>[FN179]</sup> Thus, the U.S. measures cannot be characterized as idiosyncratic or aberrant and arbitrary.

189. The second submission of the Investor is that the FHWA of the U.S. Department of Transportation refused to follow and apply pre-existing caselaw in respect of ADF International in the Springfield Interchange Project, thus ignoring the Investor's legitimate expectations generated by that caselaw. We do not believe that the refusal of the FHWA to follow prior rulings, judicial or administrative is, in itself, in the circumstances of this case, grossly unfair or unreasonable. We have already noted the Respondent's explanation that the caselaw relied upon by the Investor does *not* relate to the Buy America provisions of the 1982 STAA dealing with Federal-aid construction projects of state governments (like the Springfield Interchange Project of the Commonwealth of Virginia), but rather to the Buy American provisions of the 1933 statute on direct procurement by the Federal Government, and the substantial textual differences between those two statutes.<sup>[FN180]</sup> The Investor has not, in our view, successfully rebutted that explanation; it has not explained why caselaw under the 1933 statute should be applicable in respect of the 1982 statute notwithstanding the differences between the two laws. Moreover, any expectations that the Investor had with respect to the relevancy or applicability of the caselaw it cited were not created by any misleading representations made by authorized officials

of the U.S. Federal Government but rather, it appears probable, by legal advice received by the Investor from private U.S. counsel.

190. The Investor submitted, thirdly, that the FHWA acted *ultra vires* and in disregard of the terms of the 1982 STAA. Here, the Tribunal is bound to observe that the Investor has not established a *prima facie* case for holding that, as a matter of U.S. administrative law, the FHWA had acted without or in excess of its authority under the 1982 STAA.<sup>[FN181]</sup> More important for present purposes, however, is that even had the Investor made out a *prima facie* basis for its claim, the Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under *U.S. internal administrative law*. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures.<sup>[FN182]</sup>

Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law. The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1).<sup>[FN183]</sup>

An unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity.<sup>[FN184]</sup> But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1), even under the Investor's view of that Article. That »something more« has not been shown by the Investor.

191. The fourth submission of the Investor is that the United States failed to comply with obligations under Article 1105(1) in good faith, and breached its duty under customary international law to perform its obligations in good faith. As noted earlier, the Respondent construes this submission as an assertion that customary international law prescribes »a *general* obligation of

'good faith' subsumed in Article 1105(1)« and denies that such a *general* obligation exists. We do not consider it essential to address in any detail this issue cast in terms just as abstract as the issue posed in respect of the content of »fair and equitable treatment« and »full protection and security.« An assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment. At the same time, without meaning to intimate any view on the Respondent's defense of denial, we observe that the Investor did not try to prove, for instance, that the rejection of its request for waiver of the Buy America requirements by the FHWA was flawed by arbitrariness. The Investor did not suggest that other companies, situated in like circumstances as the Investor, had been granted waivers of the same requirements by the FHWA. The Investor, again, did not allege that the specifications of the structural steel products required under its Sub-Contract with Shirley had been so finely »tailored« that only a particular U.S. steel fabrication company could comply with such specifications. Neither did the Investor allege that application of the U.S. measures had imposed extraordinary costs or other burdens on the Investor not also imposed on successful bidders for the other portions of the Springfield Interchange Project. More generally, the Investor did not establish a serious basis for contending that some specific treatment received by ADF International from either the FHWA or the VDOT constituted a denial of the fair and equitable treatment and full protection and security included in the customary international law minimum standard embodied in Article 1105(1).

192. Accordingly, the Tribunal considers that the Investor did not sustain its claim that the U.S. measures are inconsistent with the requirements of Article 1105(1).

#### **5. Article 1103: Most-Favored-Nation Treatment and the U.S.- Albania and U.S.-Estonia Bilateral Investment Treaties**

193. We have earlier noted that the Investor has invoked Article 1103 which requires each Party to accord to the investors of another Party and their investments treat-

ment no less favorable than that it accords in like circumstances, to investors of any other Party or non-Party, and their investments, with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Through the medium of Article 1103, the Investor also invokes certain provisions of the U.S.-Albania and U.S.-Estonia treaties relating to »fair and equitable treatment« and »full protection and security.«<sup>[FN185]</sup>

The Investor's theory appears to be two-fold. Firstly, the relevant provisions of the U.S.-Albania and U.S.-Estonia treaties provide for treatment to Albanian and Estonian investors and their investments in the United States that is more favorable than the treatment given to U.S. investors and their investments and (through the medium of Article 1103) to Canadian investors and their investments, in the United States. The treatment referred to by the Investor here consists of the U.S. measures involved in the present case, which measures, according to the Investor, would be inconsistent with the »fair and equitable treatment« and »full protection and security« clauses of the two treaties. Secondly, the pertinent provisions of the two treaties provide for more favorable treatment than the treatment available to the Claimant under the provisions of Article 1105(1) as interpreted in the FTC Interpretation of 31 July 2001.

194. The Investor's theory assumes the validity of its own reading of the relevant clauses of the treaties with Albania and Estonia. That reading, as observed in some detail earlier, is that the »fair and equitable treatment« and »full protection and security« clauses of the two treaties establish broad, normative standards of treatment distinct and separate from the specific requirements of the customary international law minimum standard of treatment. We have, however, already concluded that the Investor has not been able persuasively to document the existence of such autonomous standards, and that even if the Tribunal assumes hypothetically the existence thereof, the Investor has not shown that the U.S. measures are reasonably characterized as in breach of such standards.<sup>[FN186]</sup> The Investor also contends that Article II(3)(b) of the U.S.- Estonia treaty establishes, through the operation of Article 1103, an-

other »self-contained« standard of treatment prohibiting »arbitrary or discriminatory measures« impairing the operation, use and disposal of investment. Assuming, once again, the existence of this »self-contained« standard of treatment, the Tribunal does not believe that the U.S. measures here in question, in the circumstances of this case, are reasonably regarded as merely »arbitrary and discriminatory.«<sup>[FN187]</sup>

195. The Respondent rejects the Investor's reading of the »fair and equitable treatment« language in the U.S.-Albania and U.S.-Estonia treaties. Although there are textual differences between NAFTA Article 1105(1) on the one hand, and Article II(3)(a) and (b) of the U.S.-Albania and the U.S.-Estonia treaties on the other hand, the Respondent argues vigorously that the two treaties have much the same effect as Article 1105(1) of NAFTA as construed in the FTC Interpretation of 31 July 2001. The two bilateral treaties project, according to the U.S. Department of State letters transmitting them to the U.S. Senate, a »minimum standard of treatment« that is »based on customary international law (in the case of the U.S.-Estonia treaty)« or »based on standards found in customary international law (in the case of the U.S.-Albania treaty).«<sup>[FN188]</sup> The intent of one of the two State Parties to the two treaties is clearly relevant, and it does not appear necessary to engage in rigorous interpretative analysis.

196. Assuming, once more, for purposes of argument merely, that the U.S.-Albania and U.S.-Estonia treaties do provide for better treatment for Albanian and Estonian investors and their investments in the United States, than the treatment to which the Investor is entitled in the United States under NAFTA Article 1105(1), the Investor still has not thereby shown violation of Article 1103 by the Respondent. For in any event, the Respondent is entitled to the defense provided by NAFTA Article 1108(7)(a) which, as noted earlier in some detail, excludes the application of Article 1103 in a case (like the instant one) involving governmental procurement by a Party.<sup>[FN189]</sup>

197. The Investor invokes a ruling in the Decision on Objections to Jurisdiction in *Maffezini v. Kingdom of Spain*.<sup>[FN190]</sup> The *Maffezini* Tribunal had before it a

Spain-Argentina bilateral investment treaty which includes a »fair and equitable treatment clause that establishes national-treatment as the »floor« below which the treatment accorded by a State Party to investors of the other State Party shall not be allowed to fall. The *Maffezini* Tribunal held that the national-treatment clause may be understood to embrace the treatment a Government required for its investors abroad, when more favorable than the treatment granted to foreign investors in its own territory.<sup>[FN191]</sup>

We understand the Investor to be saying that the more favorable treatment accorded to U.S. investors in Albania and Estonia under the »fair and equitable treatment« clauses in their bilateral investment treaties, and to Albanian and Estonian investors in the U.S., becomes available to the Investor not only by reason of NAFTA Article 1103 (most-favored-nation clause) but also by virtue of NAFTA Article 1102 (national-treatment clause). We observe that *Maffezini* does not set out in any detail the basis for the above ruling and hence does not provide much guidance. We note also that NAFTA Article 1105(1) sets the customary international law minimum standard of treatment, and not the national treatment clause (NAFTA Article 1102) as the »floor.« But even if we were hypothetically to put aside the textual differences between NAFTA Article 1105(1) and the Spain-Argentina treaty, and *arguendo* to assume that the Investor has demonstrated the »more favorable« nature of the Albanian and Estonian treaty provisions, ultimately *Maffezini* does not advance the cause of the Investor in any appreciable way. As pointed out already, Article 1108(7)(a) renders inapplicable both Articles 1102 and 1103 in cases of »procurement by a Party.« And the instant case does involve »procurement by a Party.«

198. Accordingly, the Tribunal believes and so holds that the Investor's claim that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1103 must be denied.

#### **VI. AWARD**

199. The conclusions the Tribunal has reached may be summed up in the following terms:

(1) The Tribunal has jurisdiction to pass upon the Investor's claim that the U.S. measures in question are in-

consistent with NAFTA Article 1103.

(2) The Investor's claims concerning construction projects other than the Springfield Interchange Project have not been considered in this proceeding because they are inadmissible and are, accordingly, dismissed without prejudice.

(3) The Tribunal does not find that the U.S. measures in question are inconsistent with NAFTA Article 1102. Assuming, however, *arguendo*, that the U.S. measures are inconsistent with the provisions of Article 1102, the Respondent is, in any event, entitled to the benefit of NAFTA Article 1108(7)(a) which renders inapplicable the provisions of, *inter alia*, Article 1102 in case of procurement by a Party. Procurement by the Commonwealth of Virginia for, or in connection with, the Springfield Interchange Project, constitutes procurement by a Party within the meaning of Article 1108(7)(a). The Investor's claim concerning Article 1102 is, accordingly, denied.

(4) The Investor has shown *prima facie* that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1106(1)(b) and (c). The Respondent is, however, entitled to the benefit of NAFTA Article 1108(8)(b) which renders inapplicable the provisions of Article 1106(1)(b) and (c) in case of procurement by a Party. The Springfield Interchange Project involves procurement by the Commonwealth of Virginia, which constitutes procurement by a Party in the sense of Articles 1106(1)(b) and (c) and 1108(8)(b). The Investor's claim concerning Article 1106 is, accordingly, denied.

(5) The Tribunal does not find it necessary to resolve the issue of whether the U.S.- Albania and the U.S.-Estonia bilateral investment treaties accord treatment more favorable than the treatment available under NAFTA Article 1105(1). The Investor is not entitled to the benefits claimed under NAFTA Article 1103, which Article is inapplicable by virtue of NAFTA Article 1108(7)(a) in case of procurement by a Party. The Investor's claim concerning Article 1103 is, accordingly, denied.

(6) The Tribunal does not find that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1105(1) as construed in the FTC Interpretation of 31 July 2001, which Interpretation is binding upon the Tribunal.

200. In its Counter-Memorial, the Respondent asked the Tribunal for an order requiring the Investor to bear the costs of this proceeding, 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 by reason of this proceeding. Having regard to the circumstances of this case, including the nature and complexity of the questions raised by the disputing parties, the Tribunal believes that the costs of this proceeding should be shared on a fifty-fifty basis by the disputing parties, including the fees and expenses of the Members of the Tribunal and the expenses and charges of the Secretariat. Each party shall bear its own expenses incurred in connection with this proceeding.

Done at Washington, D.C., in English language.

FLORENTINO P. FELICIANO

*President of the Tribunal*

Date: 4 January 2003

ARMAND DEMESTRAL

*Member*

Date: 6 January 2003

CAROLYN B. LAMM

*Member*

Date: 6 January 2003

[FN1](#)<sup>1</sup> Claimant's Memorial, paras. 49-50.

[FN2](#)<sup>2</sup> Respondent's Submission, para. 7.

[FN3](#)<sup>3</sup> See Claimant's Reply at para. 17.

[FN4](#)<sup>4</sup> See Respondent's Final Observations, p. 3.

[FN5](#).<sup>5</sup> Citing Outline of Argument of Intervenor Attorney General of Canada in *Metalclad*, para. 30, Tab. 17 of Claimants Memorial, p. 12.

[FN6](#).<sup>6</sup> Respondent's Final Observations, p. 4 and footnote 2.

[FN7](#).<sup>7</sup> Claimant's Response, para. 13.

[FN8](#).<sup>8</sup> *Ethyl Corp. v. Government of Canada*, decision regarding the place of arbitration of 28 November 1997, 38 I.L.M. 700 (1999); Tab. 23 of Claimants Memorial; and *Methanex Corp. v. The United States of America*, written reasons for Tribunal's decision of 7 September on place of arbitration, 21 December 2000, U.S. Appendix, Exhibit 1.

[FN9](#).<sup>9</sup> See Counter-Memorial of Respondent United States of America on Competence and Liability, dated 29 November 2001 (Respondent's Counter-Memorial), pp. 4-7.

[FN10](#).<sup>10</sup> Order No. D30; Contract ID No. C0000054C02, Vol. I, Materials and Cases, A and B, Tab B-1, appended to Claimant's Memorial.

[FN11](#).<sup>11</sup> Respondent's Counter-Memorial, p. 8.

[FN12](#).<sup>12</sup> Para. 2 of Exhibit B of Sub-Contract, Vol. I, Materials and Cases, A and B, Tab. B-3, appended to Claimant's Memorial.

[FN13](#).<sup>13</sup> *Id.* para. 4.

[FN14](#).<sup>14</sup> *Id.* para. 5, and Unit Price Schedule.

[FN15](#).<sup>15</sup> *Id.* para. 5.

[FN16](#).<sup>16</sup> *Id.* para. 10.

[FN17](#).<sup>17</sup> Respondent's Counter-Memorial, p. 8.

[FN18](#).<sup>18</sup> Letter of Shirley to VDOT, dated 19 April 1999, Materials and Cases Vol. I--A and B, Tab. A-3, p. 1, appended to Claimant's Memorial.

[FN19](#).<sup>19</sup> Letter of C.F. Gee of VDOT, dated 28 April 1999, to M.E. Post of Shirley, *id.*, Tab. A-4, pp. 1-2.

[FN20](#).<sup>20</sup> Investor's Memorial, paras. 13-17.

[FN21](#).<sup>21</sup> Investor's Memorial, paras. 18-21

[FN22](#).<sup>22</sup> Letter of Mr. P. Paschini, ADF International, to Mr. M. E. Post, Shirley, dated 25 June 1999, pp. 3-4; Investor's Materials and Cases, Vol. I--A and B, Tab. A-7.

[FN23](#).<sup>23</sup> *Id.* pp. 4-6.

[FN24](#).<sup>24</sup> Letter of Mr. M. E. Post, Shirley, to Mr. F. Gee, VDOT, dated 29 June 1999; Investor's Materials and Cases, Vol. I--A and B, Tab. A-8.

[FN25](#).<sup>25</sup> Letter of Mr. C. F. Fee, VDOT, to Mr. M. E. Post, Shirley, dated 26 July 1999; Investor's Materials and Cases, Vol. I--A and B, Tab. A-12.

[FN26](#).<sup>26</sup> Investor's Memorial, para. 27; Respondent's Counter-Memorial, p. 13.

[FN27](#).<sup>27</sup> Exhibit 2 of the Investor's Memorial, the witness statement of Pierre Paschini at paras. 51-53.

[FN28](#).<sup>28</sup> Respondent's Counter-Memorial, p. 13.

[FN29](#).<sup>29</sup> 23 USCA sec. 101; Vol. II--Investor's Materials and Cases, A.1, Tab. A-4. The full text of Section 165 of the STAA of 1982, as currently amended, is also quoted in the Investor's Memorial, para. 47.

[FN30](#).<sup>30</sup> 23 CFR 635.410; *id.* Tab. A-7. The full text of 23 CFR 635.410, as currently amended, is also quoted in the Investor's Memorial, para. 53.

[FN31](#).<sup>31</sup> Text quoted *in extenso* in Investor's Memorial, p. 4; Material and Cases Appended to Investor's Memorial, Vol.I--A and B, Tab-B(1) excerpts from main contract containing VDOT Section 102.5; Tab B(3) Shirley/ADF subcontract, paragraph 12, incorporating Exhibit B, paragraph 4 providing that contractor acknowledges domestic content requirements of Section 102.

[FN32](#).<sup>32</sup> Investor's Memorial, para. 6; Respondent's Counter-Memorial on Competence and Liability, pp. 14-18.

[FN33](#).<sup>33</sup> In Tab B(3), Exhibit B, para. 4; *supra* note 31.

[FN34](#).<sup>34</sup> Investor's Memorial, pp. 11-14. The Investor points to the definition of »measure« in Article 201(1), NAFTA, as including »any law, regulation, procedure, requirement or practice.« It may also be noted that the Investor refers to the interpretation and application of the measures in question »in the Springfield Interchange Project in particular, or in any Federal-aid Highway Project in general.« *Id.* p. 14.

[FN35](#).<sup>35</sup> Legal Opinion dated 22 March 1999, from Emalfarb, Swan and Bain; Materials and Cases, Vol. 1-A and B, Tab 2, Annexed to Investor's Memorial. The opinion seems to have been post-dated.

[FN36](#).<sup>36</sup> Investor's Memorial, para. 120.

[FN37](#).<sup>37</sup> *Id.* paras. 127-128.

[FN38](#).<sup>38</sup> *Id.* para. 155.

[FN39](#).<sup>39</sup> *Id.* para. 157.

[FN40](#).<sup>40</sup> *Id.* para. 160.

[FN41](#).<sup>41</sup> *Id.* para. 135.

[FN42](#).<sup>42</sup> *Id.* para. 138. Article 102(1) of NAFTA sets out the objectives of NAFTA which are, *inter alia*, to:»(a) eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties;(b) promote conditions of fair competition in the free trade area; [and](c) increase substantially investment opportunities in the territories of the parties; ...«

[FN43](#).<sup>43</sup> Investor's Memorial, para. 147.

[FN44](#).<sup>44</sup> *Id.* paras. 146, 208.

[FN45](#).<sup>45</sup> *Id.* para. 162.

[FN46](#).<sup>46</sup> *Id.* para. 165.

[FN47](#).<sup>47</sup> *Id.* para. 171.

[FN48](#).<sup>48</sup> *Id.* paras. 173, 175.

[FN49](#).<sup>49</sup> *Id.* paras. 181-190.

[FN50](#).<sup>50</sup> *Id.* para. 189.

[FN51](#).<sup>51</sup> *Id.* para. 235.

[FN52](#).<sup>52</sup> *Id.* para. 238.

[FN53](#).<sup>53</sup> *Id.* para. 239.

[FN54](#).<sup>54</sup> *Id.* para. 243.

[FN55](#).<sup>55</sup> *Id.* para. 249.

[FN56](#).<sup>56</sup> *Id.*

[FN57](#).<sup>57</sup> *Id.* para. 251.

[FN58](#).<sup>58</sup> Investor's Reply to the Counter-Memorial of the United States on Competence and Liability (Investor's Reply), para. 283.

[FN59](#).<sup>59</sup> Investor's Memorial., para. 255.

[FN60](#).<sup>60</sup> Letter, dated August 3, 2001, of the Secretary of the Tribunal to the Members of the Tribunal.

[FN61](#).<sup>61</sup> Investor's Reply, paras. 248-264.

[FN62](#).<sup>62</sup> Investor's Reply, para. 221 and footnote 53 thereof.

[FN63](#).<sup>63</sup> The U.S.-Albania BIT was signed on 11 January 1995 and went into effect on 4 January 1998; text in Materials and Cases, appended to the Investor's Memorial, Vol. II--A.2; Tab. A-17.

[FN64](#).<sup>64</sup> Investor's Reply, paras. 223, 231.

[FN65](#).<sup>65</sup> The Investor also describes the »fair and equitable treatment« and »full protection and security« standards set out in Article II(3)(1) of the U.S.-Albania BIT as »self-contained«; Investor's Reply, paras. 231 and 236, citing R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, p. 60 (1995).

[FN66](#).<sup>66</sup> As quoted in Investor's Reply, 238; *see id.* para. 240. It is worth noting that Article II(3)(2) of the U.S.-Albania BIT, substantially reproducing the first



sentence of Article II(3)(b) of the U.S.-Estonia BIT, prohibits »unreasonable and discriminatory measures.«

[FN67](#).<sup>67</sup> *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/ 97/ 7; [40 I.L.M. 1129 \(2001\)](#); Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

[FN68](#).<sup>68</sup> Investor's Reply, paras. 242-247. The *Maffezini* case referred to the »national-treatment« not to the »most-favored nation-treatment« obligation.

[FN69](#).<sup>69</sup> Investor's Memorial, para. 257 *et seq.*

[FN70](#).<sup>70</sup> *Id.* para. 259.

[FN71](#).<sup>71</sup> Investor's Memorial, para. 274.

[FN72](#).<sup>72</sup> The Clean Water Act provides:»*Section 1295. Requirements for American Materials.*Notwithstanding any other provision of law, no grant--shall be made under this subchapter for any treatment works *unless only* such manufactured articles, materials and supplies as have been mined or produced in the United States, and only *such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials and supplies* mined, produced or *manufactured*, as the case may be, *in the United States will be used in such treatment works....*« (Emphases provided) Full text in Materials and Cases, vol. IIA.1, Tab. A-8, appended to Investor's Reply.

[FN73](#).<sup>73</sup> Investor's Memorial, paras. 264-267.

[FN74](#).<sup>74</sup> *Id.* paras. 292-294.

[FN75](#).<sup>75</sup> *Id.* para. 305.

[FN76](#).<sup>76</sup> *Id.* para. 308.

[FN77](#).<sup>77</sup> Investor's Memorial, para. 31. These »other Projects« are also listed in the Witness Statement of Mr. Pierre Paschini, para. 54; Appendix 1 to Investor's Memorial. In para. 55 of this same Statement, it is said that »ADF has incurred significant additional costs on those [other] Projects because of the imposition of the Buy America Measures.« *Id.*

[FN78](#).<sup>78</sup> Investor's Memorial, para. 32.

[FN79](#).<sup>79</sup> Respondent's Counter-Memorial on Competence and Liability (Counter-Memorial), p. 20.

[FN80](#).<sup>80</sup> Respondent's Counter-Memorial, p. 23.

[FN81](#).<sup>81</sup> *Id.* p. 20.

[FN82](#).<sup>82</sup> Article 1001(1). The NAFTA Parties have, in Article 1024, recorded their intent to enter into *future* negotiations for expansion of the coverage of Chapter X to include procurement by state and provincial government agencies and enterprises. See further, *infra*, paras. 163-167.

[FN83](#).<sup>83</sup> Respondent's Counter-Memorial, pp. 25-26.

[FN84](#).<sup>84</sup> Respondent's Counter-Memorial, p. 28; see North American Free Trade Agreement,--Statement of Administrative Action, p. 135, Appendix vol. II; appended to Respondent's Counter-Memorial, Tab.-32.

[FN85](#).<sup>85</sup> *Id.* p. 27; see Dept. of External Affairs, North American Free Trade Agreement, Canadian Statement on Implementation, Canada Gazette, 1 January 1994, p. 47, *id.* Tab.-24.

[FN86](#).<sup>86</sup> Stobo Declaration, Appendix of Evidentiary Materials, to Respondent's Counter-Memorial, Tab-3 at pp. 36-47; Von Wobeser Declaration, *id.* Tab-4.

[FN87](#).<sup>87</sup> *Id.* pp. 28-29; see Expert Report of Gerald H. Stobo, Appendix of Evidentiary Materials, Respondent's Counter-Memorial, Tab.-3, paras. 9-10, 25-26, 31 *et seq.* See further Expert Report of Claus von Wobeser, *id.*, Tab.-4, paras. 12, 17 *et seq.*

[FN88](#).<sup>88</sup> Respondent's Counter-Memorial, pp. 30-31.

[FN89](#).<sup>89</sup> *Id.* pp. 21, 35.

[FN90](#).<sup>90</sup> *Id.* p. 36.

[FN91](#).<sup>91</sup> *Id.* pp. 37-39.

[FN92](#).<sup>92</sup> *Id.* pp. 39-40.

[FN93](#).<sup>93</sup> *Id.* pp. 43-44.

- FN94. 94 *Id.* p. 43.
- FN95. 95 Respondent's Counter-Memorial, pp. 44-45.
- FN96. 96 *Id.* pp. 45-46.
- FN97. 97 *Id.* p. 46.
- FN98. 98 *Id.* p. 46.
- FN99. 99 Respondent's Counter-Memorial, pp. 34-35.
- FN100. 100 *Id.* p. 49.
- FN101. 101 *See supra*, para. 39.
- FN102. 102 Respondent's Counter-Memorial, p. 51.
- FN103. 103 *Id.*
- FN104. 104 *Id.* pp. 52-54; Respondent's Rejoinder, pp. 31-33.
- FN105. 105 Respondent's Rejoinder, p. 38.
- FN106. 106 *Id.* p. 39.
- FN107. 107 *Id.* p. 40.
- FN108. 108 *Id.* pp. 40-41.
- FN109. 109 *Id.* p. 42.
- FN110. 110 Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope and Talbot*, 27 June 2002 (Respondent's Post-Hearing Submission), p. 2.
- FN111. 111 *Id.* p. 3.
- FN112. 112 *Id.*
- FN113. 113 *Id.* pp. 3-4.
- FN114. 114 *Id.* pp. 10-12.
- FN115. 115 *Id.* p. 20.
- FN116. 116 *Id.* p. 21.
- FN117. 117 Post-Hearing Submission of Claimant **ADF** Group Inc. on NAFTA Article 1105(1) and the Damages **Award** in *Pope and Talbot* and Canada, 11 July 2002 (Claimant's Post-Hearing Submission), para. 9.
- FN118. 118 *Id.* para. 11.
- FN119. 119 *Id.* paras. 33-34; 39; 62.
- FN120. 120 *Id.* paras. 43-46.
- FN121. 121 *Id.* para. 86.
- FN122. 122 *Id.* para. 96.
- FN123. 123 *Id.* para. 89.
- FN124. 124 Investor's Reply to Counter-Memorial, paras. 248, 260, 263.
- FN125. 125 Final Post-Hearing Submission of Respondent United States of America on Article 105(1) and *Pope and Talbot*, 1 August 2002 (Respondent's Final Post-Hearing Submission), p. 2.
- FN126. 126 *Id.* p. 7.
- FN127. 127 *Id.* p. 11.
- FN128. 128 *Id.* pp. 12-14.
- FN129. 129 Second Post-Hearing Submission of the Investor Responding to Article 1128 Post-Hearing Submissions of Canada and Mexico, 1 August 2002 (Investor's Second Post-Hearing Submission), para. 3.
- FN130. 130 *Id.* para. 7.
- FN131. 131 *Id.* paras. 8-9.
- FN132. 132 *Id.* para. 25.
- FN133. 133 *Id.* para. 26.
- FN134. 134 *Id.* paras. 30-31.
- FN135. 135 Submission of the Government of Canada Pursuant to NAFTA Article 1128, 18 January 2002, paras. 5-7.
- FN136. 136 Second Submission of Canada Pursuant to

NAFTA Article 1128, 19 July 2002 (Second Canada Submission), paras. 8-10.

**FN137.** 137 *Id.* para. 24.

**FN138.** 138 *Id.* para. 33 »Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926. Canada's position has always been that customary international law can evolve over time, ....«

**FN139.** 139 *Id.* paras. 36-38.

**FN140.** 140 *Id.* para. 41.

**FN141.** 141 Letter signed by Mr. Hugo Perezcano Diaz, *Consultor Juridico de Negociaciones*, dated 18 January 2002, »Article 1128 Submission of the United Mexican States,« p. 1.

**FN142.** 142 *Id.* p. 3.

**FN143.** 143 *Id.* p. 4.

**FN144.** 144 Letter signed by Mr. Hugo Perezcano Diaz, *Consultor Juridico de Negociaciones*, dated 27 July 2002, »Second Article 1128 Submission of the United Mexican States in the matter of ADF Group Inc. v. United States of America,« p. 3.

**FN145.** 145 *Id.* p. 9.

**FN146.** 146 *Id.* p. 15.

**FN147.** 147 *Id.* p. 18.

**FN148.** 148 *Id.* pp. 18-19.

**FN149.** 149 *Id.* pp. 19-20.

**FN150.** 150 *Id.* p. 21.

**FN151.** 151 Note B to Article 40 of the ICSID Arbitration Rules suggests that »the test to satisfy this condition is *whether the factual connection between the original and the ancillary [i.e., incidental] claim[s] is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute*, the object being to dispose of all grounds of dispute arising

out of the same subject matter.« *ICSID Regulations and Rules With Explanatory Notes Prepared by the Secretariat of ICSID*; (1975) p. 105. (Emphases added) Article 48 of the ICSID Arbitration (Additional Facility) Rules reproduces paragraphs 1 and 2 of Article 40 of the ICSID Arbitration Rules. C.H. Schreuer, *The ICSID Convention: A Commentary* (2001) p. 738, referring to Article 46 of the Convention, writes: »This close connection is not a matter of jurisdiction. The wording of Article 46 makes it clear that the 'arising directly' requirement is in addition to jurisdiction. *A claim may well be within the Centre's jurisdiction but not arise directly from the subject matter of a particular dispute before the tribunal. An obvious example would be a claim arising from a different investment operation between the same investor and the same host state also covered by an ICSID arbitration clause...*« (para. 49). (Emphasis added) *See further, id.* p. 742, para. 62.

**FN152.** 152 *See, e.g.*, United States--Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body (AB-1998-4) (WT/DS58/AB/R) adopted 12 October 1998, para. 114; EC-Measures Concerning Meat and Meat Products (Hormones), Report of Appellate Body (AB-1997-4) (WT/DS26/AB/R; WT/DS48/AB/R) adopted 16 January 1998, paras. 181, 165.

**FN153.** 153 *Vienna Convention on the Law of Treaties*, May 23, 1969 (UN Doc A/Conf. 39/27), Articles 31, 32. *See also*, in this connection, J. R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Toronto, 1994).

**FN154.** 154 *See* Rejoinder of the U.S., p. 27.

**FN155.** 155 Rejoinder of the U.S., pp. 25-27.

**FN156.** 156 *See* letter of 8 July 1999 from the National Steel Bridge Alliance to the FHWA referred to in para. 54, *supra*.

**FN157.** 157 *See* statement of Mr. Paschini referred to in para. 55, *supra*.

**FN158.** 158 Webster's New Twentieth Century Dictionary of the English Language, Unabridged (2d Edition, 1976) p. 1435.

**FN159.**<sup>159</sup> The French text of NAFTA Article 1108(7) uses the term » *achats effectués par une Partie.*« The French text is included in Materials and Cases, Annexed to the Memorial of the Investor, Vol. IIA.1, Tab 1, p. 11-5. The Spanish text refers to » *las compras realizadas por una Parte;*« *available at* <<http://www.nafta-sec-alena.org/spanish/nafta/chap-111.htm>.

**FN160.**<sup>160</sup> Investor's Memorial, Materials and Cases Vol. I, Exhibit B(3) introductory paragraph.

**FN161.**<sup>161</sup> Text in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) p. 94. The international customary law status of the rule is recognized in, *inter alia*, Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999, p. 62 at p. 87, para. 62. See also paras. 8, 9 and 10 of the Commentary of the I.L.C., stressing that »the principle in Article 4 applies equally to organs of the central government and to those of regional or local units« (para. 8; p. 97), and that »[i]t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations.« (para. 9; p. 97).

**FN162.**<sup>162</sup> *Supra*, paras. 84-85.

**FN163.**<sup>163</sup> *Supra*, para. 101.

**FN164.**<sup>164</sup> Investor's Reply to the U.S. Counter-Memorial on Competence and Liability, paras. 140-159.

**FN165.**<sup>165</sup> The provisions of the Clean Water Act (33 U.S.C. sec. 1281[h] [1]--[3]) relied upon by the Investor reads in part as follows:»(h) A grant may be made under this section to construct a privately owned treatment plant serving one or more principal residences or small commercial establishments constructed prior to, and inhabited in December 27, 1977, where the Administrator finds that(1) a public body otherwise eligible for a grant

under subsection (g) of this sections has applied on behalf of a number of such units and certified that public ownership of such works is not feasible; ...«

**FN166.**<sup>166</sup> *Id.*

**FN167.**<sup>167</sup> J. C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 *ICSID Review--Foreign Investment Law Journal* 21 at 22-39 (2002) provides a recent survey of this debate. See also, e.g., G. Schwarzenberger, *International Law*, vol. 1 (3d edition, 1957) 200 *et. seq.* and A.V. Freeman, *The International Responsibility of States for Denial of Justice*, chaps. 17-18 (1938).

**FN168.**<sup>168</sup> Transcript of the Oral Hearing, Vol.II, 16 April 2002, pp. 492-493. Also Post-Hearing Submission of the United States, 27 June 2002, p. 20.

**FN169.**<sup>169</sup> Transcript of the Oral Hearing, Vol. II, 16 April 2002, p. 501.

**FN170.**<sup>170</sup> See Canada's Second Submission Pursuant to NAFTA Article 1128, 19 July 2002, para. 33: »Canada's position has never been that the customary international law regarding the treatment of aliens was 'frozen in amber at the time of the *Neer* decision'. Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926. Canada's position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high.«

**FN171.**<sup>171</sup> See the Second Submission of the United Mexican States in the Matter of *ADF Group Inc. v. United States of America*, 22 July 2002, p. 11. In the *Pope and Talbot* case, Mexico submitted that »[it] also agrees that the standard is relative and that conduct which may not have violated international law [in] the 1920's might very well be seen to offend internationally accepted principles today.« As quoted in the *Pope and Talbot Award on Damages*, para. 8.

**FN172.**<sup>172</sup> ICSID Case No. ARB(AF)/99/2.

**FN173.**<sup>173</sup> *Id.* paras. 114, 115 and 116.

**FN174.** 174 *Id.* para. 117. *See*, in this connection: *e.g.*, S. Vasciannie, *The Fair and Equitable Treatment Standard International Investment Law and Practice*, 70 *Brit. Yb. Int'l L.* 99 (1999); and *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements (1999) (based on manuscript prepared by S. Vasciannie); and R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, chap. 3 (1995); and J. C. Thomas, *supra*, note 167, pp. 39-51. Note may also be taken of the continuing efforts of a number of countries to achieve, during the ongoing Doha Round of trade negotiations, a general multilateral convention on the promotion and protection of foreign investment within the framework of the World Trade Organization.

**FN175.** 175 ICSID Case No. ARB(AF)99/2, para. 119.

**FN176.** 176 *Id.* Schwarzenberger, *supra*, note 167 at p. 231 makes the comment that »[i]t is arguable that the law-creating process on which [the minimum] standard [of treatment of aliens] now rests is either international customary law or *the general principles of law recognized by civilized nations*. « (Emphasis added); Bin Cheng, *General Principles of Law* (1953) stresses the organic nature of general principles of law as one of the sources of international law.

**FN177.** 177 *See supra*, para. 94.

**FN178.** 178 *See supra*, para. 168.

**FN179.** 179 *See* the materials referred to in the Respondent's Counter-Memorial, pp. 30-31.

**FN180.** 180 *See supra*, para. 99.

**FN181.** 181 The very general assertions adduced by the Investor are summarized *supra*, para. 72. The Investor appears to argue principally that the FHWA disregarded the language of Sec. 165 of the 1982 STAA in issuing the implementing regulations. It appears to the Tribunal that the Investor believes that the FHWA fell into legal error in its interpretation of Sec. 165. It seems unnecessary to add that, in any event, such error, if error there was, does not automatically translate into lack or excess of authority on the part of FHWA.

**FN182.** 182 In *Mondev*, the tribunal commented that »[o]n the approach adopted by *Mondev*, NAFTA tribunals would turn into courts of appeal, which is not their role.« *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 136. We agree also with the statement of Mexico in its Pre-Hearing Submission under Article 1128, that the Tribunal is not called upon to sit as a »court of appeals« in respect of national law; *supra*, para. 124. The same view was earlier set out in *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, para. 99:» *The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction.* This is not true generally and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty....« (Emphasis partly in original and partly added) Cf. the statement in *S. D. Myers, Inc. v. Canada* that:»[w]hen interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making....« (para. 261 of the *Myers* Award rendered under the UNCITRAL Rules) Cf. also the statement in *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB[AF]/99/1), Interim Decision on Jurisdiction, 6 December 2000, para. 61: »[T]he Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law ....« (Emphases added)

**FN183.** 183 Cf. the statements of a Chamber of the International Court of Justice in the *Case Concerning Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy) (1989) I.C.J. Rep. 4, para. 124.

**FN184.** 184 *See* Article 7 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; text in J. Crawford, *supra* note 161, p. 106.

**FN185.** 185 *Supra*, para. 77 *et seq.* The pertinent portions of the U.S.-Albania and U.S.-Estonia treaties are

quoted, *supra*, paras. 77 and 79.

[FN186](#).<sup>186</sup> *Supra*, para. 187 *et seq.*

[FN187](#).<sup>187</sup> *Supra*, *id.*

[FN188](#).<sup>188</sup> *Supra*, para. 107. *See*, in this connection, J. C. Thomas, *Reflections on Article 1105 of NAFTA*:--*supra* note 167 at p. 51 where he concludes, after a quick but comprehensive survey of treaty practice (pp. 39-51), that »[w]hile the precise wording varied, it is evidence that states propounding the negotiation of investment protection treaties saw a clear and intended link between constant (or full) protection and security and fair and equitable treatment and the international minimum standard at general international law. The former were considered to be expressions of the latter.«

[FN189](#).<sup>189</sup> *Supra*, paras. 160 *et seq.*

[FN190](#).<sup>190</sup> ICSID Case No. ARB/97/7, 25 January 2000; 40 I.L.M. 1129 (2001).

[FN191](#).<sup>191</sup> 40 I.L.M. at p. 1139:»While this clause applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter.«

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#### **Cited documents:**

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- ICSID Arbitration Additional Facility Rules, Rule 20
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### **Cited Treaties**

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- Bilateral Investment Treaty (US-Estonia), Art. II
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- ICSID Convention, Art. 36
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- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. 1
- North American Free Trade Agreement, Chapter 11
- North American Free Trade Agreement, Art. 100
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