PUBLIC VERSION

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

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

COUNTER-MEMORIAL OF RESPONDENT UNITED STATES OF AMERICA ON COMPETENCE AND LIABILITY

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

PRELIMINARY STATEMENT

This case concerns a clause in a government procurement contract for the construction of improvements to the Springfield Interchange south of Washington, D.C. (the "Springfield Interchange"), and the laws and regulations that led to the inclusion of that clause in the contract. The clause required that the steel used in the improvements be

produced entirely in the United States. The laws and regulations required that the clause be included in the contract as a condition to certain government funding for the procurement.

Claimant ADF Group Inc. ("ADF Group") contends that it and its investments (collectively, "ADF") were injured when ADF International Inc. ("ADF International"), a Florida-based subsidiary, agreed to supply steel in accordance with the specifications of the government procurement contract and was held to the terms of its agreement. It claims that the laws and regulations leading to the inclusion of the clause in the contract violate NAFTA Articles 1102, 1105(1) and 1106.

ADF's claims are without merit. *First*, ADF's claims under Articles 1102 and 1106 are barred by the government procurement exceptions in Article 1108. ADF's claims are based in their entirety on government procurement. Under the plain terms of Article 1108, Articles 1102 and 1106 "do not apply to procurement by a Party." ADF can establish no violation of either Article here.

Second, ADF's claim of a national-treatment violation under Article 1102 is without merit in any event. ADF errs fundamentally in mistaking Article 1102's obligation to provide not less favorable treatment to foreign-owned investments as compared to their U.S.-owned counterparts with an obligation to afford equivalent treatment to foreign-produced goods. Article 1102, however, addresses *investment*, not trade in goods or services. ADF International and ADF Group here were afforded precisely the same treatment as what any U.S.-owned supplier of structural steel or its U.S. owner would have received under the clause in the government procurement contract: no supplier, whether U.S.- or foreign-owned, could supply steel fabricated

abroad under the terms of the clause. ADF's national-treatment claim is thus fatally flawed.

Finally, ADF's claim based on Article 1105(1)'s requirement of "treatment in accordance with international law" fails as well. ADF's claim appears to be based in large part on the discredited theory that Article 1105(1) provides protections beyond those of customary international law. Shortly before ADF submitted its Memorial, however, the NAFTA Free Trade Commission issued a binding interpretation clarifying that the Article's obligations are co-extensive with those of the customary international law minimum standard of treatment of aliens. ADF cannot sustain a claim based on a theory rejected by the binding interpretation. And ADF does not purport to identify any rule of customary international law that is even implicated, much less violated, by the measures at issue here. It has not established, and cannot establish, a violation of Article 1105(1).

As demonstrated below, ADF's claims should be dismissed in their entirety and with prejudice.

STATEMENT OF FACTS[1]

This case arises from a provision incorporated into a government contract for the construction of improvements to the Springfield Interchange, and the federal laws and regulations conditionally requiring that provision to be included in that contract. In the statement of facts that follows, the United States first describes the Springfield

[1] ADF's Memorial is cited herein as "Mem." and the Appendix of Evidentiary Materials accompanying this Counter-Memorial is cited as "U.S. App." The United States denies the facts stated in ADF's Memorial except to the extent specifically admitted herein. *See* Arbitration (Additional Facility) Rules art. 38(3).

Interchange Project and the incorporation and application of that provision with respect to the structural steel supplied by ADF International. The United States then examines the development of federal laws and regulations providing for inclusion of the provision in the government procurement contract. It concludes this part with brief observations on the statement of facts in ADF's Memorial.

A. The Springfield Interchange Project

1. The Planned Improvements For The Interchange

The Springfield Interchange is one of the busiest and, historically, one of the most dangerous highway junctions in the United States. Located in northern Virginia some 20 kilometers south of Washington, D.C., the interchange brings together three interstate highways and an important state highway.[2] All long-haul freight and passenger traffic on I-95, the principal north-south highway artery of the east coast of the United States, must exit into the Springfield Interchange.[3] In addition, the immediate vicinity of the interchange hosts a large shopping mall and significant office and other development, adding substantial local traffic to the mix of national and regional travelers.[4]

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[2] The interstate highways are I-95, I-395 and I-495. The state highway is VA-644. *See* Statement of Claude Napier, Nov. 29, 2001, U.S. App. tab 2, ¶ 12.

[3] *Id.*

[4] *Id.*

The original design for the interchange, dating from the early 1960s, required many travelers to make frequent lane changes within a relatively short distance to reach the exit leading to their destination. As traffic congestion increased during the latter part of the century, the 1960s design created perilous conditions that resulted in frequent accidents and traffic bottlenecks.[5]

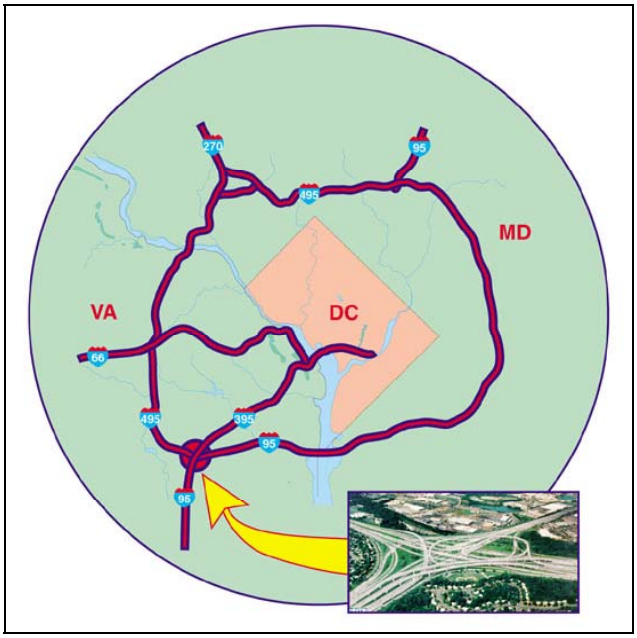

Figure 1: Location Of The Interchange

In the early 1990s, state and federal officials held a series of meetings and hearings on changing the design for the interchange. In 1998, the Commonwealth of Virginia sought and received approval from the U.S. Department of Transportation's Federal Highway Administration ("FHWA") for federal financial assistance for construction of an ambitious, multi-phase project to improve the safety and functionality of the interchange.[6]

[5] *See id.* ¶ 13 (statistical studies showed that, in the Springfield Interchange area, the accident rate exceeded 150 accidents per 100 million vehicle-miles, as compared with general accident rate in northern Virginia of 109 accidents per 100 million vehicle-miles).

[6] *See* Statement of C. Frank Gee, Nov. 29, 2001, U.S. App. tab 1, ¶ 5.

Phases II and III of the project – the phases at issue here – involved the construction of a series of improvements to the portion of the Springfield Interchange where Virginia Route 644 intersects Interstate Highway 95.

Figure 2: The Route 644 Interchange Before The Improvements

Under the design for the improvements, a number of new lanes, ramps and lane dividers were to be added to the interchange. Traffic flow was to be redirected so that travelers could select the proper lane well before reaching the interchange and, once in the interchange, dangerous lane changes would not be possible.[7]

[7] *Id.* ¶¶ 6-7.

An integral part of the design was a series of ramps in the form of long bridges that were to soar over the highways below. The bridges were to be banked and curved, to permit exiting vehicles to maintain speed while transferring from one highway to another.

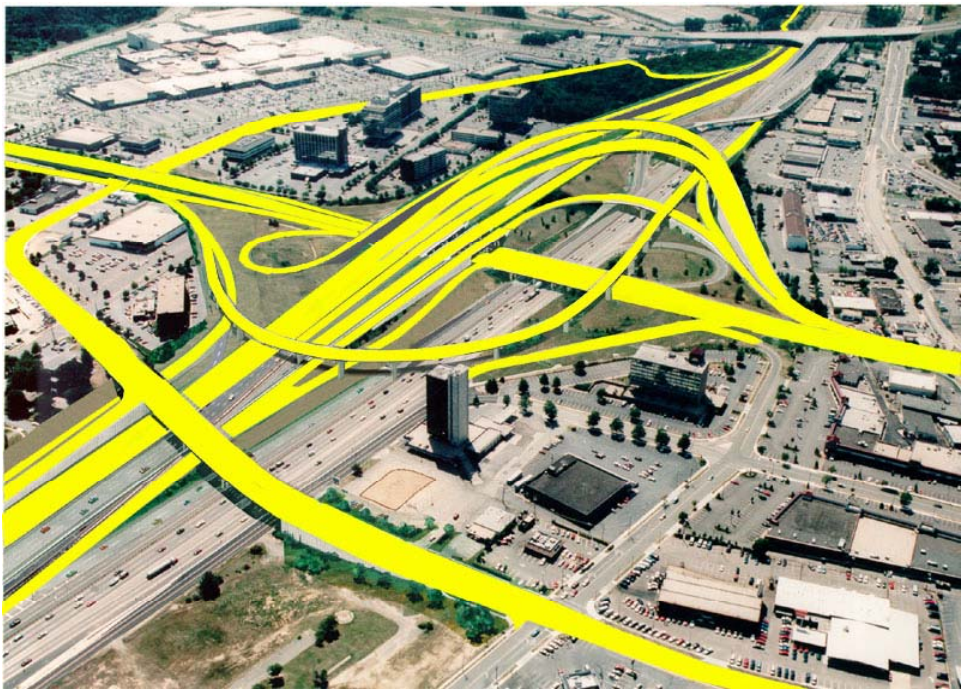

Figure 3: The Improvements To The Route 644 Interchange

These bridges required for support long, curving steel girders that were custom-built to exacting specifications. In addition, the design for the improvements called for the construction of a number of more conventional bridges. Many of these bridges also required structural steel girders for support.[8]

2. The Bid Proposals And ADF International

In September 1998, the Commonwealth of Virginia, through its Department of Transportation ("VDOT"), issued a request for bid proposals for the construction and delivery of phases II and III of the planned improvements to the Springfield Interchange

[8] *Id.* ¶¶ 8-9.

(the "Project"). The bids were opened on January 26, 1999. Shirley Contracting Corporation ("Shirley") put in the lowest bid at $90 million. Its bid proposal allocated $16.8 million for the structural steel required for the Project.[9]

Shirley, in turn, issued requests for bid proposals for a number of aspects of the Project, including structural steel girders. The lowest bid was submitted at some point in early 1999 by ADF International. That bid was for $14.3 million – some $2.5 million less than what Shirley had estimated in its 1998 bid for the Project.[10]

Structural steel fabrication for bridges principally involves the production of custom steel girders. Fabrication 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 local conditions.[11]

ADF International owns and operates a steel fabrication facility in Coral Springs. The facility offers 40,000 square feet of workspace and two overhead cranes capable of

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[9] *Id.* ¶ 10.

[10] The difference may at least in part be explained by the fact that Shirley did not subcontract to ADF all of the work relating to the structural steel, including erecting and field-painting the steel at the Project site. *See id.* ¶ 11.

lifting several tons of structural steel at a time.[12] While adequate to handle some aspects of the Project, ADF International's facility lacked the capacity to fabricate many of the structural steel elements required for the Project. Notably, the facility was not certified to produce fracture-critical structural steel, and its equipment was not able to lift the heavy girders required for much of the Project. In order to meet the terms of its bid for work on the Project, ADF International had to contract most of the work out to other facilities.[13]

3. The Shirley Procurement Contract And ADF Subcontract

VDOT entered into a contract with Shirley for the procurement of construction services for the Project on February 19, 1999 (the "Main Contract"). The Main Contract provided for the completion of the Project according to a strict schedule.[14] If Shirley substantially completed the work on or before August 18, 2001, it would be entitled to a "no excuse" incentive payment of $10 million.[15] The Main Contract incorporated the technical specifications for the work to be performed, including the nature of the structural steel required. It also included a provision entitled "Use of Domestic Material." That provision provided in pertinent part as follows:

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[11] *See* Statement of Claude Napier, Nov. 29, 2001, U.S. App. tab 2, ¶¶ 8-9.

[12] *See* ADF Group Inc., Production Capacity, U.S. App. tab 5 (stating lift capacity as 20 tons) (formerly *available at* <http://www.adfgroup.com/pages/prod.html> on Jan. 11, 2001). *But cf.* Letter from Pierre Paschini, President and Chief Operating Officer, ADF International, to Michael Post, President and CEO, Shirley (July 15, 1999), *accompanying* Mem. at Vol. I, tab 10, at 2 (stating that the lifting capacity was "----------"). By contrast, ADF Group's facilities at its Terrebonne & Laval Plants and its Lachine Plant in Quebec boasted 335,000 and 520,000 square feet of workspace, respectively, and together had 30 overhead cranes capable of lifting up to 40 tons (at the Terrebonne & Laval Plants) and 150 tons (at the Lachine Plant). *See* ADF Group Inc., Production Capacity, U.S. App. Tab 5.

TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PURSUANT TO PROCEDURAL ORDER NO. 1

[13] *See* Statement of C. Frank Gee, Nov. 29, 2001, U.S. App. tab 1, ¶ 12.

[14] *See id.* ¶ 13.

[15] Excerpts from the Main Contract between Shirley and VDOT for construction of the Springfield Interchange Project, Order No.: D30; Contract ID. No.: C00000054C02, at p. 238, *accompanying* Mem. at Vol. I, Tab B1.

> Except as otherwise specified, all iron and steel products . . . 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.[16]

On March 19, 1999, Shirley signed a subcontract with ADF International to "------ ----------.[17] The subcontract required ADF International to ---------- --------, and acknowledged that ADF International ---------- ----------.[18] The subcontract specified that --------- ---------- ---------- ----------.[19] The specifications of the Main Contract also required significant other portions of the steel to be coated. Consistent with the exacting timetable and incentive bonus in Shirley's procurement contract with VDOT, the ADF subcontract ---------- ----------."[20] The subcontract also provided that ---------- ----------

TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PURSUANT TO PROCEDURAL ORDER NO. 1

[16] *Id.* at 133.

[17] Exhibit B to Subcontract Agreement (Mar. 19, 1999) ¶ 1 at 1, *accompanying* Mem. at Vol. I, Tab B3.

[18] *Id.* ¶ 2 at 1.

[19] *Id.* ¶ 5 at 1.

[20] *Id.* ¶ 17 at 2; *accord* Subcontract ¶ 2.

TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PURSUANT TO PROCEDURAL ORDER NO. 1

---------- ADF International ----------

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4. ADF International's Performance Of The Subcontract

On March 15, 1999, Shirley informed VDOT of Shirley's designation of ADF International as its supplier of structural steel for the Project.[22] In the course of subsequent discussions with Shirley and ADF International, VDOT learned that, contrary to the terms of the Main Contract's provision on "Use of Domestic Material," ADF International intended to arrange for fabrication of the Project's steel in Canada.[23]

On April 14, 1999, VDOT informed Shirley that it would not approve of ADF International's plan to fabricate steel in Canada.[24] ADF International and Shirley requested VDOT to reconsider its decision. They presented letters and a position paper in support of their request. Representatives of ADF International and Shirley met with representatives of VDOT and the FHWA in Richmond and in Washington to explain their position. Neither VDOT nor the FHWA changed its view.[25]

On June 25, 1999, ADF International requested that Shirley seek a public-interest waiver of the "Use of Domestic Materials" provision in accordance with the regulations

TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PURSUANT TO PROCEDURAL ORDER NO. 1

[21] *Id.* Subcontract Exh. B ¶ 4 at 1 ("----------.").

[22] Letter from Jon Harman, Senior Project Manager, Shirley, to Larry Cloyed, Assistant Resident Engineer, VDOT (Mar. 15, 1999), *accompanying* Mem. at Vol. I, Tab A1.

[23] *See* Statement of C. Frank Gee, Nov. 29, 2001, U.S. App. tab 1, ¶ 16.

[24] *See id.* ¶ 17; s*ee also* Letter from Michael E. Post, President/CEO, Shirley to Frank Gee, VDOT (Apr. 19, 1999), *accompanying* Mem. at Vol. I, Tab A3 ("By fax dated April 14, 1999, VDOT rejected ADF as the structural steel subcontractor. An e-mail faxed with the rejection indicates that ADF has been rejected because of its plan to fabricate steel in Canada.").

[25] *See id.*¶ 17. *See also* Statement of Claude Napier, Nov. 29, 2001, U.S. App. tab 2, ¶ 22.

issued by the FHWA.[26] The sole reason provided by ADF International for the waiver was that "[w]e 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."[27] The request further asserted that "[w]hen measured against the value of the steel, the fabrication work in Canada is of minor importance."[28] Shirley made the request on ADF International's behalf.

After requesting and receiving further information, VDOT consulted with the FHWA and, on July 26, 1999, VDOT advised Shirley that the FHWA had denied its request for a waiver.[29] VDOT and the FHWA concluded that the facts did not support the asserted ground for the waiver – that there were no fabricators in the United States who could timely fabricate the steel according to the Project specifications.[30] VDOT's letter denying the waiver noted that the National Steel Bridge Alliance was available to assist in locating available U.S. fabricators.[31]

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[26] *See* Letter from Pierre Paschini, President and CEO, ADF International, to Michael Post, President and CEO, Shirley (June 25, 1999), *accompanying* Mem. at Vol. I, Tab A7, at 3; *see also* 23 C.F.R. 635.410(c)(1) ("A State may request a waiver if . . . (i) The application of those provisions would be inconsistent with the public interest.").

[27] *Id.*.

[28] *Id*. at 7; *see also* Letter from Pierre Paschini, President and Chief Operating Officer, ADF International, to Michael Post, President and CEO, Shirley (July 15, 1999), *accompanying* Mem. at Vol I, Tab A10, at 3 ("We want to make it clear that the work is not being shipped to Canada because of any unfair advantage enjoyed by Canada or Canadian firms. While the Canadian dollar is presently lower than the American dollar, Canadian wage rates are significantly higher than U.S. wage rates. Thus, any benefit resulting from the exchange rate differential is neutralized by the higher Canadian wage rates. The reason the work is being proposed for Canada is simply that it is the only place where the work can be performed within the time frame specified in the contract.").

[29] *See* Statement of C. Frank Gee, Nov. 29, 2001, U.S. App. tab 1, ¶ 19. *See also* Statement of Claude Napier, Nov. 29, 2001, U.S. App. tab 2, ¶¶ 26-27.

[30] *See id.*

[31] Letter from C.F. Gee, Construction Engineer, VDOT, to Michael E. Post, President/CEO, Shirley (July 26, 1999), *accompanying* Mem. at Vol. I, Tab 12, at 1; *see also* Letter from Arun M. Shirolé, Executive Director, National Steel Bridge Alliance, to Vasant Mistry, FHWA (July 8, 1999) at U.S. App. Tab 8 (noting "ample steel bridge fabrication capacity available in the U.S." and attaching a list of nearly 50

Despite its earlier doubts, ADF International succeeded in fulfilling its obligations under the subcontract using its own facilities and "sub-contracting much of the fabrication work to other U.S. fabricators."[32] Shirley substantially completed its work on the Project by August 18, 2001. As a result, VDOT has offered Shirley its $10 million incentive bonus.[33]

B. Government Procurement Restrictions In The United States

In its Memorial, ADF devotes substantial attention to the implementation and interpretation of domestic-content preferences in contracts for the procurement of highway construction services, such as the "Use of Domestic Material" clause of the Main Contract between VDOT and Shirley. The United States briefly reviews such domestic-content preferences below.

1. Overview Of Domestic-Content Preferences

The United States, like the majority of other countries, has historically mandated a number of preferences that goods procured by governmental entities be locally produced or manufactured.[34] Such preferences have been expressed in the United States in a wide

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"certified major steel bridge fabricating firms . . . a large number [of which] can effectively meet the needs of the Springfield Interchange Bypass Project.").

[32] Mem. ¶ 27.

[33] *See* Statement of C. Frank Gee, Nov. 29, 2001, U.S. App. tab 1, ¶ 20. *See also* Statement of Claude Napier, Nov. 29, 2001, U.S. App. tab 2, ¶ 29.

[34] *See, e.g.,* Paul Carrier, *Domestic Price Preferences in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement*, 10 N.Y. INT'L L. REV. 59, 67 (1997) ("The public procurement systems of virtually every country protect domestic suppliers and contractors of goods, services and construction services from external competition."); Free Trade Area of the Americas, Working Group on Government Procurement, "National Legislation, Regulations and Procedures Regarding Government Procurement in the Americas," Inter-American Development Bank (1998), *available at* <http://alca-ftaa.iadb.org/eng/gpdoc2/cove.htm>; Working Group on Government Procurement, OAS/IDB/ECLAC Tripartite Committee, "Government Procurement Rules in Integration Arrangements in the Americas," Inter-American Development Bank (1997), *available at* <http:// alca-ftaa.iadb.org/eng/gpdoc1/gp1ecov.htm>.

variety of forms, through an equally broad range of legislation and regulations issued by the federal government and by the 50 states.

At the federal level, the 1933 Buy American Act, as implemented by executive order and regulations (the "1933 Act"),[35] governs direct procurement by federal government agencies. It generally favors the purchase of domestic materials over materials of foreign origin, defined as materials in which constituent foreign products comprise more than 50 percent of the total cost.[36]

At the state level, a patchwork of state, local and federal measures apply to the procurement of goods by state and local government entities. A number of states have enacted preferences for locally produced goods similar in some respects to the 1933 Act.[37] Other states have enacted no such preferences or preferences based on different criteria.[38]

In addition, a few federal programs that provide financial assistance for specific types of state procurement mandate a limited preference for domestically produced goods as a condition to the assistance provided. Such a federal program is at issue here.

2. The 1982 Act And The FHWA Rule

The Surface Transportation Assistance Act of 1982 (the "1982 Act")[39] provided federal financial assistance to states to construct and improve the national highway

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[35] 41 U.S.C. §§ 10a-10c (1987).

[36] Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958), *reprinted in* note accompanying 41 § U.S.C. 10a-10c.

[37] *See, e.g.,* James D. Southwick, *Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57, § 42.1 (1992) (collecting state procurement statutes with national- and local-content preferences).

[38] *See id.*

[39] Pub. L. No. 97-424, 96 Stat. 2097 (1983).

system, urban and rural roads, and bridges, among other things. Federal aid with respect to a particular project is contingent, among other things, upon a state's compliance in its procurement arrangements with the 1982 Act's preference for domestic steel and iron products. Specifically, Section 165 of the 1982 Act, entitled "Buy America," provides that "the Secretary of Transportation shall not obligate any funds authorized to be appropriated . . . unless steel, iron and manufactured products used in such project are produced in the United States."[40]

The Secretary of Transportation "is authorized to prescribe and promulgate all needful rules and regulations for carrying out" the federal-aid highway program.[41] The Secretary has delegated rule-making authority in this area to the FHWA, an administration within the Department of Transportation created by Congress.[42]

In promulgating regulations to implement section 165 of the 1982 Act, the FHWA adhered to each of the three steps required under the informal rule-making procedure prescribed by the U.S. Administrative Procedures Act ("APA").[43] First, the FHWA provided the required *notice* by publishing in the *Federal Register* its proposed

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[40] *Id*. § 165(a), 96 Stat. at 2136, as amended by § 1041(a) of the *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. No. 102-240, 105 Stat. 1914 (1991) ("ISTEA").

[41] *See* 23 U.S.C. § 315.

[42] *See* 49 U.S.C. § 104(c)(2) ("The Administrator [of the FHWA] shall carry out . . . additional duties and powers prescribed by the Secretary."); *see also* 49 C.F.R. § 1.48(b)(33) (identifying FHWA as delegated authority to administer 23 U.S.C. § 315); 49 C.F.R. § 1.48(c) (identifying FHWA as delegated authority to administer "laws relating generally to highways" including "(19) The Surface Transportation Assistance Act of 1982, Pub.L. 97-424, as amended").

[43] *See* 5 U.S.C. § 553. In the United States, administrative agencies like FHWA generally operate under a statutory scheme that permits them to issue legislative rules. According to the APA, a rule is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" or to establish rules of practice. 5 U.S.C. § 551(4). A legislative rule generally applies to a general *class* of persons or situations, has "the force and effect of law" and is "rooted in a grant of power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S. Ct. 1705, 1718 (1979).

interpretation of the Buy America regulations.[44] Second, the FHWA provided interested parties with an opportunity to submit written comments on its proposal.[45] Finally, after the notice and comment period, the FHWA incorporated into its final rules a concise general statement of the rules' basis and purpose.[46]

Under United States municipal law, if the rules promulgated by the FHWA were challenged in court, its interpretation of the 1982 Act would be entitled to "great deference" from the court.[47] In reviewing an agency's interpretation of a statute, the courts will first ask whether Congress has spoken directly to the precise issue in question.[48] If it has, that is the end of the matter.[49] "But if the statute is 'silent or ambiguous' with respect to the issue, then [the courts] must defer to a 'reasonable interpretation made by the administrator of an agency.'"[50]

3. The FHWA's Buy America Requirements

Relying on the APA procedures, the FHWA has interpreted Section 165 of the 1982 Act to require in pertinent part that "[n]o Federal-aid highway construction project

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[44] *See* 5 U.S.C. § 553(b); *Contract Procedures; Buy America Requirements*, 48 Fed. Reg. 1946-47 (Jan. 17, 1983) (codified at 23 C.F.R. pt. 635), *accompanying* Mem. at Vol. IIA.1, Tab A-9.

[45] *See* 5 U.S.C. § 553(c); 48 Fed. Reg. at 1946-47.

[46] *See* 5 U.S.C. § 553(c); 23 C.F.R. pt. 635 & § 635.101 (identifying authority for promulgation of regulations in that part and stating general purpose of part); *see also Buy America Requirements*, 48 Fed. Reg. 53,099 (Nov. 25, 1983) (codified at 23 C.F.R. pt. 635), *accompanying* Mem. at Vol. IIA.1, Tab A-9 (stating that the purpose of amending the "Buy America regulation was to implement procedures required by section 165 of the [1982 Act]" and that the "amendments are based on a review of comments received in response to [the] interim final rule . . .").

[47] *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801 (1965).

[48] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), 104 S. Ct. 2778, 2792.

[49] *Id.* at 843.

[50] *Whitman v. American Trucking Associations*, 531 U.S. 457, 481, 121 S. Ct. 903, 916 (2001) (quoting *Chevron*, 467 U.S. at 844); *see also Regions Hospital v. Shalala,* 552 U.S. 448, 457, 118 S. Ct. 909, 915 (1998) (if the agency's reading of the statute is "reasonable," the court will "give that reading controlling weight, even if it is not the answer the court would have reached") (internal quotations omitted).

is to be authorized . . . unless at least one of the following requirements is met: . . . if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States."[51] Accordingly, as applied by the FHWA, to receive federal aid under these regulations, states must require contractors for the state highway construction project to use only steel materials produced entirely in the United States. The requirements apply to steel and its coatings,[52] as well as its fabrication. Consistent with legislative intent, there are few permitted exceptions to the requirements.[53]

C. Observations On ADF's Statement Of Facts

In addition to those above, the United States offers the following observations on ADF's statement of facts.

First, the witness statements offered by ADF to support most of its factual assertions are irregular on their face. Neither statement is sworn or even signed by the witness. Indeed, the record casts doubt on whether the witnesses even saw their supposed

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[51] 23 C.F.R. § 635.410(b)(2). As this rule reflects, neither the federal legislation nor legislative history indicates congressional intent to adopt a percentage-based domestic-content requirement. Indeed, Congress made clear its intention not to adopt a percentage-based general rule because it applied a lower domestic content requirement of 55 percent to procurement of a bus or other rolling stock. *See* 1982 Act, § 165(b)(3), 96 Stat. 2137 (1983).

[52] Sections 1041(a) and 1048 of the ISTEA further clarified congressional intent that the application of a coating is a manufacturing process covered under the Buy America provisions. Coating includes epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of the coated steel or iron product or component. *See, e.g., Buy America: Application to Federal-aid Highway Construction Projects*, July 24, 1997, *available at* <http://wwwcf.fhwa.dot.gov/programadmin/contracts/buyamgen.htm>. This is consistent with congressional intent. *See* 137 Cong. Rec. S7757 (statement of Sen. Packwood) ("The intent of the Buy America provisions is to ensure that only American-source products are used. . . . Epoxy coating of steel clearly falls within the Buy American provision determination because the physical form of steel rebar is changed during the epoxy coating process. . . . [A]ll this amendment does is clarify the original intent of Congress.").

[53] *See* 23 C.F.R. § 635.410(b)(3) (stating exception where lowest bid for project based on domestic steel or iron exceeds bid for project based on foreign steel or iron by 25 percent); *id*. § 635.410(b)(4) (exception for minimal use of foreign steel or iron materials); *id*. § 635.410(c) (providing for waiver of provisions in public interest).

statements before they were submitted to the Tribunal – one of the statements so consistently misspelled the witness's own name that ADF was compelled to submit a corrected (but still unsworn and unsigned) statement.[54] While the United States suspects that a consensus will ultimately emerge as to most facts concerning the Springfield Interchange Project, the record, as it currently stands, inspires little confidence in the particulars of ADF's factual assertions.

Second, ADF has offered no evidence at all to support a number of aspects of its claims. For example, it claims that ADF Group owned the steel to be fabricated for the Project (and therefore has the status of an "investor" with respect to its "investment" in the steel), but has offered no evidence to support that claim or identify when, where and from whom it acquired the steel or what it in fact did with the steel. It asserts that ADF International "is a wholly owned corporate subsidiary" of ADF Group (and therefore an "investment"),[55] but it presents no proof of ownership.

Finally, ADF provides no information to the Tribunal concerning a number of other matters that are within only its knowledge. For example, ADF begins its presentation of facts by noting "Shirley's designation [on March 15, 1999] of ADF International . . . as its structural steel fabricator." Mem. ¶ 8. However, documents ADF submitted with its Memorial make clear that ADF must have begun taking affirmative steps to secure the subcontract well before March 15, 1999. Notably, ADF must have become sufficiently familiar with the Project requirements in order to formulate the bid

[54] Letter from Stacey L. Pinchuk, Fasken Martineau DuMolin LLP, to Mr. Ucheora Onwuamaegbu, Secretary of the Tribunal, ICSID (Aug. 7, 2001).

[55] Mem. ¶ 2, n.2.

that Shirley accepted and seek legal advice on a specific question relating to the Project.[56] Yet ADF has provided no evidence or information concerning anything that took place before March 15, 1999.

STATEMENT OF THE LAW

I. ADF'S ARTICLE 1102 AND 1106 CLAIMS ARE PRECLUDED BY THE GOVERNMENT PROCUREMENT EXCEPTIONS IN ARTICLE 1108

ADF's Article 1102 and 1106 claims are foreclosed by the exceptions in Article 1108 for "procurement by a Party or a state enterprise." NAFTA art. 1108(7)(a); *id*. art. 1108(8)(b). ADF's claims of national-treatment violations and prohibited performance requirements are based in their entirety on the terms of procurement of a governmental unit of the United States with respect to steel supplied by ADF International. Under the plain text of the NAFTA, the national-treatment and performance-requirement provisions simply "do not apply" to the conduct at issue. *Id*. ADF therefore has not, and cannot, establish a violation of Articles 1102 and 1106.

ADF's assertions to the contrary (Mem. ¶¶ 285-302) cannot be reconciled with the unambiguous terms of the NAFTA, interpreted in its context and in light of its object and purpose. *First*, the purchase of steel by a governmental unit of the United States is plainly "procurement by a Party." ADF's attempt to shift the focus to instructions by another

[56] Letter and Attachment "A" from Michael E. Post, President/CEO, Shirley, to C. F. Gee, Construction Engineer, VDOT (July 19, 1999), *accompanying* Mem. at Vol. I, Tab A11 (indicating that ADF International bid for work before signing subcontract with Shirley); Letter from Hal. A. Emalfarb, Emalfarb, Swan & Bain, to Pierre Paschini, ADF International (Mar. 22, 1999), *accompanying* Mem. at Vol I, Tab A2 (letter, signed by one lawyer, consisting entirely of quotation of legal advice by unidentified "co-counsel" on question relating to the Project).

governmental unit of the United States with respect to that same procurement does not make these claims any less about procurement.

Second, the context of Article 1108's exception for "procurement by a Party" confirms that ADF's claims must be rejected. Chapter Ten, entitled "Government Procurement," makes clear that, pending the results of further negotiations, the NAFTA Parties did not intend to subject procurement by state-level governments to any of the provisions of that Chapter, including its provisions requiring national treatment and prohibiting performance requirements. The plain text of Article 1108 fully accords with this objective. The official statements of Canada and the United States accompanying the implementation of the NAFTA and the NAFTA Parties' subsequent conduct confirm this conclusion. This conclusion is also consistent with international law in this area, which has historically exempted government procurement from the application of most trade and investment agreements.

Finally, ADF's construction of Article 1108 makes no sense. ADF defies logic in suggesting that the NAFTA Parties did not intend to subject domestic-content restrictions on state-level procurement to the rules in Chapter Ten, but nonetheless intended to subject that same category of procurement to the provisions of Chapter Eleven – including the exceptional device of investor-State arbitration.

A. Under The Plain Terms Of Article 1108, ADF's Claims Are Excluded Because They Are Based On "Procurement By A Party"

As demonstrated in more detail below, ADF cannot establish a claim under Articles 1102 or 1106. NAFTA Article 1131(1) requires that Chapter Eleven tribunals "decide the issues in dispute in accordance with this Agreement and applicable rules of

international law." Article 102(2) requires the NAFTA to be interpreted "in accordance with applicable rules of international law." Thus, the NAFTA requires Chapter Eleven tribunals to apply rules of customary international law both in interpreting the NAFTA's provisions and as a rule of decision in the cases before them.

The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention").[57] Article 31(1) of the Vienna Convention sets forth the cardinal rule in construing international agreements such as the NAFTA: they must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[58] The context includes the treaty's text, its preamble and annexes and any related agreements or instruments. *Id.* art. 31(2). Consistent with Article 31, treaties must be construed to avoid unreasonable results.[59] Pursuant to Article 31(3) of the Vienna Convention, "[t]here *shall* be taken into account, together with the context: . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [and] . . . any relevant rules of international law applicable in the relations

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[57] Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter of Submittal, from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, Ex. L. 92d Cong., 1st Sess. at 1.

[58] *Accord Anglo-Iranian Oil Co.* (U.K. v. Iran), 1952 I.C.J. 93, 104 (July 22) ("[The Court] must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.").

[59] *See, e.g.*, *Polish Postal Service in Danzig*, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16) ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, *unless such interpretation would lead to something unreasonable or absurd*.") (emphasis added); 1 L. OPPENHEIM, INTERATIONAL LAW § 554(1), (3) (H. Lauterpacht ed., 8th ed. 1955) ("All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense. . . . If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable.").

between the parties." (Emphasis added.) Thus, the Tribunal must consider rules of customary and conventional international law applicable between the Parties in interpreting the NAFTA's provisions.

As demonstrated below, the ordinary meaning of the term "procurement by a Party" compels dismissal of ADF's claims of violation of Chapter Eleven's requirement of national treatment and its prohibition of performance requirements. This conclusion is supported by consideration of the term in its context.[60] It is further confirmed by a review of the NAFTA Parties' "subsequent practice in the application of the treaty"[61] and the "rules of international law applicable in the relations between the parties."[62]

1. The Ordinary Meaning Of "Procurement By A Party" Compels Dismissal Of ADF's Article 1102 And 1106 Claims

Article 1108(7) provides that "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise." Article 1108(8)(b) provides: "The provisions of 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." The term "procurement" is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party. This reading is confirmed by the French and Spanish versions of the NAFTA, which each use the generic term for "purchases" in those languages.[63]

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[60] Vienna Convention, art. 31(1).

[61] *Id.* art. 31(3)(b).

[62] *Id.* art. 31(3)(c).

[63] *See, e.g.,* NAFTA art. 1108(7) ("Les articles 1102, 1103 et 1107 ne s'appliquent pas a) aux *achats* effectués par une Partie . . .") (emphasis added), *available at* <http://www.dfait-maeci.gc.ca/nafta-alena/accord/chap-11.asp>; *id.* ("Los Artículos 1102, 1103 y 1107 no se aplican a: (a) las *compras* realizadas por una Parte . . .") (emphasis added), *available at* <http://www.nafta-sec-

The disputing parties agree that, when the Commonwealth of Virginia purchased goods and services from Shirley (which, in turn, contracted with ADF) for the construction of improvements to the Springfield Interchange, Virginia engaged in procurement. *See* Mem. ¶¶ 146, 290. There is no doubt, of course, that Virginia is one of the United States of America. Equally indisputable is that ADF's claims under Articles 1102 and 1106 hinge on Virginia's inclusion in its contract with Shirley of a provision requiring all steel products used in the Project to have been produced in the United States.[64] Indeed, it cannot be denied that, but for the inclusion of that provision in the procurement contract, there would be no government conduct of which ADF might have a basis to claim money damages under Articles 1116 and 1117.

ADF's claims, therefore, are founded on conduct that constitutes "procurement by a Party": the parties agree that the Commonwealth's conduct constitutes procurement; the Commonwealth is a governmental unit of the United States; and ADF's claims are founded on the conduct that constitutes procurement. Under the plain terms of Article 1108, the provisions of Articles 1102 and 1106 on which ADF relies "do not apply." ADF's claims under those Articles thus must fail.

2. "Procurement By A Party" Considered In Its Context Supports Dismissal Here

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alena.org/spanish/nafta/chap-111.htm>; *see also* Vienna Convention, art. 33(3) ("The terms of the treaty are presumed to have the same meaning in each authentic text.").

[64] *See, e.g.,* Mem. ¶ 42(i)-(iii) (identifying "the measures in question that are in violation of obligations contained in Section A of Chapter Eleven" as various statutes, regulations, acts, policies or practices insofar as each is "interpreted to apply or is applied to impose of enforce any *commitment or undertaking* that prohibits ADF International from using 100% U.S.-origin steel fabricated in Canada *in the Springfield Interchange Project* . . .") (emphasis added); *id.* ¶ 42(iv) (also identifying as such a measure various acts that "brought about the inclusion of Special Provision 102.05 in contracts relating to the Springfield Interchange Project . . .").

The context in which Article 1108's exceptions are stated provides further support for dismissal of ADF's claims based on Articles 1102 and 1106. Chapter Ten of the NAFTA, entitled "Government Procurement," sets forth the NAFTA's principal rules with respect to such procurement. Among other things, and as ADF acknowledges, "Chapter Ten contains its own national treatment and most favored nation obligations (Article 1003) and its own prohibition against performance requirements (Article 1006)."[65]

Not all government procurement, however, is subjected to the application of Chapter Ten. Most significantly, Chapter Ten in its current form applies only to measures relating to procurement by specified federal government entities. As in other international agreements on procurement (notably, the WTO Government Procurement Agreement), this coverage is defined in terms of the entities that conduct procurement and award government contracts, not in terms of how the government procurement is financed. Although the Chapter provides a framework for adding coverage of measures relating to procurement by state and provincial government entities, such measures are not currently subject to the application of Chapter Ten.[66]

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[65] Mem. ¶ 291; *see also* NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. I (1993) at 136 ("The general rule of Chapter Ten . . . is that the three governments must treat goods and services from another NAFTA country – and suppliers of such goods and services – 'no less favorably' than domestic goods, services and suppliers with respect to purchases by covered government entities. In addition, . . . each government is required to ensure that its entities do not consider, seek or impose 'offsets' . . . . Articles 1008 to 1016 set out a series of rules designed to ensure that procurement practices in all three countries are fair, transparent and predictable.").

[66] *See* NAFTA art. 1001(1)(a) ("This Chapter applies to measures adopted or maintained by a Party relating to procurement . . . by . . . a state or provincial government entity set out in Annex 1001.1a-3 . . . ."); *id.* annex 1001.1a-3 (annex entitled "State and Provincial Government Entities" which provides that "[c]overage under this Annex will be the subject of consultations with state and provincial governments in accordance with Article 1024."); *id.* art. 1024 (providing for continued negotiations with the goal of "further liberalization of [the NAFTA Parties'] respective government procurement markets."); *see also* Kathleen E. Troy, *NAFTA Chapter 10: New Opportunities in North American Government Procurement*

The purpose of the government procurement exception in Article 1108, considered in this context, is clear. The NAFTA Parties intended to subject only certain categories of government procurement measures to the rules providing for national treatment and the prohibition of performance requirements. The categories are defined by the type of entity that conducts a procurement, based in part on which level of government conducts the procurement. Those categories – as of today consisting only of procurement by federal government entities – were included within the scope of Chapter Ten and subjected to Articles 1003 and 1006.

The NAFTA Parties did not intend to subject other categories of procurement measures – notably, measures relating to procurement by state and provincial government entities – to those rules, and therefore did not include those categories within the scope of Chapter Ten. Consistent with these goals, Article 1108 provides an exception from those provisions in Chapter Eleven for any and all government procurement. It thereby ensures that state and provincial procurement are not subjected to any national-treatment or performance-requirement obligations, and that federal procurement is subjected only to the national-treatment and performance-requirement provisions that were drafted specifically with government procurement in mind – those in Chapter Ten.

Here, it is undisputed that the Springfield Interchange Project constituted government procurement by a state government entity.[67] That procurement, therefore, was excluded from the national-treatment and performance-requirement obligations in the

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Markets, in NORTH AMERICAN FREE TRADE AGREEMENTS COMMENTARY at 11 (James R. Holbein & Donald J. Musch eds., 1995) ("[O]ne major category of government entities that is not covered by the GATT Code, the CFTA, or NAFTA is state, provincial, and local government agencies."); Mem. ¶ 293.

[67] *See* Mem. ¶ 290 ("the activities of VDOT in purchasing construction goods and services did constitute procurement . . . .").

NAFTA by operation of the current scope of Chapter Ten and the exclusion of "procurement by a Party" in Article 1108.[68]

[68] *See, e.g.,* Mem. ¶ 293 ("no state or provincial government entity or enterprise is subject to Chapter Ten."); NAFTA art. 1108(7)(a); *id.* art. 1108(8)(b).

3. The NAFTA Parties' Subsequent Conduct And Rules Of International Law Applicable In Their Relations Support Dismissal

Contemporaneous statements made by the NAFTA Parties in implementing the NAFTA also make clear the Parties' understanding that the NAFTA does not subject domestic-content restrictions on state procurement to national-treatment or performance-requirement obligations. Canada's Statement of Implementation, published in its *Official Gazette* on the day the NAFTA entered into force, states unequivocally (albeit with some regret) that the 1982 Act's Buy America program was *not* subject to such provisions:

> While chapter ten represents a significant expansion of opportunities for Canadian suppliers of goods and services, it falls short of the comprehensive agreement sought by Canada. The Government will, therefore, continue to press its NAFTA partners to liberalize their restrictive government procurement laws and practices. In particular, the Government will use the further negotiations called for in the Agreement to negotiate Canadian access to Small Business Set-Aside programs and *transportation procurements currently restricted under Buy America Programs*. Canada considers this to be part of the unfinished agenda in the procurement negotiations, and will pursue these concerns at every opportunity.[69]

Obviously, if ADF were correct that suppliers of Canadian goods and services already had access to "transportation procurements currently restricted under Buy America Programs," Canada would have had no cause to pursue negotiations for such access "at every opportunity." The Canadian Government's understanding at the time the NAFTA

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[69] Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* CANADA GAZETTE 68, 146-47 (Jan. 1, 1994) (emphasis added); *see also* ROBERT K. PATERSON & MARTINE M.N. BAND, INTERNATIONAL TRADE & INVESTMENT LAW IN CANADA 7-21 (2d ed. 1994) ("Canada will continue to press for further liberalization, particularly by its NAFTA partners. Already on the agenda, for example, is the desire to negotiate Canadian access to Small Business Set-Aside programs *and transportation procurements that presently remain subject to U.S. 'Buy American[sic]' requirements*.") (emphasis added).

went into effect does not conform to that of ADF – for the simple reason that ADF's understanding is erroneous.

The United States' contemporaneous Statement of Administrative Action is equally clear that state-level procurement funded through federal programs like Buy America is not covered by Chapter Ten:

> The rules of Chapter Ten do not apply to certain types of purchases by the U.S. Government, among them: . . . procurements by state and local governments, *including procurements funded by federal grants, such as those made pursuant to . . . the Federal Aid Highway Act* (23 U.S.C. 101 et seq.).[70]

The NAFTA Parties' implementation of the Agreement accorded with the words of the Canadian Statement of Implementation and the United States' Statement of Administrative Action. As demonstrated in the accompanying Expert Reports of Gerald H. Stobo and Claus von Wobeser, each of the Parties continued to maintain federal assistance programs for state and provincial government procurement. For example, in Canada, the federal government provides billions of dollars to the provinces for highway construction and other infrastructure development.[71] Many of the provinces receiving that federal assistance discriminate on the basis of nationality in their procurement practices, including Ontario, for example, which maintains a 10 percent price preference for Canadian structural steel bids in provincial procurements.[72] Similarly, in Mexico, the federal Acquisitions and Public Works Laws prescribe price preferences for Mexican

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[70] NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. I (1993) at 135-36 (emphasis added).

[71] Expert Report of Gerald H. Stobo, Nov. 29, 2000, U.S. App. tab 3, ¶¶ 41-42.

[72] *Id.* ¶¶ 36-39.

goods and services.[73] Those laws apply to procurement by the states that is wholly or partially funded by the federal government.[74]

Moreover, as commentators have observed, none of the Parties appeared to consider that restrictions on such procurement would violate the Agreement:

> From the standpoint of the U.S., the NAFTA ushered in no new government procurement disciplines, and Canada needed to make relatively few changes in its procurement practices as a result of the NAFTA. . . . [C]hanges in U.S. procurement law and regulations to implement the NAFTA were relatively minor and consist mainly of lifting for Canadian and Mexican goods and services suppliers, "Buy American" requirements for U.S. government agencies and "government enterprises" subject to NAFTA Chapter 10 procurement rules.[75]

While the 1933 Act's Buy American requirements – which govern direct federal procurement – for U.S. government agencies had to be modified for Canadian and Mexican goods and service suppliers after the NAFTA was implemented, no modifications were required under the 1982 Act's Buy America requirements for state procurement since this program was not within the scope of NAFTA's coverage.[76]

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[73] Expert Report of Claus von Wobeser, Nov. 29, 2000, U.S. App. tab 4, ¶¶ 16-18.

[74] *Id.* ¶ 24(iv).

[75] Troy, *supra* note 66 at 5; *see also* Michael Hart & Pierre Sauvé, *Does Size Matter? Canadian Perspectives on the Development of Government Procurement Disciplines in North America, in* LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT 203, 212 (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997) ("This [exclusion for state-level procurement that is federally-funded from Chapter Ten] protects, for example, the ability of the federal government to promote regional development within Canada.").

[76] *See* Letter from David R. Geiger, P.E., Acting Chief, Construction & Maintenance Division, FHWA, to Mr. William F. Rogers, President, South Bay Foundry (July 15, 1994), U.S. App. Tab 7 (explaining that although some Buy American requirements under the 1933 Act were altered by the NAFTA, no Buy America requirements under the 1982 Act were impacted and that a change in the Buy America requirements would require an act of Congress); Letter from Rodney E. Slater, Administrator, FHWA, to Mr. T. Peter Ruane, President and Chief Executive Officer, American Road & Transportation Builders Assoc. (Mar. 17, 1994), U.S. App. tab 9 (explaining that changes to the 1933 Buy American Act were necessitated by NAFTA, but that the NAFTA did not affect the 1982 Buy America Act); Hart & Sauvé, *supra* note 75, at 211 ("The continuing inability of the United States to address its legislative exceptions (e.g. Buy America and Small Business set asides) ultimately precluded such an extensive [procurement] agreement [in the NAFTA]."); *see also* Memorandum from Chief, Construction & Maintenance Division Office of Highway Operations to Regional Federal Highway Administrators, Division Administrators, Federal Lands Highway Program Administrator (July 6, 1989), U.S. App. tab 10 (while the U.S.-Canada

Indeed, Canadian companies have chosen to establish a presence in the United States precisely so that they will be able to qualify for supplying certain federally-funded procurement contracts with the states.[77]

The conclusion that restrictions on state procurement are not subject to national-treatment and performance-requirement obligations is also supported by a review of the development of "relevant rules of international law applicable in the relations between the parties."[78] Historically, domestic content requirements for government procurement have been adopted in most, if not all, countries.[79] This special treatment of procurement has been used in furtherance of various social and economic policy objectives.[80] Procurement by subcentral government entities has historically been exempt even from the limited obligations imposed on central government procurement in trade agreements.[81] While the NAFTA may be credited for having opened up significant segments of procurement markets to the nationals of other NAFTA Parties, the rules governing procurement as well

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Free Trade Agreement and the Maguiladora program may affect direct federal procurement, they have no effect on federal-aid highway programs.); *id.* (Buy America unaffected by international trade agreements).

[77] *See, e.g.,* Hart & Sauvé, *supra* note 75 at 207 ("The Buy American [sic] preferences on federally funded state procurement, for example, had disposed Canadian manufacturers to establish assembly facilities in the United States (as in the celebrated decision by Bombadier, the Quebec-based transport equipment manufacturer, to locate an assembly plant in Vermont in order to qualify for a New York City subway car purchase). Exports of cement and steel for federally financed roads and bridges were virtually blocked.").

[78] Vienna Convention, art. 31(3)(c).

[79] *See* Paul Carrier, *Domestic Price Preferences in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement,* 10 N.Y. INT'L L. REV. 59, 67 (1997) ("The public procurement systems of virtually every country protect domestic suppliers and contractors of goods, services and construction services from external competition."); Troy, *supra* note 66 at 2.

[80] *See, e.g.,* PATERSON & BAND, *supra* note 69 at 7-2.

[81] *See, e.g.,* Free Trade Area of the Americas, Working Group on Government Procurement, "National Legislation, Regulations and Procedures Regarding Government Procurement in the Americas," Inter-American Development Bank (1998), *available at* <http://alca-ftaa.iadb.org/eng/gpdoc2/cove.htm>; Working Group on Government Procurement, OAS/IDB/ECLAC Tripartite Committee, "Government Procurement Rules in Integration Arrangements in the Americas," Inter-American Development Bank (1997), *available at* <http:// alca-ftaa.iadb.org/eng/gpdoc1/gp1ecov.htm>.

as the scope of entities covered by those rules are limited. In light of the historical treatment of government procurement in trade agreements, it is difficult to believe that the NAFTA Parties would have subjected procurement programs like the 1982 Act's Buy America program to obligations such as national treatment and the prohibition on performance requirements absent a clear and unequivocal expression of an intent to do so.[82] The NAFTA contains no such expression.

B. ADF's Argument That The Government Procurement Exceptions Do Not Apply Is Without Merit And Would Lead To Manifestly Unreasonable Results

ADF's three arguments that Article 1108's government procurement exceptions are inapplicable are without merit. Moreover, ADF's interpretation of the provision would violate the rule of interpretation requiring the avoidance of constructions of a treaty that lead to manifestly absurd or unreasonable results.

First, ADF's principal argument lacks substance. While conceding that one governmental unit of the United States (the Commonwealth of Virginia) was engaged in procurement, Mem. ¶ 290, it asserts that it is *not* challenging that unit's procurement practices but, rather, is challenging the instructions provided by other governmental units of the United States (the U.S. Congress and the FHWA) with respect to that same procurement. Mem. ¶¶ 146, 289. It then argues that those instructions by themselves do not constitute procurement and, therefore, its claims do not fall within the exemption for "procurement by a Party."

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[82] *See, e.g., Sambiaggio*, 10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm'n of 1903) (if the governments intended to depart from the general principles of international law, then the "agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation").

ADF's assertions are without merit. In the absence of a procurement, the 1982 Act's Buy America program would have no effect on ADF. The only way in which the 1982 Act's Buy America program affected ADF was through Virginia's inclusion of a provision approved under that program into its procurement contract with Shirley. The fact that the provision was included as a result of a program for highway construction procurement that involved give-and-take between different government units at different levels within the United States does not make the conduct at issue any less "procurement by a Party." The exclusion of "procurement by a Party" thus clearly forecloses ADF's claims under Articles 1102 and 1106.

Second, ADF's contention that "[p]rocurement is defined in Article 1001(5)"[83] to exclude restrictions attached to federal funding of state projects is erroneous. Article 1001(5)(a) provides that procurement does not include "any form of government assistance, including . . . grants . . . to . . . state, provincial and regional governments." Along with the other items listed in Article 1001(5)(a), a federal grant to a state is an example of a financial arrangement that is not, in itself, a procurement measure. Chapter Ten of the NAFTA therefore does not apply to the types of financial arrangements listed in Article 1001(5)(a).

ADF is quite correct that the federal-aid highway program provides for funding and other assistance that cannot be considered procurement under Article 1001(5)(a). That funding and assistance, however, is not at issue here: ADF does not, and cannot, complain about the federal grants that made it possible for the Project to go forward in its current form. Instead, ADF complains about the provision mandating a preference for

domestically produced materials that was required to be included in VDOT's procurement contract as a condition to receiving federal grants. That requirement is a measure relating to procurement (although not, as described above, a measure relating to procurement by a covered entity).[84] It clearly is not a grant or assistance. Article 1001(5)'s clarification that grants are not procurement does not change the conclusion that what ADF complains of here is plainly "procurement by a Party."

The WTO Agreement on Government Procurement (the "GPA"), which entered in force as between the United States and Canada in 1996, confirms this conclusion.[85] In addition to applying to federal procurement, that agreement also covers procurement by certain subfederal entities, including some states of the United States.[86] The United States negotiated an exemption for the 1982 Act's Buy America requirements in that agreement: "The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects."[87] If restrictions attached to federally-funded state procurement were not considered to be "procurement," there would have been no need for the United States to negotiate an exemption to that agreement governing procurement. In addition, the United States included this exemption in its GPA offer only because state government entities that conduct procurement subject to the FHWA Buy America restrictions were included in the offer. It was not necessary to include such a provision in

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[83] Mem. ¶ 296.

[84] *See* NAFTA art. 201 ("measure includes any law, regulation, procedure, requirement or practice").

[85] *See* Vienna Convention, art. 31(3)(c) ("There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.").

[86] *See* Interim Committee on Government Procurement, Modifications to Appendix I of the European Communities and the United States to the Agreement on Government Procurement, *available at* <http://docsonline.wto.org>, Doc. GPA/IC/10, at annex 2 .

[87] *See id.* at n.5 to annex 2.

Chapter 10 of the NAFTA because those state government entities are not included in the coverage of that Chapter.

Third, contrary to ADF's assertion, the fact that the Buy America provisions of the Clean Water Act are set out in the United States' annex to the NAFTA as a non-conforming measure maintained by a Party at the federal level that is excepted from the application of Article 1106 does not imply that Articles 1102 and 1106 extend to the 1982 Act requirements at issue here. Unlike the 1982 Act, the Clean Water Act program applied its domestic-content requirement in a context other than government procurement. It therefore required a listing in the annex as a non-conforming measure, since Article 1108's government procurement exception was narrower than the scope of that program.

The Clean Water Act authorizes the federal government to provide grants for the construction of municipal sewage or industrial waste treatment plants. As the annex makes clear, "[g]rant recipients may be privately-owned enterprises."[88] Privately-owned enterprises that receive federal funds under the Clean Water Act will not be engaged in government procurement when they purchase goods or services or contract with others to provide those goods or services. If the Clean Water Act's Buy America provisions were not listed in the United States' annex as an existing non-conforming measure, the United States could not, consistent with Article 1106, impose domestic content requirements on the privately-owned enterprises receiving those federal funds.

[88] NAFTA, Annex I, Reservations for Existing Measures and Liberalization Commitments, Schedule of the United States, *reprinted in* NAFTA TEXT 659-60 (CCH 1994).

Unlike the Clean Water Act, however, only state governments may receive funds under the 1982 Act's Buy America provisions. Those state governments will necessarily be engaged in "procurement by a Party" when they contract with companies to build highways. Their activity will therefore be excepted under Article 1108's government procurement exceptions. There was thus no need for a specific exemption for the 1982 Act's Buy America requirements to be contained in the United States' annex.

Finally, it would make no sense for state-level procurement in compliance with the 1982 Act to be exempt from national-treatment and performance-requirement obligations under the very chapter of the NAFTA that expressly governs government procurement and nonetheless be subject to challenge by an investor under Chapter Eleven. Yet, this is the result that ADF urges upon this Tribunal.

For instance, Article 1003's obligation of national treatment and non-discrimination is similar in many respects to Article 1102's obligation of national treatment. If a NAFTA Party engaged in direct federal procurement by a covered entity discriminated against the supplier of a good or service from another NAFTA Party on the basis of nationality, that behavior would constitute a violation of Article 1003. The only remedy for any such alleged violation would be resort to State-to-State dispute resolution under Chapter Twenty of the NAFTA.

If, however, the measure challenged as discriminatory was not direct federal procurement but, rather, restrictions attached to federally-funded state procurement, ADF's theory would lead to anomalous results. That measure would *not* be subject to challenge under Article 1003 because Chapter Ten only applies to measures relating to federal procurement and does not presently discipline those relating to subfederal

procurement. As ADF would have it, however, that measure *would* be subject to the national treatment obligation of Chapter Eleven and to the exceptional investor-State dispute resolution mechanism of that Chapter. Such a result is contrary to both the intent of the Parties and the NAFTA's express language.

In the final analysis, ADF may wish that government procurement by state entities was subject to the national-treatment and performance-requirement obligations in Chapter Ten, Chapter Eleven, or both. But the fact is that it is covered by neither, as the Parties clearly intended. ADF may call such policies, as well as similar policies and practices currently imposed by the other NAFTA Parties, "protectionist" and "unfair," but the United States and its NAFTA partners did not agree to alter those policies when they became Parties to the NAFTA.[89] The provisions of the NAFTA, read in context, compel denial of ADF's Article 1102 and 1106 claims on the ground that those claims are barred by Article 1108.[90]

II. ADF'S NATIONAL TREATMENT CLAIM IS BASELESS IN ANY EVENT

Even if NAFTA Chapter Eleven did not contain a national-treatment exemption for government procurement, ADF's Article 1102 claim would nonetheless fail. *First*,

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[89] *See, e.g.,* Expert Report of Gerald H. Stobo ¶ 43 (noting that the obligations on Canadian sub-central governments with respect to procurement were not altered by Canada's implementation of the NAFTA); Expert Report of Claus von Wobeser ¶¶ 9, 24(iv) (noting that Mexican laws promulgated after the NAFTA went into effect permit discrimination on the basis of nationality by sub-central governments in their procurements where the procurement is funded by the federal government).

[90] The United States respectfully submits that exceptions such as those in Articles 1108(7)(a) and 1108(8)(b), which limit the scope of application of normative obligations under the NAFTA, necessarily limit the Tribunal's competence to entertain claims based on such normative obligations. Because the disputing parties have agreed to address competence and liability together, however, the Tribunal need not determine whether such exceptions are in the nature of objections to competence or go to the merits of the claims asserted.

ADF errs fundamentally in construing the investment chapter's requirement of national treatment to apply to cross-border trade in goods and services. Contrary to ADF's contention, Article 1102 does not require special treatment for goods produced or services provided in Canada or Mexico. Article 1102 requires national treatment with respect to *investments*, not trade in goods and services: it addresses treatment as to Canadian- and Mexican-*owned* businesses and goods meeting the Chapter's definition of investments.

Second, ADF's claim that ADF International was treated less favorably than U.S.-owned structural steel fabricators is without merit. To the contrary, under the Buy America provision in the Main Contract, every steel fabricator in the United States – regardless of the nationality of its ownership – faces precisely the same constraints. None can subcontract work to fabricators outside the United States, whether closely-held or not. ADF's claim, at bottom, is not that ADF International was denied national treatment, but rather that it is entitled to *better* treatment than competing U.S.-owned investments. Its claim cannot stand.

Third, ADF Group's assertion that it was denied national treatment as an investor in its own right is equally baseless. ADF Group received precisely the same treatment under the Buy America provision in the Main Contract as would a U.S. owner of steel fabricated in Canada – neither would be permitted to use that steel in the Project. ADF Group's contention that it was denied national treatment as to its "facilities in Canada" cannot establish a violation of Article 1102. Those facilities are not investments in the territory of the Party covered by Chapter Eleven.

Finally, ADF's attempt to base a national treatment claim on decisions in cases arising under the 1933 Act – the federal direct procurement statute – also fails. Those

cases were decided under a different statutory and regulatory regime. For that reason, the investments and investors in those cases were not in "like circumstances" with ADF, as required by Article 1102. ADF's national treatment claim is baseless.

A. Chapter Eleven Governs Investment, Not Trade

Chapter Eleven of the NAFTA exclusively governs investment, and Article 1102 provides for national treatment of *investors* and their *investments*. That Article provides in pertinent part as follows (emphasis added):

> 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*.

NAFTA art. 1102(1)-(2). Thus, Article 1102's focus is on comparing treatment with respect to U.S. investors and U.S.-*owned* investments as compared to Canadian or Mexican investors and Canadian- or Mexican-owned investments that are in like circumstances. Article 1102 does not prescribe national treatment obligations with respect to Canadian- or Mexican-origin goods or services. Those areas are covered in other chapters of the NAFTA and are *not* subject to Chapter Eleven investor-State dispute resolution. The central defect in ADF's Article 1102 claim is that it fails to distinguish between *trade* and *investment*. This fundamental misconception permeates ADF's Memorial.[91]

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[91] *See, e.g.,* Mem. ¶ 147 (stating that intent of measures is to favor the *output* of U.S. enterprises over non-U.S. enterprises) (emphasis added); ¶ 149 (characterizing buy-national programs as *trade barriers*) (emphasis added).

An Article 1102 claim may only be established if investors or their investments have been denied national treatment with respect to investments in the territory of the Party. Here, both U.S.-owned companies and ADF were subject to the same obligation to fabricate steel in the United States. That the Buy America provisions favor U.S. *goods* over foreign *goods* is, by itself, immaterial. ADF's claim that the measures discriminate against Canadian steel in favor of U.S. steel thus does not constitute a violation of Article 1102.

B. ADF's Investment Was Not Denied National Treatment Under Article 1102(2)

There is no dispute that the measures at issue here on their face apply to all investors and investments, regardless of nationality.[92] Specifically, the contract provision at issue requires that all steel used in the Project must be produced, fabricated and coated in the United States. This requirement applies equally to both U.S. and foreign investors and U.S.-owned and foreign-owned investments. Thus, a U.S.-owned supplier of steel to the Project would similarly be prohibited from supplying steel fabricated outside of the United States. To the extent that fabrication costs are less outside of the United States, any increased costs associated with complying with the Main Contract's provisions apply to U.S. and U.S.-owned investors and investments as well as to ADF International.

Thus, ADF's claim that its investment, ADF International, has been denied national treatment because the measures "limit [ADF International's] ability to import fabricated steel and put ADF International at a competitive disadvantage vi[s]-à-vis domestic fabricators," Mem. ¶ 171, is without merit. *No* entity selling steel for use in the

[92] *See* Mem. ¶ 207 ("the Buy America provisions are applicable to all" entities regardless of nationality of ownership).

Project – whether U.S.-owned or foreign-owned – is permitted to use steel fabricated outside of the United States. ADF's claim urges not that it be accorded the same treatment as U.S.-owned steel fabricators, but that it be accorded *better* treatment – that it be granted a right to subcontract fabrication work outside the United States that its competitors do not have. That, however, is not a national treatment claim and it is not cognizable under Article 1102.

Similarly, ADF's errs in suggesting that "[o]nly ADF International faces the choices of either expanding its U.S. facility, subcontracting work to its competitors or abandoning significant contract opportunities." Mem. ¶ 173. Every U.S.-owned steel fabricator whose facilities were small and lacked the fracture-critical certifications necessary to meet the Project specifications would have faced precisely the same choices. Because the contract provision applies equally to all investors and investments regardless of the nationality of their ownership, there is no national treatment violation here.

The above analysis, the United States respectfully submits, disposes of ADF's Article 1102(2) claim as a matter of law. The United States nonetheless notes that, in any event, ADF has not established that the Buy America provision impacted ADF International in a manner less favorable than U.S. investments in like circumstances. At the time ADF was seeking a waiver from the Buy America requirements, it contended that the sole reason it was seeking a waiver was because there was insufficient capacity in the United States to fabricate the steel in the time required by the contract. Thus, in a letter dated July 15, 1999, from ADF Group's president and chief operating officer and ADF International's president, Pierre Paschini, to the president and chief

executive officer of Shirley providing information in response to a letter from VDOT, ADF stated:

> We want to make it clear that the work is not being [proposed to be] shipped to Canada because of any unfair advantage enjoyed by Canada or Canadian firms. While the Canadian dollar is presently lower than the American dollar, Canadian wage rates are significantly higher than U.S. wage rates. Thus, any benefit resulting from the exchange rate differential is neutralized by the higher Canadian wage rates. *The reason the work is being proposed for Canada is simply that it is the only place where the work can be performed within the time frame specified in the contract.*[93]

As is now clear, ADF's concern proved to be unfounded: ADF International was able to supply the steel to the Project in the time specified by the contract.[94] On this record, ADF's unsupported allegation of disparate impact cannot establish the "less favorable" treatment required for a violation of Article 1102.[95]

C. ADF Group Has Not Been Denied National Treatment Under Article 1102(1)

ADF's claims that ADF Group was denied national treatment fare no better. *First*, ADF alleges that ADF Group was denied national treatment "with respect to the sale of its investment which consisted of U.S. origin steel," and which ADF Group "proposed to fabricate in Canada and sell to ADF International."[96] Although ADF has

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[93] ADF's Mem at Vol. I, Tab A-10; at 3 (emphasis added).

[94] *See supra* note 32 and accompanying text.

[95] ADF may find it convenient to make one set of representations concerning the impact of the Buy America provisions to Virginia and another set of representations to this Tribunal. International law, however, does not countenance such behavior. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-49 (1987); *S.S. "Lisman"(U.S. v. Gr. Brit.)*, 3 R.I.A.A. 1769, 1790 (Special Agreement May 19, 1927) (finding claimant could not recover on grounds that British detention of vessel was unlawful, because claimant had affirmed the lawfulness of such detention before the British Prize Court and only complained there of undue delay).

[96] Mem. ¶ 160.

failed to show that it made an "investment" in U.S.-origin steel,[97] its claim is baseless regardless of where it purchased steel for the Project. ADF has not shown, and cannot show, that it received treatment with respect to that steel that was any different from what a U.S. owner of such steel would have received. No investor, whether U.S. or foreign-owned could have, consistent with the contract's requirements, fabricated the steel outside of the United States and then supplied it for use in the Project.

Moreover, to the extent that ADF's claim is that ADF Group was denied national treatment with respect to steel it purchased in Canada, that claim also fails. Steel in Canada belonging to ADF Group, whatever its origin, is not an investment that implicates NAFTA Chapter Eleven. Chapter Eleven "applies to measures adopted or maintained by a Party relating to . . . investments of investors of another Party *in the territory of the Party*." NAFTA art. 1101(1)(b) (emphasis added). Steel owned by a Canadian in Canada is therefore not an investment covered by Chapter Eleven.

Second, there is no merit to ADF's assertion that the "measure negatively impacts [ADF Group] 'with respect to the . . . expansion[,] management[,] conduct and operation' of the Investment ADF International by denying ADF International access to the full range of goods and services produced by its parent corporation, the Investor ADF Group." Mem. ¶ 164. Contrary to ADF's contention, nothing in Article 1102 guarantees an

[97] Mem. ¶ 161; *see also id.* ¶ 159 ("[ADF Group] purchased steel from Bethlehem Steel in order to fulfill the Shirley/ADF Sub-Contract. That steel was therefore an investment of the Investor."). ADF has failed to submit any evidence to support its allegation that ADF Group purchased steel from Bethlehem Steel with the expectation that it would sell that steel to ADF International for use in the Project. The record is devoid of any proof that ADF Group in fact owned such steel, when it was acquired, from whom, where it was acquired, where it was stored, whether it was in fact in some way segregated from other inventory and earmarked for the Project and what its ultimate disposition, if any, may have been. Aside from reflecting a complete failure of ADF's burden of proof, the absence of any support for these allegations concerning the steel renders it difficult to address ADF's unsupported claims of discriminatory treatment under Article 1102.

"ability to freely transfer goods and services between the parent corporation and its subsidiary." Mem. ¶ 165. Also incorrect is ADF's assertion that Article 1102 prohibits a NAFTA Party from restricting an investor's management, conduct or operation of its investment. *See id.* Rather, Article 1102 prohibits a NAFTA Party from adopting such measures only to the extent that its own nationals and the investments of its nationals in like circumstances with foreign investors and investments are accorded treatment that is more favorable. As set forth above, ADF was accorded treatment no less favorable than that accorded to U.S. investors in like circumstances. ADF's national treatment claim thus fails.

Finally, ADF errs in claiming that it "was prohibited from [fabricating steel in Canada and selling it to ADF International] because *its facilities in Canada* were treated less favorably than any like facilities in the United States." Mem. ¶ 160 (emphasis added). ADF's facilities in Canada are neither an "investor" nor an "investment" within Chapter Eleven. ADF's facility in Canada is not an "investor"; that facility has not made, is not making and does not seek to make an investment in the United States. *See* NAFTA art. 1139 (defining "investor"). Nor is that facility an "investment" within the scope of Chapter Eleven. Chapter Eleven covers only those investments of an investor of another Party that are made in the territory of the Party that has adopted or maintained the measure being challenged by the investor – in this case, the United States.[98] Because ADF's facilities in Canada are neither an investor nor an investment as defined by the NAFTA, those facilities cannot be the subject of an Article 1102 national treatment violation.

D. The Case Law Cited By ADF Does Not Support Its Claims

ADF's allegation that it was denied national treatment by the purported failure of the United States to "follow constant case law" is groundless. *See* Mem. ¶¶ 181-190. The cases cited by ADF all concern the interpretation of the 1933 Buy American Act, a direct federal procurement statute not at issue in this case. Those cases do not, and cannot, establish less favorable treatment than that accorded U.S. investors and investments *in like circumstances* with ADF, as required by Article 1102. This is so for several reasons.

First, the 1933 Act applies in the direct federal procurement context, while the Buy America provisions of the 1982 Act relate only to federally-funded state procurement for highway projects.[99] As noted in Part I of this Counter-Memorial, central and subcentral government procurement have historically been subject to different legal regimes.[100] Investors and investments engaged in procurement contracts with subcentral government entities are not in like circumstances with those engaged in such contracts with central government entities.

Second, the statutory regime applicable to direct federal procurement is materially different from that applicable to federally-funded state highway procurement. The 1933 Act applicable to direct federal procurement requires that construction contracts include a provision requiring use only of "such manufactured *articles, materials and supplies* as

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[98] *See* NAFTA art. 1101(1)(b).

[99] *See Buy America: Application to Federal-aid Highway Construction Projects,* July 24, 1997, *available at* <http:// wwwcf.fhwa.dot.gov.program> (distinguishing between the two domestic-content requirements); *accord* Buy American and Highway Projects, *available at* <http://www.canadianembassy.org/english/business/library/highway.asp>.

[100] *See supra* note 81 and accompanying text.

have been manufactured in the United States *substantially all* from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States . . ."[101] The direct procurement statute thus on its face places emphasis on a substantial percentage of the raw materials and components used being mined, produced or manufactured in the United States. By contrast, the 1982 Act's provision applicable to federally-funded state highway procurement provides that "the Secretary of Transportation shall not obligate any funds authorized to be appropriated . . . unless steel, cement, and manufactured *products* used in such project are produced in the United States."[102] By its use of the word "product" and its failure to suggest that a substantial percentage of production in the United States could suffice, the 1982 Act places emphasis on production of the *finished product* in the United States.

Third, the regulatory regime applicable in the two contexts is materially different. The executive order implementing the direct federal procurement statute provides that "materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials."[103] By contrast, the regulations implementing the 1982 Act's Buy America provision provide that "[n]o Federal-aid highway construction project is to be authorized . . . unless at least one of the following requirements is met: . . . if steel or iron

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[101] 41 U.S.C. § 10b(a) (1933) (emphasis added).

[102] Surface Transportation Assistance Act of 1982, § 165, Pub. L. No. 97-424 as amended (emphasis added).

[103] Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958), *reprinted in* 41 § U.S.C. 10a-10c.

materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States."[104]

ADF therefore cannot establish – nor does it even attempt to establish – that the claimants in the cases it cites are in like circumstances with it or ADF International. Its claim under Article 1102 based on the cases it cites therefore must fail.

In addition, it is undisputed that the FHWA has consistently interpreted the standard in the 1982 Act to require that all manufacturing activities, including "rolling, extruding, machining, bending, grinding, drilling and coating" must take place in the United States.[105] It is also undisputed that the FHWA so interpreted the regulation in its dealings with ADF. ADF therefore cannot establish – nor has it attempted to establish – that it was accorded treatment less favorable than any investor or investment in like

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[104] 23 C.F.R. § 635.410(b) (2001).

[105] *See, e.g.,* Study Report, FEDERAL HIGHWAY ADMINISTRATION'S OVERSIGHT OF THE BUY AMERICA PROGRAM as required by Section 359(c) of the NHS Designation Act of 1995 at 2-3 (Nov. 1996) at U.S. App. tab 11 ("All foreign steel and iron materials are covered by Buy America requirements regardless of the percentage they comprise in the manufactured product or the form they take. The manufacturing process for steel or iron materials is considered complete when all grinding, drilling, and finishing of the steel or iron material has been accomplished. . . . All manufacturing processes involved in the production of steel or iron material products (*i.e.*, smelting or any subsequent process which alters the material's physical form, shape, or chemical composition) must occur within the United States to be considered of 'domestic origin.' These processes include rolling, extruding, machining, bending, grinding, drilling and coating."); *id.* at 5-6 ("[W]hile Federal-aid regulations [1982 Act] would require a steel plate girder to be made of 100 percent domestic steel; the same girder under Federal procurement [1933 Act] could be made of up to 50 percent [by value of the plates] foreign steel."); Memorandum from Chief, Construction & Maintenance Division, Office of Highway Operations, FHWA to Regional Federal Highway Administrators, Division Administrators, Federal Lands Highway Program Administrator (July 6, 1989) at U.S. App. tab 10 (compliance with Buy America Act requires that processes such as grinding, drilling, and rolling must be completed in the United States); CONTRACT ADMINISTRATION CORE CURRICULUM PARTICIPANT'S MANUAL AND REFERENCE GUIDE (1997) at U.S. App. tab 6 ("All manufacturing processes involved in the production of steel or iron material products (i.e., smelting or any subsequent process which alters the material's physical form, shape, or chemical composition) must occur within the U.S. to be considered of 'domestic origin.' These processes include rolling, extruding, machining, bending, grinding, drilling and coating."); *Buy America: Application to Federal-aid Highway Construction Projects* (July 24, 1997), *available at* <http://wwwcf.fhwa.dot.gov/programadmin/contracts/buyamgen.htm> ("'Manufactured in the United States' means that all manufacturing processes starting with the initial mixing and melting through the final shaping and coating processes must be undertaken in the United States.").

circumstances with it (*i.e.*, those investors and investments supplying steel to a federally-funded state project governed by the same statutory and regulatory regime).

Finally, ADF's reliance for support on the award in *S.D. Myers v. Canada* is misplaced, as the reasoning of that tribunal was flawed in certain respects essential to ADF's argument here.[106] A brief review of the *S.D. Myers* decision reveals the flaw common to ADF's claims here.

S.D. Myers, Inc. an Ohio corporation that remediates PCB waste, was found by the tribunal to be an investor. The tribunal also found that Myers Canada, Inc., a Canadian corporation that provided marketing services, was an investment. The tribunal, in accordance with Article 1102, should have compared the treatment with respect to investments accorded to Myers Canada and S.D. Myers with that accorded to companies that were in like circumstances with each of them. Presumably, given the nature of the measure in that case, those companies would have been Canadian-owned companies engaged in the marketing of PCB services and their Canadian owners, respectively.

Instead, the *S.D. Myers* tribunal found S.D. Myers and Myers Canada Inc. to be in like circumstances with Canadian companies engaged in the business of providing PCB waste remediation services. *S.D. Myers v. Canada* at ¶ 251. Myers Canada, however, was not in the business of remediating PCB waste; it was in the business of marketing such services. It was thus not in like circumstances with companies that remediated PCB waste. S.D. Myers, the U.S. investor, was in the business of remediating PCB waste. While the measure at issue prevented S.D. Myers from importing PCB waste from

[106] The United States expresses no opinion here as to whether, on the facts of that case, an Article 1102 violation could nonetheless be found on a proper analysis under that Article. Nor does the United States

Canada to remediate at S.D. Myers' plant in the United States, it did not restrict S.D. Myers' ability to make investments in Canada, including investments in companies that marketed or provided PCB remediation services in Canada. This treatment of S.D. Myers, therefore, was not "treatment . . . with respect to . . . investments," as required to implicate Article 1102. Rather, the measure related to S.D. Myers' provision of its own services in the United States to customers in Canada.

So too here. The Main Contract's provisions do not impact ADF International's ability to fabricate steel in the United States or to supply such steel: there are no such restrictions. And ADF Group's inability to fabricate steel for the Project in Canada is not "treatment . . . with respect to . . . investments." ADF's claim under Article 1102 is without merit.

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

ADF's claim of a violation of Article 1105(1)'s requirement of "treatment in accordance with international law" is without support. *First*, ADF's claim appears to be based entirely on the view that Article 1105(1) announces a new, conventional standard of treatment unknown to customary international law. Shortly before ADF submitted its Memorial, however, the NAFTA Free Trade Commission made clear that the standards incorporated into Article 1105(1) are those of the customary international law minimum standard of treatment of aliens. ADF's claims cannot stand to the extent they are contrary

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express any view here as to whether the flaw in the tribunal's reasoning compels a grant of the relief requested in the proceeding to set aside the award that is pending in the court in Canada.

to the Commission's interpretation, which is binding in these proceedings by virtue of NAFTA Article 1131(2).

Second, ADF fails to identify any rule of customary international law incorporated into Article 1105(1) that is implicated by the measures at issue. ADF therefore has failed to carry its burden of demonstrating a violation of the Article's requirement of "treatment in accordance with international law."

A. The Free Trade Commission's Binding Interpretation Rejects ADF's Reading Of Article 1105(1)

ADF's claim under Article 1105(1) appears to be based entirely on a view of the Article as prescribing a subjective and intuitive standard unknown to customary international law. In its Memorial, ADF states that "every NAFTA Chapter Eleven arbitration decided to date [has included] a discussion of the scope and meaning of Article 1105." Mem. ¶ 212. Reviewing this "discussion," ADF directs this Tribunal's attention to the decision in *Pope & Talbot v. Canada*, which suggested that NAFTA Article 1105(1) incorporates not only the customary international law minimum standard of treatment of aliens, but also certain undefined, subjective "fairness elements." Mem. ¶ 214. Notwithstanding ADF's acknowledgment of the decision of the British Columbia Supreme Court in *Metalclad* rejecting *Pope & Talbot*'s approach, *see* Mem. ¶ 217, ADF argues that the British Columbia Supreme Court erred in its conclusion that "the reference to 'principles of international law' in Article 1105 is a reference to 'customary international law.'" Mem. ¶ 218. ADF asserts that Article 1105 "contemplates *separate* obligations of 'fair and equitable treatment' and 'full protection and security,'" *id*. ¶ 226 (emphasis added), that cannot be construed as "mere examples of the meager protection

provided under 'customary international law.'" *Id*. ¶ 238.

The Free Trade Commission's interpretation, however, has conclusively resolved the "discussion" to which ADF refers regarding the scope and meaning of Article 1105. As the Tribunal is aware, on July 31, 2001, the Free Trade Commission, established under NAFTA Article 2001, issued a binding interpretation of NAFTA Article 1105(1). Contrary to ADF's argument that the British Columbia Supreme Court erred, the Commission confirmed 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." FTC Interpretation of July 31, 2001 ¶ B(1). Also contrary to ADF's suggestion, "[t]he 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." *Id*. ¶ B(2). In addition, the interpretation made clear that "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)." *Id.* ¶ B(3). The Free Trade Commission's interpretation is binding on this and other NAFTA Chapter Eleven tribunals. *See* NAFTA art. 1131(2).

In short, ADF is wrong in suggesting that Article 1105 "applies to *any* treatment that is not in itself 'fair' and 'equitable.'" Mem. ¶ 243 (emphasis in original). To the contrary, to prevail on its Article 1105 claim, ADF must demonstrate that the challenged measures violate a specific rule of customary international law. This, ADF cannot do.

B. There Is No Principle Of Customary International Law Implicated Under The Circumstances Presented Here

Without explanation and absent citation to any authority, ADF asserts that "the relevant statutory and regulatory provisions and administrative decisions and conduct that have been applied to the Investment in this case have become a means to deny 'fair' and 'equitable' treatment with 'full protection' and 'security.'" Mem. ¶ 254. ADF's three-fold contention is unsupported.

First, ADF errs in complaining that "the Buy America provision of section 165 of the STAA is *per se* unfair and inequitable within the context of the NAFTA." Mem. ¶ 249. ADF, however, has not (and cannot) identify any rule of customary international law prohibiting the United States from imposing domestic-content restrictions on government procurement.[107] To the contrary, State practice conclusively refutes the existence of any such rule.

Second, ADF errs in complaining that the statute "also does not give to the FHWA sufficient indication as to how decisions must be reached," concluding that the "provision does not accord *full* protection and security because it delivers investors into the hands of the FHWA which applies the law as it sees fit." Mem. ¶ 249 (emphasis in original). ADF, however, does not identify any rule of customary international law that is implicated by the *process* by which the FHWA adopted its long-standing rule that the 1982 Act's provisions require that all manufacturing processes used to produce a steel

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[107] *See supra* Part I(A)(3) at 26; *see also* Paul Carrier, *Domestic Price Preferences in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement*, 10 N.Y. INT'L L. REV. 59, 67 (1997) ("The public procurement systems of virtually every country protect domestic suppliers and contractors of goods, services and construction services from external competition."); Kathleen E. Troy, *NAFTA Chapter 10: New Opportunities In North American Government Procurement Markets* at 2, in NORTH AMERICAN FREE TRADE AGREEMENTS COMMENTARY (James R. Holbein & Donald J. Musch eds. 1995) ("Public sector procurement historically has been a well-protected market in most, if not all countries.").

product, including fabrication, take place in the United States.[108] ADF does not identify any such rule because there is none. Customary international law does not address the processes by which States prescribe laws, rules or regulations of general application. Indeed, the variety of legislative and administrative procedures for issuing rules of general application is so great – involving democratic States and authoritarian States, parliamentary States and presidential States, federal States and centralized States – that no general international consensus on what is a fair process has emerged or even been proposed. ADF's complaint concerning the process by which the rule was adopted is without merit.

Finally, ADF errs in claiming that "[w]ith respect to the *application* of the 'buy national' policy," the FHWA "appl[ied] the Party's measures . . . arbitrarily [to defeat] unfairly and inequitably [ADF's] legitimate expectations . . . with respect to 'buy national' policies." Mem. ¶ 251 (emphasis in the original). Again, without citing any authority, ADF concludes that the treatment that it was accorded by the FHWA was "neither fair nor equitable nor, in the manner in which the measures are applied, does this afford full protection and security." *Id*. ¶ 252. ADF complains in particular of the arbitrary application of "new rules," but is unclear as to which "new rules" it refers.[109]

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[108] *See, e.g., Buy America: Application to Federal-aid Highway Construction Projects*, July 24, 1997 ("All Federal-aid construction projects . . . require that all steel and iron materials used in the project be manufactured in the United States. 'Manufactured in the United States' means that all manufacturing processes starting with the inital mixing and melting through the final shaping and coating processes must be undertaken in the United States."), *available at* <http://wwwcf.fhwa.dot.gov/programadmin/contracts/buyamgen.htm>; *Quick facts about "Buy America" requirements for Federal-aid highway construction* (23 CFR 635.410) (undated) ("All manufacturing processes must take place domestically. . . . If a domestic product is taken out of the U.S. for any process, it becomes foreign source material.").

[109] ADF states, "[b]y imposing new rules on to others that which the United States hitherto applied to itself, there entails a radical and arbitrary shift in the law that defeats its reasonable stability and predictability . . . ." Mem. at ¶ 253.

Again, ADF fails to identify any customary international law obligation barring the FHWA from applying the statute as it sees fit.

Moreover, to the extent that ADF's use of the term "new rules" is a reference to FHWA's regulations implementing the 1982 Act's Buy America provisions, as compared to the regulations promulgated under the 1933 Act applicable to direct federal procurement, ADF's claim of arbitrariness is without merit. That the United States applies different domestic content rules pursuant to other distinct statutory schemes does not make the FHWA's regulations at issue here "new," much less arbitrary. The cases ADF cites concerning the application of the 1933 Act's Buy American regulations are irrelevant. As set out above in Part II(D), the statutory schemes under the 1933 and 1982 Acts differ. The 1933 Act allows some foreign content by requiring that "substantially all" of the components incorporated into a manufactured construction material must be mined or produced in the United States. By contrast, the 1982 Act at issue here requires that all production of steel materials take place in the United States.[110] In any event, ADF has identified no customary international law obligation implicated by the FHWA's actions, and the United States is aware of no such obligation. Moreover, the evidence before this Tribunal belies ADF's claim that the FHWA imposed "new rules" and acted arbitrarily. As demonstrated above, the FHWA has consistently applied its regulations to require that all manufacturing processes, including fabrication, take place in the United

[110] *See supra* notes 101-104 and accompanying text (comparing the domestic-content provisions of the 1933 and 1982 Acts).

States.[111] ADF has offered no evidence to the contrary. FHWA's application of its regulations therefore was in no sense either "new" or "arbitrary."

For the reasons set out above, none of ADF's complaints regarding the challenged measures is cognizable under the customary international law obligations incorporated into Article 1105(1). This Tribunal should reject ADF's Article 1105 claim in its entirety.

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

ADF's claims with respect to "other projects involving Buy America," advanced for the first time in its Memorial (¶¶ 30-33), are not within the scope of the dispute submitted to arbitration under the NAFTA and the Additional Facility Rules. The United States' consent to arbitration was limited to claims submitted "to arbitration *in accordance with the procedures set out in this Agreement*."[112] ADF's claims with respect to projects other than the Springfield Interchange Project were not so submitted.

Pursuant to Article 1119, a disputing Party is entitled to receive, and an investor "shall deliver," written, advance notice of its intent to submit a claim to arbitration, "which notice shall *specify*: . . . (c) the issues and the factual basis for the claim . . . ." (Emphasis added). In its presentation of the factual basis for the claim, ADF made no reference – much less the requisite specific reference – to any project other than the Springfield Interchange Project.[113] No claims based on any such other projects, therefore,

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[111] *See supra* note 105 and accompanying text.

[112] NAFTA art. 1122(1) (emphasis added).

[113] *See* Notice of Intent to Submit a Claim to Arbitration ¶¶ 3-28 (Feb. 29, 2000).

could be submitted to arbitration in accordance with the NAFTA's procedures, as required for such claims to fall within the United States' consent.[114]

Because the claims with respect to any project other than the Springfield Interchange Project are not "within the scope of the arbitration agreement of the parties," these claims cannot be admitted as incidental or additional claims.[115] This Tribunal therefore has no jurisdiction over ADF's claims based on the Lorten Bridge Project, the Brooklyn Queens Expressway Project, the Queens Bridge Project or any project other than that for improvements to the Springfield Interchange.

[114] *See* NAFTA art. 1122(1).

[115] Arbitration (Additional Facility) Rules art. 48(1).

CONCLUSION AND SUBMISSIONS

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

Respectfully submitted,

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