TO: **International Centre for Settlement of Investment Disputes (ICSID)**
1818 H Street, N.W.
Washington, DC
U.S.A.
20422

BETWEEN:

ADF GROUP INC.

INVESTOR

AND

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

PARTY

NOTICE OF ARBITRATION

SERVICE ACCEPTED IN OFFICIAL CAPACITY ONLY
Robert J. McCammon
EXECUTIVE DIRECTOR 7-21-00
OFFICE OF THE LEGAL ADVISER

TRUE COPY

Fasken Martineau DuMoulin LLP

FASKEN MARTINEAU DuMOULIN LLP

Index

Tab

Notice of Arbitration. 1

A. Notice that the Dispute be Referred to Arbitration ..... p. 3

B. Precise Designation of Each Party and Address ..... p. 3

C. Reference to the Relevant Provisions Embodying the Agreement of the Parties to Refer the Dispute to Arbitration ..... p. 4

D. Indication of the Date of Approval by the Secretary General of the Agreement of the Parties Providing for Access to the Additional Facility ..... p. 5

E. Issues in Dispute and Indication of the Amount Involved..... p. 5

I. Legal Provisions..... p. 5

II. Nature of the Claim..... p. 7

III. Breach of Chapter 11 Obligations by the Party ..... p. 14

National Treatment Obligations ..... p. 16

The Minimum Standard of Treatment Obligation ..... p. 18

The Obligation not to Impose or Enforce Performance Requirements ..... p. 19

F. Issues ..... p. 20

G. Quantum of Damages ..... p. 21

H. Relief Sought ..... p. 22

I. Appointment of Arbitrators ..... p. 22

J. Statement of Claim ..... p. 23

K. Condition Precedent ..... p. 23

Tab

Letter of waiver of ADF Group Inc. 2

Letter of waiver of ADF International Inc. 3

Exhibit ADF-1:
Notice of Intention to submit a claim to arbitration
under NAFTA Articles 1116, 1117 and 1119, dated February 29th, 2000,
with certificate of service dated March 1st, 2000. 4

Exhibit ADF-2A:
Power of attorney of ADF Group Inc. 5

Exhibit ADF-2B:
Power of attorney of ADF International Inc. 6

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NOTICE OF ARBITRATION

NOTICE OF ARBITRATION
UNDER THE *ARBITRATION (ADDITIONAL FACILTY) RULES* OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND SECTION B OF CHAPTER 11 OF *THE NORTH AMERICAN FREE TRADE AGREEMENT*

ADF GROUP INC.

Investor

v.

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Party

1. Pursuant to Articles 2 and 3 of the *Arbitration (Additional Facility) Rules* of the International Centre for Settlement of Investment Disputes and Articles 1116, 1117, 1120(1)(b) and 1137(1)(b) of *The North American Free Trade Agreement* ("NAFTA")[1], the disputing investor, **ADF Group Inc.** (or the "Investor"), being an enterprise of Canada, hereby serves a notice of arbitration (the "Notice of Arbitration") on its own behalf and on behalf of **ADF International Inc.** (or the "Investment"), being an enterprise of the United States of America, for breaches of obligations undertaken by the Government of the United States of America (or the "United States" or the "Party") under NAFTA.

[1] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America*, December 17, 1992, Can.T.S., 1994, No. 2 (entered into force January 1, 1994).

A. NOTICE THAT THE DISPUTE BE REFERRED TO ARBITRATION

2. Pursuant to Articles 2 and 3 of the *Arbitration (Additional Facility) Rules* of the International Centre for Settlement of Investment Disputes (the "ICSID Additional Facility Rules" or the "ICSID-AFR"), being Schedule C to the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)* (the "Administrative ICSID-AFR") – see Article 6 of the Administrative ICSID-AFR - and Articles 1120(1)(b) and 1137(1)(b) of Section B of Chapter 11 of NAFTA, the Investor hereby serves notice requesting that the dispute between the parties be referred to arbitration under the ICSID-AFR, to the extent modified by Section B of Chapter 11 of NAFTA, as specified by Article 1120(2) of NAFTA and as contemplated by Article 1 of the ICSID-AFR.

3. As more fully appears from the recital of facts set out below, the parties have already attempted to settle – to no avail - their differences through prior consultation and negotiation, pursuant to Article 1118 of NAFTA.

4. Written notice of its intention to submit a claim to arbitration (the "Notice of Intent") at least ninety (90) days before the claim is submitted has already been served by the Investor on the Party pursuant to Article 1119 of NAFTA, the more as fully appears from the Notice of Intent, with evidence of service, attached hereto as exhibit **ADF-1** and incorporated by reference as if fully recited at length.

5. As more fully appears from the recital of facts set out below, six (6) months since the events giving rise to the Investor's claim have elapsed, thus allowing the Investor to submit at this time its Notice of Arbitration pursuant to, and under the authority of, Section B of Chapter 11 of NAFTA (Article 1120(1)) and the ICSID-AFR.

6. As more fully appears from the recital of facts set out below, not more than three (3) years have elapsed from the date on which the Investor and the Investment first acquired, or should have acquired, knowledge of the Party's breach of the obligations provided in Section A of Chapter 11 of NAFTA, and knowledge that the Investor and the Investment have incurred loss and damage by reason of, or arising out of, that breach (Articles 1116(2) and 1117(2)).

B. PRECISE DESIGNATION OF EACH PARTY AND ADDRESS

7. Pursuant to Article 3(1)(a) of the ICSID-AFR, the Investor designates precisely each party to the dispute and states the address of each:

INVESTOR:

ADF GROUP INC.
300 Henry-Bessemer
Terrebonne (Québec)
Canada, J6Y 1T3

ADDRESS FOR SERVICE :

Mtre PETER E. KIRBY
Tel: 514-397-4385
E-mail: pkirby@mtl.fasken.com

- or -

Mtre RENÉ CADIEUX
Tel: 514-397-7591
E-mail: rcadieux@mtl.fasken.com

Fasken Martineau DuMoulin LLP
Stock Exchange Tower
Suite 3400
800 Place-Victoria
Montréal (Québec)
Canada
H4Z 1E9
Fax: 514-397-7600

PARTY:

The Government of the United States of America

Executive Director[2]
Office of the Legal Advisor
United States Department of State
Room 5519
2201 C. Street, N.W.
Washington D.C.
USA
20520

C. REFERENCE TO THE RELEVANT PROVISIONS EMBODYING THE AGREEMENT OF THE PARTIES TO REFER THE DISPUTE TO ARBITRATION

8. Pursuant to Article 3(1)(b) of the ICSID-AFR, the Investor refers to Section B of Chapter 11 of NAFTA, more particularly Articles 1116, 1117, 1120 and 1122 of NAFTA, as authority for arbitration. Article 1122(1) of NAFTA provides in this respect that the Party consents to the submission of a claim to arbitration in accordance with the procedures set out in NAFTA and

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2 Service to be effectuated at this address pursuant to Article 1137(2) and Annex 1137.2 of NAFTA.

Article 1122(2)(a) provides that the consent given by paragraph 1 of Article 1122 and the submission by the disputing investor of a claim to arbitration shall satisfy the requirement of the Additional Facility Rules of the *Convention on the Settlement of Investment Disputes*[3] as defined by Article 1139 of NAFTA (definition of "*ICSID Convention*"), for written consent of the parties. The United States is a party to the *ICSID Convention*[4] and has thus, in effect, given advance consent to arbitration under NAFTA.

D. INDICATION OF THE DATE OF APPROVAL BY THE SECRETARY GENERAL OF THE AGREEMENT OF THE PARTIES PROVIDING FOR ACCESS TO THE ADDITIONAL FACILTY

9. The dispute involves measures adopted and maintained by the United States relating to the Investor's activities as well as those of its Investment, more particularly as those activities are injured, directly or indirectly, by design or by effect, by the United States' measures, the Investor and the Investment incurring loss and damage by reason of, or arising out of, such measures.

10. The Investor claims that the Party's measures breach the United Sates' obligations under Section A of Chapter 11 of NAFTA and that the Investor is entitled to invoke this Section against the Party in arbitration proceedings, as set out in Section B of Chapter 11 of NAFTA, in its own behalf (Article 1116) and on behalf of the Investment (Article 1117). Article 1122(2)(a) of NAFTA provides that the consent provided by paragraph 1 of Article 1122 and the submission by a disputing investor of a claim to arbitration shall satisfy the ICSID-AFR. By now submitting the Notice of Arbitration, the Investor seeks confirmation – *de bene esse* - of the approval of the Secretary General under Article 3(1)(c) of the ICSID-AFR and Article 4 of the Administrative ICSID-AFR. For the purposes of the Notice of Arbitration, the Investor will assume for now and until further notice that the approval of the Secretary General has already impliedly been given under Article 4(5) of the Administrative ICSID-AFR.

E. ISSUES IN DISPUTE AND INDICATION OF THE AMOUNT INVOLVED

I. Legal Provisions

11. The Investor alleges that, as a Party to NAFTA, the Government of the United States has breached its substantive obligations under Section A of Chapter 11 of NAFTA, in particular, but without limitation, the following obligations provided for in Articles 1102, 1105 and 1106 which run, in their relevant parts for the purposes of the proceedings, as follows:

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3 The "*ICSID Convention*".

4 Signature: August 27, 1965; Deposit of Ratification: June 10, 1966; Entry into Force of Convention: October 14, 1966. See: "http://www.worldbank.org/icsid/constate/c-states-en.htm" as at the date of the Notice of Arbitration. Canada and Mexico are not a party to the *ICSID Convention*, *Id.*

"Article 1102: National Treatment

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

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

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

"Article 1105: Minimum Standard of Treatment

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

2. (...).

(...)".

and

"Article 1106: Performance Requirements

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

(a) (...);

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

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

2. (...).

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

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

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory; (...).

(...)."[5]

II. Nature of the Claim

12. The **Investor**, ADF Group Inc. (or "ADF Group"), is incorporated under the laws of Canada and began operations in 1956. The **Investment**, ADF International Inc. (or "ADF International"), is a corporation organised under the laws of Florida, having its head office in Coral Springs, Florida. ADF International is a wholly-owned subsidiary of ADF Group[6].

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5 The Investor has quoted the English version of Articles 1102, 1105 and 1106 of NAFTA. Under Article 2206 of NAFTA, the English, French and Spanish texts of NAFTA are equally authentic. Under Article 33(1) of the *Vienna Convention on the Law of Treaties* (Done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331; the "*Vienna Convention*"), "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language". The Investor informs that it will also rely, if and when relevant, on the French and Spanish versions of NAFTA and that the use of the English version of NAFTA by the Investor in its pleadings or elsewhere should not to be interpreted as meaning that the Investor necessarily and invariably accords preference to the English version of NAFTA or that it otherwise waives its right to rely, when appropriate, on the other versions of the treaty (see: Article 33(4) of the *Vienna Convention*).

6 "Investor of a Party" is defined in Article 1139 of NAFTA as:

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

"Enterprise" is then defined in Article 201(1) of NAFTA as:

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

"Investment" is defined in Article 1139 of NAFTA as being, *inter alia*:

> "**Investment** means:
>
> (a) an enterprise;
>
> (...);
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests *arising from* the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

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

14. Early in 1999, Shirley Contracting Corporation ("Shirley") concluded a contract[7] (the "Main Contract") with the Virginia Department of Transport ("V-DOT") for the construction of certain highways at the Springfield Interchange (the "Springfield Interchange Project"). The main Contract provides (at p. 3) that it "shall be construed in accordance with: the plans; the *Virginia Department of Transportation Metric Road and Bridge Specifications*, dated January 1997 (...)" (the "*V-DOT's Specifications*").

15. In March, 1999, ADF International signed a sub-contract agreement with Shirley (the "Shirley/ADF Sub-Contract") in respect of the Springfield Interchange Project. The Main Contract contained a "Buy America" clause, Special Provision 102.05, which was incorporated by reference into the Shirley/ADF Sub-Contract[8]. Special Provision 102.05 runs as follows:

> (i) contracts involving the presence of an investor's property in the territory of the party, including turnkey or constructions contracts, or concessions, or
>
> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
>
> (...)."

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

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

As a result of the above, ADF Group ("Investor of a Party") is entitled to claim on behalf of its Investment under Article 1117 of NAFTA since ADF International ("Investment") is a wholly owned corporate subsidiary ("enterprise") that is controlled directly by ADF Group (as "an investment of an investor of a Party"). Under Article 1117(4), an investment may not make a claim under Section B of Chapter 11 of NAFTA.

7 Order No.: D30; Contract ID. No.: C00000054C02.

8 Section 12 of the Shirley/ADF Sub-Contract incorporates by reference Exhibit B attached thereto. Section 4 of Exhibit B indicates in turn that the subcontractor acknowledges Section 102C of the Special Provisions, which in turn refers to Special Provision section 102.05.

ORDER NO.: D30
CONTRACT ID. NO.: C00000054C02

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

May 3, 1995 c
Reissued January 1, 1997

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

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

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

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

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

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

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

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

17. The Springfield Interchange Project is a Federal-aid highway construction project, the funding for which is purportedly granted under the *Transportation Equity Act for the 21st Century* ("Tea 21"), adopted by the Congress of the United States[11]. Funding for such projects is contingent upon the recipient State complying with the numerous requirements of the Federal Highway Administration, including the FHWAR.

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

19. On March 15, 1999, in accordance with, *inter alia*, *V-DOT's Specifications* 407- "Steel Structures"[12] as well as *V-DOT's Specifications* 106.01 -"Source of Supply and Quality Requirements"[13] and 106.10 –"Unacceptable Materials"[14], Shirley informed V-DOT of Shirley's designation of ADF International to act on Shirley's behalf in matters relating to structural steel as its structural steel fabricator for the Springfield Interchange Project and, in April, 1999, Shirley informed V-DOT that ADF International was proposing to perform the Shirley / ADF Sub-contract by using 100% U.S.-produced steel and by subsequently performing certain fabrication work on that U.S.-produced steel in Canada. No fundamental changes would brought to the US-steel.

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9 Title 23 - Highways Chapter I - Federal Highway Administration, Department of Transportation - Subchapter G - Engineering and Traffic Operations - Part 635 - Construction and Maintenance - Subpart D - General Material Requirements (23 CFR, Part 635, Section 410).

10 Section 165 of the STAA (1982), Pub.L.97-424, 96 Stat. 2097, 2136, as amended in its relevant parts for the purposes of the proceedings in 1984 by section 10, Pub. L. 98-229 and section 1048(a), Pub. L. 102-240 in 1991.

11 Pub. L.105-178.

12 "This work shall consist of furnishing, fabricating and erecting steel materials in accordance with these specifications (...)".

13 "The materials used throughout the work shall conform to the requirements of the Contract. (...). (...), the Contractor shall file a statement of the origin, composition, and manufacture of all materials to be used in the work, including optional and alternate items."

14 "Materials that do not conform to the specifications shall be considered unacceptable."

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

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

> "ADF intends to use only steel produced in the United States. Such steel will be transformed from iron ore into finished steel products in the Unites States. This assures the protection of U.S. steel mills contemplated by the FHWA regulations and Section 102.05. (...).
>
> ADF proposes to perform in Canada cutting, welding, punching/reaming holes, and milling on steel product produced in the United States. The fabricated U.S.-origin steel product which has been subjected to these processes will then be shipped to the construction site and will be used in construction of the I-95 Springfield Interchange.
>
> (...)
>
> (...). What is at issue here is the specific protection of U.S. steel mills in the production of finished steel and ADF will meet that requirement by providing finished steel produced in the United States. (...)." [Emphasis added].

22. On April 28, 1999, V-DOT informed Shirley that:

> "Based on the Department's, the Attorney General's, and the Federal Highway Administrations interpretation, Special Provision for Section 102.05 and 23 CFR 635.410 refers to all manufacturing processes involved in the production of steel or iron manufactured products. This means smelting or any subsequent process that alters the materials physical form, shape, or chemical composition. These processes include rolling, extruding, machining, bending, grinding, drilling, and the application of various types of coating.
>
> The manufacturing process is not considered complete until all grinding, drilling, and finishing of steel or iron material has been accomplished. As proposed, the additional processes that are to be performed in Canada are necessary to turn steel into a product suitable to be installed in the project. As such, they fall under the aforementioned provision and are not allowable under this contract." [Emphasis added].

23. In June, 1999, representatives of Shirley and ADF International met with representatives of V-DOT and the Federal Highway Administration at V-DOT's offices in Richmond, Virginia. The representatives of V-DOT explained that they took guidance and direction from the Federal Highway Administration (or the "FHA") on all matters involving the interpretation and application of Buy America provisions as they applied to Federal-aid highway construction projects, including Special Provision 102.05 and 23 CFR 635.410 and that V-DOT was not in a position to change the interpretation of, or the administrative policy relating to, the contract provision. V-DOT officials stated that the authority to interpret the contract provision or to amend the administrative policy that relates to it rested exclusively with the FHA.

24. The representatives of the FHA, also present at the meeting, confirmed the V-DOT officials' statements as to which agency exercised real authority in matters of Buy America,

ating that the governing interpretation was that of the FHA and that the FHA had the authority › make all decisions in respect of the application of Buy America in the present contract. The ›presentatives of the FHA reiterated the position of the FHA as reflected in its various ublications on the subject of Buy America, namely that if any work was performed in Canada n U.S.-origin steel, then that steel would no longer qualify as U.S. steel for the purposes of Buy ›merica.

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

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

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

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

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

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

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

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

and that:

> "From a local perspective, some 375,000 vehicles use the Springfield Interchange daily. Each day, delays in the Interchange cause hundreds of thousands of dollars in lost productivity. (...).
>
> The Interchange straddles one of the most important North-South arteries in the country and represents one of the costliest burdens to interstate commerce. By choking the North-South movement of goods, the interchange imposes a costly burden on all businesses operating in interstate commerce.
>
> (...).
>
> In the present case, the steel used will be 100% U.S. steel, only fabrication work will occur in Canada. When measured against the value of the steel, the fabrication work performed in Canada is of minor importance." [Emphasis added].

31. On June 29, 1999, Shirley wrote to V-DOT seeking a waiver, stressing in turn that:

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

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

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

34. By letter dated July 26, 1999, V-DOT informed Shirley that the request for a waiver had been denied, there being "no basis" to grant such a waiver, which information was relayed in turn by Shirley to ADF International by letter dated July 30, 1999.

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

36. On March 1, 2000, the Investor served on the Party a Notice of Intention to Submit a claim to Arbitration under Articles 1116, 1117 and 1119 of NAFTA, the more as fully appears from the Notice of Intent, with evidence of service, attached hereto as exhibit **ADF-1** and incorporated by reference as if fully recited at length.

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

III. Breach of Chapter 11 Obligations by The Party

38. Chapter 11 of NAFTA applies, according to Article 1101, as follows:

> **"Article 1101: Scope and Coverage**
>
> 1. This Chapter applies to *measures* adopted or *maintained* by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, *all* investments in the territory of the Party.
>
> 2. (...).
>
> (...)." [Emphasis added]

39. The term "measure" is defined in turn in Article 201(1) of NAFTA as follows:

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

40. As a prefatory matter, the Investor intends to submit at arbitration that the obligations contained in Section A of Chapter 11 of NAFTA can be breached when they are not satisfied either by action or omission, directly or indirectly, by design or by effect[15], as long as a

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15 Government of Canada, *Statement on Implementation of the North American Free Trade Agreement*, (1994) *Canada Gazette Part I*, January 1, 1994, at p. 148:

> "Article 1101 states that section A covers measures by a Party (i.e., any level of government in Canada) that **affect**:
>
> - investors of another Party (i.e., the Mexican or American parent company or individual Mexican or American Investor);

"measure", adopted *or* maintained, is involved, which *includes* (non limitatively) "any law, regulation, procedure, **requirement** *or* **practice**". The definition of the term "measure" must therefore taken to be viewed as a "non-exhaustive definition of the ways in which governments impose *discipline* in their respective jurisdictions."[16]

41. Further, the Investor intends to submit at arbitration that, under Article 1131(1) of NAFTA, the Arbitral Tribunal established under Section B of Chapter 11 of NAFTA shall decide the issues in accordance with NAFTA and international law. In this respect, under Article 31(1) of the *Vienna Convention*, the Investor intends to submit at arbitration that NAFTA must accordingly be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Under Article 102(2) of NAFTA, it is provided that the parties shall interpret and apply the provisions of NAFTA in light of the objectives set out in Article 102(1) and in accordance with the applicable rules of international law. Under Articles 102(1)(a) and 102(1)(b) of NAFTA, one of the principled objectives of the treaty is to, *inter alia*, "eliminate barriers to trade in, and facilitate the cross-border movement of, goods (...) between the territories of the Parties" and to "*promote* conditions of *fair* competition in the free trade area"[17].

42. As a necessary consequence of the above, the Investor intends to submit at arbitration that, under the terms of NAFTA and international law[18], the provisions of Section A of Chapter

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

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

16 See to this effect the position taken by Canada, a party to NAFTA: Government of Canada, Statement on Implementation of the North American Free Trade Agreement, (1994) *Canada Gazette Part I*, January 1, 1994, at p. 80.

17 Under Article 31(2) of the *Vienna Convention*, the context for the purpose of the interpretation of a treaty "shall comprise, in addition to the text, including its preamble and annexes: (...)".[Emphasis added]. The Preamble to NAFTA further provides in this respect, *inter alia*, that:

> "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
>
> (...)
>
> **REDUCE** distortions to trade;
>
> **ESTABLISH** clear and mutually advantageous rules governing their trade;
>
> **ENSURE** a predictable commercial framework for business planning and investment;
>
> (...)".

18 Under Article 102(2) of NAFTA: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international

11 of NAFTA shall be interpreted against the United States to the extent that the measures imposed on the Investor and its Investment do not actively eliminate, directly or indirectly, trade "barriers" and do not actively "*promote*", directly or indirectly, "*fair* competition" in the United States.

The National Treatment Obligation

43. Article 1102 of the NAFTA provides, in part, as follows:

> **"Article 1102: National Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part."

44. The Investor intends to submit at arbitration that the Investor and the Investment are subject to measures imposed by the Party that are contrary to Article 1102 of NAFTA.

45. The Buy America requirements that are imposed, directly or indirectly, by design or by effect and by way of the Party's measures on the Investor and its Investment, do not accord with treatment no less favorable than that which the Party 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.

46. By forcing a State (Virginia) to purchase exclusively the industrial output of U.S. facilities (steel), the Party is using the State to grant more favorable treatment to U.S. Investors and their Investment (any U.S. undertaking that manufactures or fabricates U.S. steel for the purposes and in respect of subsequent "acquisition" and "sale") than that accorded to non-U.S. Investors (ADF Group) and their Investments (ADF International) "with respect to" the

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law." See further *Ethyl Corporation* v. *The Government of Canada*, Award on Jurisdiction, NAFTA Chapter 11, 24 June 1998, at pp. 25 and ss., more particularly: "The Tribunal reads Article 102(2) [of NAFTA] as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the *Vienna Convention* are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the *Vienna Convention*" (at p. 29; ¶56). See also Article 55(1) of the ICSID-AFR – "The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute".

"acquisition, expansion, management, conduct, operation and sale or other disposition" of "investments" (the "enterprise" and its "steel").

47. The particular Buy America provisions which were specifically applied to the Springfield Interchange Project constitute a specific violation of the national treatment obligation set out in Article 1102. The applicable Buy America provisions are specifically drafted and administered to favour U.S. investments and investors over non-U.S. investments and investors, such as the Investment and the Investor in this case. The fact that a U.S. national (such as Shirley) that has aligned itself with a foreign investor (such as ADF Group) and its investment (such as ADF International) is equally affected by the Party's measure is irrelevant as Article 1102 requires that the same treatment afforded to U.S. nationals that have not aligned themselves with foreign investors and investments be afforded to those that do.

48. In addition to the general violation referred to above, the U.S. courts of law and administrative agencies have previously addressed issues similar to those raised by ADF International's proposal, namely, the extent to which post-production *fabrication* work on U.S.-origin steel or foreign steel will disqualify that steel from contracts which include a "Buy American" provision.

49. According to the Party's own authorities, post-production fabrication of steel products does not change the origin of that steel for Buy American purposes. If the steel was manufactured outside of the United States, it remains foreign steel even if it is fabricated in the U.S. Likewise, if the steel is U.S.-origin manufactured steel, it remains so even if fabrication occurs outside of the U.S.

50. As stated above, a Party's obligation to grant national treatment to an investor or the investment of an investor is an obligation to grant "treatment no less favorable than that it accords, in like circumstances, to its own investors [and to investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".

51. In the present case, the standard against which one measures compliance with the obligation to accord national treatment to ADF Group and ADF International is the treatment accorded in the United States according to the Party's own authorities. The treatment accorded by these authorities is the standard to be complied with because it represents authoritative statements on the precise issue raised by ADF International's proposal. The failure to grant ADF International the same treatment, in like circumstances, and the adoption and application of measures which are contrary thereto is also a violation of the national treatment obligation contained in Article 1102 of NAFTA.

52. Be it *in face*, as applied or understood, the Buy America provision directly violates national treatment, a central pillar of the NAFTA treaty.

'he Minimum Standard of Treatment Obligation

3. Article 1105(1) of the NAFTA provides in its relevant parts as follows:

> "**Article 1105: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> 2. (...).
>
> (...)."

54. Treatment "in accordance with international law, *including* fair and equitable treatment and full protection and security", as provided for in Article 1105, implies, at least, that the host State's treatment affecting the investment of an investor shall be "fair" and "equitable" *per se and* applied in a manner that provides "full protection" and "security". These requirements are but a mere articulation ("*including*") of the "minimum" basic universal principles that are embedded in, and stem from, the essential foundations of the Rule of Law. Such requirements are breached when they are not satisfied by action or omission, directly or indirectly, by design or by effect.

55. The treatment must *per se* be "*fair*" and "*equitable*", which means literally what is stated: the treatment must be "fair" and "equitable" as such. One must therefore look at the substance of the treatment in order to establish whether or not such treatment – on its own - is in itself "fair" and "equitable". The provision is in no way limited to egregious conduct alone and applies to *any* treatment that is not in itself "fair" and "equitable".

56. The requirement that the treatment be in itself "fair" and "equitable" includes in turn, but without limitation, that it must be clear and accessible, must not be vague or arbitrary and must provide a reasonable opportunity to know the law so that one may reasonably be allowed to rely and act according to its tenets; such treatment must not, in turn, arbitrarily defeat established legitimate expectations. There must be "law" in the first place, which implies fairness, equity, adequate accessibility, sufficient precision, reasonable predictability and reasonable stability in treatment[19].

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19 Under the authority of Article 31(2) of the *Vienna Convention*, the Investor reminds that the Preamble to NAFTA provides, *inter alia*, that:

> "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
>
> (...)
>
> **ENSURE** a <u>predictable</u> commercial framework for business planning and investment;
>
> (...)". [Emphasis is ours].

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

58. In the present case, applying the Party's measures to the Investment arbitrarily defeats the legitimate expectations that have been created by previous actions of the United States, including, but without limitation, decisions of the U.S. courts of law and administrative agencies. A radical and arbitrary shift in the law defeats its reasonable stability and predictability and the reasonable attempts to comply with it, which, in turn, defeats the reasons for there being "law" in the first place.

59. Further, but without limitation, the enabling Congressional legislation and applicable instruments made thereunder its governing authority are drafted and applied in such a way that they are *per se* unfair and inequitable and do not provide full protection and security.

60. Further, but without limitation, U.S. administrative officials have acted in such a way that is *per se* unfair and inequitable and do not provide full protection and security.

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

The Obligation not to Impose or Enforce Performance Requirements

62. NAFTA Article 1106 provides in its relevant parts as follows:

> "**Article 1106: Performance Requirements**
>
> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) (...);
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; (...).
>
> 2. (...).
>
> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

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

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory; (...).

(...)."

63. By adopting by Act of Congress a Buy America requirement, the United States government is imposing a performance requirements in contravention of Articles 1106(1) and 1106(3) of NAFTA[20]. In this case, the performance requirement is enforced by the Party through the State of Virginia, contrary to these provisions.

64. The existence and application of the Buy America provisions in the Springfield Interchange Project is the direct result of the legislative requirement that such a provision appear in such contracts. Special Provision 102.05 appeared in the Main Contract (and the resulting Shirley/ADF Sub-Contract) because it was required by the Federal Highway Authority as a pre-requisite to granting any funds to V-DOT for the Springfield Interchange Project.

65. Special Provision 102.05 was subject to prior approval of the Federal Highway Authority before it could be inserted into the Main Contract and in fact received such approval from the Federal Highway Authority.

66. V-DOT imposed the Buy America requirement in the Main Contract as a direct result of a legal requirement in a Federal law and under explicit instructions of Federal officials.

67. Officials of V-DOT and the Federal Highway Administration have repeatedly confirmed that all authority over the administration, interpretation, application and enforcement of the Buy America provisions of the Main Contract resides with and was exercised at all relevant times by the Federal Highway Authority, the United States governmental agency which imposes the *discipline* under the circumstances.

F. ISSUES

68. The Investor submits that the facts surrounding the denial of ADF International's proposal to fabricate U.S.-origin steel in Canada raise the following issues:

(i) Did the government of the United States violate its obligation under NAFTA Article 1102 to grant national treatment to either the Investor or its Investments?

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20 Under section 105 of NAFTA, it is provided that:

> "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."

As a result of this provision, the United States cannot do indirectly via State governments what it is prohibited from doing directly under NAFTA.

(ii) Did the government of the United States violate its obligation under Article 1105 to accord ADF International and/or ADF Group treatment in accordance with international law, including fair and equitable treatment and full protection and security?

(iii) Did the government of the United States violate its obligation under Article 1106 not to impose or enforce the performance requirements listed in that provision?

G. QUANTUM OF DAMAGES

69. In order to fulfil its contractual obligations to Shirley, ADF International continued to perform its obligations under the ADF/Shirley Sub-Contract but without fabricating any steel at its facilities in Canada. As a result, the Canadian facilities of ADF Group operated at a reduced rate of production, increasing the costs incurred by ADF Group.

70. ADF International performed some of the fabrication work in its own facilities in Coral Springs, Florida, which had to operate at an accelerated rate to accommodate the increased demands, and sub-contracted the rest of the steel fabrication work to other steel fabricators in the U.S.

71. As a result, the cost of the steel fabrication rose substantially because of, but not limited to, the following factors: fewer economies of scale, greater supervision and management expenses, greater travelling and communication expenses, greater steel handling and transportation costs.

72. In addition, ADF International and ADF Group were not able to realise the profits that they had reasonably expected to make on the ADF/Shirley Contract.

73. As ADF International had to use several fabricators in the U.S. to complete the contract, the work has taken longer than expected to complete; these resulting delays may expose ADF International to liability to third parties who may have suffered damage as a result of ADF International's delays in performing its contract.

74. In particular, but without limitation, Shirley will collect a "no excuse" incentive bonus of US$10 million for timely completion of its contract. If it fails to achieve that bonus, and can demonstrate that its failure to do so was caused by ADF International's failure, then ADF International may face a claim from Shirley for US$10 million.

75. Given that the Main Contract has not yet been completed and all of the additional costs and potential claims have not yet been realised, an estimate can only be provided at this time as to ADF's additional losses, which estimate may nevertheless already be evaluated as amounting to several million dollars.

76. Continued application of the law, regulations and administrative policies and practices referred to herein will cause additional damage to ADF International, limiting its ability to fully participate in all future Federal-aid highway construction projects.

H. RELIEF SOUGHT

77. In the arbitration the Investor will seek the following relief from the Arbitral Tribunal:

i) A declaration that the government of the United States has violated its obligations under Part A of Chapter 11, in particular, the obligations set out in Articles 1102 (National Treatment), 1105 (Treatment in Accordance with International Law) and 1106 (Performance Requirements);

ii) An order that the government of the United States pay to the Investor its damages resulting from the aforementioned violation which are estimated to be not less than US$90 million;

iii) Its entire costs in the arbitration;

iv) Pre-award and post-award interest at a rate to be fixed by the Arbitral Tribunal;

v) Any amount required to pay any applicable tax in order to maintain the integrity of the award; and

vi) Such further relief that counsel may advise and the Arbitral Tribunal may permit.

I. APPOINTMENT OF ARBITRATORS

78. Pursuant to Article 1123 of NAFTA, the Investor designates:

Professor Armand DeMestral

to be its appointed arbitrator for the purposes of the arbitration. The co-ordinates of Professor DeMestral are as follows:

Professor Armand DeMestral
McGill University
Faculty of Law
3644 Peel Street
Montreal (Quebec)
Canada
H3A 1W9
Tel: (514) 398-6643
Fax: (514) 398-3233

J. STATEMENT OF CLAIM

79. Pursuant to Article 38(1)(a) of the ICSID-AFR, the Investor will submit its memorial within the period of time to be determined by the Arbitral Tribunal. The Investor reserves the right to, *inter alia*, supplement the facts, its allegations, its submissions and its claims in its memorial as required by the circumstances, the present Notice of Arbitration being only "*information concerning* the issues and an *indication* of the amount involved", as required by Article 3(1)(d) of the ICSID-AFR.

K. CONDITION PRECEDENT

80. Pursuant to Article 1121 of NAFTA, the Investor and the Investment attach, include, deliver and serve herewith its Notice of Arbitration, being its "submission of a claim to arbitration", the required consent and waiver, "in writing", as specified more particularly by Article 1121(3) of NAFTA.

Signed at Montreal, this 19th day of July, 2000.

FASKEN MARTINEAU DuMOULIN LLP

Peter E. Kirby
René Cadieux

FASKEN MARTINEAU DuMOULIN LLP
Stock Exchange Tower
Suite 3400
800 Place-Victoria
Montreal (Québec)
Canada
H4Z 1E9

Counsel* for: ADF Group Inc.
ADF International Inc.
*Power of Attorney Attached as:
Exhibit **ADF-2A** and **ADF-2B**

TRUE COPY

Fasken Martineau DuMoulin LLP

FASKEN MARTINEAU DuMOULIN LLP

Served to:

Executive Director
Office of the Legal Advisor
United States Department of State
Room 5519
2201 C. Street, N.W.
Washington D.C.
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Terrebonne, July 19, 2000

Executive Director
Office of the Legal Advisor
United States Department of State
Room 5519
2201 C. Street, N.W.
Washington, DC
USA 20520

Re: ***ADF Group Inc.*** v. ***The Government of the United States of America***

Investor-State dispute pursuant to Chapter 11 of *The North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States of America.*

Consent and Waiver under Article 1121.

Dear Sir/Madam:

Pursuant to Articles 1121(1)(a) and 1121(2)(a) of *The North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States of America* ("NAFTA"), ADF Group Inc. (the "Investor") hereby consents to arbitration in accordance with the procedures set out in NAFTA; and

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, the Investor waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to NAFTA, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of the United States of America (the "United States") that are alleged, in the Investor's Notice of Arbitration dated July 19th, 2000 and served contemporaneously on the United States, to be a breach referred to in Articles 1116 and 1117 of NAFTA, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except, to the extent applicable, of the costs of such proceedings), before an administrative tribunal or court under the laws of the United States.

This consent and waiver of the Investor is being served on the United States with the Investor's Notice of Arbitration pursuant to the provisions stipulated therein.

ADF GROUP INC.

Pierre Paschini, President

RC/rc

TRUE COPY

Fasken Martineau DuMoulin LLP

FASKEN MARTINEAU DuMOULIN LLP