IN THE ARBITRATION UNDER

THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

MONDEV INTERNATIONAL LTD.,	
Claimant/Investor,	
v.	ICSID Case No. ARB(AF)/99/2
THE UNITED STATES OF AMERICA,	
Respondent/Party.	

VOLUME I

Monday, May 20, 2002

The World Bank
Room H1-200
600 - 19th Street, N.W.
Washington, D.C.

The hearing in the above-entitled matter was convened at 10:00 a.m. before:

SIR NINIAN STEPHEN, President

PROFESSOR JAMES R. CRAWFORD

JUDGE STEPHEN M. SCHWEBEL

ELOISE M. OBADIA, Secretary of the Tribunal

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT STEPHEN: Well, ladies and gentlemen, welcome to these proceedings which have not been unduly punctual in the sense that we all started this, I think, some two or three years ago. We now reach something approaching finality, and I see that we have a large number of people associated with the parties on either side, and I welcome them and look forward to succinct--and I think you had another adjective, didn't you, for the sort of argument that we're looking forward to?

JUDGE SCHWEBEL: Focused.

PRESIDENT STEPHEN: Yes, focused. Focused argument.

We've been--I'm not sure whether it was assisted or burdened by innumerable volumes which we've looked at, examined, I won't say read every word of, but certainly been ourselves focused by, and I imagine that the parties would now wish to formally introduce themselves and those who are accompanying them. Perhaps if I can ask the

Claimant to begin that process.

MR. WATTS: Certainly, Mr. President. Thank you very much. My own name, despite the nameplate that I have here, is, in fact, Sir Arthur, but never mind.

PRESIDENT STEPHEN: Well, that's a great relief, I must say.

MR. WATTS: And then on my right, immediate right, is Ms. Abby Cohen Smutny, then Mr. Ray Hamilton, and then Mr. Stephen Oleskey. At the far side at the back is Mr. Rocke Ransen, Mr. Lee Steven, Anne Smith, and Trevor Doyle.

That's our team for this proceeding, Mr. President. We will look forward to being as succinct and focused as we can be.

PRESIDENT STEPHEN: Thank you, Sir Arthur.

MR. TAFT: Mr. President and Members of the Tribunal, my name is William Taft, and I am the legal adviser for the U.S. Department of State. It's a great pleasure for me to be able to be with you this morning and to introduce my team. I

should say that that pleasure, unfortunately, will be a brief one. I regret that I have long since been expected to be in Europe at the end of this week, and I understand that our case will not actually go on until Wednesday. So while I'll be with you this morning, I will not be here for the presentation of the U.S. case or the final day.

But having said that, I would say that we do have a very important case, and I am leaving it in extremely capable hands. And I would like to introduce our team that we have for you, and they will be succinct and focused, of course, now that they know that that is what they should be.

Starting to my left, and just working down the table here, Mr. Ronald Bettauer is the Deputy Legal Adviser at the Department of State. Next to him is Mark Clodfelter, who is our Assistant Legal Adviser in charge of these matters, NAFTA matters as well as also claims in the office.

Next to him is Mr. Bart Legum, who is the chief of our NAFTA Arbitration Division, and next

to him, Laura Svat is an attorney-adviser in that office. And David Pawlak is beyond her. He is also an attorney-adviser, and Jennifer Toole at the end of the table rounds out our team from which you will be hearing during the course of the week.

Thank you.

PRESIDENT STEPHEN: Thank you very much. I suspect that my two colleagues don't experience quite the same feeling that I have, but personally, not being very familiar in this area, it's very good indeed to actually put faces to names, such as Barton Legum, that I've seen in letters innumerable times for those two years, and good to know with whom we're dealing, and the same applies to Abby Smutny.

Very well. We start this morning with the Claimant's presentation, and over to you, Sir Arthur.

By the way, I received stern injunctions about people not using microphones. Would you please be careful to use the microphone whenever

you want to say anything? And that applies to me. I forgot.

MR. WATTS: This microphone works automatically.

Mr. President and Members of the Tribunal, I have the honor to address you this morning on behalf of the Investor/Claimant in this arbitration, Mondev--sorry, Montreal Development Corporation, known as Mondev.

My immediate purpose is to tell the Tribunal in simple terms what this case is about. Let me begin by identifying the main actors in the story.

We have on the one side the Claimant, Mondev, a Canadian company, and for the purpose of the project which is at the center of this case, Mondev created and acted through a local partnership, Lafayette Place Associations, LPA, and the partnership which was effectively at all times wholly owned by Mondev. And given that close relationship between Mondev and LPA, I propose

generally just to refer to Mondev without distinguishing necessarily between the two separate entities.

On the other side, we have the Respondent, United States of America, involved in these proceedings essentially because of the conduct of the executive organs of the City of Boston and the Commonwealth of Massachusetts, and the City of Boston and the Boston Redevelopment Authority, the BRA, but also because of the conduct of the courts of the Commonwealth. And, again, for convenience, I'll refer generally just to Boston or the City, without trying to distinguish always between the City and the BRA.

The story of this case can be told at several levels. At one level it's a story which concerns the quality end of the real estate market, a property development project of high quality in a major city. The Claimant, Mondev, is an award-winning real estate development company of high standing and wide international experience.

Architects of worldwide reputation have been associated with its work, people such as Mies van der Rohe and Aldo Giurgola, who, in fact, was the architect of the project at the heart of the present dispute. He also was the architect of the new parliament building in Canberra.

Commercial enterprises of the standing of Bloomingdale's, Jordan Marsh, Swissair, Nestle participated in the project which is at the heart of this dispute.

The other party principally involved is the City of Boston, a major and historic city, the capital of the Commonwealth of Massachusetts.

At another level, it's a story of two contracts: Mondev's contract with Boston for a major prestige development project in downtown Boston, and then later Mondev's contract with another company, Campeau, whereby Campeau was to acquire Mondev's interests in the project.

After the first and most risky phase of the project had been completed, at a cost of some

$175 million, Boston thought better of the deal it had struck in its contract with Mondev. It broke that contract. And when Mondev sought to sell its interest to Campeau, Boston tortiously interfered with that contract. And those conclusions are not mine. They are the findings of the Massachusetts jury which, on the basis of their findings, awarded Mondev $16 million in damages. But Mondev never saw a cent of that money.

At the lowest level--and I use the word "lowest" advisedly--this is a story of malpractice, deviousness, and abuse of authority on the part of Boston. The result, fully intended by Boston, was that Mondev was deprived of its investment without receiving any compensation. And this occurred in circumstances for which there can be no shred of justification and which violated accepted international standards again and again.

Mondev has thus suffered the uncompensated loss of its investment and has been subjected to seriously unlawful treatment. In both respects,

the Respondent is, as Mondev will show, in breach of its obligations under NAFTA. And for those breaches Mondev in these proceedings seeks compensation.

Let me now flesh out the story a little. We're talking about the downtown area of the City of Boston, where there was what both parties agree a rundown area known as Lafayette Place. "Rundown" is something of a euphemism. It was a physically dangerous blighted area, bordering on an area harboring the local red light district, more graphically known as the Combat Zone.

On the screen you are now being shown a general aerial photograph of the central Boston area taken in the early 1980s. The rundown blighted area lies more or less within the red lines, and the importance of that area for the City of Boston is clearly apparent.

The City wanted to revitalize the rundown area. In 1975, it proposed to develop one particular region in the area of Avenue de

Lafayette and Hayward Place. The project became known as the Lafayette Place Project.

On the screen now is a street map of the area. Lafayette Place and Hayward Place are being pointed out. They were the areas covered by the project as it eventually developed. Clearly, this was a large and prestigious real estate development. Mondev was brought in to undertake the necessary work, and for the project Mondev acted through its Massachusetts general partnership LPA. On the City side, the principal player was the Boston Redevelopment Authority, the BRA.

The project as it emerged involved a large-scale, mixed-used development. There would be underground parking facilities, a multi-level retail mall complex, a luxury hotel, and while there was an existing Jordan Marsh department store on the north side of the proposed development, there was to be a second new department store on the south side, on the Hayward Place site.

Those stores were to be connected to the

retail mall, and above the new south Hayward Place department store, there was to be an office building.

Now, I need to explain two particular aspects of a development such as that now under consideration.

First, a developer venturing into the kind of dilapidated area which was the site for the Lafayette Place Project is incurring very considerable financial risk. Many millions of dollars would have to be invested, and the eventual return could at the outset only be problematic.

Second, for a retail shopping mall development to be viable, it's essential that it should attract enough shoppers and that there should be a flow of shoppers through all parts of the retail mall. Through personal experience as shoppers, one knows that retail tenants don't prosper if their premises are in a dead end.

Thus, the two department stores--the existing Jordan Marsh store at the north end of the

proposed retail mall and the new prestige store at the south end--were essential as anchors for the retail part of the project. But the area was, as I say, extremely dilapidated, even dangerous, and that made it impossible to retract a new department store retailer willing to establish a major presence in such an area.

But the City insisted that development should begin immediately, so the parties agreed that the project should proceed in two phases, with the second anchor department store being relegated to Phase II.

Now on the screen is a plan, as marked by the City's Board of Appeal in 1979, showing the division of the project into its two phases. This division didn't alter the fundamental overall economics of the planned project, although Phase I standing alone and without the second anchor store would not be economically viable for any length of time.

Nevertheless, Mondev agreed to meet the

City's request to undertake immediate development of the first half of the project. Any development in that rundown area at that time entailed major financial risk. But by undertaking at the City's request only partial development, that already high financial risk was substantially increased. And the risk was this: It was hoped that the Phase I development would lead to an improvement in the area, and this would then attract the type of major retailer whose involvement in the second anchor store was necessary in Phase II in order to complete the economically viable retail mall complex as a whole.

But there was significant uncertainty whether Phase I would have that result. If it didn't, the second anchor store would not materialize and the whole project would fail.

But Mondev was prepared to accept that risk. In exchange, the City agreed to grant Mondev on favorable terms option rights on the adjoining piece of land known as the Hayward Parcel, the

Phase II area. And this would let it extend its development to include the economically vital Phase II.

The possibility that Phase II could proceed on favorable terms was essential to induce Mondev in 1978 to undertake this high-risk project.

In December 1978, Mondev through LPA, the City, and the BRA concluded what was known as the Tripartite Agreement governing the scope and terms of the project. So far, so good. Work started, made good progress. Phase I was completed in November 1985. And you can now see on the screen what the completed Phase I looked like. The total cost had been about $175 million.

A year earlier, Mondev had secured an investment by Swissotel, an affiliate of Swissair and Nestler, to provide the planned luxury hotel for the site. In mid-1986, Mondev secured a commitment by the top market retail store Bloomingdale's to establish the second and necessary anchor store. The development as a whole

was progressing well.

But then things began to go wrong. There was a change of administration in Boston at the beginning of 1984. The new Boston administration concluded that the City's contract, in retrospect, contained terms which were far too favorable for Mondev. The City had made an agreement in 1978. Now, in 1984, the new administration found the agreement too favorable for Mondev. It found it no longer expedient to honor the balance of the agreement. And so the City set about finding ways to walk away from its commitment to Mondev.

The new administration ignored the fact that changing mayors did not affect either the continuity or enforceability of a contract earlier concluded with the City and BRA. It ignored the fact that Mondev had performed all its obligations. It ignored the circumstance that the too favorable terms were, in effect, the counterpart for the higher risk which Mondev had assumed in meeting the City's wishes that Phase I of the development

should begin in advance of Phase II. It ignored the heavy risk that Mondev had already assumed in engaging in the project to revitalize an extremely rundown area. It ignored the fact that improvement in land values in that formally rundown area had been in part the result of Mondev's initial considerable risk taking.

Instead, as to the purchase of the Hayward Place site, it wanted to treat Mondev as if it were a newcomer to the market. The new administration, therefore, set about frustrating the completion of the project as envisaged under the Tripartite Agreement. It wanted Mondev to pay the current market price for the Phase II area, the Hayward Parcel, instead of the more favorable option price agreed in the Tripartite Agreement.

Mondev refused and insisted that an agreement is an agreement and must be honored. Boston then engaged in a series of delaying and obstructing maneuvers. Planning applications were delayed. Spurious tax claims were advanced.

Applicable rules were arbitrarily changed and so on. In short, in abuse of its regulatory authority, the City determined steadily and intentionally to erode the value of Mondev's investment under the Tripartite Agreement, until the stage was reached when Mondev had been deprived of its investment property altogether.

It had quite simply determined from the moment the new administration took over to disregard the Tripartite Agreement, thereby depriving Mondev's investment of value.

Realizing it was getting nowhere, in 1987 Mondev sought to sell its interest in the project to another larger company, the Campeau Corporation. Since Campeau already owned both Jordan Marsh and Bloomingdale's, it seemed probable that Boston and Campeau would be able to do a deal. But Boston ensured that that sale did not prosper. As the jury found, Boston, in the form of the BRA, tortiously interfered with that contract and prevented its consummation.

So Mondev then leased its interest to Campeau, a transaction which didn't require approval from the BRA. Campeau had its own alternative proposal for the site, and it eventually agreed in 1989 to pay the BRA the current market price for the Hayward Parcel, $17 million. Campeau's proposed development was more than twice the size of Mondev's Phase II development, which had met with such obstruction from Boston. But Campeau's proposal was then approved in just over a year. This underlines the real aims and intentions of the City and the BRA.

Instead of the so-called favorable price fixed in their agreement with Mondev, they got from Campeau the current market price, except--and here a touch of schadenfreude may creep in--they didn't. Campeau declared bankruptcy, and its development was never completed. The Hayward Parcel site remains empty to this day, a derelict parking lot in an otherwise increasingly successful area.

To return to Mondev's situation, Boston's

dealing with Mondev inevitably greatly aggrieved Mondev. Accordingly, Mondev without delay sought its legal remedies against the City and the BRA through the local courts. It commenced proceedings in 1992, and Mondev's claim was three-fold: it claimed that both the City and the BRA had breached their contractual obligations under the Tripartite Agreement; it claimed that the BRA had tortiously interfered with LPA's contractual relations with Campeau; and it claimed that both the City and the BRA had violated certain statutory provisions of the Massachusetts General Laws.

The trial came on in 1994. The jury found that the City had breached its contract with LPA and that the BRA's conduct constituted a tortious interference with LPA's contractual relations. The jury awarded LPA $16 million in damages. Again, so far, so good.

But, again, things went wrong for Mondev. In particular, subsequent legal proceedings in 1998 led to one part of the jury's award amounting to

$6.4 million being set aside on grounds of an immunity, which had the effect of denying LPA any access to the courts in respect of BRA's tortious conduct. And it led to the other part of the jury's award amounting to $9.6 million being set aside in circumstances which can only be described as an arbitrary disregard of applicable judicial standards. Mondev sought review of--

PRESIDENT STEPHEN: Judicial?

MR. WATTS: I'm sorry. Applicable judicial standards. I'm sorry, Mr. President.

Mondev sought a review of these decisions by the United States Supreme Court, but certiorari was denied on the 1st of March 1999. In short, therefore, by March 1999, Mondev had been deprived of its investment and had been thwarted in its attempts to recover compensation.

It was in that situation that Mondev commenced this arbitration, and Mondev submits that the treatment it received violated the Respondent's NAFTA obligations in that it constitutes treatment

not in accordance with international law, discrimination, and expropriation, or a measure tantamount to expropriation. Respondent has, of course, raised various preliminary objections concerning the competence of the Tribunal to entertain the proceedings and certain temporal objections. And in the course of developing its substantive case, Mondev will, of course, deal with and refute those objections, and I will leave them until then.

For the moment I'll just identify the principal thrust of Mondev's arguments on the substance of the case.

Article 1105, paragraph 1 of NAFTA is central to a substantial part of Mondev's case, and it reads as follows: "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." The treatment Mondev received at the hands of the City of Boston, the BRA, and the

courts of Massachusetts satisfied none of the requirements of Article 1105.

Let me take first the behavior of the City and the BRA. Their misconduct was manifest.

PROFESSOR CRAWFORD: Sir, Arthur, I don't want to disorganize the order of your proceeding, but obviously NAFTA was not in force at a time when at least some of the alleged breaches of contract occurred in the 1980s. So how do you deal with that relative to--and NAFTA was in force when many or most of the judicial decisions were taken.

MR. WATTS: Thank you. I will, in fact, deal with that, as I said, in the substantive part of the deployment of Mondev's case. At the moment, may I just leave it that I will deal with it then? It will be dealt with, believe me, at considerable length, and hope satisfactorily.

The behavior of the City and the BRA was manifestly improper. What they did towards Mondev's investment was devoid of any vestige of good faith.

They wrongly exercised their governmental authority in an arbitrary and abusive manner. They distorted their administrative procedures to Mondev's prejudice. They intentionally sought to prevent Mondev from realizing its contractual rights. They broke their own contract to commitments to Mondev. They tortiously interfered with Mondev's contractual relations with a third party. That summary catalog demonstrates a level of conduct well below that required by international standards.

Looking at Boston's treatment of the Canadian investor Mondev, nothing about it was in accordance with international law, nothing about it was fair and equitable, and the very last thing afforded to Mondev's investment was for protection and security. Indeed, far from protecting Mondev, the Boston authorities were themselves the wrongdoers. It was not only the City authorities which behaved wrongfully towards Mondev, a state must make available to an alien who suffers damage

as a result of wrongful conduct the necessary judicial and other procedures whereby the alien can obtain redress.

This is part of the standard of treatment which international law obliges a state to afford a foreign investor, involves both access to the courts and observance of proper judicial standards by the courts in dealing with the foreign investor's claims. In terms of NAFTA, those obligations rest upon the local state as part of its obligation to treat the foreign investment in accordance with international law and fairly and equitably and to afford it full protection and security. The way in which Mondev's claims were dealt with in the Massachusetts judicial process left a great deal to be desired. And in the course of dealing with the substantive aspects of the claimant's claim, these modalities of the judicial process will be explained at great length. But the result of it was clear. Despite having been subjected to repeated intentional and systematic

wrongdoing, Mondev was effectively deprived of its investment and denied compensation.

On the first of March 1999 the United States Supreme Court denied Mondev's petition for certiorari. With that, Mondev had done all that it could to seek in the local courts remedies for wrongs it had suffered. The only course open to Mondev was to take the matter up under NAFTA, a Treaty whose terms afforded Mondev the protection granted by international law. Throughout Boston's wrongful treatment of Mondev, it is abundantly clear that there was a persistent anti-Canadian animus. Had Mondev been a wholly United States investor, there can be little doubt that Boston would not have acted towards it in the way it in fact did. Such discrimination violates Article 1102 of NAFTA.

And let me now turn to expropriation. Mondev, as I've explained, lost its investment as a result of Boston's wrongful conduct. Mondev sought compensation. A jury found that the conduct had

indeed been wrongful. It awarded Mondev $16 million in damages, but in the manner I had explained, that compensation came to nothing. Thus, the original loss of its investment became an uncompensated expropriation, and this violated Article 1110 of NAFTA. That article provides so far as here relevant, "No Party shall directly or indirectly expropriate an investment or take a measure tantamount to expropriation except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105 (1); and (d) on payment of compensation."

There is no dispute between the parties on one matter at least, the payment of compensation. There has been none. There can also be no dispute on another matter, that the lawfulness of an expropriation under NAFTA imports considerations of general international law. Article 1110, as a Treaty provision, is to be interpreted in the light of international law. Also, the reference to

Article 1105 assures that the treatment accorded to an investment must be measured by the standard of international law.

Another matter is beyond dispute. Expropriation encompasses not only a formal seizure of titled property by the host state's authorities, but also interference by them with the use of property which has the effect of depriving the owner of its use or economic benefit. Further, it is beyond dispute that contract rights constitute an investment for expropriation purposes.

The conclusion is inescapable. Mondev was deprived of the economic benefit which it reasonably expected to enjoy under its contract, and that was the direct, foreseeable and intended result of the City's and the BRA's conduct. That deprivation was uncompensated and became, upon the definitive denial of compensation by the United States Supreme Court, and expropriation in breach of Article 1110 of NAFTA.

PROFESSOR CRAWFORD: So, Sir Arthur, you

say that the date of the expropriation within the meaning of paragraph (2) was the date of the Supreme Court's refusal of certiorari.

MR. WATTS: That is when it became clear that there was no compensation going to be obtained, but again, that's an element that I'll develop later.

Mr. President and Members of the Tribunal, that's the outline of the case put before you by the Claimant. It will be expanded in considerable detail today and tomorrow. It comes to you under NAFTA, a Treaty for the promotion and protection of foreign investments as between the contracting states. The Treaty is but one of many hundreds of treaties, mostly bilateral, and so far as concerns the protection of foreign investments, they all follow a similar pattern. Most treaties work both ways. They are indeed bilateral or trilateral in our case. They confer rights to be protected and also and equally impose obligations to ensure that that protection is granted. The standards of

protection are the same in each case.

In the present case the United States is an investment importer. In deciding this case it's essential to look at the rest of the picture. Lurking behind this case is its shadow case. Invites the question: is Boston's treatment of Mondev the sort of treatment which United States investors expect to get abroad?

Mr. President, could I now invite you to call upon Mr. Rayner Hamilton of White & Case to address the Tribunal on the facts of this case.

Thank you, Mr. President.

PRESIDENT STEPHEN: Thank you.

I should say, Mr. Hamilton, that I think it's right to say that we are generally, to a large extent, familiar with the facts. Just bear that in mind when dealing with them in your exposition.

MR. HAMILTON: I will certainly endeavor to do that, Mr. President, and I have taken note of your admonition that we should be as precise and direct on these matters as we can. It is important

to understand the underlying facts that led up to the court proceedings and the ultimate deprivation of our client's property because it is a course of conduct that extended for over many, many years, and is involved, complicated, but in our view at the end of the day, discriminatory against our client and in violation of international law.

PRESIDENT STEPHEN: Well, let me be clear that I certainly don't want to cut you short. It's just that we have lived with these facts for some time now.

MR. HAMILTON: All right. If you think I'm giving you too much detail at any time, Mr. President, I'll take your suggestion quickly into heart. And let me say right here at the outset that my career has been in commercial disputes some 40 years, litigation and arbitration, and I am someone who is relatively unfamiliar with these concepts of public international law that it is your pleasure to deal with. My job here today is to try to highlight for you the underlying facts so

that you really understand what happened here, and then you decide, you get to decide, does that rise to the level of a violation of NAFTA and international law? And let me say also that everything I highlight for you has been dealt with in our Memorials, and therefore I will not be unduly detailed if I possibly can.

Let me just start out by saying a couple of words about our client, Mondev. Mondev, as Sir Arthur stated, is Canadian, headquarters in Montreal, a real estate development and management company that has operated for many, many years, highly experienced in all phases of real estate development. Its Chairman, Mr. Ransen, who is here, has more than 40 years of experience in this field, past President of important international organizations in his field. His group has done important projects all around the world. They have a flagship project in Montreal, but they have many in the United States and elsewhere. They have won awards for architectural design. They have used

some of the most important and well-known architects in the world, did on this project, and they have on many others. That's their history.

Now, I tell you all this--it's all laid out in one of the exhibits that you have, Surkis Exhibit No. 1, but I tell you all of this because the United States here, for reasons best known to it, has taken upon itself to attack the architectural merits of this particular project, characterizing it as an enormous grim cliff of gunboat gray on lower Washington Street, bunker-like monstrosity, terrifying, it looks like a prison, it's a Chinese wall that says we're a fortress. No wonder people hate it.

PRESIDENT STEPHEN: Fortunately, we don't have to rule on the merits of the architecture.

MR. HAMILTON: Fortunately we don't. The point that I was making, Mr. Chairman, the point that we have made in all of this submissions on this subject, is that simply that in documenting Mondev's credentials, which are on any standard,

sophisticated, highly competent, experienced, et cetera, but that is a reality which cannot credibly be challenged, whatever one's view is as to the merits of the architectural aesthetics of the project, and therefore, in light of that history, query to inherent credibility of Respondent's underlying position which--and they've said it in their Memorials--which says that the problems that arose in this matter largely resulted from Mondev's failure to follow normal procedures, and because its efforts to implement Phase II were, in their words, sporadic and incomplete. In essence, Mondev didn't know what it was doing.

Query, query the inherent credibility of that in light of this client's own history. One also cannot lose track of the inescapable fact that at the end of the day a Boston jury found that Mondev has met its obligations under the agreements at issue here, and indeed, that it was the City and the BRA who had breached, thus frustrating the project.

Let me say just a word about the project. Sir Arthur has already described it in general terms. As he said, Mondev was invited back in 1975, a long time ago, to participate in a development that had been proposed by Boston for this downtown area that was largely blighted, decaying, vacant, bordering the infamous Combat Zone, which at that time was the City's flourishing red light district. The City's plan was to revitalize that area through commercial and economic development, and the City could do that because they were able to give developers such as Mondev certain tax advantages called Chapter 121A benefits which were designed to encourage the revitalization of decaying urban areas of this kind. And Mondev got those Chapter 121A tax benefits.

In due course it formed LPA to build, development and manage that project, and in 1978, December 1978, the City of Boston, the BRA and the LPA signed the Tripartite Agreement, which

envisioned the building of a large-scale mixed use development in two major phases.

Now, Phase I, as Sir Arthur stated, was to consist of three components, an underground parking facility, a multi-level retail mall which was connected to the existing Jordan Marsh store, and a large first-class luxury hotel. That was Phase I.

Phase II contemplated the construction on the adjacent Hayward Place Parcel land right next to Phase I of a second department store, as well as an office building above it. And if you go to the screen, you will see a map of this area. The overall project is outlined in yellow. The mall is in the center in brownish-gray. The hotel is in green on the right-hand side. Up at the top is the Jordan Marsh Store in violet, if my color vision is accurate. The Hayward Place Parcel is down at the bottom in turquoise, and you can see that it is separated from the rest of the project by Avenue de Lafayette, which cut it off from the balance of the project.

PRESIDENT STEPHEN: The Boston Common is right over to the left, is it?

MR. HAMILTON: You're familiar with Boston than I am, Mr. Chairman.

Next slide, please. There is--would you go back, please, hold that one. There is the model of the mall itself, is the white building in the front with the open courtyard. The hotel is to the right. Jordan Marsh is the red building in the back, and the separate Hayward Parcel is down here in the front lower right-hand corner, empty with the trees on it in that display.

Next slide please. There's a photograph of the mall after it was done. You can see it's a multi-level mall, open in the way displayed there.

Now, as Sir Arthur emphasized, from Mondev's perspective the financial success of this whole project required a second anchor store on the Hayward Parcel, and from its perspective Phase I and Phase II needed to be an integrated whole. You can see this on the floor plans that we now have

projected on the screen. This is the base of a ground floor plan for the project. The Phase II is in the lower left-hand corner. That was where it was envisioned that the second store would be placed. Avenue de Lafayette goes right through here. In this particular drawing this is shown as a pedestrian mall, and I will come back to that in due course, but the street itself, before there was any--the site itself before there was any construction, had a street going completely through here. Here is the mall. The hotel is over here. Jordan Marsh is up here. So that shoppers could come into Jordan Marsh, come around, come into this store, go around. They would have complete access to the two anchor stores, an important consideration in a development of this kind.

Do the next slide, please. Here's the second floor. You can see the connection that was envisioned here between the second anchor store more clearly here, Jordan Marsh up here, basically the same concept.

Next slide, please. Here is the connection between Jordan Marsh, a model of the connection between Jordan Marsh and the mall. The connection between the expected store on the other side would have been similar. And then just to complete the picture, there is an elevation showing the completed structure, and you can see a multi-story tower was envisioned as part of the overall construction.

Now, as--

JUDGE SCHWEBEL: May I ask, please, Mr. Hamilton, I gather that the thrust of the case of the applicant is that the construction on Hayward Place was a necessary component of the viability of the whole plan. At the same time, my recollection is that the option was a conditional option, and that a condition of its exercise was a decision by the City to I believe abandon a parking garage on Hayward Place.

Now, if that decision was within the prerogative of the City, and therefore from the

perspective of Mondev unpredictable, can it be maintained that Mondev counted upon the exercise of the option?

MR. HAMILTON: Yes, I think it can, Judge Schwebel. There was a contingency on that option. I'll get to that in just a minute. It was indeed eliminated in early 1979 before Mondev bought any land, Phase I or Phase II, so that it--this is a package that goes forward, and I think it's fair to say that they understood that that contingency would be eliminated. If it wasn't eliminated they had other opportunities not to go forward with the project. But in any event, it was eliminated.

If you look, for example, at Mondev's application for the tax benefits, 121A tax benefits that I mentioned to you before, they put in an application on June 21, 1979. Now, this is some five months after they have signed the contract, but you will see right there in their application they are counting on a department store on the second parcel, that is, the Hayward Place Parcel.

That comes right out of their application. It says a three- or four-level commercial structure to house a major department store; a bridge spanning Avenue de Lafayette would integrate this structure with the hotel, retail, commercial activities on Parcels A and B. So it was clear from Mondev's point of view that they envisioned this kind of an arrangement from the outset, and we think it was from the City's as well, because all of these matters were clarified.

Let me deal with the option that you have referred to. First of all, the Tripartite Agreement itself was signed in December 1978 amongst the three parties. As it turned out, LPA closed on the Lafayette Place piece of it for Phase I in September 1979. So the basic agreement is signed right at the end of '78, and the parties continue the necessary activities and close on the first land in September 1979.

Now, with respect to the Hayward Place Parcel, it is correct that under the Tripartite

Agreement there was a contingent option on that Hayward Place Parcel. The contingency was whether the City would decide to demolish an above-ground garage that originally sat there. That decision was made in April 1979 and is recorded in the documents. As a result, the option from that moment on was no longer contingent, and this was a reality well before they closed on even the Phase I land. Now, once the City decided to discontinue that garage, LPA's option was exclusive. The City could make no other sale or disposition of the Hayward Place Parcel until three years after the City had given notice as to the extent, if at all, the City had determined to create subsurface parking under the Hayward Place Parcel. And the City gave that notice in December of 1983. They said, "We are going to create subsurface parking under the Hayward Place Parcel."

What that meant was that LPA had to give notice to the City within three years from that date, that is, within three years from December

1983, as to whether or not it was going to exercise that option. And it did so within that three-year period. Once it gave notice that it wanted to exercise the option for the Hayward Parcel, the parties were then obligated under the agreement to sit down and negotiate in good faith a purchase and sale agreement. In other words, the details would be set out in an agreement that they would negotiate in good faith once LPA exercised its option.

Now, the procedure also contemplated that they would close on that purchase and sale agreement within six months tacked onto the end of the option period. However, it was clear that the expiration of the option period plus six months did not affect LPA's right to proceed unless it had not been working in good faith to conclude this purchase and sale agreement. Moreover, there was one other contingency involved, which is important, and it stated in substance that whatever had happened, as I've just described, LPA's rights

extended for such period of time as may be necessary for the City to substantially complete construction of any subsurface parking facilities for which the City was obligated.

Now, to put this in factual perspective, the City gave its notice on December 13, 1983, that it intended to create subsurface parking. That triggered the three-year timeframe. LPA exercised that option in July of 1986, which is well within that three-year period, so timeliness is not at issue here at all. But it's also important to understand that the City had not at that time substantially completed its subsurface parking garage, indeed, it hadn't even started. So the time of LPA to negotiate the final purchase and sale agreement and close on the Hayward Parcel was open-ended at that time. There was no terminal date on that option.

Now, we want to talk about price because Sir Arthur pointed out to you that Mondev, under the Tripartite Agreement was entitled to a favored-price

provision with respect to the Hayward Parcel.

And may I have the next slide please. We're honing in on the relevant provision, and there it is. You will see the sentence reads: "The purchase price to be paid hereunder shall, if subsurface rights are retained by the City"--which is the case here--"be one-half of the fair market value shown by such appraisals"--I'll come to it in just a second--"plus one-half of the increase, if any, in such values as a result of construction of the public improvements and the project."

Now, the appraisals, the "such appraisals" that are referred to in this formula, were appraisals as of 1978 of the four smaller parcels which made up the overall Hayward Parcel. So the "such appraisals" is the 1978 appraisals of that land. And the price of the Hayward Parcel therefore was half of the 1978 appraisal value, plus half the increase in value of the Hayward Parcel, brought about by Phase I and the City's improvements to the area. Thus it's clear that if

the value of Hayward Parcel increased as a result of Phase I and the affiliated City improvement to the area, LPA would be able to purchase the Hayward Parcel rights at a figure well below current market value when it closed on the transaction. And so you understand the perspective here at trial, the uncontradicted testimony of LPA's expert appraiser was that as of January 1, 1989, the value of the Hayward Parcel was 19.1 million, 19.1 million. Under the formula set out under the Tripartite Agreement, LPA was entitled to purchase that parcel for 2.68 million, a difference of 16.32 million. This was the carrot that Mondev had, and its incentive in going forward with this procedure.

Yes, Mr. President?

PRESIDENT STEPHEN: Can I just understand the price? First of all it's got two components. The first component is one-half of fair market value as at 1978.

MR. HAMILTON: The time of the agreement, yes.

PRESIDENT STEPHEN: Yes. The second is only one-half of the increase?

MR. HAMILTON: Yes, brought about by.

PRESIDENT STEPHEN: Yes. Not one-half of the--it's really the increase that you take?

MR. HAMILTON: Yes.

PRESIDENT STEPHEN: I see, yes. Thank you.

MR. HAMILTON: $16.32 million differential, as our expert appraiser testified at the trial.

Now, let me go move on from the Tripartite Agreement and just say a couple of words about Phase I because there were a couple of developments there that are relevant to the overall scheme of things. The original plans for Phase I called on the City to build an underground garage under the Lafayette Place, but in the early 1980s the City had financial difficulties, as many cities did, and that delayed construction of a garage. It also had problems with its contractor, and at this point it

asked LPA to add the construction of a garage to LPA's other activities. And we agreed to do this, formed an affiliated company, LPPA, for this purpose. And in May of 1981 LPPA entered into a lease with the City that required LPPA to construct this garage at its own expense, and LPPA was given the right to operate the garage for 40 years for an annual rental payment to the City of $344,000 a year plus a percentage of profits.

However, that rental payment was to be deferred from year to year until the garage made sufficient operating profit to cover the annual payments. Now, I mention this because this rental agreement comes into play later on when the City is unhappy with the arrangements that they had entered into.

In any event, LPA persevered, and as Sir Arthur stated, ultimately completed Phase I successfully. The garage was finished in early 1984. The mall was finished in late 1984. And in the fall of 1984 Mondev agreed to sell half of its

interest in the hotel to Swissotel, a well-known prestigious hotel chain. The sale was made because Swissotel wasn't willing just simply to manage the hotel and franchise its name; it insisted upon having an equity interest. But before Mondev could effect such a transfer, it had to obtain approval from the City and the BRA because Phase I and the hotel property there had been part of this Chapter 121A tax advantage status. So they had to get the BRA's approval.

Now, Swissotel was a prominent company. The City and the BRA were delighted that Swissotel was participating in the project, and they promised an expedited approval process which they delivered on. The application for approval of this transfer of ownership was made in December 1984 and approval was granted just a few weeks later in early 1985, demonstrating that when the City wanted to move quickly on a transfer of this kind, they certainly knew how to do so.

In any event, the hotel was completed in

the spring of '85. The BRA issued a certificate of completion December 1, 1985. The cost of Phase I roughly 175 million.

Now, it was at this time, Mr. President, that we got a new mayor and his team in Boston. And indeed by the mid 1980s, which is where we are now, the City's economy had improved markedly from where it had been in the late 1970s when this agreement had been negotiated. In particular, downtown property values and demands for downtown office and commercial space had increased dramatically. At trial our expert real estate appraiser, who had been appraising real estate in Boston since 1956, characterized the '80s in Boston as "the greatest boon in real estate in my lifetime."

But we had a new Mayor, Raymond Flynn, who began his term of office in Boston on January 1, 1984. And you will see displayed on the screen extracts from the testimony of Mr. Coyle, who became the BRA director under the Mayor as to some

of the background in Mr. Flynn's campaign. You can see that property interests, neighborhood, downtown developers were a significant part of the campaign. Indeed it was characterized, the election was characterized as a referendum on the question of downtown growth. So this became a hot political subject.

With the benefit of hindsight, Mr. President, this political change was the beginning of the end for Mondev on Phase II. Now I say that with hindsight. They certainly didn't know it at the time, but Mayor Flynn, and in particular his BRA Director, Mr. Coyle, really wanted to write on a clean slate as they had been saying during their campaign. Phase I was essentially complete. The positive impact on the area was patently obvious. Property values were up, and they didn't want to hear about agreements that had been entered into by the previous administration. They were not interested in the risks Mondev had assumed and overcome, the quid pro quo for its favorable price

on Hayward Parcel.

What they wanted was for Mondev to pay the present market value for a City property without regard for any of that history. And I will put on the screen just a quote from another observer of this time, Lawrence Kennedy, who has written a book on the history of Boston. It contains a passage in here which relates specifically to this subject, indicating the economic and fiscal tide that turned in the mid 1980s. The situation differed radically from the 1960s and late '70s when the City had to implore people like Mondev to come in with Chapter 121A benefits and so forth. Now the City Government was in the driver's seat. And it continues comments about BRA Chairman role playing a key role, and reports that Mr. Coyle enjoyed his role as keeper of the gate, and as one observer said, made developers dance. He did.

Now, as Sir Arthur said in his introductory remarks, Mr. President, from the outset, LPA had been searching for a suitable

department store to locate on the Hayward Parcel, and in early 1986 LPA enjoyed success in this regard. They agreed with Federated Department Stores to locate a Bloomingdale's on that site. Now, I don't know whether you're familiar with Bloomingdale's or not, but certainly it was one of the best-known high-end retailers in the U.S. at that time, and therefore the success of these negotiations for LPA was a significant coup for LPA to get a store like Bloomingdale's in.

And with that commitment from Bloomingdale's in hand, LPA on July 2, 1986, exercised its option under the Tripartite Agreement to acquire the rights to the Hayward Parcel.

Now, throughout this period, up to the exercise of these rights in July of '86, Mondev's people had been meeting regularly with Director Coyle and his staff at the BRA to discuss this Phase II development. They had been meeting throughout the time that Director Coyle was in office. By 1986, at this point in time, they were

meeting at least once a month. By '87 the meetings had increased to every week or so. But it was clear that from the outset Mr. Coyle was unhappy with the price provisions for the Hayward Parcel, and he was very candid in saying that.

And I'm displaying on the screen now testimony from Mr. Ottieri of Mondev, Project Director on this matter of a senior man from Mondev on the site. This is an affidavit which he submitted in these proceedings, and he describes the fact that Coyle was very up front with him from the outset about the terms of the agreement and the fact that the price for the Hayward Parcel option was too favorable. He was complaining that the City could have sold it at a much higher price due to the appreciation in real estate. He thought the City had a disadvantageous agreement and he wanted to change the deal. More specifically, he wanted a larger purchase price for the Hayward Parcel. No secret about this. Mr. Coyle was candid in this regard.

Now, in the middle of 1986, notwithstanding the fact that Bloomingdale's was now in place, Mr. Ransen, the Chief Executive, decided to go meet with the Mayor himself because his people were getting nowhere. And Mr. Ransen explained to Mayor Flynn that Director Coyle and the BRA were stalling, they just weren't doing their job. And the Mayor called in his Executive Assistant, Joe Fisher, and asked Ransen to repeat his story to Fisher, which Ransen did. Regular staff meetings continued thereafter. Matters did not improve.

So in January Ransen sat down with Director Coyle himself to complain about slowness of progress. And Mr. Ransen was asked about this at the trial, this conversation.

"Did you have a conversation at that time about the development of Hayward Parcel?"

"Yes."

"Would you tell the jury what that conversation was?"

"Well, I complained to Mr. Coyle about the slowness of the project, and he said to me, "That's because you went to see the Mayor. Next time you go around me, you won't be building in Boston any more. I look after development, not the Mayor.""

Next slide. Mr. Ransen continued saying, "Do you recall anything further about the discussion as it related to the construction of Phase II on the Hayward Parcel?"

"Yes. We talked about the slowness of the system and why he was stalling. And he said to me that the option price was too cheap, that in 1978 we came in there--it was a bad area and the Combat Zone was rampant--he'd like to change the deal now to reflect the values in 1987."

"What did you say to that?" I asked him.

"I asked him: "Well, we have a contract. We made a contract together. We put a lot of money in here, and we've been here 13 years building it, and we've been losing a lot. Why should you break your contract?" And he said, "Because I feel like

it.""

Now, because of Mr. Coyle's unhappiness, he set about trying to leverage Mondev by creating roadblocks. And among other things he reopened issues long ago resolved or which should have been resolved. For example, about a month after LPA had exercised its option on the Hayward Parcel following its recruitment of Bloomingdale's, Mr. Coyle sent a letter which appeared to assume that LPA was initiating a project for the first time, was just beginning the design approval process, whereas in reality, they had been talking about Phase II plans for months, indeed years. And Director Coyle set forth the steps which LPA would be required to undertake to achieve final designation for Phase II. Now they didn't need to be finally designated for Phase II. They had already been designated under the original entire Lafayette Place project back in '78. But the staff nonetheless insisted that LPA still needed to be designated.

We followed up on that letter, advising that we're somewhat puzzled because we were designated back in November 1978, but in any event, we asked what should the next step be? No response--yes?

PRESIDENT STEPHEN: Excuse me. What do you mean by or what did they mean by "designate?"

MR. HAMILTON: That you were officially approved as the developer for Phase II.

PRESIDENT STEPHEN: By BRA?

MR. HAMILTON: By BRA.

PROFESSOR CRAWFORD: Sorry. Follow-up question if I may. Given this attitude, which as you say, was candid, did you think that something needed to be done to force the issue, or were you, the reason you didn't, as it were, confronted, for example, by suing for anticipatory breach or something like that? Was it simply because you felt that nonetheless the issue was still negotiable?

MR. HAMILTON: I think at that time, at

this stage, we felt that it was salvageable. The situation was deteriorating, but nonetheless, the thought was that these problems will work out if we just persevere and if we display our good faith and come up with creative solutions to the various problems. I think it's a gradual effect that goes over of a period 1985, 1986, 1987. There is no moment in time perhaps where you can say that's it, but at this stage certainly the hope and belief was that this would work out.

But this episode with respect to official designation as the approved developer was just one. All it did was divert people's attention and delayed progress briefly. There were other things of this kind as well, but there came a point where more serious obstacles were created by Director Coyle, and just let me highlight two or three of them so that you will get a flavor for the environment, and understand what Mondev was up against.

I'll start with the appraisals for the

property. Now, you saw that the purchase price for the Hayward Parcel turned on these appraisals, but before appraisal which measured the value as of 1978 and the after-appraisal, if I may characterize it that way, which measured the increase in value brought about by Phase I and the City's improvements to the area.

Now, when the Tripartite Agreement was signed, the City had obtained appraisals for two of the underlying parcels making up Hayward Parcel. This is Hayward Parcel down here, and the little parcels here are numbered. Is that one, Lee? I can't see it. This is D-1, and the City had already obtained the appraisal for that one, and also for D-2, but 602 of the Tripartite Agreement obligated the City to forthwith, in the words of the agreement, obtain appraisals for the remainder.

PROFESSOR CRAWFORD: These were appraisals of the increased value?

MR. HAMILTON: No, these are the original. These are the '78 appraisals.

PROFESSOR CRAWFORD: And those appraisals didn't already exist until--

MR. HAMILTON: No, two of them did. These two did. These two did. This one then was obtained in May 1979. The one on four never was obtained, never was obtained.

PRESIDENT STEPHEN: Can I just revert to a question I put earlier? The formula for the purchase price, I just want to be quite clear that it's one-half of the some-years-back--

MR. HAMILTON: The '78 appraisal.

PRESIDENT STEPHEN: --value. Yes. The other half was not of the much-later-increased price, but half of the increase in price.

MR. HAMILTON: Half of the increase in price brought about by Phase I and the City's attendant--so that if there is a big inflation factor out there--

PRESIDENT STEPHEN: Yes. If there had been no increase in price, all that would be paid would be one half of the old price.

MR. HAMILTON: That's correct.

Now, when we exercised our option on the Hayward Place Parcel in July 1986, Mr. President--give me the next slide, please, Lee--we flagged immediately for the City the fact that there were appraisals out there that remained to be accomplished, and you'll see it described there in that letter. The City took this up--next slide, please--at a board meeting on the 19th of September 1986, a couple of months later. You can see from those minutes that they acknowledged that it was necessary to obtain two appraisals and authorize the Chairman of the Real Property Board to get those appraisals.

Next slide, please. On the 15th of October, having heard nothing, we followed up, noted that additional appraisal was long overdue, made a comment also about needing information about subsurface parking facility on the site, and concluded in the last paragraph there our progress in the orderly development of the site is being

seriously impeded.

December 17, next slide, the board advised that it would take about a year to complete these appraisals, and they couldn't even begin until the BRA had defined the precise final boundaries of the Hayward Parcel.

In any event, the staff meetings between the BRA and the Mondev continued, no real progress made. On appraisals in May, some four or five months later, LPA, trying to move this thing forward, forwarded an overlay of a footprint of the building that they hoped to build on the Hayward Parcel, saying, "I think this will allow you to proceed with the necessary appraisals." Nobody responded to that. Indeed, nothing specific happened until the late fall, October 28, 1987, when the Real Property Board finally solicited from Boston real estate appraisers to conduct an appraisal of Hayward Parcel's then current value. This would have been the after appraisals, or would have gone into the makeup of the after appraisals.

Now, they sent out this information, solicited these bids, but in fact the necessary appraisals were never obtained. Those would have been the after appraisals. Indeed no provision was ever made whatsoever to complete the 1978 appraisals, which would have been the before appraisals. This is an indication of the frustration that Mondev had, pressing and pressing and pressing to get these done. Nothing happened.

Now, there were a second series of what we call run-arounds that occurred during this timeframe, over a period really from '85 and continuing up to '87, the BRA repeatedly raised the subject of traffic studies, street closures, street extensions, and the need to deal with the traffic problems, all of which created obstacles for Mondev in completing its design for Phase II.

Next slide. Starting in the summer of 1985, Mondev LPA met with Director Coyle, and proposed at this time to extend Avenue de Lafayette so as to connect to a major road west of the

project.

Show the next slide, please. Right there is the Hayward Place Parcel, and in red there is the proposal that LPA made, in other words, to extend this street straight on out to get on this major street because the traffic up in here was getting complicated. That was the proposal they made at--

PROFESSOR CRAWFORD: Mr. Hamilton, sorry to interrupt. What was the contractual position vis-a-vis the City in terms of road proposals, the road closures, extensions, or anything else? Was that laid down in principle in the agreement, or was that an independent operation?

MR. HAMILTON: That's an independent operation. The City had control of any kind of a road. This extension here went through property that we had no relationship--"we" Mondev--had no relationship with whatsoever. So to get the City to put a street through there--and my recollection is that this property was under development--required a

decision by the City and presumably the BRA, that we had no control over. We could make a suggestion, but we couldn't make control. But in terms of our design and what we were going to put on this piece of property, traffic and how it flowed and all of that were factors that the BRA and the City would take into account, so we had to address that in developing our design, and this was one of the suggestions that we came up with at this time.

PROFESSOR CRAWFORD: I mean, obviously, their conduct in not getting appraisals, which they are required to get under the contract, would be capable of being a breach, but their conduct in making road proposals or in refusing road proposals, couldn't be a breach of contract.

MR. HAMILTON: I think that's probably right, assuming it's done in good faith, and they evaluate whatever considerations they have, but I'm going to take you through a sequence of events here, Professor Crawford, and it raises the

question of what was going on here with respect to this traffic and street proposal.

Next slide, please. Now, initially Director Coyle, as you can see there, was interested in this idea, and as a result, LPA engaged traffic consultants to evaluate it, and presented its proposal to the BRA in November. But at that meeting he changed his mind, which he is entitled to do, and suggested and requested at that time that the street running between the Hayward Parcel and the Lafayette Parcel be turned into a pedestrian walkway, and you saw that on that floor plan that I showed you early on. That was his request at that time.

Next slide, please. And as a result of that, we then undertook another study from the traffic consultants, analyzing some five alternative traffic patterns, which was forwarded to the BRA in February in anticipation of a March meeting. That March meeting took place, but what we learned at that time was that the BRA had

commissioned yet another study of traffic patterns for the entire area, this one to be coordinated by a man named Larry Fabian, again a privilege they have, but nonetheless, in light of this growing history of frustration for Mondev.

PRESIDENT STEPHEN: Mr. Hamilton, if this is a convenient moment to break for coffee?

MR. HAMILTON: At your pleasure. Thank you, Mr. President.

[Recess.]

PRESIDENT STEPHEN: Thank you, Mr. Hamilton.

MR. HAMILTON: Mr. President, thank you very much.

I had just mentioned, as we broke for coffee, that the BRA had advised that there was a new traffic study being done by a Mr. Fabian. We were asked to participate in it, and that essentially mooted the studies that we had previously done. As you'll see from the slide, we contacted Fabian for further directions but were

referred back to the BRA, and the scenario continued. We complained vigorously on May 20 that these delays in our resolving the traffic issue were impeding the Phase II development, so there was no question about that, followed up--next slide, please--in a second letter, and the BRA simply responded, really a holding letter on June 19 saying it was reviewing all the alternatives and that they would contact us again once they completed their analysis.

The efforts continued to resolve these traffic matters, and we met with the BRA on July 29, '86, as you'll see from that slide, and presented the current conversion of our plans for Phase II. They simply responded that these plans would have to be redefined once the traffic studies were completed.

A follow-up letter, as you'll see there on that slide, in which we emphasized that our plans were tentative, as they had to be because of these traffic studies, and that we really needed specific

direction on that issue. Nine months later, April 22, Director Coyle sent a letter to us advising that a transportation access plan, including traffic analysis, had to be submitted.

Now, here we are two years after we first began proposing solutions to the traffic issue around Phase II being sent back, essentially sent back to square one. The fact of the matter is that these traffic issues, traffic plans were never resolved during the period that we were actively involved in design and review process for Phase II.

The next thing that happened was that we received an announcement from the BRA in January 1987--not from the BRA, from the City Transportation Department that it was proposing to route a new street diagonally through the Hayward Parcel from one corner to the other. Now, that was indeed a dramatic initiative coming from the Transportation Department, and indeed Director Coyle himself testified that had that been done or had that been implemented, the economic viability

of the whole project would have been destroyed. He testified to that effect at the trial.

That, of course, did not happen, but it was another disrupting event and diverted attention of everybody to what we viewed to be more important things.

A third--sorry?

PROFESSOR CRAWFORD: I'm sorry, Mr. Hamilton. There's no suggestion that that particular--well, I'm not expressing a view. Is there any suggestion that that particular proposal was part of any concerted plan of delay, or was this just one damn planning thing after another?

MR. HAMILTON: It was one damn planning thing after another. I don't believe--we can't say that that was a concerted effort between the BRA and the City Transportation Department to frustrate us. It had that effect in the sense that it diverted attention and created difficulties. But I think that's the essence of it.

PRESIDENT STEPHEN: I don't think I've

read when it was that that was abandoned.

MR. HAMILTON: It never was.

PRESIDENT STEPHEN: Aha.

MR. HAMILTON: I'm sorry. They withdraw that in 1989. This particular thing here.

PRESIDENT STEPHEN: Yes.

MR. HAMILTON: That was withdrawn in 1989.

PRESIDENT STEPHEN: '89.

MR. HAMILTON: Yes. Now, the third area that we had ongoing difficulties with the BRA and the City related to height limitations on our building. As you see on the slide I've displayed on the screen, you will see that, starting in December 1986, we were presenting plans for the Hayward Parcel to the BRA, which included plans for an office tower 310 to 330 feet high. And this continued over the next several months. In January there was a meeting, Mr. Ransen himself with Director Coyle, at which a design envelope encompassing a building of this size, up to 330 feet, was discussed at some length.

The next slide, please. Also in January, we met--LPA met with the staff of the BRA, continued discussions of a 310- to 330-foot tower. Further presentations in February, again in March, all specific discussions of a tower of this kind. On none of these occasions did anybody from the BRA suggest that there was anything wrong or that there was a problem of any kind with LPA's plans which reflected a 310- to 330-foot building.

However, in late April, LPA received a letter from Director Coyle, April 22, in which he advised that any proposed building on the Hayward site would have to be limited to a height of 125 to 155 feet. You will see that passage from his letter, which came as somewhat of a surprise, to put it mildly, to Mr. Ransen. And he responded--the director also said in a letter a couple days later, "Please revise your plans accordingly so as to comply with this."

Mr. Ransen was frustrated and exacerbated by this and sent a letter of his own back to the

director of May 4. You can see there the letter itself displays his frustration. He's tried to reach him by telephone, at a loss, he can't understand what's happening. They had agreed on a design envelope, instructed people to reduce everything to writing. Mr. Ransen had advised his board, his lenders, the Bloomingdale's owners, et cetera. Does this mean you've now changed these imperatives? Architect had been meeting with the staff on a regular basis, et cetera, asked for a meeting the earliest convenience. Just displaying Mr. Ransen's, number one, surprise and, number two, frustration over these events.

He then followed up himself with a letter asking the director to include the Hayward Parcel site in an economic development area subdistrict, and the reason he wanted to do that was that if that would be done, he would avoid the other restriction that the director had said he had to comply with and would be allowed to build a building of up to 400 feet in height. And, indeed,

the BRA had already established an EDA, an economic development area, about a block from the Hayward Parcel. So he urged that this be done in this instance.

Director Coyle responded, however, on August 11, indicating that Mondev had to basically comply with these design limitations and urged Mondev to develop several different scenarios, including a no-build alternative, that is, no-build, apparently, anything; secondly, an alternative to fit within the IPOD restrictions that put the height at 100 to 125 feet, and LPA's preferred alternative.

Now, no explanation was given as to why anyone was even thinking about a no-build alternative since plans to build had been clear since 1978.

But, in any event, we did--

PROFESSOR CRAWFORD: Mr. Hamilton?

MR. HAMILTON: Yes?

PROFESSOR CRAWFORD: Sorry to bother you

again. What was the contractual situation vis-a-vis the height of the building?

MR. HAMILTON: Don't know.

PROFESSOR CRAWFORD: So you didn't have a contractual right to approval of a building of a certain height? It was simply a general understanding of the parameters of the project?

MR. HAMILTON: Mr. Oleskey may be able to answer that directly.

MR. OLESKEY: The contract does not provide for a particular height, but there were these plans that had been developed and agreed upon conceptually with the director, as Mr. Hamilton has said.

PROFESSOR CRAWFORD: So the position was there was a concept, it was an agreed concept design, as it were?

MR. OLESKEY: That there be an office building and a tower, and you'd still have to work out the height--

PROFESSOR CRAWFORD: Yes, which would be a

substantial--

MR. OLESKEY: Yes.

PROFESSOR CRAWFORD: --construction.

MR. OLESKEY: Yes.

PROFESSOR CRAWFORD: I see. Thanks.

MR. HAMILTON: What we did do in response to this last letter, Mr. President, was to submit alternatives as the director had requested, and there is the first alternative plan, the preferred scheme. This was the one that we wanted to do, which was the significant tower over the department store on Hayward Parcel, and then a second alternative scheme which complied with the IPOD restrictions.

You can see from the two elevations that there is a significant difference, but neither one of these was ever approved by the BRA.

Now, I've just highlighted those three subjects, Mr. President, to give you an idea of the problems that Mondev was experiencing in trying to get its design approved and the efforts that it

initiated itself to move things along, with no success at this stage.

Now, as I had said before, under the Tripartite Agreement, LPA's rights to close on its interest in the Hayward Parcel extended until such time as the City substantially completed construction of the underground parking garage that it had stated in 1983 it intended to build. And at this stage, as I said before, the City had not taken any steps at all to commence that construction and, therefore, the option period for LPA to negotiate in good faith the final purchase and sale agreement and to close on that Hayward Parcel transaction was, in essence, open-ended.

At this point in time, when these height restrictions were imposed on the Hayward Parcel, LPA asked Director Coyle what could be done, what really had to be done to resolve these problems. And you'll see there displayed on the screen the response that he gave to Mr. Ottieri, who, as I said, was the project manager on this undertaking

for Mondev. He responded that what he wanted was the insertion of a drop-dead date, that is, a fixed, unextendable time period within which LPA had to close on the Hayward Parcel. And he advised Mr. Ottieri that if we would agree to that kind of a fixed deadline, the BRA staff would work in good faith throughout the design/review process to assure that LPA could conclude a closing within this period. And it was Mr. Ottieri's understanding that either this be done or that Phase II was going to be plagued with unending problems and would not go forward.

Under all the circumstances, LPA was very frustrated at this point as to Hayward Parcel for all of the reasons that I have mentioned: these unending traffic studies, the height limitations, et cetera. And, therefore, they undertook, LPA undertook to negotiate with the BRA an amendment to the Tripartite Agreement which would give Mr. Coyle what he was asking for, what he wanted. And their view was that unless they did this, they were going

to have problems ever getting these plans approved.

So they sat down and negotiated an amendment to the Tripartite Agreement which set a fixed closing for the Hayward Parcel some 18 months in the future, that is, 18 months beyond the anticipated date of this amendment, which would have been a drop-dead date of February 1, 1989.

LPA forwarded that negotiated amendment, signed it and forwarded it to Coyle for signature in July, and it came up with a meeting of the City's Real Property Board held on September 25, 1987, and we have the minutes of that meeting displayed on the screen. And you will see there that Mr. Coyle's executive assistant, Paul McCann, addressed the board relating to this supplemental amendment, supplemental agreement. He noted that under the original agreement there was an ambiguity because the City had to prove failure of the developer to work in good faith to conclude a purchase and sale agreement, and there was a second problem because of--the process was exacerbated

further because the agreement provides the developer's rights shall extend for as long as it takes for the City to construct a subsurface garage on the site, the point that I was just making.

So the proposed third supplemental agreement established a drop-dead date for the closing to be accomplished. Someone on the board questioned whether the City's rights were weakened under the agreement, but Mr. McCann assured the board that the change is totally in the City's favor, and the City would then be free to dispose of the parcel to another development entity if LPA did not perform satisfactory within this fixed time period.

The board approved that amendment, but they did advance the date from February 1, 1989, to January 1, 1989, and that was then signed by LPA and went into effect at this point in time. The applicable language in the amended agreement is on the screen there in front of you, and you will see that it says that unless the City and the developer

agree to a further extension, the developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the authorities shall fail to work in good faith with the developer through the design/review process to conclude a closing.

Now, the reality of the matter is that LPA received very little, if anything, in exchange for this drop-dead amendment. One would think that with or without this amendment, LPA should have been entitled to have the City and the BRA, quote, work in good faith with the developer through the design/review process to conclude a closing. Nonetheless, Mr. Ransen and LPA agreed to this drop-dead date because, as I said, they concluded, rightly or wrongly, that absence such a concession, the project would likely not be approved at all, and they simply had to take on faith that the City and the BRA would now act in good faith in this design process.

Now, it's at this time, Mr. President, that the second chapter in this story begins because in the fall of 1987 now, LPA is approached by Campeau Corporation, and Campeau Corporation is interested in the possibility of buying LPA's rights and interests in the whole Lafayette Place Project. I think Sir Arthur mentioned this in his opening, but Campeau was a very substantial entity, owning at this time both Allied Stores and Federated Stores, which are two of the largest retailing chains in the U.S. And they at this time owned both the Jordan Marsh store, which is one side of this mall, and they owned Bloomingdale's, which was proposed to be the second anchor store. They are also--or were also one of the largest real estate development companies in the world.

Initially, they proposed a partnership with LPA, but Mr. Ransen concluded that that would result in conflicts of interest because they and the Campeau would be owners, but they would have two--that Bloomingdale's store would be there, the

Jordan Marsh store would be there. It was an invitation for difficulties, and so the deal was then converted into an outright sale by LPA to Campeau.

Now, Ransen was interested in a sale after he was approached by Campeau because his relationships with Mr. Coyle and the BRA were less than satisfactory, to be kind about it; but, moreover, Campeau was a much bigger developer with larger resources, and also because it owned both Jordan Marsh and Bloomingdale's, it had some leverage there that Mondev did not have.

PRESIDENT STEPHEN: Mr. Hamilton, could I just confirm my understanding of the dates? The drop-dead date was agreed to in October '87.

MR. HAMILTON: In the final version, yes. That was negotiated back in July.

PRESIDENT STEPHEN: And that seemed to create a new relationship between the parties. That was the hope of--

MR. HAMILTON: That was the hope.

PRESIDENT STEPHEN: But almost immediately after that, there seems to--Campeau comes into the picture, and Campeau, the application to sell to Campeau is made to the City in December '87.

MR. HAMILTON: That's correct.

PRESIDENT STEPHEN: That's, what, within two months after the drop-dead date.

MR. HAMILTON: That's--you have to understand, Mr. President, that the original drop-dead date agreement was negotiated in July, back some six months earlier.

PRESIDENT STEPHEN: I see.

MR. HAMILTON: And we signed it at that--we sat down and negotiated, signed it, and returned it at that point in time to the BRA. They sat on it, discussed it, evaluated it, and changed the date, and it ultimately is signed--whatever date I said--October--

PRESIDENT STEPHEN: So that it was much longer than two months--

MR. HAMILTON: Yes. Yes.

PRESIDENT STEPHEN: I follow.

PROFESSOR CRAWFORD: But had there been any worsening of the relationship between July and October '87?

MR. HAMILTON: Well, I think the relationship, Professor Crawford, was adversarial both times, and whether it is 60 percent down to 50 percent is hard to say. It was certainly not improving. And the view was that the drop-dead date hopefully would improve the situation, but time was going to tell. But certainly it is at this time that the relationship was highly acrimonious because of the history that I explained.

In any event, Campeau enters the picture at this point in time. And, in addition, Mr. Ransen, as I said before, is a major developer. He had other projects going. His overall reputation was at stake. He was worried as to whether this thing was going to succeed. It was bad for the City. I mean, they had a lot there. It was not a

good situation from anybody's point of view, and he thought, well, Campeau may be able to do better here than I, for the reasons that I've given, let's see. So he tries to develop and they negotiate an agreement in which LPA's interest in the whole shooting match--the mall itself, the garage, the Hayward Parcel--would be sold to Campeau.

Now, that agreement, of course, provided that it would be consummated once it was approved by the BRA, and it had to be approved by the BRA because of these 121A tax benefits that I had mentioned before. Just like the sale of the hotel had to be approved by the BRA, this sale of the whole interest of the mall, et cetera, had to be approved by the BRA.

So, in early December, Campeau and LPA submitted a formal application to the BRA for approval of this contract, and they asked the BRA specifically to act very quickly, that is, act by mid-December, December 18, 1987.

Initially, their impression was that

Director Coyle was positive. But an article then appeared in the Boston Globe on December 10 which reported on an interview that Director Coyle and City Councilor McCormack had given in which concern was immediately raised in the minds of Mondev and Campeau both. And that article is displayed there on the screen in front of you. You'll see in the initial paragraph a reference that there will have to be some costly concessions before this Toronto-based firm Campeau will be allowed to purchase, an interview with Director Coyle, City Councilman McCormack, who heads the Council's Planning and Development Committee: "They said yesterday the City will seek a better deal before allowing Campeau to buy the mall from Mondev. `Among the concessions sought by the City,' said Coyle, `will be to receive a market rate adjustment payment for the adjacent lot'"--that's Hayward Parcel, needless to say--"`linkage payments and tax payments on any new construction and possibly a new lease agreement for the city-owned parking garage, measures that

could cost millions.'"

They go on. He makes a number of other comments in the third column there. The special tax agreement--that's the 121A agreement--gives the owner the development rights to the adjacent land parcel which is the real prize in the sale, notwithstanding the failing shopping mall has been unable to flourish because of its location next to the Combat Zone and its fortress-like appearance. It goes on to say that 121 agreement was made in 1978, does not reflect current market.

Next slide, please. If the terms were applied today, the developers would have a sweetheart deal.

Down at the bottom of the page, it's a major opportunity to get capital into downtown Boston. But the 121A agreement must be changed. It was made at a time when the City was begging, but the developers got a good deal, but it was a '78 deal.

It goes on in the next paragraph, under

the '78 agreement, the owners would only have to pay $5 million to $6 million to purchase the adjacent lot. But he said that the development market has escalated since and the City now wants market rates for the lot which could raise the price to $18 million, et cetera. A lengthy, interesting interview with Director Coyle.

There was a similar article about a week later in another Boston paper, which is in the record. I won't take you to that.

Now, during this time period, throughout December, LPA was emphasizing to the BRA that this approval needed to be--this contract needed to be approved quickly to avoid disruption, because there was information in the public press, as you can see. Tenants were raising questions. Leases needed to be signed or renegotiated. Progress was hard to achieve if no one knew who was in charge. And it was at this time, December 1987, that BRA suddenly claimed that LPA had not made certain payments in lieu of taxes as were required under

Section 6A of the statute and by reason of the project's Chapter 121A status.

Now, this assertion by the BRA was news to LPA and Mondev. It had never been made before, either by the City or by the BRA, and we didn't think it was true.

Nonetheless, the assertion was made, and Mr. Ransen, in order to avoid any problem on this issue, authorized immediate payment of the claimed amounts so that this could not be used as a pretext to avoid or disrupt approval of this sale.

Now, we now know from an internal BRA memorandum dated December 17, 1987, that the BRA staff was recommending approval of the transfer of the project to Campeau, and specifically stated in that memorandum that, with regard to payment of outstanding taxes, the Authority is satisfied that all payments due to the Commonwealth of Massachusetts under Chapter 121A, Section 10, and all payments due the City of Boston under 6A contracts have been made. Reports attesting that

no arrearage exists have been submitted to the city assessor and the Commonwealth's Department of Revenue.

In any event, nothing happened in December. The approval point did not reach the agenda of the necessary people, of the BRA board, so no action was taken.

PROFESSOR CRAWFORD: So, in effect, the suggestion is that the allegation of unpaid taxes was made in bad faith?

MR. HAMILTON: Yes. Yes. It was false and known to be false.

PROFESSOR CRAWFORD: The payment that was made by LPA or by Mondev, whichever, was made under protest.

MR. HAMILTON: Yes, it was.

PROFESSOR CRAWFORD: Was it subsequently repaid?

MR. HAMILTON: Yes.

At this same time, the Real Property Board Chairman Roche weighed in with the mayor on this

proposed transaction. He sent a letter on December 30 in which he characterized the price under the appraisal process that we have seen to be a monetary windfall for the new owner, Campeau, and indeed for the old owner, Mondev. And he also raised the issue--or complained about the deferred yearly rental under the parking garage lease that I have mentioned before.

In any event, when nothing happened, in December Mr. Ransen decided to try to make some concessions to Director Coyle at the urging of Campeau to see if he couldn't get this thing going. And on January 12th they sent a proposal, which is set out on the screen now.

They would agree to pay $75,000 to the City each year, regardless of the net income from the property. Under the original deal, the payments in lieu of taxes were tied into the net income from the property, and that was eliminated here. So that was a concession.

On the lease, second paragraph there, you

can see that Campeau and Mondev made a concession on the lease because originally there was deferred rental payments there as well.

Next slide, please. LPA in this letter agreed to pay and, in fact, had already paid all amounts due to the City. As we just discussed, LPA agreed to withdraw an appeal. These are less important. They did ask that this be approved by the end of January since time was of the essence, and--next slide, please--they also requested that the BRA extend the drop-dead date by 90 to 120 days.

However, they did not agree and would not agree to abandon or modify the appraisal formula for the Hayward Parcel property.

This matter then came up before the Real Property Board at a meeting on January 22, 1988, and we have the minutes of that meeting. You can see the considerations that were discussed by them at this time. They were briefed on the proposal, emphasized three issues were directly involved.

One was the $2 million in deferred basic rental from the mall that had accrued. The second was the formula under the Tripartite Agreement for Hayward Parcel. And the third was the garage rent that I have mentioned.

The highlighted paragraph there, "The board expressed its desire to capture the $2 million owed the City but deferred until now to receive the fair market value for the Hayward Parcel, abandoning the tripartite formula, and to receive the basic rental of $344,000 without contingency, allowing for deferment of same." All of those requiring or really involving repudiation, abandonment, or complete unilateral changing to the Tripartite Agreement.

In any event, during this same time period, Mr. Ransen was pressing Director Coyle personally to expedite approval, and at the trial he testified about his efforts in this regard. That's shown on the slide in front of you.

"What did Mr. Coyle say to you at that

meeting?"

"Well, I discussed with him the problem of getting the transfer made. I explained to him, as I explained to the jury, that we should all agree in essence to get the project completed so it's successful. It was really the spark plug for the entire area around the Combat Zone, and I tried to impress him that he should have the approval made quickly, expedited to get Campeau in there and start doing the building."

"What did Mr. Coyle say?"

"Mr. Coyle said, `No, not until I get a higher value for the land, and I don't want you to take all that profit and run back to Canada with it.'"

In any event, Mr. Coyle rejected or at least did not accept the proposal contained in the January 12 letter, and the matter did not go before the BRA Board at that time.

At this point it was evident that the proposed sale to Campeau would not be approved on a

timely basis, so LPA and Campeau then structured an alternative arrangement which did not require BRA approval, and that was the lease agreement which Sir Arthur mentioned briefly in his opening remarks.

Under that lease agreement, the essence of it was that LPA and Campeau agreed that LPA would lease the mall to Campeau; they would assign to Campeau the parking garage lease; and they would assign to Campeau an option to purchase all of LPA's rights and interests under the Tripartite Agreement, including LPA's rights to Hayward Parcel.

Now, the intent in entering into this lease agreement was to really give Campeau the right to manage the mall and work towards completion of Phase II until they were able to obtain the necessary Chapter 121A approvals so that it could then exercise the options and acquire everything outright--the mall, the garage, the rights to the Hayward Parcel, et cetera.

Now, the hope was that Campeau would be able to obtain these approvals reasonably quickly and, therefore, exercise its option and own this property outright.

And after executing that lease agreement, Campeau then announced its own development plan named Boston Crossing Project, projected to cost roughly $750 million, a plan double the size of what LPA had planned for Phase II.

Interestingly, the Campeau plan called for a 400-foot tower on Hayward Parcel. It contemplated the construction of a parking garage under Hayward Parcel connected to the one under Lafayette Place. It contemplated a significant expansion of the mall and the adjacent Jordan Marsh store, which, of course, Campeau owned. And it contemplated the construction of a second 400-foot tower above Jordan Marsh.

BRA--yes?

PRESIDENT STEPHEN: That is a new building in place of the already very recently constructed

building?

MR. HAMILTON: No, no. No, they envisioned two towers--we were going to put a tower on Hayward Parcel.

PRESIDENT STEPHEN: Yes, sure.

MR. HAMILTON: And that was, of course, not done. They're going to put a tower on Hayward Parcel bigger than ours, but at the other end of the project over the Jordan Marsh store--

PRESIDENT STEPHEN: Which was already constructed.

MR. HAMILTON: Which was already constructed, but no tower.

PRESIDENT STEPHEN: That was going to be demolished and--

MR. HAMILTON: Well, it was going to be renovated and this tower was going to--

PRESIDENT STEPHEN: That's what I meant.

MR. HAMILTON: Yes.

JUDGE SCHWEBEL: Mr. Hamilton?

MR. HAMILTON: Yes?

JUDGE SCHWEBEL: As an element of the lease agreement between Mondev and Campeau, was Mondev paid a significant capital sum by Campeau?

MR. HAMILTON: Let me find my notes on that subject.

[Pause.]

MR. HAMILTON: Let me come back to that.

JUDGE SCHWEBEL: All right.

MR. HAMILTON: There was a sum paid, but it gets a little complicated. And before I answer that, I need to make sure I understand the details. But we'll give you a display of that, Judge Schwebel.

Now, once that plan was developed, Campeau set out to get it approved and indeed was encouraged by the BRA, who was, at least initially, taken with this plan. And they began to develop--as it began to develop its plans, Campeau recognized that it might have trouble completing and getting final approval from the BRA for these extensive plans by the end of the year, that is, by

the end of 1988, which was the drop-dead date.

Accordingly, in many meetings and letters between March and December of 1988, Campeau repeatedly requested an extension of the January 1, 1989, deadline for closing on Hayward Parcel.

Would you give me the next slide, please?

And this is testimony of the project manager for Campeau, a Mr. McQuarrie, who testified on this subject: "In brief, what I'm asking, did Mr. Coyle give you a position about your ability to acquire the Hayward Parcel during that period from March to December?"

Answer: "Mr. Coyle never really said yes or no in regard to the question relating to the option. He always operated on the premise that don't worry about the site, you will get the site."

As the time passed, however, and the plans were not yet final or approved, Campeau became increasingly concerned. And in December 1998, December 19, 1998, to be specific--I'm sorry, '88. I lost a decade.

PRESIDENT STEPHEN: Can I just stop you--

MR. HAMILTON: Yes.

PRESIDENT STEPHEN: --to tell you something that puzzles me, and it's this: At this time surely the City must have regarded the transaction with Campeau with all sorts of doubts because the City had refused the initial move by Mondev to sell to Campeau, and Mondev had got around that refusal by going through a lease arrangement. Surely the relationship between Mondev, Campeau, and the City must have been very bad after that.

MR. HAMILTON: No, I don't think it was. I think--

PRESIDENT STEPHEN: Well, that's the curiosity.

MR. HAMILTON: Well, it depends on what point in time you're looking at. At this point in time, which is up--I'm up to December. The drop-dead date is just about to expire.

PRESIDENT STEPHEN: Yes.

MR. HAMILTON: So Chairman Coyle is pleased because if that drop-dead date expires, now there's--they can't--you know, the whole--the appraisal price provision is no longer binding, and the arrangements will change.

They also liked this programming. It was a significant big development, so on an objective standard, as you can see, this was attractive to the City.

Now, Campeau--

PRESIDENT STEPHEN: But if that's so, you wonder why they objected to the sale to Campeau. But, obviously, you can't answer that. Thank you.

MR. HAMILTON: The letter of December 19 that I just referred to, Campeau wrote directly to Mayor Flynn, and it's clear that what they were trying to do was basically preserve the appraisal price that was set out in the original agreement. And you'll see the passage that we've highlighted there: "Our people have been seeking an extension to close on our purchase of land owned by the City

which is part of our downtown project. Mr. Coyle refused to extend the closing but wanted to give some kind of letter which would, in fact, protect us on buying the land, and that change would expose us to perhaps paying a much higher price and could significantly affect our economics on the project. My lawyers advised me today that we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately."

So this was the request that Campeau made at this time, an effort to avoid the drop-dead date, protect the price set forth in the appraisal provision of the Tripartite Agreement.

There was no response until the end of the month from Director Coyle, who responded both for the BRA and on behalf of the City, saying that from here on Campeau would have to purchase the Hayward Parcel for its current fair reuse value because the formula under the Tripartite Agreement had expired on January 1. Campeau objected, saying that it was

entitled to an extension, reserved any and all rights, but it is clear that from this point on, the City and the BRA consistently took the position that the right to acquire the Hayward Parcel at the Tripartite Agreement formula had expired.

Campeau, nonetheless, pursued the Boston Crossing Project throughout '89 and the first part of 1990. Indeed, once the drop-dead date had expired, the BRA expedited the design/review process and approved this large Boston Crossing Project in June 1989.

To give you an idea of the time period, the total length of a design/review process for this $750 million Boston Crossing Project was some 15 months. LPA had spent 40 months for its much smaller Phase II plans, which were, of course, never approved.

The final plans that the City did--BRA did approve for the Boston Crossing Project did allow Campeau to build towers up to 400 feet on both Lafayette Parcel, where the Jordan Marsh store was,

and on Hayward Parcel, that is, the height restrictions were obviously removed.

However, that approval of the design for the Boston Crossing Project was achieved only after Campeau agreed in May 1989 to pay roughly $17 million for the Hayward Parcel and to pay additional benefits package relating to the parking garage and the mall.

Now, once the BRA approved this project, Campeau emptied the mall of tenants in preparation for its renovation and all of the construction work that it envisioned. But before substantial work on the Boston Crossing Project could begin, Campeau encountered severe financial difficulties. In the spring of 1990, Campeau defaulted on its payment obligations to LPA under the lease agreement of two years before and ultimately filed for bankruptcy.

Let me just say that Campeau's bankruptcy had nothing whatsoever to do with this project. The bankruptcy resulted from financial exposures in the billions that resulted from Campeau's

aggressive acquisition practices in the late 1980s. In addition, the real estate market had turned sour, as well. But this particular project was a minor part of the overall Campeau empire and was not in any way a cause of the bankruptcy.

As a result of Campeau's default, under the lease agreement LPA terminated that lease agreement in June 1990, and the interests and rights under the Tripartite Agreement reverted at that point to LPA.

Shortly thereafter, the mall failed. It had a large mortgage. There were no tenants or essentially no tenants, no income stream to service that debt. And in February 1991, Manufacturers Hanover, which held the mortgage on the mall, foreclosed.

At the end of the day, what happened then was that neither Campeau nor LPA was ever able to construct a second anchor department store on the Hayward Parcel, and the Hayward Parcel remains to this day, some 24 years after the execution of the

Tripartite Administration, an open-air parking lot. Nonetheless, the interest in that Hayward Parcel and indeed the value of the Hayward Parcel is well documented. We know, as I just said a moment ago, that Campeau agreed to pay $17 million for those Hayward Parcel rights in 1989. But the interest continues.

There was an article in the newspapers in July 2001, which we are displaying on the screen now, concerning more recent interest. You can see consideration of Saks Fifth Avenue opening a second Boston store under a developer's proposal to turn a parking lot at Hayward Parcel into a 12-story office and retail complex. The second paragraph down there, the developer, led by local development arm MDA Associates, bid $20.5 million for the parcel, et cetera. In the right-hand column, some other bidders have their own retail plans for the site. Lincoln Properties offer a $23 million bid for the parcel, et cetera. Thus, the value interest in the parcel is unquestioned. And that's

where the litigation started.

JUDGE SCHWEBEL: I'm still puzzled about the impact of the payment that was made by Campeau to Mondev when the lease agreement was concluded. And it would be interesting to know the dimension of that payment and how, if at all, it relates to the claims that Mondev now maintains. Could it be argued--I'm not saying it can be cogently, but I ask: Could it be argued that Mondev's losses were, in fact, compensated, at least in part, by the payment for the lease? It's true that the lease payments eventually were defaulted upon by Campeau when it ran into financial difficulties, but when the lease was concluded, this sum was paid over, was it not? And--

MR. HAMILTON: Well, a sum was paid, Judge Schwebel, but you'll recall that this lease agreement was a lease of the mall and a lease of a garage, but was an option--was an option to buy the other properties, including the rights to Hayward Parcel, an option that was never exercised.

PROFESSOR CRAWFORD: The lease payments were made with respect to property which LPA actually owned?

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: So that was the result of the transaction, but it wasn't as well contingent upon--those payments themselves weren't contingent upon the completion of Phase II?

MR. HAMILTON: Well, I want to--I'll address, as I said before, Judge Schwebel's earlier inquiry as to how this all worked. But there were payments. I mean, the basic--the compensation from Campeau was servicing the debt, for example. Go ahead.

MR. OLESKEY: Just to clarify this point, at the time the lease was signed for this larger package of rights than simply the option, namely, the garage, the mall, and the option to acquire the option, $9 million cash paid for the mall, $3 million paid cash for the garage rights, then a note given of almost $9.5 million, and then the

option to acquire the option, nothing was paid. That was contingent on their success in acquiring the option.

MR. HAMILTON: Thank you, Steve.

PROFESSOR CRAWFORD: I notice that the--it seems to have been Campeau acting on legal advice that called upon the City to perform immediately, prior to the drop-dead date.

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: Campeau, in effect, was acting as agent for LPA.

MR. HAMILTON: Yes, that's right. If you look at the lease agreement--and I had at one time a slide on that, but I removed it--it displays the role, the ongoing role. Basically Campeau took over and managed this property, but LPA had to assist and facilitate and do whatever was necessary. It was essentially a coordinated effort.

PROFESSOR CRAWFORD: Was there anything that Campeau did after the drop-dead date that

could have been regarded as a waiver of the loss of those rights?

MR. HAMILTON: I don't think so.

PROFESSOR CRAWFORD: That issue never arose in the--

MR. HAMILTON: It's never been raised.

PROFESSOR CRAWFORD: --domestic litigation. The point was that they continued even after the drop-dead date to negotiate with the City on the footing that they would have to acquire the Hayward Parcel at market rate--

MR. HAMILTON: Yes, they did--

PROFESSOR CRAWFORD: --and actually made a market rate offer.

MR. HAMILTON: The City said the drop-dead date happened, it's over, it's now market rate. They went ahead with their design, and they got it approved. But one of the quid pro quos for getting that approved was an agreement to pay $17 million for the Hayward Parcel.

PROFESSOR CRAWFORD: And my question was

whether any of that conduct could have been regarded as, in effect, a waiver of the earlier breach of contract, to which your answer was no. And in any event, of course, there was--

MR. HAMILTON: They reserved all their rights as of December; they specifically did in a letter. So it's under protest in that sense, Professor Crawford.

I want to turn now to the litigation and take you quickly through the history of the litigation so you can see what happened, because on March 16, LPA brought its lawsuit against--March 16, '92, LPA brought its lawsuit against the City and the BRA. And the claims that were asserted in that lawsuit are set forth there on the screen now: basically a breach of contract against the City and the BRA under the Tripartite Agreement and breach of the covenant of good faith and fair dealing; second cause of action, tortious interference by the BRA with LPA's proposed sale to Campeau--next slide, please--a cause of action based on Chapter

93A of the Massachusetts General Laws, which, in essence, provides a cause of action for damages caused by unfair or deceptive acts or practices in the conduct of trade or commerce; and the fourth bullet, Chapter 12 claim under the Massachusetts General Laws as well. Those were the essential claims asserted at that time.

Some 15 months later, in the normal course of events, the City and the BRA moved for summary judgment on all four of those claims, and in due course, that was resolved and the results are set forth on the slide that you now have.

The first two causes of action--breach of contract and breach of covenants of good faith and fair dealing--the motion for summary judgment was denied in all respect, no reasoned opinion, no opinion at all.

The Chapter 93A claim that I just mentioned was granted, no explanation given, and LPA filed a timely appeal from that decision with the Supreme Judicial Court of Massachusetts.

The fourth claim motion was similarly granted without explanation. LPA did not appeal from that decision.

PROFESSOR CRAWFORD: Mr. Hamilton, notwithstanding the distinction which could be relevant in Massachusetts law between the different causes of action, but presumably the case that the Claimant's claims for breach of contract and for inducing breach of contract in substance covered the field of their grievance.

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: So, so long as those two claims survive, they could bring the substance of the objections--

MR. HAMILTON: And the tortious interference claim.

PROFESSOR CRAWFORD: Yes.

MR. HAMILTON: Those were the essential claims here. That third claim is an important claim. We are going to come back to it, the one that was the Chapter 93A claim that was dismissed.

We viewed that as an important claim, and that is why the people was preserved.

PROFESSOR CRAWFORD: What could that have given you in terms of quantum or substantive right, which the first two, as were common law claims, couldn't give you?

MR. HAMILTON: Well, that's a difficult question. I'm not sure a whole lot.

PROFESSOR CRAWFORD: We have the same question in Australia with the Trade Practices Act. It's exactly the same issue which covers the field of contract and tort in a few words.

MR. OLESKEY: On that point, Professor Crawford, if it was established that the City or the BRA were acting wrongfully, abusively, they could be found liable on an additional substantive ground and liable for double or treble damages, plus attorneys' fees. So it could be a considerably greater quantum if that claim had been allowed to stand.

MR. HAMILTON: Now the trial in this case,

Mr. President, began in October 1994, before Judge Mulligan and a jury of 12. It lasted 2 weeks/14 days, ended towards the end of October.

In that connection, it is interesting because both the City and the BRA were, of course, parties to the Tripartite Agreement, and LPA had asserted that both of them had breached. However, the City alone held title to the Hayward Parcel, not the BRA, and the LPA, in the breach of contract claim, was seeking damages for breach of the obligation under the Tripartite Agreement in respect of that Hayward Parcel.

So there became the relationship between the BRA and the City with respect to that parcel became important, evidentially important, and specifically whether the acts of the BRA could, and should, be attributed to the City or, more precisely, was the BRA acting as an agent of the City of Boston regarding the purchase and sale of that Hayward Parcel? Because that was important, and the judge at the trial specifically charged the

jury on that subject, making this distinction very important, there were various pretrial events that occurred during the discovery phase that are important.

I will try to be very brief and get this done before the luncheon recess, Mr. President.

What happened was that about a year after the case began, President Clinton nominated Mayor Flynn to be the new United States Ambassador to the Vatican, and he said he was going to accept, which meant that he was going to move to Rome, a place it beyond the subpoena power of the Massachusetts Court.

So my colleague here, in his infinite wisdom, decided that he would take the testimony of Mayor Flynn before he departed, and he served a notice to that effect. The City tried to stop that. A judge at that time, Judge Zobel, who was dealing with these matters, said, no, they can take his deposition. The City then filed for a protective order saying he is high-ranking

government official, which has, by the way, no support in Massachusetts law, but, in any event, they said that he has no real knowledge, that his position with respect to this matter was largely ceremonial and that Coyle was the man, and that he, the mayor, had no useful memory of the events in question.

LPA, nonetheless, wanted to take his testimony, and the net result of it was that Judge Zobel said, look, you guys sit down with the mayor and interview him for an hour. We'll give you an hour. You sit down and interview him, test out his memory, and let's see if he knows anything so we don't burden everybody with all of this stuff, and then we'll see.

And so the lawyers sat down with the mayor for a 1-hour informal to test his knowledge and memory of these events. Needless to say, at the end of that hour, the Mondev team thought that he had a lot of knowledge of relevant events, and particularly matters that related to his

relationship with Director Coyle and whether or not Director Coyle was indeed acting as an agent of the City in all of these efforts.

So, as a result--

PRESIDENT STEPHEN: Could I just ask you how does that work? Is it a sort of matter of cross-examination of--

MR. HAMILTON: The interview?

PRESIDENT STEPHEN: Yes.

MR. HAMILTON: This is unique in my experience that this happened, Mr. Stephen. It was a way by the judge, this is an important political person, it's controversial, they don't want to burden him, so they said, sit down and interview the guy. We may save everybody a lot of time, and they agreed to do that, initially, reserving their rights.

PRESIDENT STEPHEN: What if the former mayor said nothing?

MR. HAMILTON: Well, we didn't have that problem.

PRESIDENT STEPHEN: No, I see.

But he was asked questions, presumably, and--

MR. HAMILTON: Yes, just interviewed him informally around the table.

PROFESSOR CRAWFORD: This wasn't a deposition?

MR. HAMILTON: It was not a deposition. It was informal. Everybody took notes, but no transcript made or anything.

PRESIDENT STEPHEN: Very ingenious, thank you.

MR. HAMILTON: Very ingenious. But then what happened is that LPA went back to Judge Zobel and said, listen, this is good stuff. Now we want to take his deposition and record this because it is important, and we want to use it. And that resulted in a hearing before Judge Zobel, which I am displaying on the screen and which I will highlight in the seven minutes that I have until the luncheon recess.

At the top of the page, you will see the Mondev lawyer saying, "What I would like the mayor to say," once his deposition, "What I would like the mayor to say is to give the same sorts of responses that he gave to me during my interview, which was an hour-long interview, where I probably asked him dozens of questions."

The Court then says, "Let me explain to you, to the extent I would be moved to say you could have a deposition, it would be to give you the opportunity to put into permanent form what the mayor said. Now we can do that by a tape recording, you can do it by video, by an affidavit, you can do it by a permanent form, by your writing out with Mr. Weinerman's, the City man's, agreement, which I trust, on the basis of what has been told to me, would not be difficult. These are ways you can solve this problem."

Then he goes down to the top of the next slide. "I want to know what's the fairest way to do, and the least intrusive way."

And the judge said, "I'm concerned that if I say, yes, you can have a deposition, this will turn into a full-scale scrap deposition, with people running up here, emergency motions, et cetera," in the middle of the paragraph there.

And then he continues, "I think it was entirely appropriate, and indeed I may say I suggested it, that the mayor sit down and talk with you. It is not inappropriate that you want to have what the mayor told you, with respect to his relations to Mr. Coyle, in a permanent form that can be used."

It continues, "For example, if all of the parties, including the BRA, were willing to concede that the mayor will testify as follows, then it is an agreed fact that whatever--I would suppose it would not be entirely inappropriate to have the mayor ask one question and give one answer."

The lawyer for the City is complaining. He is talking about his problems trying to schedule the mayor, which no doubt was a difficult thing.

He says, "I think it's really outrageous if they are back in here."

And the Court says, "No, please, keep the temperature down, will you?" And then the Court continues, "No, it is not at all outrageous what they are doing. What they are saying is the mayor gave us something that is of value. We want to make sure that value can be translated into litigation."

The City's lawyer, "Fine. Then let them, in some written, you know, by written stipulation."

Then Mondev's lawyer, "Your Honor, a written stipulation is not really acceptable to the Plaintiffs, Your Honor, for the very reason that a jury is not going to be swayed by a written piece of paper. A jury is going to be swayed by--"

The judge, "It depends on how dramatically you read it."

Mr. Wanger, "Well, that's true."

The Court, "You think a jury is swayed by a video deposition?"

Mondev's lawyer, "I think they are much more swayed by that than by a written stipulation."

And the Court, "Do you think seeing, and I use the term in its nonpejorative sense, seeing a politician talk on television is persuasive to the average Massachusetts resident?"

Mr. Wanger, "Well, this is very different from being on television because the mayor would obviously be under oath, et cetera."

And the judge intervenes, says, "Well, as far as the jury is concerned, it's television." And then he says, "Let me put it this way: Either it is stipulated as to what the mayor said or else you get a chance to ask the question of this mayor on camera."

And Mr. Wanger says, "Well, what do you mean stipulated?"

They talk about that a little bit, and then down at the bottom of the page, "You have your choice, a stipulation honestly arrived at and not resisted on either side or one question: Tell us

about your official relationship with Mr. Coyle, with respect to the Lafayette Place."

Mr. Wanger, "Is that a choice for the Plaintiff to make, Your Honor?"

The judge, "That is an alternative if, and only if, you are unable to reach agreement, and I will determine whether you are reaching agreement, and since I'm going to be on vacation, you had better reach your own agreement, and it better be agreed. Please, Mr. Wanger, do not play games with this Court."

PROFESSOR CRAWFORD: The gentleman was appearing for the City?

MR. HAMILTON: No, for us, for Mondev.

Mr. Wanger, "Your Honor, I'm not playing games with this Court."

The judge, "I understand that," et cetera.

Now that was the colloquy that took place, and they then stipulated what the mayor had said in this 1-hour interview. The City and the Mondev lawyers sat down and formed a stipulation, the

piece that is displayed there on the screen in front of you now. Included in that stipulation is a summary of what the mayor said with respect to his relationship to Mr. Coyle, going of course to this agency issue that I highlighted just a moment ago.

If I may, Mr. President, I would like to break there, and I will resume with the next installment on this subject after the break.

PRESIDENT STEPHEN: And perhaps when you do, you might explain, to me at least, the relevance of this, of what you have been talking about the last 5 minutes, the importance or the significance, what light does Mr. Coyle's statement throw on anything that we are concerned with because I don't follow--

MR. HAMILTON: I will do that, Mr. President. The light that the mayor's testimony here would be goes to the question of whether or not Coyle was acting as the agent of the City. When Coyle does something, whether that is binding

on the City and whether the BRA is in an agency relationship with the city vis-a-vis the Hayward Parcel, but let me expand on that.

PRESIDENT STEPHEN: Yes, thank you.

We resume at 3 o'clock.

[Whereupon, at 12:59 p.m., the hearing recessed, to reconvene at 3:00 p.m. this same day.]

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A F T E R N O O N S E S S I O N

[3:00 p.m.]

PRESIDENT STEPHEN: Perhaps we should start precisely at 3 o'clock.

MR. HAMILTON: Thank you, Mr. President.

PRESIDENT STEPHEN: You have the floor.

MR. HAMILTON: I hope I didn't look too impatient.

PRESIDENT STEPHEN: No, merely virtuous.

[Laughter.]

MR. HAMILTON: When we broke for the luncheon recess, Mr. President, I had taken you up to the stipulation that the parties had entered into with respect to what the mayor had said concerning his relationship to Mr. Coyle. I had said that this was important because many of the events complained of by Mondev were acts of Mr. Coyle, and in many respects the BRA is independent of the City of Boston. It is an independent authority, and the question, therefore, was significant as to whether or not Mr. Coyle spoke,

and acted, and bound simply the BRA or whether he spoke, acted and bound the City as well.

Indeed, this came up on many occasions during the trial, where the BRA and the City were separately represented and directions were sought from the Court and given as to whether a particular piece of evidence would come in against the City or whether it would come in against the BRA or both. So it was not an issue without significance, and indeed that is exactly why Mondev had sought to take the deposition of the mayor on this issue, which they were entitled to do.

In any event, the stipulation ultimately resulted, and I have taken you through the colloquy with the judge which showed how that developed. We have on the screen now extracts from that stipulation, and you can see its significance or at least its relevance to the issue of a relationship between Mr. Coyle and the mayor.

The mayor had--this is a stipulation between the parties concerning what the mayor had

said during his interview. "The mayor had recommended to the BRA board that Mr. Coyle be hired as executive director of the BRA. Mr. Flynn said, in substance, that in his view, Mr. Coyle was the person primarily responsible for development issues involving the City from 1984 to 1990. The mayor felt it important to give department heads and officials, such as Mr. Coyle, flexibility and latitude to administer their respective departments using their own good judgment and skills.

The mayor felt that this was particularly true in the area of development, where he left all of the details to department heads, such as Mr. Coyle, and was content to let Mr. Coyle act as he saw fit. The mayor indicated that he had tremendous confidence in Mr. Coyle, and relied on him and his staff and that he had been very pleased with the manner in which Mr. Coyle handled development issues.

In response to the question of whether there was a person designated within the mayor's

office to handle Lafayette Place, the mayor replied that Steven Coyle would have handled it directly." A concession in our view that insofar as this particular project, Lafayette Place, was concerned, Mr. Coyle was acting on behalf of the mayor.

Now, after the trial began in 1994, Mr. President, the City took the position that this stipulation should not be admitted as evidence. This is a different judge now. The judge that handled the preliminary matters, Zobel, and had encouraged the parties to come up with this stipulation was not trying the case.

Judge Mulligan, who was the trial judge, postponed ruling on the admissibility of the stipulation throughout the trial. Near the end, however, LPA learned that the former mayor, Ambassador Flynn, might be in Boston and informed the judge that it was trying to subpoena the former mayor.

Let me have the next slide, please, Lee.

The City, at that point, tried to quash

the subpoena that Mondev was endeavoring to serve upon the mayor, but at the same time, likewise, continued to object to the stipulation. You see that there in the trial transcript displayed on the screen.

"Do you continue to object to the stipulation on behalf of the BRA?"

"Yes, I do."

"Okay. The oral motion to quash the subpoena is denied."

"We'll see what happens. see if Mr. Flynn shows up tomorrow, Ambassador Flynn. Okay, so we'll reserve on that matter."

Now, as it turned out, Mondev was unable to locate Ambassador Flynn, and therefore he could not be served with a subpoena, the net result being, obviously, that he did not appear at the trial to testify. However, for reasons unknown to anyone, Judge Mulligan, at the end of the day, excluded the stipulation from evidence completely so that the evidence that Mondev had endeavored to

record, for purposes of the litigation in this stipulation, did not come in.

PROFESSOR CRAWFORD: Mr. Hamilton, sorry. You said Judge Mulligan excluded, but he gave no reasons for excluding?

MR. HAMILTON: Yes, yes.

It is important, also, Professor Crawford, this relationship between the City. Because as I pointed out this morning, there were all kinds of events that had taken place over a 5-year period, some involving Director Coyle, some involving the Real Estate Board, some involving someone else, some involving the mayor, et cetera, and the relationship is important because you can isolate on any single event and say that is okay.

There is nothing wrong with that, whether that be traffic studies which I talked about or the refusal really to obtain the appraisals or new roads or closing roads or any of those events. If you take one of them by themselves, they are understandable, but the cumulative impact of those

is very significant, and it's important.

PROFESSOR CRAWFORD: I'm sorry, Mr. Hamilton, I hate to interrupt. Why does it matter to your case that it was excluded?

MR. HAMILTON: That what was excluded, the stipulation?

PROFESSOR CRAWFORD: The stipulation, yes.

MR. HAMILTON: The stipulation because--

PROFESSOR CRAWFORD: When I say "your case," I mean your case before this Tribunal. Why does it matter to your case before this Tribunal that it was excluded?

MR. HAMILTON: Well, because what we are trying to demonstrate that we were prejudiced by the acts of all kinds of people, and we want to be able to attribute all of those acts to almost everyone. In other words, we don't want to have someone say: Oh, no, no, no, no. This only is attributable to the City, this one is attributable to the BRA or someone else.

PROFESSOR CRAWFORD: Mr. Hamilton, I can

see that the issue of attribution matters in the domestic context because the question was whether these acts were a breach of the City's contract.

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: But, of course, your cause of action here is an after-cause-of-action.

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: And the rules of attribution and treaty is different from the rules of attribution and contracts.

MR. HAMILTON: Yes.

PROFESSOR CRAWFORD: So does it matter, as long as we know what the stipulation was and what the evidence is, in any event, in relation to the BRA, which is obviously a public authority, presumably--

MR. HAMILTON: You now know what the stipulation is. I will let more of my colleagues respond to that substantive point, Professor, but you now have the stipulation. You understand what the intention of the parties was at the time.

Now we had a similar story--

PRESIDENT STEPHEN: Can I just ask, really, you are putting all of this, concerning the stipulation and the exclusion, as a further instance of improper conduct on the part of the Respondent.

MR. HAMILTON: Yes, we are.

PRESIDENT STEPHEN: That's what it comes to.

MR. HAMILTON: Yes, we are. It's a bundle of twigs.

PRESIDENT STEPHEN: Yes, I follow you.

MR. HAMILTON: Yes. Now we had a similar problem at the trial with respect to Chairman Roche of the City's Real Estate Board. This was slightly different because there we actually subpoenaed Chairman Roche. You will recall that this morning I mentioned he had written a letter to the mayor at a key point in connection with the time when we were seeking approval of the Campeau contract. Here we served a subpoena, and he was to attend.

If you will put up on the screen, the colloquy on this, please, Lee, you will see that he had been served, and the judge asked where does he live, he lives in Dorchester.

The Court, "Well, that's about six miles away."

"I understand, Your Honor. I have left messages, et cetera."

"Well, we're going to need him," said the Court.

"I've told him, Your Honor, and I will continue to tell him at the lunch break, at the end of the day."

The Court, "Well, he can drive over or he can come over in a police car," referring, obviously, to the power of the Court to compel this man's attendance. He was within the immediate vicinity of the Court.

Nonetheless, Chairman Roche ignored the subpoena. He did not appear at trial, and the judge declined to exercise his authority to compel

attendance, again, without stating any reason for it. The net result simply being that Chairman Roche's contribution to an understanding of facts was not available at the trial.

Now, at the close, when Mondev completed its presentation of its case, but before the BRA or the City had commenced their defense, the BRA made a motion for a directed verdict. It was a written motion on multiple grounds, including that it had immunity, and that particular ground is stated there.

As you can see, this is a generic immunity claim, no specific citation, you know, nothing, just immunity from Plaintiff's "Fourth Claim" for intentional interference with contractual and advantageous business relations. This was the first time immunity had come up. There had not been an affirmative defense pleaded. There had been no motion at the outset to dismiss on the grounds of immunity, no motion for summary judgment on immunity grounds. It comes up after this case,

plaintiff, has completed the presentations of its case. Judge Mulligan denied the motion from the bench without any opinion.

After the defendants put on their case, the motion was renewed in exactly the same form, and once again Judge Mulligan denied the motion from the bench without any explanation or opinion.

Now, during the closing arguments, Mr. President, as part of the effort to persuade the jury that there was no enforceable contract between this City and the LPA for the purchase and sale of the Hayward Parcel because the terms of the so-called agreement were too vague and undefined, counsel for the City argued, as displayed there on the screen, arguing to the jury here.

"And then the question becomes, how do you figure that out? Well, how do you decide what the deed is going to be to transfer the property? How did you decide when the transfer is going to take place, where to show up for the closing? The closing is where you show up to exchange the deeds,

and you know what date is it going to be? Is it 2 o'clock in the afternoon or 10 o'clock in the morning? Do you just bring a plain check? Do you bring a certified check? Does it have to be a certified check drawn on an American bank? Remember, we're dealing with Canadians here."

Now I don't know what that argument was all about, Mr. Chairman. LPA had been around for some time in connection with this project. It had issued many, many checks, no evidence that there was any problem with any check it issued, so I don't know what the reference is to a plain check or to a certified check or to a certified check drawn on an American bank or to the problem that we're dealing with Canadians here.

I'm sure--

PROFESSOR CRAWFORD: Mr. Hamilton?

MR. HAMILTON: Yes?

PROFESSOR CRAWFORD: I could well understand that if the jury verdict had gone against Mondev or LPA, in the context in which

counsel had stressed that you were dealing with a Canadian institute, that that might be evidence of discrimination, but how is it evidence of discrimination if Mondev won the case notwithstanding? I mean, the remark may have been, depending on how you read it, unfortunate, but what's the causal link to the breach?

MR. HAMILTON: There are pieces of the case we won, Professor Crawford, at this early stage. There are pieces, of course, of the case that we did not win. There were damages issues out there, et cetera, so it was important.

As I say, there may be, to me, it is just a naked appeal to the jury by the City to prejudice to discriminate against foreigners. There may be some other explanation.

PROFESSOR CRAWFORD: But the proposition which is being addressed there is what you had to do in order to fulfill your side of the bargain in order to give effect to your option, and on that point you won with the jury because the jury said

that you--

MR. HAMILTON: Said there was a contract.

PROFESSOR CRAWFORD: Said not merely that there was a contract, but that you had done everything that you needed to do in order to rely on the contract.

MR. HAMILTON: The jury said that, yes, sir.

PROFESSOR CRAWFORD: And that seems to be the point that this passage is directed to.

MR. HAMILTON: I think it is, but I think the only reason to make this argument about a Canadian company is to discriminate against Canadians, whether it is in the magnitude of the damages that are awarded or whatever. It comes up. To me, it's an unnecessary, inappropriate and gratuitous remark. It shouldn't have happened.

Now, once the closing arguments were completed, Mr. President, Judge Mulligan sent the case to the jury based upon a special verdict form containing nine questions, which I will display for

you on the screen, together with the answers that the jury gave when it concluded its deliberations.

Question One: Was there a valid contract between the City and the LPA for the purchase and sale of the Hayward Parcel? They answered that yes. That's the point that you were just making, Professor Crawford.

Question Two: Did the LPA perform its obligations under the contract? They answered that yes, and you can see there that they were instructed at this point to go to Question Four and not address Question Three, Question Three, of course, being if LPA had not performed, if the jury had found that they had not performed, was its failure caused by some material breach by the City or because the City was dealing in bad faith, et cetera. They didn't address that question because they found that the LPA performed.

Then Question Four: Did the City of Boston breach? The answer to that was yes.

Question Five: Was the BRA acting as the

agent of the City of Boston regarding the purchase and sale of the Hayward Parcel? Answer to that is no. This is where that stipulation could well have had a--caused the jury to check the other box, but in any event, the jury was instructed, if no, follow the instructions under Question Number Six, but the jury answered Question Number Six itself, and answered it: Did the BRA breach the contract? Answer: Yes.

Question Seven: What damages were proximately caused to the LPA by the breach less any money received for the Hayward Parcel from Campeau? So the jury was to determine the damages caused by breach after taking into account any money received for the Hayward Parcel from Campeau. They found damages of $9.6 million.

Question Eight: Did the BRA intentionally interfere with the contractual relations between LPA and Campeau? Answer: Yes.

And the final question: What damages resulted to LPA from that interference, again, less

the money received from Campeau? And the answer there, $6.4 million.

Now, when that was returned--yes?

PROFESSOR CRAWFORD: What is the relationship between the $6.4 million and the $9-point--

MR. HAMILTON: $9.6-.

PROFESSOR CRAWFORD: --$9.6 million?

I realize that these verdicts are relatively inscrutable, but on what basis can you say that if the damages caused to LPA, taking into account the money received from Campeau, the gist of the complaint being essentially the same against the City and BRA, that they were different figures or they intended this cumulative and, if so, on what basis?

MR. HAMILTON: Well, we will never know exactly what the jury did, of course, but the claims are not the same against the two.

PROFESSOR CRAWFORD: They are not the same cause of action, but surely the underlying loss

suffered by LPA, and therefore by Mondev, was essentially the same. It was a combined course of action by the two parties.

MR. HAMILTON: Well, in a sense, but the damages sought against the City for a breach of contract were for breach of the Tripartite Agreement in respect of the Hayward Parcel. That was what we were seeking. The damages for tortious interference against the BRA are tortiously interfering with the separate Campeau contract, by which we lost the sale of the whole project. So they are not the same.

PROFESSOR CRAWFORD: So, in fact, there is no overlap between the two damages.

MR. HAMILTON: We didn't think so.

But, to finish that story, Judge Mulligan had a different view, Professor Crawford. Immediately after the jury returned this form, he first struck the jury's finding that the BRA had breached the contract, saying it was a meaningless answer in that they had just answered the previous

question to the effect that the BRA was not agent for the City. Ergo, it wasn't a party to the contract regarding the purchase and sale of the Hayward Parcel. So, under that theory, it could not have breached.

He did not seek clarification. He was asked by the lawyers to seek clarification from the jury. He declined to do that. He also ruled, at that time, that the $6.4 million against the BRA for tortious interference was encompassed within or swallowed up by the $9.6 million award against the City for breach of contract, the point you were just making.

Counsel for Mondev made the answer that I just gave you, but it did not persuade Judge Mulligan, and he concluded that the damages did overlap, and again refused to seek any clarification from the jury.

A week after the trial ended, roughly, both sides made the usual motions for judgment, notwithstanding the verdict, or, in the

alternative, for a new trial. Those were, of course, addressed to the trial judge, and, roughly, almost a year later, 10 months later, August 1995, Judge Mulligan decided those motions. The result of Judge Mulligan's decision is displayed there on the screen now.

He first held that there was sufficient evidence to support the jury's finding that there was a binding purchase and sale agreement, the City, of course, taking the position that there was not.

He found sufficient evidence to support the jury's finding that the City had breached. He, similarly, affirmed the $9.6 million for a breach of contract. He concluded that the LPA had presented sufficient evidence for the jury to conclude that the BRA unlawfully attempted to exact a higher price for the Hayward Parcel than would have been obtained using the formula in the Tripartite Agreement, and he further stated that that the LPA had offered strong evidence that the

BRA was improperly attempting to strong arm it during the design review process.

However, Judge Mulligan concluded that even though the BRA had not raised its immunity defense until after the case had essentially been tried, the defense was not waived and was still available, and then he held that the BRA was entitled to immunity under Massachusetts law as to the commission of intentional torts, such as interference with contractual relations, and that essentially mooted his earlier decision about the overlap between the two because he had now eliminated the $6.4-, in any event.

He also ordered interest on the damages running from the date the LPA filed suit, rather than the date we claimed was the date of the breach, and that was his decision on that. That resulted in an immediate motion to amend, arguing on this interest point, and unfortunately the judge did not rule on that motion for almost 2 years, denying it on August 20, 1997. The case was not

ripe for appeal until that happened, which explains some of the passage of time, 2 years were occupied there.

Both parties then--

PROFESSOR CRAWFORD: Mr. Hamilton, is the award of interest under Massachusetts law discretionary?

MR. OLESKEY: [Off microphone.] [Inaudible.]

PROFESSOR CRAWFORD: That's the quantum of interest, but what about the period in respect of which interest is payable. Certainly, the legal systems that I am used to, there is no amount of discretion in them.

MR. OLESKEY: The only question was whether there is going to be interest on the contract award from the date of the breach or from the date of the filing of the complaint, and it was that motion that was pending for 2 years. The judge ultimately ruled, as Mr. Hamilton has said, that the interest should run from the date of

filing, not from the date of breach.

PROFESSOR CRAWFORD: My question was whether the determination of that issue was a matter within the judge's discretion.

MR. OLESKEY: No, it's just a matter of the clerk literally mathematically determines, once it's clear the date from which the interest runs. It is statutory, yes.

MR. HAMILTON: At this point, as I said, Mr. President, both the City and Mondev sought direct appeals by the Supreme Judicial Court in Massachusetts, bypassing an intermediate appeal. That can be done under certain circumstances, and it was done here. Leave was granted for direct appeal from what had already transpired that I have described to the Supreme Judicial Court in Massachusetts.

In that connection, as I had said earlier, the parties appealed not only the grounds that arose out of these various decisions by Judge Mulligan and the jury, but also appealed from Judge

Zobel's earlier decision dismissing that third cause of action under Chapter 93A of the Massachusetts General Laws. That had been preserved by an appropriate filing early on.

So that went up, along with the issues that arose out of the decisions by Judge Mulligan. That resulted, then, in the arguments and ultimate decision of the Supreme Judicial Court of Massachusetts. I am not going to summarize those arguments. I am going to leave those for Ms. Smutny, who wants to deal with that in the context of the substantive claims here in this NAFTA proceeding.

Let me only say, as you are well aware, that once the Supreme Judicial Court had completed its deliberations and analysis, our client, Mondev, was left with no recovery of any kind in this matter. They filed immediately an application, a petition for rehearing, setting forth their complaints as to what the Supreme Judicial Court had done. That was denied very quickly, again,

without opinion.

PRESIDENT STEPHEN: Can you tell me an application for rehearing, that presumably requires some grounds. Was it suggested there was discovery of new material or on what ground would you succeed, other than merely saying this decision was incorrect?

MR. HAMILTON: Well, they basically said that that decision was incorrect. They said, for example, that there was--

PRESIDENT STEPHEN: But that's not a ground for rehearing, surely, is it?

PROFESSOR CRAWFORD: I think under American law it is.

PRESIDENT STEPHEN: Really?

MR. HAMILTON: Yes. You can raise, for example--

PRESIDENT STEPHEN: Going back to the same Court and saying--

MR. HAMILTON: Yes.

PRESIDENT STEPHEN: --please rehear

because you were wrong?

MR. HAMILTON: They said, rehear, and they said, for example, you have decided issues in your opinion that had never been raised before. We really haven't had the opportunity to brief them or be heard on them, but you have relied on them. They said that in their application. They said, you allowed them to assert this immunity defense. We had claimed it had been waived. You didn't address waiver. It's waived. There were those kinds of things.

They then filed, when that petition for rehearing was denied, there was then a petition for writ of certiorari to the Supreme Court of the United States. I suspect that all of you are familiar enough with American jurisprudence to know that that is, indeed, a challenge, but it was, nonetheless, made here, claims being made that property had been taken in violation of the Fifth Amendment and the Fourteenth Amendment. That petition was denied without opinion on March 1,

1999, which was the end of the day for Mondev in these proceedings, prompted a comment from the City.

Lee, Slide 100, please.

"We thought all along the City had done nothing in breach of this agreement. We're glad the taxpayers won't have to pay about 20 million to a Canadian developer that's already made a lot of money."

Mr. Oleskey: "I think my client is plainly disappointed and will continue to review options."

And that is what brought us here. Thank you, Mr. President.

PRESIDENT STEPHEN: Thank you.

Ms. Smutny?

MS. SMUTNY: I'm going to address the Tribunal now on what I'll refer to as the preliminary objections that were raised with respect to the Tribunal's competence and to the admissibility of Mondev's claim that were raised by

the Respondent and I'll just--Lee, are you with me there on the slides?

All right. Well, the Tribunal will recall that in its letter of April 14th, 2000, Respondent urged that these arbitral proceedings be bifurcated in order to address several jurisdictional and admissibility objections following an exchange of pleadings between the parties as to whether bifurcation on that basis was warranted. The Tribunal ordered that the issues of competence raised by Respondent be addressed together with a question of liability, so now we will address those issues.

First, the need for a final judicial act. The Respondent objected that the Tribunal lacked competence to address Mondev's claims insofar as they are based upon the BRA's tortious conduct because the SJC's decision on that subject was not a final act of the United States judicial system that can give rise to state responsibility under Chapter 11. That's now been--

PRESIDENT STEPHEN: That's no longer being pursued?

MS. SMUTNY: Right, wanted to make sure that that was clear.

PRESIDENT STEPHEN: Yes, that's clear.

MS. SMUTNY: Okay. Lee, go to the next. That was clear, the Counter-Memorial. Let's move on to the next.

Respondent also objected that Mondev has failed to present a claim under 1116. Article 1116 provides in relevant part that an investor of a Party may submit to arbitration a claim that another Party has breached an obligation under NAFTA's Chapter 11(a), and that the investor has incurred loss or damage by reason of or arising out of that breach. Article 1116 in effect describes the type of claim that the NAFTA State's Parties consent to submit to arbitration, that is, a claim that the investor incurred loss or damage that was caused by a breach of a substantive provision of Chapter 11. This is compared to Article 1117, but

I'll address more on 1117 shortly.

Now, recalling the decision of the International Court of Justice in the Barcelona Traction case, Respondent argues that that case demonstrates that international law does not recognize the losses that a shareholder of a corporation might suffer unless those losses are independent of the injuries sustained by the corporation. Respondent therefore objects that insofar as Mondev has only presented a claim based upon losses incurred by LPA, it cannot proceed under Article 1116 as Article 1116--under Article 1116 Mondev is limited to seeking compensation for its own losses. As Mondev has set forth in its written submissions, it does seek compensation for its own losses in this proceeding, and therefore is properly proceeding under 1116.

Now, the Tribunal will recall that in its order of September 25, 2000, it reserved any issues regarding damages to be disposed of following the disposition on the merits. Therefore, issues

regarding the nature and degree of Mondev's losses would appear therefore to have been reserved for a later phase. Nevertheless, Respondent's preliminary observations on the matter merit a few remarks.

If we can go to the next slide. It is useful to recall that Lafayette Place Associates, or LPA, is a limited partnership. It was created solely and exclusively for the Lafayette Place project, and the only assets it ever had were the bundle of contract rights and other property held in respect of the project. The sole general partner of LPA is Mondev U.S.A., which is a Massachusetts corporation, which is wholly owned by Mondev International. That is the Claimant. The sole limited partner is the Salem Corporation, also a Massachusetts corporation, wholly owned by Mondev International. Neither of the two LPA partners, Mondev U.S.A. and the Salem Corporation, conducts any business nor owns any assets other than their respective partnership interests in LPA.

Let's go to the next slide. NAFTA's Chapter 11 substantive provisions, including 1105 and 1110, prescribe standards of treatment to be accorded to investments of investors, and as set forth in Article 1139, NAFTA defines investment of an investor--of a Party--as an investment owned or controlled directly or indirectly by an investor of such Party. Thus NAFTA contemplates that an investor may present a claim for losses incurred as a consequence of treatment accorded to an investment that it may own indirectly.

Third, the United States overstates the holding of the court in the Barcelona Traction case. In that case the International Court of Justice was addressing the allocation of the right of diplomatic protection as a matter of customary international law between two potential Claimant states arising out of an alleged taking by Spain of the assets of a corporation. In the circumstances, the Court held that as between Canada, the state of the injured corporation, and Belgium, the state of

the shareholder's nationality, it was Canada that had the right of diplomatic protection. The Court expressly stated that its decision would have been different if Belgium had presented a claim in reliance upon a treaty granting it rights that had been infringed. Also the Court left open the question of whether its decision would be to deny Belgium standing if Spain had been the state of incorporation rather than Canada, a third party, that is, if the Court had been confronted with a bilateral situation, rather than a decision of allocating the right of diplomatic protection to one of two potentially claiming states. In other words, the Court left open the question of whether if Barcelona Traction had been a Spanish company with Belgian shareholders, would Belgium in that circumstance have standing to espouse claims of its nationals, the shareholders, against Spain, arising from Spain's alleged wrongful conduct, vis-a-vis the assets of the corporation.

The Court also expressly left open the

question, which it observed was not before it, of whether an attack on a company's rights that causes damage to the shareholders, could constitute a violation of the shareholders' direct rights.

Let's turn to the Article 16 slide.

PROFESSOR CRAWFORD: [Off mike, inaudible]

MS. SMUTNY: Oh, we could give you those references. I'm sorry, I'm not going to point them right now, but that's something that we certainly can do.

PROFESSOR CRAWFORD: Fine.

MS. SMUTNY: It is noteworthy in this regard that NAFTA's provisions do not refer to a violation of rights, either direct or indirect, but rather to an investor's loss or damage, but rather to an investor's loss or damage.

Finally, Respondent's assertion that 1116 only applies to what the Respondent calls direct losses or direct injuries, as opposed to what it characterizes as indirect losses or injuries, reads language into the provision that is not there.

Likewise, its asserted test that injuries suffered by an investor who chooses to proceed under 1116 must be independent of the injuries that may have been suffered by an enterprise that it may own or control also cannot be found in NAFTA's text.

In this regard the Tribunal may note, as Mondev has observed in its Memorial, in at least two other NAFTA Chapter 11 cases, Pope & Talbot and S.D. Myers, both against Canada, U.S. companies submitted claims under 1116 for losses and damage incurred as a consequence of measures taken that affected the business operations of their wholly-owned Canadian subsidiaries, the Tribunals in both cases rendered decisions finding liability. Apparently no issue about 1116 was raised.

PRESIDENT STEPHEN: The strength of your current submission, which you are now dealing with is that your claim falls validly within 1116.

MS. SMUTNY: That's right.

PRESIDENT STEPHEN: Yes.

PROFESSOR CRAWFORD: And your position, is that LPA itself was an investment?

MS. SMUTNY: LPA was one of several investments. Obviously, Mondev International, the Claimant, owns indirectly even the assets of LPA. So there are several possible investments at issue here. And in fact, this needs to be addressed in the context of clarifying where the losses are, the quantification of the damage, and so on. But certainly LPA could be considered an investment, so could LPA's assets.

PROFESSOR CRAWFORD: It doesn't only go to quantum? Doesn't it go to the question of whether there has been a breach?

MS. SMUTNY: Right, which is why I think at a preliminary stage it's useful to go over this now. At least in theory is it possible that we have articulated breaches of NAFTA, Chapter 11, that have caused some damage to Mondev, and then we can talk about the quantification at a later stage.

PROFESSOR CRAWFORD: My point was this:

if you regard LPA as an investment, it's an investment indirect of Mondev.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: It is therefore an investment of an investor of another Party.

MS. SMUTNY: Yes.

PROFESSOR CRAWFORD: The 1105 standard is a standard of treatment of the investment.

MS. SMUTNY: Yes.

PROFESSOR CRAWFORD: So you don't have to show--

MS. SMUTNY: That's right. I mean, that's right.

PROFESSOR CRAWFORD: On ordinary--I mean I'm not expressing concluded views, obviously, but on an ordinary interpretation of 1105, read with the various definitions, that would seem to follow.

MS. SMUTNY: Certainly LPA is an investment of Mondev International.

Another point necessary to be made is that there are many arbitral awards issued under

investment protection treaties, that like NAFTA Chapter Eleven, do not distinguish between claims for direct and indirect losses, an in which the Claimant was awarded compensation for losses incurred as a consequence of treaty violations that injured investments owned indirectly, that is to say, through shareholdings in companies. And examples of these, two noted in the Memorials, were Maffezini v. Spain, which is Claimant's legal Exhibit 52; AMT v. Zaire, Claimant's legal Exhibit--I'm sorry, Legal Appendix 53; and most recently--and a copy of this case will be provided to the Tribunal at the end of this afternoon--CME v. the Czech Republic, a decision certainly Judge Schwebel is familiar with, decided under the Czech-Netherlands BIT. These cases were all decided under international law. The only reference to direct and indirect in those treaties, like in Chapter Eleven, refers to the ownership of the investments to which the protections of the Treaty apply, and yet the Barcelona Traction doctrine,

urged here by the United States, apparently was not even discussed as presenting a bar to such claims being made by the shareholder. One may therefore inquire what purpose is served by Article 1117, if it was not intended as the sole option for an investor to present a claim for losses incurred as a consequence of injury sustained by an investment owned indirectly.

The NAFTA State Parties obviously concluded that they did not wish to allow locally-incorporated entities to bring claims on their own behalf, even if those entities were owned by a national of another NAFTA State party. This is seen--go to the next slide--in 1117(4). 1117(4), you can see right there, an investment may not make a claim under this section. The effect of this provision is that a locally-incorporated project company may not present a claim under NAFTA for itself. This is distinguished from many investment protection treaties that do permit a locally-incorporated company that is foreign controlled to

present a claim directly.

And in this regard--and this is maybe an attenuated point, but worth observing--in Article 1120, NAFTA Chapter Eleven contemplates the eventual possibility of arbitration under the ICSID Convention. It's possible only eventually because neither Canada nor Mexico are currently parties to the ICSID Convention, but Article 25(2)(b) of the ICSID Convention--and we'll pass around a text of that also this afternoon later if it's useful for the Tribunal--Article 25(2)(b) of the ICSID Convention provides that parties may agree to submit to ICSID arbitration claims presented against the state directly by a locally-incorporated entity, where the entity is foreign controlled.

So that Article 1117, the Article 1117 mechanism, therefore provides a needed option when in the circumstances. For example, when there may be several layers of corporate ownership that involve various other owners, and/or corporations

that are engaged in other activities. The circumstances of proof may be complicated. It may be difficult in some cases to quantify or to calculate precisely losses that flow as a consequence of a treaty violation that injured investments owned by the local project company. That kind of proof is not a problem in this case.

PROFESSOR CRAWFORD: Ms. Smutny, is it the case that under 1117 you don't have to show what eventually loss was incurred by Mondev?

MS. SMUTNY: That's right.

PROFESSOR CRAWFORD: All you would have to do is show what loss was incurred by the enterprise.

MS. SMUTNY: That's right, by LPA in this case.

PROFESSOR CRAWFORD: What if it was the case hypothetically that Mondev had hedged its investment so that it didn't in fact itself suffer any loss as a result of what happened? Would that mean that Mondev could nonetheless recover the full

damage to a U.S. corporation in the absence of any loss to itself?

MS. SMUTNY: well, it would be presenting the claim on behalf of LPA, so that the award would be rendered on behalf of LPA, and then whatever distribution then might go to shareholders or the owners of LPA would happen in due course. And you can imagine corporate structures where the flow might be a bit complicated, and there might be good reasons why there needs to be that provision, to allow the locally-incorporated project company, as is a classic structure for a foreign investment to be able to present claims. It's really a matter of proof and what the circumstances in the given case require.

Well, if we're ready, let's move on to 1117. In Mondev's submission, in any event, this Tribunal is competent to hear Mondev's claims under 1117. That is to say, on behalf of LPA. 1117 provides in relevant part that an investor of a Party on behalf of an enterprise of another Party

that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration a claim that the other Party has breached an obligation of NAFTA, and that the enterprise has incurred loss or damage by reason of or arising out of that breach.

As set forth in the written submissions Mondev has submitted its claim in the alternative under 1117 on behalf of LPA. The United States' objection is that Mondev may not do so without commencing an entirely new arbitration. Respondent concedes that it would have no objection on this ground if Mondev originally had submitted its claim under 1117, and there is no disputing that all the facts and all the issues of law would be completely identical--of course save this exception--had Mondev done so. And that even the identity of the Claimant would be the same as 1117 provides for the investor to bring the claim on behalf of an enterprise.

The United States objects, however, that

because Mondev did not reference Article 1117 in its notice of intent to submit arbitration, which notice is required under 1119, Mondev did not submit its claim therefore in accordance with the procedures set forth in Chapter Eleven.

The parties do not dispute the fact that the only supplemental information that would have had to have been contained in Mondev's notice had Mondev submitted the claim originally under 1117, was LPA's address, which has since been provided. It's by the way the Offices of Hale and Dorr. Nor do the parties dispute the fact that the purpose of Article 1119, that is to say the purpose of the notice, as Canada has described in its submissions in this case, is to enable a NAFTA party to ascertain the allegations made by the investor against it, and to identify the scope of the dispute.

The United States does not protest that it could not, without the benefit of the knowledge of LPA's address, ascertain the allegations made by

the investor against it and identify the scope of the dispute presented. Thus, the United States' protests that the scope of its consent could not extend to Mondev's Article 1117 claim, raises form over substance to a very remarkable degree.

Respondent also objects, however, that Mondev did not fulfill the formal requirements of providing LPA's written consent to arbitration, and LPA's agreement as to the appointment of the Members of the Tribunal. But this too was addressed in Mondev's submissions on this point, and such consents indeed were provided, and provided again during the course of these proceedings. Respondent simply objects to the form of that consent.

Let's go to the blank. Finally, the position urged here by the United States that the scope of its consent set forth in NAFTA must be interpreted strictly or formally, has already been rejected by at least three other NAFTA Tribunals.

Let's go to the next slide. In Ethyl

Corp. v. Canada, the Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter Eleven is to be construed strictly. The erstwhile notion that in case of doubt a limitation of sovereignty must be construed restrictively has long been displaced by Articles 31 and 32 of the Vienna Convention.

The next slide. Metalclad v. Mexico. The Tribunal prefers Mexico's position, as stated in its rejoinder, that construes NAFTA Chapter Eleven as permitting amendments to previously submitted claims, particularly where the facts and events arise out of or are directly related to the original claim. A contrary holding would require a Claimant to file multiple, subsequent and related actions, and would lead to inefficiency and inequity..

Next slide. Loewen v. United States. We do not accept the Respondent's submission that NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in

deference to the sovereignty of states.

Just go to the next. But even--go ahead.

PRESIDENT STEPHEN: Which was the first of those three cases?

MS. SMUTNY: I'm sorry. Ethyl.

PRESIDENT STEPHEN: Ethyl, yes, thank you.

MS. SMUTNY: Claimant's Legal Appendix 6. Metalclad is Claimant's Legal Appendix 4. Loewen, Legal Appendix 87.

Even as to Waste Management v. Mexico, which is Exhibit 9 to Canada's submission and is cited to as being more correct for having dismissed a NAFTA case where the Claimant had failed to submit a waiver of recourse to further local remedies as required by NAFTA, the Tribunal's decision in that case was more clearly taken in response to a perceived substantive deficiency as to whether the Claimant in fact had waived such recourse, than to a formal procedural point. Even so, the Tribunal should not overlook the sharp descent of Keith Hyatt accompanying the Tribunal's

decision in that case, criticizing the Tribunal's formalistic approach to Article 1121, for having, quote: "Heaved the baby enthusiastically out with the bath water," and concluding that as a consequence, the entire NAFTA claim has been undone, noting that such a harsh consequence can hardly be presumed to have been the intention of the NAFTA parties when they executed the treaty.

PROFESSOR CRAWFORD: Ms. Smutny, it remains to be seen whether the baby was thrown out with the bath water or the bath was postponed.

MS. SMUTNY: Right, in that case, yes.

PROFESSOR CRAWFORD: But in any event, it's clearly the case that NAFTA requires a waiver.

MS. SMUTNY: That's right. In that case, that's right.

PROFESSOR CRAWFORD: I mean I categorically requires a waiver.

MS. SMUTNY: That's right, and in that case that's my point, that to the extent that Waste Management dismissed the case, it was because of a

substantive rather than a mere procedural point. That's exactly the point I intend to make.

In the face of these decisions, the United States cites to its own arguments, advanced in these proceedings, as well as similar arguments advanced by Canada and Mexico also in the context of Chapter Eleven submissions, and urges that such arguments, evidence of, quote, subsequent agreement by the parties regarding the interpretation of a treaty that may be taken into account in accordance with the terms of the Vienna Convention, to interpret whether Mondev's 1117 claim properly falls within the scope of the United States' consent. Mondev agrees that the Tribunal may take such statements into account and accord them such weight as the Tribunal deems appropriate. Mondev submits, however, that according such defensive submissions of the state's parties made in their capacities as respondents in Chapter Eleven proceeding, warrant very little weight.

I am now ready to turn to the--

PRESIDENT STEPHEN: Well, just before you leave that, in summary, what you submit is that your claim falls within Article 1116. Alternatively, Article 1117 should be given a liberal interpretation, and your claim falls within it. Is that the alternative?

MS. SMUTNY: Well, yes, except I would say not a liberal interpretation, but rather simply an interpretation in good faith that essentially what is in that treaty is an agreement to arbitrate, and if you look, for example, at the Ethyl Corp discussion, the reference is made, for example, to the Amco-Asia case in interpreting agreements to arbitrate made by states, that those agreements governed by international law, the rule of interpretation should be that one should view the intent of the parties in good faith, what did they intend to permit. That's the point. But essentially--

PRESIDENT STEPHEN: So when I say "liberal", if I am to mean principle rather than

form.

MS. SMUTNY: Yes, that's right.

PROFESSOR CRAWFORD: Is it your position that you submitted the case under Article 1116, but that you now say that in the event that you're wrong about that, you intended to submit it under Article 1117 and seek to amend, or is it the case that you actually submitted as it were under both, but simply forgot to include the address?

MS. SMUTNY: We submitted the case under 1116. Our position is that it was properly submitted under 1116, and that there is no defect in the nature of the claims presented as being addressed under 1116, but in the context of the written pleadings, we submitted the case in the alternative under 1117. This is found in our submissions. The United States objects, well, that's not the proper time or the proper form, and it's in that context that we say we'll take a look at what 1117 is really about. Is that really not sufficient, particularly with a view to the

decisions in Ethyl Corp on similar objections, similar points about whether or not one has to go back, wait six months, do another notice, do it all over again exactly the same.

PRESIDENT STEPHEN: The whole debate doesn't seem very meritorious on this particular point. I'm not criticizing you, but the case that you are trying to discredit, quite successfully I might say from an emotional point of view, doesn't sound like a very meritorious case.

MS. SMUTNY: You mean the United States's objection?

PRESIDENT STEPHEN: Yes.

MS. SMUTNY: Well, that's our position.

PRESIDENT STEPHEN: That's what you are saying?

MS. SMUTNY: Yes.

PROFESSOR CRAWFORD: On the other hand, if I may stand up for the United States, at least briefly, Article 1119 does say, "where a claim is made under Article 1117," and it does seem to imply

that there will be, as it were, as it were an intention to bring a claim under 1117 or that the claim will be ostensibly brought. There seems to be a legal distinction between an 1116 case and an 1117 case.

MS. SMUTNY: Well, the question is whether--

PROFESSOR CRAWFORD: I mean it may well be that it encourages a form of redundancy or circularity in proceedings to require it to be started again, but there might--I mean could, for example, there be legal differences in the tax treatment of recoveries under 1117 as compared to 1116?

MS. SMUTNY: Well, a couple--

PROFESSOR CRAWFORD: And if so, is that something that the United States might have a legitimate interest in?

MS. SMUTNY: A couple of points, you raised a couple of points. First of all, the question needs to be assessed whether or not the

United States effectively obtained the notice that it sought in 1117 in the course of these submissions. The second point regarding--and there might have been a third, I'm going to skip over that I'm forgetting now--but the point about, for example, tax treatment, if the United States is concerned about fraudulent avoidance of tax, this is not the forum to present such a counterclaim, that Mondev has to hold--Mondev is going to have to prove where Mondev's losses are, that the monies that would have gone to Mondev's pocket, that will require an analysis of any monies that might get lost in the flow up from LPA all the way to Mondev. That will be in the nature of the proof of Mondev's losses.

PROFESSOR CRAWFORD: What would the situation be hypothetically if, leaving aside any questions of form, if a Claimant commenced proceedings under Article 1116 and 1117, alleging both losses, direct losses to itself and losses to an enterprise that it had?

MS. SMUTNY: I think a Claimant is free to submit a claim such as that in the alternative.

PROFESSOR CRAWFORD: Yes. I think--there could be no doubt that you could out together in a single claim a claim announced as being under both.

What would be the position of the Tribunal? Would the Tribunal then have to distinguish between the extent of the recovery under each of the two provisions?

MS. SMUTNY: Well, I think the--in a hypothetical circumstance where a party would submit two claims like that in the alternative, the Tribunal would have to decide which is--where would the award go? It would either go in the name of the enterprise, or it would go directly to the investor, so that would be something that the Tribunal would have to decide when a claim is presented in the alternative, and presumably the Claimant would indicate, when it presents in the alternative, the preference. We proceed under "A." If not "A", then "B." So the Tribunal would have

to decide is "A"--does "A" work? If "A" does not work, then we consider whether or not we can proceed under "B."

The third point I had wanted to make before is that as the Metalclad Mexico case considered that amendments are possible, the notion of amendment needs to be considered in the context of evaluating the significance of Mondev's claim in the alternative in the course of the written proceedings.

PROFESSOR CRAWFORD: But I was really hypothesizing a claim that was not in the alternative, a claim that was expressly cumulative, so you claimed both the damage to yourself and the damage to the enterprise.

MS. SMUTNY: One cannot obtain double recovery.

PROFESSOR CRAWFORD: Of course not.

MS. SMUTNY: Well, that's quite right.

PROFESSOR CRAWFORD: The rule against double recovery is a rule about the results. It is

not a rule about, as it were, the form of the verdict, and one might have an award which gave damages to both, but on the basis that the total amount could not exceed whatever the actual loss suffered.

MS. SMUTNY: Right, and one can imagine also a circumstance in which the losses to a project company are some and losses to an investor are other, and if they are perfectly well quantifiable, perhaps, as you say, it's possible to have two Claimants, multiple Claimants, in a single proceeding. That is not so unusual in these types of cases.

PROFESSOR CRAWFORD: My point was really precisely what is the form of your claim? You are saying that, in the first instance, you claim under 1116, and it is only, as it were, if your 1116 claim fails that you claim under 1117.

MS. SMUTNY: That's right.

If there are no further questions, and I would be happy to answer further questions, but if

there are no further questions, I am going to turn now to the scope of the mortgage exclusion.

Here the United States objected that Mondev does not, and did not, own any of the contract rights that formed the basis of LPA's claims before the Massachusetts courts, even as of the date when LPA commenced those proceedings and, as such, that Mondev did not qualify as an investor within the meaning of NAFTA's Chapter 11.

What the United States refers to is its interpretation of the terms of a mortgage granted by LPA to its bank, upon which, following Compeau's default, the bank foreclosed in 1991. Let's go to this slide.

The mortgage granted security to the bank over LPA's rights in the Lafayette project, including rights arising under the Tripartite Agreement, but excluding LPA's rights under the Tripartite Agreement to develop the parcels adjacent to the premises. It is the scope of the exclusion that the United States now disputes.

Now the security granted to the bank by LPA, that is, the mortgage, included, "All rights and benefits derived from the Tripartite Agreement, including all rights to exercise options, including options to purchase and lease, excluding any rights of the mortgager thereunder to develop parcels adjacent to the premises. There is no dispute that parcels adjacent to the premises includes the Hayward Parcel. There is no dispute that the bank foreclosed on the mortgage prior to the commencement of the Massachusetts legal proceeding. The dispute is whether the clause, any rights of the mortgager thereunder to develop the Hayward Parcel was intended to exclude LPA's option with respect to the Hayward Parcel altogether or whether it was intended to exclude only a right to develop, thus, leaving any option right to purchase the Hayward Parcel within the scope of the mortgage property."

Let's go blank for a moment.

"Preliminarily, one should note that the

United States began by overstating its objections on this grounds as relating to all of Mondev's claims. This objection, however, cannot relate to Mondev's NAFTA claim insofar as it relates to LPA's contract with Compeau, that is to say, not the Tripartite Agreement. The Tribunal will recall that jury found that the BRA had tortiously interfered with LPA's contract with Compeau to sell all of LPA's interests in the Lafayette Place project, as to which the jury assessed $6.4 million in damage to LPA.

Since LPA's contract with compeau was not included in the bank's security, the United States' objection, in retrospect to the mortgage, does not relate to Mondev's claims in regard to the Massachusetts tort immunity, as we will discuss later.

There is no dispute that noncontractual claims, including claims of tort, would not have been subject to the mortgage. The United States would appear to have accepted these points, and it

therefore seems to be agreed by both parties--I hope I'm not wrong, but maybe I'll hear otherwise--that the United States' objection, at best, is thus limited.

Now the essence of the United States' objection is that, when Manufacturers Hanover Trust Company, then a very well-known and large commercial bank in the United States, when it foreclosed on the mortgage, it foreclosed on LPA's option rights in respect of the Hayward Parcel, such as they were in 1991, and that LPA, therefore, never had standing to raise claims in respect of those rights in the Massachusetts Court.

PROFESSOR CRAWFORD: I'm sorry. What option rights did you have in respect of the Hayward Parcel in 1991?

MS. SMUTNY: Actually, I'll talk about that very precise thing when we walk through the text--

PROFESSOR CRAWFORD: I'm sorry.

MS. SMUTNY: But it was the--well, that's

really the heart of the dispute.

What the Tribunal needs to appreciate, first of all, I think, is that there is no dispute that throughout the nearly 7 years of litigation between LPA, and the City and BRA, neither the City, nor the BRA, ever raised the argument that LPA's rights, in respect of the Hayward Parcel were conveyed to the bank following the foreclosure.

That is notwithstanding the fact, observed even by the United States in its submissions, that the parties obviously were fully aware of the mortgage from the very outset of the litigation. This is reflected in passing references to the facts of the security in the early pleadings, and that if the mortgage had the effect that the United States now seeks to attribute to it, the bulk of LPA's claims would have had to have been dismissed altogether, had there been a proper pleading to that effect.

It should also be clear that LPA's rights, in respect of the Hayward Parcel, were very

valuable, at least potentially worth up to $16 million. Thus, it is the United States' position that in the face of a foreclosure on a mortgage granted to secure a $50-million loan by the bank, Manufacturers Hanover Trust, its lawyers, and the bank left $16 million sitting on the table at a time when they should have been looking for all possible value in the mortgage rights, but there is no evidence that the bank ever claimed ownership of those rights or made any other assertion of such rights.

Throughout the many years of public litigation, the bank never moved to prevent Mondev or LPA from seeking to claim such rights that allegedly belonged to it. The bank never raised the issue.

Now, to the scope of the mortgage or, more specifically, the scope of the exclusion. I would direct the Tribunal's attention on this issue to the two opinions of Professor Robert Scott submitted by Mondev. Professor Scott most recently

served as the dean of the University of Virginia Law School. He is the author of several of the most widely used texts on contracts and commercial law in the United States. He is recognized as a leading expert in the United States, in particular, on the meaning and interpretation of contracts and financing agreements.

The parties dispute both what rules of contract interpretation are applicable to interpret the scope of the mortgage and the conclusions to be drawn from the application of those rules. Now, as to the rules of contract interpretation, the parties seem to agree that the choice depends upon the characterization of the property interest at issue, that is, whether one is assessing the bank's security in real property or the bank's security in intangible property.

Professor Scott explains that any contract right to purchase or contract right to develop is a so-called intangible property right, and the rules applicable to determine the scope of a secured

interest on such property in New York, which is the governing law of the mortgage, are those found in the Uniform Commercial Code or the UCC. The significance of the UCC is that it was enacted with reference to commercial transactions as a departure from traditional common law rules of contract interpretation that require a strict adherence to the text of an agreement.

The UCC, where it is applicable, requires an assessment of the circumstances, as a whole, to determine the bargain of the parties in fact, and thus requires a broader analysis of the evidence of the parties' intent in the text of their agreement alone. The United States' expert, by contrast, argues that the UCC does not apply and advocates reference to the text of the parties' agreement alone.

But regardless of which rules of contract interpretation ultimately are to be applied, one must consider which right granted to LPA by the terms of the Tripartite Agreement were to be

excluded. In other words, where can the excluded right to develop the Hayward Parcel be found in the Tripartite Agreement?

Now let's go to the slide.

LPA's option rights, in respect of the Hayward Parcel, are contained in 6.02 of the Tripartite Agreement, granting LPA the right to acquire the unencumbered title to the interest of the City in the air rights over the Hayward Parcel, and such rights are pertinent thereto as are necessary to make the air rights commercially viable. This was not a straight option to purchase land, as such.

Lee, would you pass out, I'm sorry, would you pass out I have just excerpts of the Tripartite Agreement for the Tribunal's reference that might be useful to have in front of you. Let me just take a moment to pass that out. So that is in Section .02. That's the option right.

Respondent points to Sections 4 and 9 of the Tripartite Agreement entitled, "Development and

Selection of Developer," to suggest that the mortgage exclusion was intended to relate to the rights to develop the Hayward Parcel that are contained in those sections of the agreement. But as a matter of the plain text of those sections, which Respondent insists is all that can be consulted, there simply is not any right to develop provided to LPA in those sections.

In Section 4, you will find that it sets forth the developer's obligations, that is, not its rights, obligations to commence construction properly, to proceed in a good workmanlike manner, to hire local workers, et cetera.

Section 9 does not convey rights either. It merely recites the parties' understanding of the importance of the identity of the developer. It does prohibit LPA from transferring its development interests in the projects without the consent of BRA, but I would direct your attention to Section 9.03(c), which contains an express exception with regard to mortgages that might need to be given.

Neither section--

PRESIDENT STEPHEN: That is in this?

MS. SMUTNY: Yes, if you look under Section 9, I have given you the full text of Section 4 and Section 9.

Neither section is the source of LPA's contract right to develop. Thus, Respondent's plain-text argument fails even on its own terms. The plain text of 6.02, however, demonstrates that the right to purchase that is granted in 6.2, if anything, was the right to purchase the right to develop the Hayward Parcel. That is inherent in the language you see there. The two are intertwined, and the mortgage exclusion, reasonably read with reference to the text alone--

PRESIDENT STEPHEN: I'm sorry. I think you're going too fast for me. I am not following you at all.

MS. SMUTNY: Let's look at the right that is given in Section 6.02.

LPA has the right to acquire the title of

the City in the air rights over the Hayward Parcel. The Hayward Parcel here is expressed as Parcels D-1, D-2, D-3, D-4, and the new Essex Street. That, together, is the Hayward Parcel.

So LPA has the right to acquire the air rights over the Hayward Parcel, and such rights are pertinent thereto as are necessary to make air rights commercially viable. What could that mean other than the right to develop? They are purchasing the right to develop.

PROFESSOR CRAWFORD: Well, they are purchasing the rights with a view to develop. Of course, they would have had to get any necessary permissions to allow them to develop.

MS. SMUTNY: Of course. Of course, rights to develop are subject to whatever the legal regime is about what those rights are, whatever rights are pertinent to the air rights to make them commercially viable. But the point is what are we to make of language that says, excluding the right to develop, when there is no, expressed in so many

words, in the Tripartite Agreement, a "right to develop"?

So, if one is to look at the language of the texts alone, the most rational conclusion is that the United States' submission is incorrect on this point, but the fact is there is more.

PROFESSOR CRAWFORD: I don't want to interrupt your argument. I'm sort of trailing along in the wake of your argument now, and perhaps while I speak, I may catch up.

At some point, I would like you to try to relate these issues, which are issues of the United States, and Massachusetts and New York law, to the question of standing, to the question that arises under NAFTA. NAFTA is governed by international law.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: Not by United States law.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: Obviously, one has to

refer to United States law as relevant.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: But the question is how it relates to the issue of whether someone is an investor or whether an entity is an investment.

MS. SMUTNY: Well, quite right, and maybe also these questions should be directed to Respondent. What is the objection they tend to make--what is the significance of what they are saying?

I think ultimately this will relate more to damages than to anything else. The United States' position is that you never own these contract rights in the first place. If you never owned the contract rights in the first place, then if you didn't receive damages for breach of the contract, right, where are your losses? I mean, I think that's where the United States is going with this.

At first, they overstated the position. So, at first, in their original objection, they

said that this means that Mondev has no investment because the investment was foreclosed upon. And it was in the context perhaps of overstating the objection that it was characterized as a "jurisdictional objection." If it's understood as being more limited, maybe it only relates to damages.

PROFESSOR CRAWFORD: Take an example where someone invests, perhaps through a local vehicle in property in a NAFTA party, which property is outright expropriated, and let's say the local vehicle is expropriated.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: Or is compulsorily wound up as a result of insolvency arising from the expropriation. The foreign party at that point ceases to have any property interest or any proprietary interest of any kind. It's a valid expropriation under local law.

It would surely still be entitled to bring proceedings under 1116 or 1117. In other words,

the word "investor" surely extends to cover persons who were investors at the time of the breach.

MS. SMUTNY: Absolutely. And this is going to inevitably connect to the discussions that we are going to have later on in these presentations about the temporal objections raised by the United States because the foreclosure takes place in 1991. Again, thinking I think about the United States is overstating perhaps, maybe not fully appreciating at that stage of the proceedings, what this mortgage related to and what the nature of the claims were, the United States' view, perhaps, that even as of 1991, if you were deprived of all of your property and NAFTA doesn't enter into force in '94, this was all part and parcel of trying to emphasize how much was already lost before NAFTA even entered into force.

Now the significance of the temporal issues will be addressed, as we talk about more of the specific claims, but ultimately--

PROFESSOR CRAWFORD: But, I mean--

MS. SMUTNY: I agree with what you are saying. I'm sorry.

PROFESSOR CRAWFORD: You agree with what I'm saying, and you'll fight to the death to stop me from saying the next thing.

[Laughter.]

PROFESSOR CRAWFORD: There are two different questions. There is the question whether you were an investor within the meaning of NAFTA at the time you commenced the proceedings, and I've just made the point that leaving aside any problem of ratione temporis issues, the fact that you have lost all of your property interests which constitute your investment as the result of a breach can't stop you.

MS. SMUTNY: Quite right.

PROFESSOR CRAWFORD: Otherwise it would be the very breach which prevented you from bringing the proceedings.

MS. SMUTNY: Quite right.

PROFESSOR CRAWFORD: I assume, for the

sake of argument, that NAFTA was in force at all relevant times.

MS. SMUTNY: Quite right, particularly if you consider LPA the investment. If anything, certainly Mondev is an investor because it owns LPA as of that time, and if what had happened as of 1991, even if this were correct, if LPA was wiped clean of any of its underlying assets, still Mondev is an investor of a party within the definitions of Chapter Eleven, no question about it.

Once we get past the text alone, a review of the evidence in the record relating to the bank's assessment of its own rights under the mortgage strongly supports the conclusion that the United States' objection must fail; that is to say, if we take the UCC approach and do look at other evidence, the case is even stronger that there is no merit to any objection regarding the scope of the mortgage.

I would refer you to Olesky Exhibits 32, 33, 34, and 35, and I will summarize them to you

very briefly.

PRESIDENT STEPHEN: Sorry, thirty--

MS. SMUTNY: Thirty-two through thirty-five, basically. Olesky Exhibit 32 through 35.

Thirty-two, very briefly, is a memorandum prepared by the bank, Manufacturers Hanover Trust, in September '89, describing the bank's vulnerability caused by Compeau's worsening financial situation and recommending that the bank seek to obtain an assignment of LPA's rights to purchase the Hayward Parcel. Such an assignment would not have been necessary if the bank's mortgage on the mall had already encompassed those rights.

Exhibit 33 is a memorandum of a meeting between the bank and Compeau to determine what the bank's liabilities would be if there was a foreclosure on the mall. The memorandum discusses the bank's liabilities in respect of parking garage and mall. It fails to discuss anything relating to the Hayward Parcel.

The memorandum discusses, also, ways in which the Bank could recoup its losses after foreclosure. It never mentions the possibility of asserting a claim as the owner of contract rights relating to Hayward Parcel.

Exhibit 34 is a statement by the bank in the course of litigation that is coincident with the foreclosure. The bank never objected when Mr. Ransen informed it that only LPA had rights to the Hayward Parcel.

Thirty-five is a letter sent from LPA's counsel to the bank, as well as the City and the BRA, in which again LPA asserts its rights and to which the bank never objected.

Now, regarding this further evidence, the United States protests that it might also be consistent with a view by the bank that it had acquired the Hayward Parcel option rights by virtue of the foreclosure, but in which case its silence in the face of the foregoing correspondence and internal communications would still be unexpected.

The undeniable fact remains that the bank, in fact, never took steps with the conclusion that it had acquired the Hayward Parcel option.

Let's go to the next slide, Lee.

Now, finally, the United States had objected, and I will just touch on this very briefly because this really needs to be addressed in the course of each of the substantive breaches, the United States' objective that Mondev's claims were time barred, to the extent that they are based upon actions taken by the City and the BRA more than 3 years before Mondev commenced this proceeding, I direct you to the language of 1116(2), parallel language is contained in 1117, this 3-year period--let's read it.

"An investor may not make a claim if more than 3 years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

This 3-year period, as prescriptive

periods in general, was designed to avoid the submission of stale claims. As the language clearly provides, it relates to the date of the investor's knowledge of the breach and resulting damage, not to the date of the acts, leading eventually to the breach.

Mondev does not take the position, it does not take the position that a provision of NAFTA might have been breached before such provision came into existence, but both parties seem to agree--

PRESIDENT STEPHEN: I'm sorry. Would you just repeat that. Mondev does not take the position--

MS. SMUTNY: Because in the written submissions one might think, based on the Respondent's characterization of our position, Claimant does not take the view that NAFTA provisions could have been breached before the treaty even entered into force, just a very simple point.

Both parties seem to agree, though, that

the Tribunal may consider facts that predate the NAFTA's entry into force. The Tribunal, thus, is not prevented from considering the effect of such facts, insofar as they are relevant to an assessment of the lawfulness of later acts or omissions. Just a little example. The importance of the content of the evidentiary record that was before the Supreme Judicial Court, in order to appreciate the merits, the issues that relate to the Supreme Judicial Court's review of the evidence, one needs an appreciation of the content of that evidence, what that evidence shows.

As to the significance of 1116(2), as I have just said, Mondev will address such further questions as may arise. As to the date of the breach, in the course of further presentations, it would make more sense in the context of individual claims.

Unless we want to break for coffee, I would--

PROFESSOR CRAWFORD: I don't want to

anticipate that interesting discussion to come, but can you just help us now by saying when, in your view, did the breach occur?

MS. SMUTNY: The breaches finally occurred with the decisions of the SJC and then the denial of the petition for rehearing and the denial of the cert. That is when the breaches occurred.

PRESIDENT STEPHEN: Finally, you say.

MS. SMUTNY: Finally occurred.

PRESIDENT STEPHEN: Everything really revolves around your emphasis on "finally," doesn't it?

MS. SMUTNY: Quite right. And when there are maybe three elements to a claim, to prove a cause of action, it requires there elements: A, B or C. A occurs at one point, B occurs a little later, and it is not till C occurs that there is a breach, and that maybe is a very simple way of characterizing our theory, but a great deal more is going to be discussed on this point, as we continue.

PROFESSOR CRAWFORD: I mean, there is a distinction, in a way, between the claim against the City and the claim against BRA. You took the view and advice that there was no point in asking for certiorari in respect to the claim against BRA.

MS. SMUTNY: That's right. So vis-a-vis the BRA, the ends of the day was as of the rehearing being denied.

PROFESSOR CRAWFORD: Rehearing denied by--

MS. SMUTNY: Regarding the--

PROFESSOR CRAWFORD: The Massachusetts Court.

MS. SMUTNY: Exactly. Regarding the conduct relating to BRA.

PROFESSOR CRAWFORD: Whereas, as to the--

MS. SMUTNY: Contract claims, basically.

PROFESSOR CRAWFORD: Yes, the contract claims, we would have to say that the date, as were the final effective date of the breach, was the date of the refusal of certiorari.

MS. SMUTNY: Yes, that was the very last

act taken, the very last chance if you will.

That is where I am completed, and we would ordinarily turn to now Sir Arthur Watts to address more. It's up to you as to whether or not we should break or--

PRESIDENT STEPHEN: Indeed, that's what I was about to propose, a short break for coffee.

MS. SMUTNY: Thank you.

[Recess.]

PRESIDENT STEPHEN: Sir Arthur?

MR. WATTS: Thank you very much, Mr. President, Members of the Tribunal.

What I would like to do now is to open up the presentation of the Claimant's case on the Articles of substance.

PRESIDENT STEPHEN: I wonder if I might ask you a question at the outset, and that is, how are you running as far as time is concerned? Are you falling behind your schedule or do you feel that all is well as far as time?

MR. WATTS: The short answer to the first

bit of the question is yes, we are behind hand. There were a certain number of more questions than we had anticipated. We allowed for some, but not quite as many. We are running about half an hour behind.

PRESIDENT STEPHEN: Thank you.

MR. WATTS: I'll try and catch up if I can without speaking too fast.

PRESIDENT STEPHEN: Thank you. We'll bear that in mind.

MR. WATTS: Thank you.

I'd like to begin to open up the substantive issues that are involved in this arbitration, particularly start talking about Article 1105 of NAFTA. But before I do that, I'd just like to make one very quick point, and that is to remind the Tribunal--and I am sure you don't need reminding--but nonetheless to remind the Tribunal that under Article 1131 of the NAFTA, the Tribunal is to decide the issues in dispute in accordance with NAFTA and applicable rules of

international law. And it's apparent from other provisions also in NAFTA that in short international law, NAFTA itself is the predominant law to be applied to Chapter Eleven disputes.

Now against that background, let me turn to Article 1105. It's obviously one of the crucial provisions in the case. Mr. President, we have available the text of Article 1105 in this form if it would be more convenient for you than looking at the books that you have. We can make them available if necessary. So whatever the Members of the Tribunal would like. This little package of pages includes the other relevant articles as well.

PRESIDENT STEPHEN: Thank you.

JUDGE SCHWEBEL: Sir Arthur, may I ask, is it your intention that you or one of your colleagues will come back to this temporal matter in more detail?

MR. WATTS: Yes.

JUDGE SCHWEBEL: Good.

MR. WATTS: Partly now and partly tomorrow

morning.

On Article 1105 let me just quote the first paragraph which is the critical one. "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."

It's a provision with a number of separate constituent elements. Similarly, the facts of this case lend themselves to treatment under different headings, and it will be convenient in the Claimant's exposition of its case to look at times at the case from the standpoint of one or other of these separate elements. But that is only a matter of convenience. In law Article 1105, paragraph (1) is a single whole. By the same token, it is not so much the Respondent's conduct taken as a series of isolated incidents which is in question, however blameworthy it is when it is considered as isolated incidents, but rather, their overall effect. The question for the Tribunal is not so much whether

this or that particular incident was wrongful, but whether the treatment, that is, the whole package of treatment accorded to Mondev meant the required standard set by Article 1105. It's the story as a whole which matters in this case. It's a single protracted wrongdoing.

Boston embarked on a pattern of misconduct over a period of years. Mondev did its best to keep its investment alive. When that failed, it immediately sought redress in the local courts. When that failed, it immediately initiated this arbitration. In no way did Mondev by oversight or inertia allow its claims to become stale.

I should first like to look a little more closely at what Article 1105, paragraph (1) means. On its face it seems clear enough. Foreign NAFTA investments have to be accorded--and this is the crucial phrase--treatment in accordance with international law including fair and equitable treatment and full protection and security. And those three elements seem clear.

It's difficult to see where any real problem might lie. Unfortunately, the matter has not proved quite so simple. One issue has been whether the requirements of fair and equitable treatment and full protection and security, what we might call the fairness and protection requirements, are part of what is required by international law. And the significance of that question lies in the view espoused by the Respondent that the standard required by international law is subject to certain limitations. For example, that in accordance with customary international law, full protection and security only applies to police protection of aliens and their property and not to investments. On that basis, it's argued accordingly, that if the fairness and protection requirements are part of international law, they too are subject to the same limitations. Of course, if they are self standing, separate NAFTA provisions, they have all to be applied on the basis of the normal meaning of the

words used.

Now, in its partial award of the 13th of November 2000 the Tribunal in the Myers case concluded that, and I quote: "The phrases fair and equitable and treatment and full protection and security, cannot be read in isolation. They must be read in conjunction with the introductory phrase, treatment in accordance with international law." And that's at paragraph 262 of the Myers Tribunal's award.

And then in April of last year another NAFTA Chapter Eleven Tribunal in Pope & Talbot, held that the fairness in protection requirements in Article 1105 are in addition to the treatment required by international law, not subsumed within it. As that Tribunal expressed the position, investors under NAFTA are entitled to the international law minimum plus the fairness elements. That's a paragraph 110 of its award.

Now, those decisions were of course binding on the parties to those cases.

Nevertheless, the three NAFTA governments, acting as the Tripartite Commission, chose to adopt on the 31st of July 2001 an interpretation. This purported to establish a different interpretation of Article 1105(1). The interpretation also dealt with certain other matters, but for present purposes, it's only the interpretation of Article 1105 paragraph (1) which is relevant here.

The three states assert that this interpretation is binding under Article 1131 paragraph (2). The text of the interpretation, Mr. President, again, I have here and I can make it available--the Tribunal may already have copies in correspondence.

PRESIDENT STEPHEN: Yes, I have it.

MR. WATTS: But if it would be helpful--

PRESIDENT STEPHEN: [Off mike]

MR. WATTS: Good, thank you. The relevant passages are on the last page of the paper that's being circulated.

So far as immediately relevant, the

interpretation is as follows, and it's paragraphs (1) and (2) under heading (B) on the last page. It says: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to investments of investors of another party." And (2), "The concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

Mondev, as the applicant in these proceedings, is somewhat bewildered by this turn of events. On the one hand, Mondev believes that its case can be amply sustained, whichever view is taken of Article 1105. On the other hand there is here an issue of principle, which Mondev considers it right to draw to the Tribunal's attention. Mondev commenced these proceedings and submitted its Memorial on the basis of the NAFTA provisions as they stood at the time. It then received the

Respondent's Counter-Memorial, and then the day before its reply was due the be submitted. Mondev was notified of this interpretation, which affected its understanding of Article 1105 paragraph (1). All Mondev could reasonably do was reserve its position. Now, the right of the three NAFTA states to issue binding interpretations under Article 1131 is acknowledged. The manner of its exercise, however, needs the most careful appraisal. So too does the question whether any given text is a true interpretation to which the binding quality conferred by this article attaches, and so does the question whether an interpretation's binding quality applies to cases already in progress.

The right to issue interpretations is vested only in the three states. They of course are the likely Respondents in disputes under Chapter Eleven. The other parties to such disputes, the investor parties, do not enjoy any such right of interpretation. And there is therefore, at the outset, an inherent imbalance

between the parties to disputes with regard to these interpretations. And this calls for particular care.

In this present instance the Respondent State Party to these ongoing proceedings saw fit to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part. It did so after it had already become aware of the Claimant's arguments as set out in its Memorial, and indeed it did so in a sense which conformed with its own argument as advanced in its own Counter-Memorial.

Mr. President, there is a principle of good faith which applies both to the interpretation and application of treaties, and there is a well-known concept of the rule of law. There must therefore be a question whether Article 1131 is properly to be understood as permitting a respondent to behave in that way. There's also a question as to the limitations upon the power conferred in that article in the notion of

interpretation. The meaning of that which is being interpreted must still involve some uncertainty. Yet in this instance, whatever uncertainty there might have been had been removed by the earlier decisions, and thereafter there was no further room for interpretation. It was more a matter of amendment to that judicially found meaning of the text.

On two other counts so far as Article 1105, paragraph (1) is concerned, the interpretation has about it the quality of an amendment to that article. First it conflates two separate ideas appearing separately in that article and its heading, the minimum standard of treatment and treatment in accordance with international law. And second, the interpretation states that the fairness and protection requirements are subsumed within the reference to customary international law. In effect, therefore, it says that they may be disregarded since they add nothing.

Mr. President --

PROFESSOR CRAWFORD: Sir Arthur, I hate to interrupt. This is probably one of the reasons why we're half an hour behind. Surely whether the interpretation of the three parties is an interpretation or an attempt to amendment depends on how you construe what they said. Of course they may well in due course wish to interpret their interpretation in the way that Coleridge was called on to explain his explanation by Byron. But in the meantime we have to interrupt it. And it doesn't seem to me on the face of it, that paragraph (2) says that the words "fair and equitable treatment" and "full protection and security" are mere surplusage. They say that they are incorporated in the concept of treatment in accordance with international law. It's one thing to say they are included in that concept. It's another thing to say that they are quite unnecessary, they don't add anything to the--I agree with you that if the three parties accept Article 1105 should be read as if the words after "including" were emissive, that

would be an amendment, but they didn't say that.

MR. WATTS: Well, they didn't say that, but that's the effect of what they have said. They have in effect said that since those fairness and protection requirements are included in the reference to international law, saying "international law" is enough to include them, you don't need the other words.

Mr. President, to add to a treaty text words which are not there, which is what the conflation of the separate concepts involve, and to deprive words which are there of their separate meaning is amendment not interpretation. Is it perhaps to be understood that Article 1131 permits the three NAFTA states, under the guise of an interpretation, to overturn decisions of NAFTA Tribunals which they don't like. Respondent specifically refers to--and I quote--"the erroneous interpretations of Article 1105(1) of the Pope & Talbot, S.D. Myers and Metalclad Tribunals." That's at page 15 in its rejoinder. And says that

it has, I quote, "expressly disavowed them." And that's at page 16.

Mr. President, so far, there have been only four awards on the merits by Chapter Eleven Tribunals. We're now told that of those four, three, all of them unanimous, were erroneous. The third paragraph of the interpretation deals with a somewhat separate matter, and it stipulates that a determination that there has been a breach of another NAFTA provision or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). This, Mr. President, is truly astounding as an interpretation of the text. An article which requires treatment in accordance with international law is now said not to cover treatment in violation of a treaty. That's a very blinkered view of what constitutes international law, and it's far removed from anything in the nature of an interpretation.

Finally, Mr. President, Mondev would draw attention to the trenchant criticism of the United

States' interpretation which has been advanced by Sir Robert Jennings in a recent opinion which is available on the Internet. A copy of that opinion is already, I know, available to the Respondent, and copies can be made available to the Tribunal at the end of this afternoon's session if that would be helpful.

In sum, Mr. President, what we have here is the United States, along with its co-contracting states, seeing fit to try to change the rules in mid game. Yet again Respondent disregards its obligation to accord fair and equitable treatment.

Now, Mr. President, Mondev is content to leave the Tribunal to deal with this issue as it sees fit. What matters is that by whatever route one takes, the fairness and protection requirements are included in the treatment which the Respondent is obliged to accord the Mondev's investment. They are expressly included among the standards forming part of the protections afforded by Article 1105. There can be no argument on that score.

For the sake of completeness, however, let me address Respondent's substantive argument on this point. First advanced as a matter of pleading and then purportedly made binding as a consequence of the interpretation. This is the argument that full protection and security does not apply to the protection of investments. It's wrong as a matter of customary international law for the reasons set out in the Claimant's reply at paragraph 183 to 192. So consequently, even if full protection and security is limited to whatever is covered by customary international law, treatment, then it is still applicable to investments.

Mr. President, we have a treaty provision dealing specifically and only with investments. It refers to full protection and security. It just is not conceivable that those words are to be understood and not applied to investments.

Mr. President, let me now turn to the underlying general question of what is the treatment required by international law? Two

things are clear. First, the context of Article 1105 is the protection of foreign investments in particular, not the protection of aliens in general. Many of the older authorities are concerned with the latter, but it's the former, investment protection, which concerns us here, and this is an area where the law has developed significantly over the last half century.

And second, we're here concerned with a treaty concluded in 1992 and entering into force in 1994. It speaks as of that time. When it refers to treatment in accordance with international law, it must at least to start with, mean international law as it stood in the early 1990s. But there's more to it than that. In referring to a generic concept, such as the standard of treatment in accordance with international law, there is a presumption that a treaty text using such a concept is, to use the language of the International Court, intended to follow the evolution of the law and to correspond with the meaning attached to the

expression by the law in force at any given time. And that comes from the Aegean Sea Continental Shelf case, ICJ Reports 1978 at page 32.

In short it is today's international law standard of treatment of foreign investments which is invoked by Article 1105(1), not that of long ago. State conduct is more sophisticated today than it was 100 or even 50 years ago. So too are the patterns of behavior of investors. Notions of civilized and appropriate state behavior have improved. In particular the promotion of cross-country (?) investment is recognized as a necessary part of the modern economic world, a consideration which is reflected in the hundreds of bilateral treaties for the promotion and protection of foreign investments, and particularly in NAFTA. The objectives of NAFTA include, and I quote, "Increasing substantially investment opportunities in the territories of the parties." That's Article 102, paragraph (1)(c). It's these sorts of considerations which underlie the modern

international law regarding the treatment of foreign investments. United States' investments abroad, just as much as in this particular case, Mondev's investment in the United States.

And what content then is to be given to the expression "treatment in accordance with international law?" Tribunals are not given to offering abstract definitions of legal concepts. They prefer to decide the part cases before them in the light of their particular facts.

But let me take some examples of language used in some recent decisions. The fullest citations are in the pleadings, and for the moment I'll just give an edited selection of highlights. In Myers in Canada, it's a the Legal Appendix 3 in the Claimant, the Tribunal in November 2000 stated that a breach of Article 1105 occurs when an investor has been treated in an unjust or arbitrary manner that is unacceptable from the international perspective, and that's at paragraph 263.

In the ELSI case before the International

Court in 1989, the Court defined arbitrariness in this context as, I quote, "not to much something opposed to a rules of law as something opposed to the rule of law. It is a willful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety." That's at page 76 in ICJ Reports 1989.

Then there is Amco-Asia v. Indonesia. It's at Legal Appendix 45. This is an ICSID award in 1990. First I must note that the Tribunal regarded denial of justice as a concept covering also administrative procedural irregularities. I say that because otherwise there might be confusion in the quotation that I am about to read. The Tribunal continued, I quote: "Even if no single act constitutes a denial of justice, such denial of justice can result from a combination of improper acts." And the Tribunal then applied the tests laid down in--and I quote, "laid down in the ELSI case, a willful disregard of due process of law," or in the Eidler case, the need for ordinary justice, or

in the Chattin case, bad faith, willful neglect of duty or insufficiency of action or pattern to any unbiased man. In the Pope & Talbot case, that's Legal Appendix 58, a NAFTA Chapter Eleven Tribunal in April last year, found there to be a lack of fair and equitable treatment in the way in which Canada had conducted an administrative review of the Claimant's records. And it found that Canada had acted without legal justifications for its actions and had relied--and I quote--"relied instead on naked assertions of authority and on threats that the Claimant's allocation"--and that is the allocation of timber exports--"could be canceled, reduced or suspended." That's at paragraph 174.

In the Metalclad case, which is at Legal Appendix 59, the Tribunal in August 2000 found a failure to accord fair and equitable treatment in the circumstance that Mexican municipal authorities had dealt with certain administrative matters they were faced with. The Tribunal pointed out that, I

quote, "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA." That's paragraph 99.

In Maffezini v. Spain--this is the last case I will be referring to--in Maffezini v. Spain, Legal Appendix 61, an ICSID Tribunal in November 2000 concluded that certain acts--and I quote, amounted to a breach by Spain of its obligation to protect the investment. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with the treaty." And that's at paragraph 83 of the judgment.

Mr. President, Tribunals may be reluctant to embark on abstract definitions. Commentators

are less inhibited. Let me just give a few examples. First, Vasciannie, writing in 1999, the Legal Appendix 38, and I quote, "If the investment has been subject to arbitrary or capricious treatment by the host state, then the fair and equitable standard has been violated. This follows from the idea that fair and equitable treatment inherently precludes arbitrary and capricious actions against investors."

Then F.A. Mann, writing in 1971, Legal Appendix 39. Whatever concept is spoken of, the essence of the matter is always the same. It is fair and equitable treatment, or as is it sometimes put, good faith that every state in internationally required to display in its conduct towards aliens.

My last quote, Mr. President, is from the OECD commentary to Article 1 of the OECD draft convention of 1967. That's at Legal Appendix 37. It's rather a long quotation, but it contains a lot of very useful material. I hope you will bear with me. And I quote. "It is a well-established

general principle of international law that a state is bound to respect and protect the property of nationals of other states. From this basic principle, flow the three rules contained in paragraph (a) of draft Article 1. That is to say that each party must assure to the property of other parties' nationals, (a) fair and equitable treatment; (b) most constant protection and security; and (c) that the exercise of rights relating to such property shall not be impaired by unreasonable or discriminatory measures. The phrase fair and equitable treatment, customary in relevant bilateral agreements indicates the standard set by international law for the treatment due by each state with regard to the property of foreign nationals. Most constant protection and security must be accorded in the territory of each party to the property of nationals of the other parties. Couched in language traditionally used in the United States' bilateral treaties, the rule indicates the obligation of each party to exercise

due diligence as regards actions by public authorities, as well as others in relation to such property. A breach of obligations by a party is established if it can be shown that the exercise of any right referred to in Article 1 is impaired by an unreasonable measure that may be attributed to that party, and a measure may be unlawful in view of the manner or circumstances in which the power has been exercised. In many cases such a measure will also violate the standard of fair and equitable treatment."

Mr. President and Members of the Tribunal, the foregoing sample is representative of late 20th century legal opinion. What's striking about all of it is the absence of extreme language. There is nothing to the effect that, in order to fall afoul of the international law standard for the treatment of aliens, the wrongdoing must have about it some extreme quality. The language used in all instances, like the language of Article 1105 itself, is normal, ordinary language.

The standard there in that article is "treatment in accordance with international law, including fair and equitable treatment and full protection and security"--terms which are to be given in good faith their ordinary meaning in their context and in the light of NAFTA's object and purpose.

The content of that standard is reflected in the sort of words used in the passages to which I've drawn attention: unjust, arbitrary, unacceptable from the international perspective, willful disregard of due process of law, ordinary justice, insufficiency of action apparent to any unbiased man, lack of orderly process and timely disposition, expectation of being treated fairly and justly, arbitrary or capricious treatment, due diligence, and the impairment of rights by any unreasonable measure. Those are the standards to be applied when considering whether there has been a breach of Article 1105(1).

Now, in the light of those indications of

what kind of treatment is required by international law, let me now turn to examine more closely Boston's conduct towards Mondev.

PROFESSOR CRAWFORD: Before you do, in the Pope & Talbot case, the Tribunal on several occasions referred to a margin of appreciation in terms of the conduct of the host state, and the term "margin of appreciation" has obviously been used in other contexts in, for example, human rights.

How is the margin of appreciation to be applied in relation to these standards, or is it surplusage?

MR. WATTS: Well, I think we're in the position where a rule of law, which is set out in a fairly general way, has got to be applied to a given set of facts. It is a question of judgment. Mondev's submission to you in this case is that the facts that are the facts of this case suggest that the facts amount to a breach of those standards of international law. That is a matter for the

Tribunal's appreciation.

It's true that underlying that there is an element of appreciation in the particular circumstances with which, for example, Boston or the BRA was faced. They have a margin of appreciation, too, but, nonetheless, there is an overall picture which their conduct produces, and t overall picture needs to be appreciated by the Tribunal in order to determine whether it matches up to the standards which are required by NAFTA.

Let me first, before going into detail on Boston's conduct, remind the Tribunal of a point which I made this morning. I then said, in summarizing Boston's conduct towards Mondev, that the Boston authorities--and I quote from what I said this morning--the Boston authorities determined steadily and intentionally to erode the value of Mondev's investment under the Tripartite Agreement until the stage was reached when Mondev had been deprived of its investment property altogether. It had, quite simply, determined from

the moment the new administration took over to disregard the Tripartite Agreement, thereby depriving Mondev's investment of value.

That, Mr. President, was the essence of the matter. Understand that, and everything else falls into place. It permeates the whole story of Boston's conduct towards Mondev.

If I may be colloquial for a moment, that conduct smells, and smells badly, and if it doesn't pass the smell test, it doesn't pass the NAFTA test.

Now, let me look at what actually happened against the background of Article 1105 and the three legal elements expressly identified in it.

It is Mondev's submission that the treatment it received at the hands of the City of Boston and the BRA satisfied none of those three elements. And their misconduct was not just marginal; it was manifest. They didn't just tiptoe a little way over the threshold impropriety. They blundered and bulldozed their way across it and out

again the other side, with no regard whatever for their contractual commitments, the rights of Mondev, any notions of fairness, or investment protection, or international law.

The factual record has been set out fully in Mondev's Memorial and Reply and again today by Mr. Hamilton. Let me remind the Tribunal of some of the highlights.

Throughout the City's and BRA's dealings and relation to Mondev's investment, their conduct was devoid of any vestige of good faith. The Tribunal will recall the SJC's reference to dishonest and unscrupulous behavior and BRA Director Coyle's brazen statement that he'd break his contract "because I feel like it." They wrongfully exercised their governmental authority in an arbitrary and abusive manner.

The Tribunal will recall the omission to get the necessary appraisals, BRA's conflicting and ultimately inconclusive request for traffic studies, the drop-dead ultimatum imposing on LPA a

fixed date for the exercise of its purchase option.

They distorted administrative procedures so as to prejudice Mondev. The Tribunal will recall the trumped-up tax claim against LPA and BRA's arbitrary and belated imposition of building height restrictions.

They intentionally set out to prevent Mondev from realizing its contractual rights and benefits. The Tribunal will recall BRA's repeated statements that it wanted to exact a higher price than the Tripartite Agreement provided. They broke their contract with Mondev. It was the jury which, having heard all the evidence, reached that clear conclusion.

They tortiously interfered with Mondev's contractual relations with Campeau. Again, it was the jury which so found.

Those clear examples of wrongdoing by Boston demonstrate its failure to live up to the standards required by international law.

And there is one further factor which is

significant. Once Campeau had agreed to pay the market price and to make other extra-contractual concessions, all these difficulties came to an end. Suddenly all was sweetness and light. This shows that those difficulties were not just normal bureaucratic considerations or coincidences. They were part of a concerted campaign to frustrate and undermine Mondev's Tripartite Agreement rights.

And here it's necessary to emphasize a point made earlier. It is less the wrongfulness of individual acts of misconduct which is violative of Article 1105 than their cumulative effect. The Metalclad Tribuna referred to the totality of the circumstances. The Amco Asia v. Indonesia Tribunal relied on a combination of improper acts.

Article 1105 itself refers to the treatment to be accorded to investors, and treatment is more than individual acts. It's the whole package, the whole course of conduct related to Mondev's investment.

Moreover, the whole course of conduct was

permeated from start to finish by an anti-Canadian animus on the part of the City and the BRA. And Mondev has given examples of this in its Memorial at paragraph 204 and its Counter-Memorial at paragraph 225 and 226, comments such as: "Remember, we're dealing with Canadians here"; "I don't want you to take all that profit and run back to Canada with it." Such comments extended over many years made to different audiences show how deep-seated was the anti-Canadian animus on the part of the Boston authorities, and there can be little doubt that had Mondev been a wholly U.S. investor, the City and the BRA would not have been disposed to frustrate and, in effect, expropriate its investment.

PROFESSOR CRAWFORD: You said earlier that some--and there is considerable evidence to support the proposition that Boston's concern was with what it then perceived as the low option price. Presumably that concern--well, is there any evidence that that concern would not have been

expressed in relation to a non-Canadian investor?

MR. WATTS: The difficulty with trying to find comparisons is that we're faced here with, in effect, a unique project. There isn't another one like it. So it seems to me one can't find that evidence. But the reason is not necessarily that the evidence isn't there. It's just the project stands on its own.

PROFESSOR CRAWFORD: A Canadian corporation which was prepared to pay the market price, then got the various commissions and so on, again, as you've pointed out.

MR. WATTS: Well, if you're referring to Campeau--

PROFESSOR CRAWFORD: Yes.

MR. WATTS: Well, the trouble with that line of argument is that Campeau was, in fact, at that stage a multinational conglomerate, and it's very difficult to attribute to it at that stage a purely Canadian character.

So if I may conclude on that argument,

that kind of anti-Canadian animus not only makes the misconduct worse, but it, in effect, affords a separate ground of NAFTA complaint under Article 1102.

But let me return to Article 1105 and the three legal elements mentioned in it. Nothing about the treatment by the City of Boston and the BRA of the Canadian investor Mondev was in accordance with international law. Nothing about it was fair and equitable. And the very last thing they afforded to Mondev's investment was full protection and security.

Indeed, what is here in issue is not the usual case of a failure by local authorities to protect a foreign investment from the wrongful conduct of other parties, such as rioters or striking workers and so on. Here it is the local authorities themselves which were engaging in the wrongful conduct. Far from protecting Mondev, they were themselves the wrongdoers.

Mr. President, let me now turn to the

topic which has--

PROFESSOR CRAWFORD: Sorry. You don't need to answer this question now, but it would be helpful to have citations of cases on the minimum standard that involved, in effect, contractual conduct by the respondent state. I mean, the point you've just made that many of the cases from which the minimum standard are taken involve essentially a failure to stop torts by private parties, which is a totally different context. So it would be helpful to have a list of cases where the minimum standard was held--was at least articulated in the context of a contractual claim.

MR. WATTS: There are some cases referred to in the pleadings in the context of establishing that contract rights clearly constitute the kind of property which can be subject to expropriation. But we'll produce a list overnight if--

PROFESSOR CRAWFORD: I'm more interested in the 1105 type of claim in the contract--

MR. WATTS: Yes, we'll try and find them

overnight and if I may let the Tribunal have them in the morning.

JUDGE SCHWEBEL: Sir Arthur, before you leave the terms of Article 1105 and the three parties' interpretation of it, may I ask you a question or two about the interpretation? It'll be observed that Article 1105, paragraph (1), provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law; whereas, the interpretation states that Article 1105(1) prescribes the customary international law minimum standard of treatment.

Do you have any observations on the conclusion that international law, as used in Article 1105, paragraph (1), is confined to customary international law?

MR. WATTS: The Claimant has accepted in its written pleadings that that is the case. It's noticeable, however, that the word "customary" does not appear in Article 1105 itself.

JUDGE SCHWEBEL: And why does the Claimant accept that that is a proper reading of the Article?

MR. WATTS: Because it was the view at the time that that was so.

PROFESSOR CRAWFORD: Does the Claimant continue to be of that view?

MR. WATTS: Well, since the Claimant--on this issue that's raised by the interpretation, the Claimant is of the view that whichever view is taken of the significance of the interpretation, the Claimant's case is not affected. So there was no need, so to speak, for the Claimant to go into this one way or the other.

PROFESSOR CRAWFORD: Well, it would not have been necessary for Article 1105 to say that each Party shall accord to investments of investors treatment required by the other Articles in this chapter because that would have been purely superfluous. So there is some basis. But, of course, one has to give some meaning to the word

"including fair and equitable treatment and full protection and security."

MR. WATTS: Indeed.

JUDGE SCHWEBEL: Well, one could argue, could one not, that in accordance with international law, it goes beyond simply customary international law and refers as well to conventional international law, for example, that found in some 1,800 or 1,900 or 2,000 bilateral investment treaties.

Now, one could argue that the fact that such a multitude of treaties has been agreed upon establishing standards of those treaties. As to what international law means has of itself altered the content of customary international law, that would be one point of view.

On the other hand, if one looks at the treatment of customary international law, in the United Nations, in the 1970s, in the resolutions on permanent sovereignty of a natural resources, the later ones, at any rate, the so-called new

international economic order, the charter of economic rights and duties of states, the essence of which is that there's no international law that protects foreign investment and it's simply a matter of the national law of each state to determine what, if any, rights the foreign investor has, is it credible to maintain that customary international law, if one believes that customary international law must be universal law, does include in its minimum standard the concepts of fair and equitable treatment and full protection and security? Am I clear?

MR. WATTS: Well, not entirely, if I may--not to me. Not to me. The failure is on my part, I'm sure.

JUDGE SCHWEBEL: Well, no, the failure is on my part. I'm sorry. I've put too complex a question. Let's see if I can restate it.

I find it disquieting to maintain that customary international law, if this is what is indeed maintained by the interpretation--that's not

clear to me, but customary international law and the minimum standard thereunder embraces the concepts of fair and equitable treatment and full protection and security, or put another way, that those provisions add nothing to the minimum standard of treatment to be afforded to investments under customary international law, I find that a somewhat disquieting asseveration in the light of the fact that so many members of the United Nations have been prepared to deny that foreign investors are entitled to any protection under customary international law.

MR. WATTS: But I think it was the International Court which observed that the Charter of Economic and Duties had met with opposition or at least abstention from some very significant states

JUDGE SCHWEBEL: That's true.

MR. WATTS: As a result, the charter's effect as standing as evidence of customary international law was, to say the least, reduced if

not nullified. So it doesn't quite, I think, fit in the scenario you've depicted.

JUDGE SCHWEBEL: Well, I would be the first to maintain that the Charter of Economic Rights and Duties of States is not an authoritative statement of customary international law. I don't think it is. But, nevertheless, I'm not sure that one can totally disregard it and the other resolutions of the UN to which I've referred. They may not be law-creative, but they may be law-destructive. They may cast doubt upon the content of customary international law. And one would have thought that these almost 2,000 Bilateral Investment Treaties had been concluded to vault over the dispute between developed and developing countries as to the content of customary international law by prescribing relatively clear and concrete standards binding on the states parties to those Bilateral Investment Treaties.

MR. WATTS: If I may say so, it seems to me that's a very possible situation. But the

trouble is that, so far as concerns the NAFTA, it may well have been that following the pattern of other investment protection treaties, it may be that the parties put those fairness and protection provisions in for the same sort of reason, to make quite certain that whatever the dispute may be about customary international law, those two concepts were at least home and dry, so to speak.

Unfortunately, Mondev wasn't a party to the negotiation of NAFTA, nor, of course, are we members of the Tripartite Commission. We don't know what the parties actually intended. One can only infer from the language used what it might have been, but it might well have been in the direction that you were indicating, namely, an intention to make clear that at least those two concepts were to be applied, not allowing, therefore, any dispute in those respects about what the treatment in accordance with international law meant.

But that's speculation, and we now have an

interpretation of what that means. What the interpretation itself means is no doubt a question that you may feel inclined to address to our colleagues later in the week.

JUDGE SCHWEBEL: Thank you so much.

MR. WATTS: Thank you.

Perhaps I may now move on, albeit briefly, to the interesting topic of temporal considerations, and the Respondent has raised a number of arguments on this side of the Claimant's case. I'd like just to refer to a couple of them now, and that's because one main group of temporal issues is more conveniently treated together with the temporal aspects of expropriation, which we've proposed to deal with tomorrow. So if I can deal with some of the issues now, and then leave others over until tomorrow.

The first point that I wish to take is that the main thrust of the Respondent's case is that this whole case is all past history and pre-dates NAFTA.

PRESIDENT STEPHEN: I'm sorry. I didn't catch that. That is all?

MR. WATTS: Past history.

PRESIDENT STEPHEN: Thank you.

MR. WATTS: And pre-dates NAFTA, and that a claim under NAFTA only arises in respect to events occurring after NAFTA entered into force, which is the 1st of January 1994.

Did the Respondent go so far as to attribute that view also to Mondev? The Respondent says in its Rejoinder, and I quote, "It is undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA's entry into force."

That's a view which is most certainly not undisputed. It is indeed precisely contrary to Mondev's view, which is that while a breach of NAFTA can only occur once NAFTA is in force, such a post-NAFTA breach does not have to be based only on acts or omissions which also post-date NAFTA. I'll

have more to say on this tomorrow.

The next issue that the Respondent raises is to invoke the three-year requirement in Articles 1116, paragraph (2), and 1117, paragraph (2). And it claims that that requirement effectively excludes Mondev's claims.

Now, Mondev agrees that those articles were apparently intended to exclude stale claims. Ms. Cohen Smutny has already said that. But they only achieve that intention to the extent that the specific terms of those Articles prescribe. In fact, Mondev's claim is far from stale and is fully consistent with those Articles.

Again, the text of the Article is available in the paper that we circulated, and they stipulate that the three-year period runs from the date when an investor or enterprise, and I quote, "first acquired knowledge of the alleged breach and knowledge that the investor or enterprise had incurred loss or damage."

The second limb, at least, of this double

requirement did not materialize until the judicial recourse came to an end, which was in 1998 or 1999, as the case may be.

When NAFTA entered into force, 1994, Mondev could not have known that it had already suffered loss or damage because it still expected to receive compensation through the courts. It was only in 1998 or 1999 that Mondev knew for sure that compensation was excluded and that it was left with clear loss and damage. And Mondev promptly gave notice of intent to submit a claim to arbitration just five weeks later, well within any three-year time limit.

PROFESSOR CRAWFORD: Can it be argued that Mondev's--well, in these proceedings, clearly Mondev suffered damage as a result of not succeeding in the court. But the court claim by Mondev was for damages already suffered by it, which the court decision would have compensated for.

MR. WATTS: Would have remedied, but the

ultimate loss, the loss for which the United States is being called to account is the loss that finally results after the domestic proceedings have come to an end. We're not claiming in these proceedings for the loss that was claimed for in the domestic courts of Massachusetts.

PROFESSOR CRAWFORD: This may relate to questions you want to discuss tomorrow, but let's assume for the sake of argument that the United States Supreme Court had granted certiorari--well, of course, there was the problem of the other claim not being brought before it. But let's assume that it had granted certiorari, upheld your case, and awarded you $9.6 million damages plus interest. Would the consequence of that have been there would have been no NAFTA violation?

MR. WATTS: Well, there's the other part of the claim that would still be outstanding.

PROFESSOR CRAWFORD: Yes, but let's ignore that for the moment. Would the consequence of that decision mean that vis-a-vis the conduct of the

City, there would have no NAFTA--

MR. WATTS: I think that's probably right.

PROFESSOR CRAWFORD: Does that value the breach of NAFTA in relation to the conduct of the City?

MR. WATTS: Sorry. Does that?

PROFESSOR CRAWFORD: Does that value the breach--does that quantify the breach of NAFTA vis-a-vis the conduct of the City?

MR. WATTS: No, I don't think it does, but if I may say so, I think questions of quantification are really left for the later stage and after you've decided to uphold Mondev's claim.

JUDGE SCHWEBEL: Sir Arthur, am I right in recalling that Mondev is requesting interest as well as the principal of its claims?

MR. WATTS: Again, I think that's a matter which we can pursue at a later stage. I think we are claiming interest, but we certainly haven't quantified it yet.

JUDGE SCHWEBEL: But have you specified

interest from when?

MR. WATTS: No.

PROFESSOR CRAWFORD: Let's assume that the--let's just look at the BRA case in relation to 1105 and the temporal aspects of that for the moment. Is it your case that a statutory immunity granted to a public authority of the kind we have here is, as such, a breach of 1105? Or if not as such, in what circumstance?

MR. WATTS: Well, again, if I may say, that's something which we will deal with in some detail tomorrow morning when we're dealing with the judicial aspect of the conduct of Massachusetts, I being concerned very much with the conduct of the City and the BRA, Ms. Cohen Smutny will deal with the judicial conduct, and certainly that aspect of the immunity will be dealt with in what she has to say.

PROFESSOR CRAWFORD: In a sense, I'm interested in the relationship between the two items of conduct, because it seems to be the case

that all of the conduct of the City and BRA as such occurred prior to NAFTA's entry into force and that it was the judicial conduct which could, of course, itself have amounted to a breach. I think it's quite clear that there could be a breach by judicial conduct in respect of an investment made prior to the entry into force of NAFTA. It doesn't exclude earlier investments.

The question is: How do we relate those two episodes of conduct in the context where it's conceded that NAFTA doesn't have retrospective effect, it doesn't make conduct committed before 1994 a breach, even if it would have been a breach? Let's assume for the sake of argument, your very persuasive argument, that this would have been a breach is accepted, if this conduct had occurred after 1994, it would per se have been a breach.

In the Azinian case, the Tribunal--I think an ICSID Tribunal or perhaps Additional Facility--said that where there's been local conduct which has been taken to the courts, as it were, the

decision of the court becomes the crucial determinant and the executive conduct is, as it were, subsumed in the judicial decision. If the judicial decision itself is a regular decision, the earlier irregularities are cancelled out. Is that right? If so, how does it apply here?

MR. WATTS: This is one of the difficulties of trying to deal with these temporal matters in two parts. The relationship between, if I can put it this way, the pre-NAFTA conduct with a post-NAFTA breach is an issue which I propose to talk about tomorrow morning. So perhaps we could pursue these sorts at that stage, if that would be convenient for the Tribunal.

PRESIDENT STEPHEN: And I would be very grateful if you could also analyze this problem--which essentially is a question of breach or remedy? And which are we concerned with? And at what stage does a breach come to an end and a remedy then emerges?

MR. WATTS: Precisely the comment that is

in my text for tomorrow morning, sir.

PRESIDENT STEPHEN: Thank you.

MR. WATTS: If I may then carry on with another of the Respondent's temporal points, it's a relatively straightforward one.

Respondent suggests that Mondev's argument that there is a continuing violation of international law would deprive the three-year time limit of all meaning, and it cannot, therefore, so they say, be sustained.

Now, that time limit is dependent, as I've said, on two dates: the date when the investor acquired knowledge of the breach and the date when the investor acquired knowledge of the loss. Two quite separate things.

We know with Mondev that Mondev, in Mondev's submission, could not have acquired knowledge of a loss until after NAFTA had entered into force. But if we take a hypothetical--

PRESIDENT STEPHEN: I'm sorry. Why are you--

MR. WATTS: Because before NAFTA entered into force, there was still a possibility of compensation at the international level.

PRESIDENT STEPHEN: Although Mondev goes to court saying "I have suffered loss."

MR. WATTS: Yes. And it suffered loss domestically, within the domestic framework.

PROFESSOR CRAWFORD: But it doesn't make--

PRESIDENT STEPHEN: That's the only framework in which it's operating.

PROFESSOR CRAWFORD: It doesn't make any sense to interpret 1116, if I may follow what Ninian has said, as referring to the possibility of recovery for loss of damage at the international level; otherwise, the Article would be wholly self-referred.

MR. WATTS: No--

PROFESSOR CRAWFORD: Surely the reference to loss or damage must be local loss of damage. I mean, I agree with you entirely that there couldn't have been knowledge of the breach until after NAFTA

had entered into force, because until NAFTA had entered into force, there could not have been a breach. That's obvious. So you can't acknowledge something that couldn't have existed. There may have been an independent breach of the customary rule of international law, but that's not what 1116(2) is concerned with. So the very earliest point of time at which there could have been knowledge of a breach was the 1st of January 1994 if there was a continuing breach. When the loss was is another question.

MR. WATTS: If we go back to a hypothetical stale, old claim, let's assume Mondev--a pre-Mondev--was having these same problems in the 1920s. The situation then would be completely different, particularly in relation to 1116, 1117. Either this pre-Mondev would have pursued its claim through the local courts and would by then have failed, in which case it would have known of its loss and indeed of its breach and the three-year period under 1116 would prevent it from

resuscitating its claim--that's clear--or the pre-Mondev would not yet have bothered to present a claim. But in that case, its own failure to prosecute its claim would be held against it. It doesn't follow that because it has done nothing for 50 years, 70 years, or whatever it is, it can now revive its claim.

Mondev's situation, the real Mondev situation, is, of course, totally different. It involves no claim which in any sense can be called dead or stale.

The third and, for this evening, final temporal point which I'd like to deal with is the Respondent's argument that Mondev, in contending that pre-NAFTA conduct gives rise to a breach of NAFTA is acting contrary to Article 28 of the Vienna Convention on the Law of Treaties.

This isn't so for a number of reasons. Let me read that Article. It provides for the non-retroactivity of treaties.

What it says is this: "Unless a different

intention appears from the Treaty or is otherwise established, its provisions do not bind the Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that Party."

As a preliminary point, I just note that this provision can only have effect if it's to be regarded as enunciating a rule of customary international law because the United States is not yet a party to the Vienna Convention. But leaving that aside, the Respondent somewhat oversimplifies the position.

Mondev is not presenting a claim in respect of conduct which was all over and done with by the time NAFTA entered into force. There is no stale claim being opportunistically revived now that NAFTA has appeared on the scene. It's a claim arising out of a course of conduct to be appraised as a whole, as a single package of wrongdoing.

It is a far cry from some long-dead claim

suddenly being revived, like the Sleeping Beauty, by a NAFTA kiss of life. That single package of wrongdoing, while it started before NAFTA, was still continuing when NAFTA entered into force. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force even if they first began at an earlier date.

Now, I read that last sentence because it is not mine. It's the International Law Commission's, explaining what was meant by Article--by the draft article which became Article 28 of the Vienna Convention. It was, in fact, Draft Article 24.

It's, thus, directly in point as to the meaning of the Article invoked by the United States, and so, too, is the preceding sentence. If, however, an act or fact or situation which took place or arose prior to the entry into force of the treaty continues to occur or exist after the treaty has come into force, it will be caught by the

provisions of the treaty. And as the Commission also put it, what the Article contemplates is that, and I quote, "the treaty will not apply to acts or facts which are completed"--the Commission emphasized that word--"or to situations which have ceased to exist before the treaty entered into force."

PROFESSOR CRAWFORD: Sir Arthur, there's a distinction which the Commission also sought to draw in Article, I think it's 13 of the Articles on State Responsibility, which very much took into account Article 28. There's a distinction between a case where an act which is in itself wrongful can be said to continue and a situation where the harm that an act has caused continues but the act itself has ceased.

So, for example, if someone is injured as a result of police brutality and the injury continues to cause them pain and suffering after the critical date, it's not as if the wrongful act has continued after that date. The wrongful act

occurred in the past. The person continues to suffer. They may have a right to a remedy after the critical date, and it may be the denial of the remedy would itself be a wrongful act, but there's still an analytical distinction between the original beating up and the failure of the court to provide a remedy.

On the other hand, the human rights courts have held that in the case of a disappearance, where the disappearance, the situation of disappearance continues until after the critical date is a continuing wrongful act.

Now, what is the gist of the wrongful act that you say continues after the 1st of January 1994?

MR. WATTS: It's the misconduct coupled with the failure to offer redress. It's a complex, it's as double-headed wrongfulness. But it's one package.

Again, the awkward situation that I'm in, Article 14 of the State Responsibility Articles is

high on my agenda for tomorrow. You are taking some of the words out of my mouth.

I was talking about that the International Law Commission talked about completed acts and so on. What Mondev is faced with is a situation which continued to exist after NAFTA came into force and with a course of misconduct which was not completed by the 1st of January 1994 and which had not ceased to exist by that date. Its claim is not affected by the Vienna Convention Article 28, even if, which is still to be shown, that that represents customary international law.

Mr. President, as I say, I would like to deal with the other temporal aspects tomorrow, particularly since the time has now gone to whatever it is now, just before 6 o'clock. I think under the pressure of the questioning that we have all had, we're a little bit behind schedule for now. But I'd be very much willing to receive your guidance as to what is the best way to resolve that particular situation.

PRESIDENT STEPHEN: Thank you, Sir Arthur. We're due to start at--is it 10:00 tomorrow?

MR. WATTS: Yes.

PRESIDENT STEPHEN: Would it be convenient to the parties to start half an hour earlier, for instance, and to my colleagues?

PROFESSOR CRAWFORD: The same tolerance will be allowed for the United States if they're provoked in the same way.

PRESIDENT STEPHEN: Yes. Well, it's suggested that the United States may be provoked by some members of the arbitrators in the same way and perhaps the same additional time could be allowed to them. But what of this suggestion that we start at 9:30? Would that be feasible?

MR. LEGUM: We certainly have no objection.

PRESIDENT STEPHEN: I beg your pardon?

MR. LEGUM: We have no objection.

PRESIDENT STEPHEN: Thank you.

MR. WATTS: Nor do we.

PRESIDENT STEPHEN: Well, in that case, 9:30.

MR. WATTS: Thank you very much.

PRESIDENT STEPHEN: Thank you, Sir Arthur, and we look forward to tomorrow morning.

We'll adjourn now until 9:30 tomorrow morning.

[Whereupon, at 6:00 p.m., the hearing recessed, to reconvene at 9:30 a.m., Tuesday, May 21, 2002.]