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 III

Wednesday, May 22, 2002

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

The hearing in the above-entitled matter was reconvened 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: Are you comfortable where you are situated?

MR. BETTAUER: I think so.

PRESIDENT STEPHEN: You may proceed.

MR. BETTAUER: Thank you. Mr. President, Members of the Tribunal, it is my pleasure to introduce the United States' case on competency and liability. I speak on behalf of the entire U.S. team in saying that we are honored to appear before such a distinguished panel.

This is a case of great interest and importance to the United States. It is important because the Claimant here has asserted that a unanimous decision of the oldest sitting appellate country in the country fails to conform to the minimum standards of customary international law.

This is a grave and, we think, unfounded assertion. The United States takes great pride in the high standards and fairness of its legal system. This case is important because it presents

a question of principle that is vital to the interests and the international reputation of the country.

The case is also important because of its place in the history of NAFTA investor state jurisprudence. This is only the second case to be submitted to investor state arbitration against the United States under the NAFTA.

The United States is vitally interested in promoting investment and in effective protection for its nationals who are investors in other NAFTA countries and in countries around the world. But such protections need to be founded in the Treaty provisions we negotiate and in customary international law. These taken into account the host country's interests as well the need to protect investors.

This Tribunal's decision, while it will not be binding on future Tribunals, will have wide ramifications. Arbitration continues to be an important part of the investment protection regime,

and we have every confidence in all the Tribunals constituted to consider the cases brought against the United States.

This morning I shall make some general remarks, give a brief overview of the United States' argument, and review for you how we intend to split up the presentation among the members of the U.S. team.

We do not intend to repeat all the material, the arguments, and authorities that we have in our written submissions, but we stand by those arguments and authorities and rely on our written submissions to supplement the points that we will address orally in these next two days.

Now, the central claim in this case is whether the decision of the highest court of Massachusetts violated the minimum requirements of customary international law, whether that decision constituted a denial of justice, as that term is understood in international law. Today and tomorrow my colleagues will demonstrate in some

detail why this claim is completely devoid of merit.

What I would first like to do is take a very few moments to examine from a more general perspective both the court and the court decision. This will show just how improbable Mondev's claim is.

The Supreme Judicial Court of Massachusetts was established in 1692. It is the oldest appellate court in continuous existence in the Western Hemisphere. It is a court with long and proud traditions, a tradition of dispensing justice according to the highest standards.

The House of Lords, the Supreme Court of Canada, the High Court of Australia, and many other jurisdictions around the world have relied on decisions of the Supreme Judicial Court as persuasive authority. Beyond long tradition, the Massachusetts court has an excellent reputation for integrity and judicial craftsmanship.

Let us look for a second at the decision

at issue. We would like to provide you separate copies. It's in the binder that we have given. The decision is also found in the record at Exhibit 23 to the Oleskey statement.

This decision was a unanimous decision by all seven justices of the court. If the decision indeed represented the novel and outrageous departure from international minimum standards of judicial behavior that Mondev asserts, one would expect that at least one justice on such a court as this would have expressed a different view. None did.

The second thing one observes about the decision is that it is an extensively reasoned one. It takes, as you have seen, 28 pages in the Massachusetts Reports. It is filled with detailed analysis of the issues and citation to authority. I note that Mondev quotes in its Memorial and Sir Arthur referred to it again in his presentation the observation of the chamber of the International Court of Justice in ELSI that arbitrariness is

something opposed to the rule of law.

This decision suggests the opposite of arbitrariness. With its careful attention to detail and precedent, the decision on its face embraces, not opposes, the ideal of the rule of law.

The third thing one notices about this decision is that it was written on behalf of the full court by Justice Charles Fried. Justice Fried, a law professor at Harvard Law School from 1961 through 1985 and again since 1991, also served as Solicitor General of the United States, the principal representative of the United States Government before the Supreme Court of the United States. He is one of the most distinguished jurists and legal scholars in the United States.

So what do we have here? We have a unanimous decision, a detailed opinion. It was handed down by one of the oldest and most respected appellate courts in the world. It was authored by one of the nation's most distinguished jurists and

legal scholars. It is, to put it mildly, highly improbable that such a decision would constitute a denial of justice under customary international law.

Now, I acknowledge the possibility that even the leading judicial institutions of the world--and I can count, I think, this court among them--might in some hypothetical circumstance violate customary international law norms for the administration of justice. But this is really a hypothetical case. To our knowledge, there has never been a case in which a decision of any of the highest appellate courts of England, Canada, Australia, or the United States has been found to constitute a denial of justice under international law.

As my colleagues will show, the decision of the Supreme Judicial Court at issue here does not remotely resemble the first denial of justice case by such a court. In fact, there is simply nothing extraordinary about the case. It presents

unremarkable questions that the Supreme Judicial Court resolved by reference to time-honored principles. It was resolved in a routine and fair manner. Nothing about the decision even hints at a violation of the minimum standards of customary international law.

Well, then, why are we here today? There was a Supreme Judicial Court decision, and it was unfavorable to Mondev. Although every case has a losing side, Mondev apparently could not abide by that result. Mondev, therefore, has grasped at the mechanism of Chapter Eleven of NAFTA to seek to revive its claim. It attempts to make an international case out of this unremarkable decision. It resorts to four tactics that distort the law and distort the facts, and I'd like to spend a moment discussing those.

First, it is evident that Mondev really wants this Tribunal to review the Supreme Judicial Court's decision not according to the standards of customary international law, but as if the Tribunal

were a reviewing court in a municipal system. Mondev wants you to review the ruling of the court on such issues of Massachusetts law as whether an appellate court in a civil case is entitled to find that facts are insufficient to sustain a conclusion of law, or whether the issue needs to be sent to a lower court for decision.

The international authorities, including those relied upon by Mondev, did not ascribe such a role, a reviewing role, to this Tribunal. This Tribunal is not the Supreme Court for North America. The issue before this Tribunal is not whether the Supreme Judicial Court was right or wrong. The issue is whether that decision was so manifestly unjust as to violate the minimum standards of customary international law. That is the applicable legal standard.

While at times Mondev gives lip service to that international law standard, at bottom its argument is merely that the Supreme Judicial Court decision was wrong. We will show that the Supreme

Judicial Court decision did not constitute a denial of justice. Indeed, we believe it was correct.

Second, we have seen in Mondev's presentation Monday and Tuesday an effort to conflate events that occurred in the 1990s--excuse me, that occurred in the 1980s and events that occurred after 1993. But for the purposes of NAFTA, time does matter. NAFTA does not reach back to alleged breaches that occurred before its entry into force.

Sir Arthur put forward yesterday a novel theory that an internationally wrongful act does not, under customary international law or understand NAFTA, in fact, constitute a breach until all domestic avenues of recourse to obtain a remedy have been exhausted. We will show that this is a misreading both of customary international law and of NAFTA.

As Professor Crawford pointed out, there is an analytic difference between a breach and a remedy. We will demonstrate to you that the bulk

of the purported breaches alleged by Mondev occurred before the entry into force of NAFTA, could not possibly constitute breaches of NAFTA, and are, thus, not within this Tribunal's jurisdiction.

Third, Mondev invents rules of customary international law that do not exist and distorts NAFTA. I will provide examples of Mondev's inventive approach to international law and the NAFTA in my summary of the United States' arguments, which I will turn to in a moment.

Fourth, Mondev in its presentation has tried to confuse the distinction between Mondev and LPA. Sir Arthur started by saying that they refer to both as Mondev and the Mondev team has referred to the two of them interchangeably. But for purposes of NAFTA, this distinction also matters. We will show why this matters in the context of our discussion of the requirements of Articles 1116 and 1117.

I would like to make two other very brief

points before summarizing our argument.

In Mondev's presentation yesterday, my first point is that the Tribunal should note the remarkable lack of international legal authority for Mondev's contentions, many of which were novel.

Second, I would like to note that Mondev made many additional points on Monday and Tuesday which they called ancillary or subsidiary. These were offered to show aggravating circumstances, but Mondev did not make any attempt to explain the legal relevance of ancillary or subsidiary points. These points most likely are being put forward for emotional coloration, but we should not imagine that they have any legal relevance.

Now, let me summarize our response to Mondev's arguments.

The first claim asserted by Mondev is under the obligation in paragraph (1) of Article 1105 of treatment in accordance with international law. Mondev makes three contentions under this article, and I will take those in turn.

First, it contends that the decision of the Supreme Judicial Court that I have just discussed constitutes a denial of justice. I have just shown that this contention is highly improbable, and we will demonstrate in our presentation that it lacks any support in fact or in international law. The Supreme Judicial Court's carefully reasoned decision bears none of the characteristics of a denial of justice.

Indeed, Mondev's principal assertion in its written submission appeared to be that the Supreme Judicial Court's decision announced a supposed new rule of contract law requiring for the first time that a buyer must manifest that he is ready, able, and willing to perform by setting a time and place for passing papers or making some other concrete offer of performance.

In our written submissions, we demonstrated that this rule had its origins in Massachusetts jurisprudence going back to 1859 and had been described as reflecting established law in

1991, a year before LPA brought suit by the Massachusetts appeals court.

Perhaps recognizing that the new rule argument was devoid of merit, yesterday Ms. Smutny suggested that Mondev's contention now is that the Article 1105 breach was the failure of the Supreme Judicial Court to remand to the trier of fact the question of whether Mondev should be excused from its failure to use arbitration procedures, the arbitration procedures in the Tripartite Agreement.

As I said a moment ago, neither NAFTA nor customary international law speaks to which court or system must be used to find facts in civil cases.

PRESIDENT STEPHEN: Excuse me. Are you submitting that that was a novel point raised for the first time by Ms. Smutny? Because my recollection is that it does appear in material that we've read.

MR. BETTAUER: Mondev did assert in its pleadings that the case should have been remanded.

The change is that they asserted that the gist of the breach was the failure to remand rather than asserting that the gist of the breach was the establishment of the new rule. They found many difficulties, but we think they changed the focus.

So I was at the point of saying that there is no basis for an argument that international law requires a certain procedure for a trier of fact in a civil case; that it be the appellate court or a court below or a jury, that just does not exist.

Next, Mondev makes an argument under paragraph (1) of 1105 that even though LPA litigated for seven years in four courts in the United States, it was denied access to U.S. courts. Mondev's principal assertion appears to be the rather startling one that customary international law now requires that municipal courts allow litigation against a municipal government in all cases where local law establishes a standard of conduct that could be breached by that government.

They argue that an assertion of immunity

by the municipal government, even in limited circumstances, would violate the customary international law minimum standard of treatment of aliens.

Mr. President, Members of the Tribunal, we will show that this assertion has been invented from whole cloth. The international authorities that Mondev cites provide no support for such a rule, and contrary to Mondev's position, contemporary state practice on domestic sovereign immunity shows that there is no international consensus on when a state must subject itself to suit in its own courts. Mondev's assertion is without merit.

Mondev's final contention under Article 1105, paragraph (1), is its theory that a breach of international law in the past, no matter how distant, does not under customary international law or under NAFTA in fact constitute a breach until all domestic avenues of recourse to obtain a remedy have been exhausted.

We will show that this assertion is a prime example of a distortion of the text of NAFTA and a mischaracterization of international law in an effort to find some basis to make the claims.

Neither Article 1105, paragraph (1), nor the customary international law minimum standard requires as an element of breach a showing that an investor's attempted--that an investor has attempted and failed to obtain a remedy under domestic law for losses ensuing from such an international violation.

The rules incorporated into 1105, paragraph (1), consist of primary rules. Under well-established principles of state responsibility, breaches of those rules give rise to responsibility. It is not also required to prove a failure of domestic remedies, or as Professor Crawford put it, the distinction between the international wrongful act and--the distinction between that and remedies is a meaningful one.

Under Sir Arthur's logic, as long as local

remedies for any NAFTA breach are still available, that breach would not be considered to have occurred, and no limitation period would run. But as you know, NAFTA does not require that local remedies be exhausted in every case before an alleged breach may be brought to a Chapter Eleven Tribunal. And that would be the effect of Mondev's rule.

Mondev's continuing violation theory would undercut also NAFTA's three-year prescription provision, a result not permitted under the principle the Treaty provisions must be read to give them meaningful effect. This theory, like Mondev's other claims under paragraph (1) of Article 1105 is without merit.

The next claim asserted by Mondev is under Article 1110, the provision barring expropriations or nationalizations of investment without compensation. This claim is time-barred in its entirety. Mondev acknowledges, as it must, that its interactions with the City and BRA took place

in the 1980s. Yesterday Sir Arthur said that Mondev was deprived of its investment by mid-1991. Mondev further concedes that the City and BRA at all times emphatically denied any compensation was due. A supposed taking, therefore, before NAFTA was even written cannot violate the Treaty.

Mondev's only argument in response is the creative theory that a state does not act wrongfully when its administrative officials take a foreign investor's property but deny that any expropriation has taken place or that any compensation is due. According to Mondev's theory, international law places the burden on the Claimant at this point to pursue domestic remedies seeking a declaration contrary to the state's stated position that an expropriation has, in fact, taken place and that compensation is due. Only when such a declaration has been pursued to no avail, Mondev asserts, may the state be considered to have acted wrongfully under international law.

We will demonstrate that this theory lacks

any foundation in state practice or international jurisprudence. Mondev identifies not a single instance in which a Tribunal has found it consistent with international law for a state to take property, deny that there was any expropriation, and deny that compensation was due.

Mondev identifies not a single instance in which on these facts a Tribunal has found it necessary to examine whether a claimant has sought a declaration under local law that an expropriation has taken place. It does not do so because there is no such requirement in international law, and, in fact, every international decision of which we are aware in this context goes the other way. Every decision on such facts finds a taking without compensation to be immediately wrongful under international law, without regard to whether the Claimant has pursued local remedies.

Mondev's novel theory of expropriation lacks support, and its tactics of inventing new rules cannot be credited.

In any event, Mondev's contention that there was an expropriation back in the 1980s is without merit. The City and the BRA never took LPA's contract rights to buy the Hayward Parcel. In fact, LPA sold an option on those very same rights to Campeau for millions of dollars after the supposed expropriatory acts took place.

It is hard to see how LPA could have sold an option on its rights for so much money if, as Mondev asserts, it did not have those rights at the time. And Mondev's position that those supposed acts expropriated LPA's contract rights is flatly inconsistent with what LPA told the Supreme Judicial Court. there, it represented to the court, a representation on which the court relied, that those same acts in no way prevented it from exercising those same contract rights. The sale of the option and the record belie Mondev's expropriation claims.

PROFESSOR CRAWFORD: I didn't want to interrupt your summary, but my understanding of

Mondev's position, which may or may not be accurate, was that there were two other bases of the 1110 claim other than the one you've just described. One was that, at any rate, there was, in effect, a continuing breach of Massachusetts law at the time when NAFTA came into force, and that the subsequent decisions, including, of course, the grant of immunity, had the effect of, as it were, ripening those breaches of Massachusetts law into a breach of international law.

Alternatively, there was a prior breach of international law even on your view of the rules about expropriation which occurred in the 1980s and was unremedied. I suppose both of those points are covered, in effect, by points you've made under 1105. But I do think there were those sort of strands of their 1110 argument as well.

MR. BETTAUER: Yes. In a way, those arguments go back and forth between each other, but we think they equally merit--

PROFESSOR CRAWFORD: For the reasons

you've given under--

MR. BETTAUER: Right. And we will come back to that in our detailed presentation.

The last main claim I wanted to mention briefly is the claim under 1102, the national them provision. But, frankly, it is difficult for us to understand what the basis of this claim could possibly be.

Mondev's counsel barely touched on the claim Monday and Tuesday. Mondev has conceded that it does not attribute bias to the courts of Massachusetts. It acknowledges that only treatment post--the only treatment post-dating NAFTA that could--it could only be treatment post-dating NAFTA that could result in an Article 1102 violation. It does not allege any treatment after 1993 by any organ other than the U.S. courts. How can there be a NAFTA treatment violation, national treatment violation, if the only relevant treatment was by the courts and the courts were unbiased?

Mondev has no answer to this question

because the answer is clear. There was no national treatment violation.

In addition to these defects in the claims under Articles 1105, 1110, and 1102, Mondev's claims are defective in two other important respects. Notably, as we have shown in our written submissions and will further review for you, Mondev cannot make the bulk of its claims now because LPA does not own the contract rights in question, having by contract agreed to transfer those rights to its mortgage lender.

In addition, Mondev failed to demonstrate that it has standing under Article 1116 or to establish the Tribunal's jurisdiction over its claims under Article 1117 of NAFTA by following the procedures that are prerequisite to arbitration of claims under Chapter Eleven.

Now that ends my brief introductory remarks, and I would like to take a second and describe for you how we propose to split up our presentation so that you can follow what we are up

to during the course of today and tomorrow. The facts will be addressed next and that will be by Mr. Legum. After our review of the facts we will go to the preliminary objections that we make. Ms. Svat will explain why the claims are time barred. Ms. Toole will then address Article 1116 and demonstrate why Mondev--and show that Mondev has not demonstrated that it was directly injured and therefore lacks standing. And we'll address--

PRESIDENT STEPHEN: I'm sorry. I missed that, what it was that Ms. Toole was going to do.

MR. BETTAUER: She will demonstrate two things. Firstly, under 1116, she will show that Mondev has not demonstrated that it was directly injured as is required for standing under Article 1116. That's a standing requirement. She will then address Article 1117 and show that this Tribunal has no jurisdiction over that claim because Mondev failed to meet the Chapter Eleven requirements for bringing a claim to arbitration.

Then Mr. Legum will take the floor again

and he will address ownership of the claim and the mortgage situation. That will complete our presentation of the preliminary objections, and then we will turn to the merits. On the merits, first Mr. Clodfelter will address the 1102 National Treatment Claim.

Then we will address Article 1105, paragraph (1) in three parts. First Mr. Clodfelter will continue, and he will address the applicable legal standards, customary international law standard, denial of justice standard that is to be applied to the claim. Next Mr. Pawlak will take the denial of justice claim in specific and deal with that. And finally, Mr. Legum will come back and address the sovereign immunity issues and show that there's no customary international law that prevents the assertion of sovereign immunity in this case. That will conclude our 1105 presentation.

Then we'll go to 1110 and we'll deal with that in two parts. First Ms. Svat will show that

there was no expropriation after 1994, since NAFTA was enacted. And next, although we don't believe we need to show this, we will nonetheless show that there was no expropriation in the 1980s, and Mr. Legum will do that. That will conclude our presentation, and I will come back for a very brief wrap up at the end.

In presenting our arguments the U.S. side will use slides on the projection screen. These have been prepared to highlight material that is already in the record and to summarize points that we will make during our oral presentation. We will give the Members of the Tribunal and counsel for Mondev copies of the slides at the end of each day's presentation.

Now without--

PRESIDENT STEPHEN: Excuse me. In a primitive country like Australia, tell me how do I use these slides?

MR. BETTAUER: Oh, we will give printed copies.

PRESIDENT STEPHEN: I see. Thank you.

MR. BETTAUER: Now, without further delay, I would like to suggest that the Tribunal turn the floor over to Mr. Legum who will review the facts of the case that are material to our argument.

PRESIDENT STEPHEN: Yes, Mr. Legum.

MR. LEGUM: Mr. President, Members of the Tribunal, the factual story pertinent to the admissible claims in this case begins in 1992 when Lafayette Place Associates, a Massachusetts Limited Partnership indirectly controlled by Mondev brought suit against the Boston Redevelopment Authority in the City of Boston in Massachusetts Superior Court. This morning I would like to provide an overview of this factual story with a particular emphasis on the arguments made by the parties before the Massachusetts Courts and the decisions of those Courts based on those arguments. My presentation will be divided into three parts. First I will address the proceedings in the court of first instance. Second I will discuss the proceedings

before the Supreme Judicial Court. And finally I will discuss the decision of the Supreme Judicial Court. In the interest of brevity, I do not propose to repeat all of the assertions concerning the facts made in the United States' pleadings.

Now, before I begin I would like to note three prefatory points. First, my remarks this morning will be directed to the facts that are central to the issues of the interpretation and application of the NAFTA before this Tribunal, the facts that occurred in the Court proceedings that took place during the period in which the treaty has been in force.

Now, over the past couple of days we have heard a flood of rhetoric concerning supposedly outrageous conduct by the BRA and the City of Boston in the 1980s. We heard yesterday in Sir Arthur's closing that those supposed facts were, quote, "undeniable," close quote. I want to make very clear at the outset that the United States in no way concurs, in no way concurs with Mondev's

view of the events of the 1980s. In my presentation tomorrow morning I will demonstrate that Mondev's assertion that any international wrong occurred in the 1980s is without legal merit or factual substance. Today, however, we will concentrate on the facts that are relevant to the issues before this Tribunal.

My second prefatory note is that the procedures and the words used to describe those procedures can vary widely from one jurisdiction to another, even one common-law jurisdiction to another. If at any point the Tribunal has a question about the procedures used in the Massachusetts Courts or any of the terms that I use, please do not hesitate to interrupt me.

And finally, if at any point the Tribunal would like a citation to the record for anything that I say this morning, I would be happy to provide it.

On March 30th, 1992 LPA filed an amended complaint against the City and the BRA in

Massachusetts Superior Court. The complaint alleged the facts in dispute and set forth the claims that LPA asserted based on those facts or rather those allegations. I will first summarize the facts in dispute in that case and then the claims. As I go through the facts what I'll do is we'll project on the screen a running timeline of the events that may assist in remembering what happened when.

The complaint concerned a 1978 real estate development deal conducted among the LPA, the City and the BRA. The parties signed a Tripartite Agreement pursuant to which LPA agreed to develop a piece of property in a rundown area of downtown Boston known as Lafayette Place. The development was to proceed under an urban renewal plan that provided city, state and federal assistance to approve developers to refurbish decaying urban areas.

Among many other things the agreement granted LPA a contingent option to purchase from

the City an adjoining parcel of land known as the Hayward Place Parcel. That option would come into existence, in other words, lose its contingent status only in the event that the City determined not to continue operating a parking garage on those premises, and provided notice of that determination. The agreement, however, did not fix either the price to be paid for the Hayward Parcel or its exact boundaries or the extent of the rights to be conveyed in the land.

Now, parenthetically I describe the option as a contingent one because that is what it was. It was contingent on the City determining to discontinue the parking garage and provide notice of that determination and the extent to which it decided to create subsurface parking. We heard from Mr. Hamilton on Monday, in response to a question by Judge Schwebel, that the option really wasn't contingent because after the Tripartite Agreement entered into force between the parties, but before the closing on Lafayette Place took

place, one of the contingencies was resolved. The City decided to discontinue the parking garage. This of course says nothing about the other contingencies, that is, the decision on how much subsurface parking to build and notice of that decision.

The terms of the agreement concluded in 1978 do not support Mondev's current assertion about the importance of the Hayward Parcel to the Lafayette Place development. And the implication of Mr. Hamilton's response is rather troubling. Surely is not suggesting that LPA would have breached its obligations under the Tripartite Agreement to close under that agreement if the City had determined not to discontinue the parking garage before the closing. But I digress.

Back to LPA's allegations in the Superior Court. LPA's complaints allege that in late 1983 the City provided LPA with the notice that triggered the Hayward Place option. Nearly three years later, in July 1986, LPA gave notice to the

City that it wanted to exercise the option. From that time forward, LPA, the City, the BRA and other interested municipal agencies met frequently to discuss and attempt to agree on the parameters of the project LPA was considering for the Hayward Parcel.

The complaint further alleged that in the fall of 1987 LPA shifted course and decided to sell its interests in both Lafayette Place and the Hayward Parcel to the Massachusetts subsidiary of Campeau Corporation, another Canadian developer. In October 1987 LPA, the BRA and the City concluded an amendment to the Tripartite Agreement that established a drop-dead date of January 1, 1989 for the transfer of the Hayward Parcel. Now, parenthetically, the complaint did not allege, as Mondev does now, that the drop-dead date was the result of coercion, and the facts simply do not support Mondev's new allegation of coercion. I will have more to say on this subject tomorrow.

Campeau applied for the approval of the

BRA to the sale of LPA's interests in the project in December 1987. On February 1, 1988, 56 days after the application had been submitted, LPA withdrew the application for approval.

PRESIDENT STEPHEN: Excuse me. I hadn't appreciated, until you mentioned, it was Campeau that sought the approval.

MR. LEGUM: That is correct.

PRESIDENT STEPHEN: Not LPA.

MR. LEGUM: That's correct. The application was filed by Campeau.

PROFESSOR CRAWFORD: I see. On what basis, if was filed by Campeau, could LPA withdraw it?

MR. LEGUM: That is a mystery.

PROFESSOR CRAWFORD: How do we know it was withdrawn by LPA?

MR. LEGUM: Because they indicated that it was being withdrawn, and the BRA accepted that.

PROFESSOR CRAWFORD: There's some suggestion in the record that Campeau was acting as

agent for [off mike] in respect to those transactions. I suppose that nothing turns on that.

MR. LEGUM: Well, I would submit that something does turn on that, but the agency, the formal agency, at least the contractual evidence of agency is something that occurs a slide or two from now, when the lease agreement was entered into.

PRESIDENT STEPHEN: And I suppose the legislation that gives BRA the powers it has refers specifically to applications for sale of development rights? And if so, those applications, one would imagine, would be by the holder of the rights, namely LPA.

MR. LEGUM: The application, as I understand it, was an application by Campeau to form an improved investment vehicle under Chapter 121A, which would then be entitled to the tax benefits, and the reason stated was the sale of the interests in the Lafayette Place Parcel by LPA. That's my understanding of the application.

In March of 1988 LPA then leased to Campeau the interests that it had proposed to sell. The lease included a grant to Campeau of an option to purchase all of LPA's rights under the Tripartite Agreement, including those with respect to the Hayward Parcel. The lease also included an exclusive delegation of LPA's authority to deal with the City and the BRA with respect to the project. The option granted to Campeau and Campeau's obligation to make the required payments in the event the option was exercised, were not contingent on closing on the Hayward Parcel before January 1, 1989.

Campeau then proceeded to negotiate with the BRA and the City to pursue its own development plan. Campeau's Boston Crossing Project was much larger than LPA's Hayward Place project had been and involved both Lafayette Place and the Hayward Parcel. Beginning early in the negotiations Campeau unsuccessfully sought an extension of the January 1, 1989 drop-dead date. On December 19,

1988, the Chief Executive Officer of Campeau wrote to the Mayor of Boston and asked that the sale be completed before January 1. No closing occurred in that 12-day period. Although LPA's rights with respect to the purchase of the Hayward Parcel expired on January 1, 1989, Campeau and the city agencies continued negotiating. Campeau's plans were approved by the BRA in June 1989. Campeau, however, never began the construction of Boston Crossing because it declared bankruptcy in October 1990.

LPA terminated Campeau's lease in mid 1990, and resumed control over the mall. It then made a business decision, however, not to keep up its payments on the non-recourse loan granted to it by Manufacturers Hanover Bank. In February 1991 the bank foreclosed on the mall and other collateral including rights under the Tripartite Agreement.

Now, that concludes my summary--please.

PRESIDENT STEPHEN: Can I just--if you had

concluded--go back to March '88.

MR. LEGUM: Yes.

PRESIDENT STEPHEN: LPA leases interest to Campeau and that included a right on Campeau's part to purchase.

MR. LEGUM: That's correct.

PRESIDENT STEPHEN: Is it curious that whereas the parties were obliged to resort to a leave because BRA had rejected an application to purchase, yet within the terms of the lease, there was going to be a right conferred on Campeau to purchase from Boston, namely BRA, if you can treat the two as very similar.

MR. LEGUM: Well, just to be clear, the right granted in the lease was a right granted by LPA to sell to Campeau its interests under the Tripartite Agreement.

PRESIDENT STEPHEN: Yes, but the effect would be that then you would have a direct relationship between Campeau, who had been rejected when it had sought to have a direct relationship

with the City, and the City. However, that's merely a curiosity perhaps.

MR. LEGUM: I believe that at some point there would have had to have been an approval by the BRA of the sale from LPA to Campeau. Where that would happen in terms of the closing on the Hayward Parcel is unclear.

PRESIDENT STEPHEN: The whole idea of leasing these rights is a strange one, to me at least.

MR. LEGUM: Well, the document is entitled a lease, but it contains provisions that one would not normally find in a lease, an option on a right to purchase and a delegation of rights with respect to development of future development of the whole project.

PRESIDENT STEPHEN: But of course I don't expect you to be able to explain a transaction that the U.S. had no part in. Thank you.

MR. LEGUM: Let me just make one point clear in case it's not. In February of 1988 the--and that's

on the previous slide--the BRA never rejected the application that was submitted by Campeau for approval of the sale. It was withdrawn before any action was taken on it.

PROFESSOR CRAWFORD: Although it's fair to say that the record doesn't disclose rapid action always by BRA in some of these transactions, these transactions that occurred in the 1980s.

MR. LEGUM: Well, based on my experience in government, and it is not a long experience, but based on my experience in government, had action occurred in 56 days, that would have been the remarkable fact.

[Laughter.]

PROFESSOR CRAWFORD: In your present position, we'll take that remark under advisement.

[Laughter.]

MR. LEGUM: Now, having reviewed the facts alleged, I'd like to now review the claims asserted by LPA based on those facts in the Massachusetts Courts. As a general matter, LPA's claim was that

it had been unfairly denied the opportunity to buy the Hayward Parcel for the favorable price provided by the formula in the Tripartite Agreement. It contended that the City and the BRA had failed to negotiate in good faith and thereby prevented the sale of the property from taking place before LPA's purchase rights expired. LPA also claimed that the BRA had illegally interfered with its proposed sale to Campeau and prevented it from closing. In consequence, LPA claimed to have lost profits that it would have received had either sale taken place.

LPA's claims were based on the following theories of Massachusetts Law, and we have them displayed on the screen in the event that that's useful. First, that LPA was entitled to specific performance. Second, that the City and the BRA stood in breach of Section 6.02 of the Tripartite Agreement. Third, that the two defendants had breached an implied covenant of good faith and fair dealing. Fourth, that BRA Director Steven Coyle had intentionally interfered with LPA's contractual

relations with Campeau. Fifth, that the BRA and the City had acted in violation of Massachusetts General Law, Chapter 93A, which I presume everyone in the room now remembers what that statute is about. And sixth, that the BRA and the City had committed constitutional torts in violation of the Massachusetts Civil Rights Statute.

After the initial pleadings were filed in 1992, there was a period of pretrial disclosure in the case known as discovery. The parties produced many documents to each other, and conducted out-of-court examinations of witnesses under oath known as depositions during this discovery period, the City and the BRA moved for summary judgment on six grounds. By a memorandum and order dated September 15th, 1993, the trial judge granted the motion as to three grounds and denied the motion as to the other three. Now we have the decisions on the screen.

The first ground addressed one part of LPA's claim of a breach of the implied covenant of

good faith and fair dealing. LPA contended that the City and the BRA breached that covenant by refusing to extend the deadline for the purchase of the Hayward Parcel under the Tripartite Agreement beyond January 1, 1989. The City and the BRA argued that LPA's claim of injury could not be sustained because the record conclusively established that Campeau was unable in any event, and for reasons unrelated to the City or the BRA, to close on the purchase of the Hayward Parcel at any point in 1989 or 1990 when it experienced financial difficulties. The trial court agreed, holding, quote, "That defendant's refusal to extend the January 1, 1989 deadline was not a proximate cause of the failure of Campeau to purchase the so-called Hayward Parcel." LPA never appealed this decision of the trial court.

Parenthetically I note that the trial court's unchallenged decision on this issue is pertinent to Mondev's claim that an expropriation of LPA's rights took place back in the 1980s. If

the failure to grant an extension was not a proximate cause of Campeau's failure to purchase the Hayward Parcel, it is difficult to see how it could have contributed to an expropriation of the rights to purchase that same parcel.

The second issue resolved on summary judgment, as indicated on the screen, related to LPA's claim under the Massachusetts state prohibiting unfair and deceptive conduct in trade or commerce, Chapter 93A. The City of Boston and the BRA citing three consecutive decisions of the Supreme Judicial Court, argued that that chapter did not apply to governmental entities like the BRA or the City in their performance of governmental duties. The trial court agreed and dismissed that claim.

The third issue resolved related to LPA's claim of a deprivation of its constitutional rights in violation of the Massachusetts Civil Rights Act. The City and the BRA argued the claim was barred in its entirety as a result of the statute of

limitations, and that it failed for a lack of any constitutional right which LPA alleged it had been deprived of by threat intimidation or coercion. The trial court agreed and dismissed the civil rights claim. LPA never appealed this ruling.

The trial court denied the rest of the City's and the BRA's motion in its entirety.

At the close of the discovery period the City and the BRA renewed their motion for summary judgment, relying on new evidence uncovered in discovery. The trial court denied the motion in its entirety in February 1994.

The case went to trial before a jury in October 1994. The trial lasted for 14 days. Now, we heard Mr. Hamilton on Monday assert that during the trial the trial judge acted improperly by supposedly excluding from evidence a stipulation memorializing the interview of Mayor Flynn that LPA had conducted. The Tribunal will recall that Mr. Hamilton flashed pages and pages of transcript on the screen concerning this episode with Mayor

Flynn. He never, however, flashed on the screen the place in the transcript where the Judge supposedly excluded the stipulation from evidence. There is a reason for this. There is no such page in the transcript.

After the Judge issued the subpoena for the Mayor that LPA had requested, LPA never moved for admission of the stipulation into evidence. This point is made in the United States' Counter-Memorial at page 58 with supporting citations to the record, a point that incidentally, Mondev never contested in its reply. In the adversary system of justice that exists in Massachusetts and elsewhere in the United States, the parties are obligated to move for the admission of exhibits into evidence. Mondev faults the trial court for a ruling that it never made and never was asked to make. Indeed, LPA did not appeal on this point, likely because it never asked for a ruling from which an appeal could have been taken.

At the close of LPA's case and after all

of the evidence in the case had been submitted, both the City and the BRA moved for the Court to direct a verdict in direct a verdict in their favor on the ground that no reasonable jury could find in LPA's favor based on the evidence presented.

One of the grounds asserted by the BRA was that it was immune from suit in tort under Massachusetts Law. The trial court noted that ground, but denied the motions without prejudice, stating that, quote, "This case is going to the jury and you can renew, based on the jury verdict, that by way of judgment NOV," NOV referring to the procedure for judgment notwithstanding the verdict.

Counsel for the parties then presented their closing arguments to the jury. The City's principal argument was that the Tripartite Agreement's provisions concerning the sale of the Hayward Parcel were too incomplete to form an enforceable contract as they left essential terms undefined. The City's alternative argument was that LPA had made no real effort to close on the

transaction. The BRA's principal argument was that the record contained no evidence that the BRA had conducted the design review process in bad faith. The BRA's second argument was that the BRA did not interfere with LPA's contract with Campeau by not acting on Campeau's application for a mere 56-day period, including the year-end holidays in December 1987 and January 1988.

LPA, as was its privilege under Massachusetts law, addressed the jury last. Its principal argument was that there was an enforceable contract to buy the Hayward Parcel. It contended that the design review process did not need to be completed before any closing took place. It argued that, quote, "You don't have to know what's going to be built first," close quote, in order to determine the price for the parcel under the formula in the Tripartite Agreement. LPA contended that the City and the BRA did not work quickly and in good faith toward a closing and it contended that the BRA, in bad faith, did not act

quickly on Campeau's application for 56 days when LPA agreed in principle to sell its interest to Campeau.

Now, parenthetically I note that contrary to Mondev's contention here that there was overwhelming evidence--and I'm quoting Mondev--that the City had repudiated its obligations concerning the Hayward Parcel, LPA did not assert in the trial court that there had been a repudiation that excused its performance. Indeed, early in the day closing arguments were present in the case. LPA's counsel explained its theory on excuse to the court. LPA's theory was not that the City or the BRA had repudiated the contract, but that the City and the BRA had acted in bad faith and had failed to perform their obligations under the contract. Mr. Oleskey stated that, quote, "The jury can find that even without bad faith it was a failure to perform by the City and the BRA under the contract, and that excused LPA from going forward and doing anything else." Close quote.

PROFESSOR CRAWFORD: He appears to be saying that there are two different grounds, but I also think the jury can find that.

MR. LEGUM: Yes, bad faith being one, and the other being failure to perform. Bad faith being a reference to the contractual provision in the third supplemental agreement that would extend the date based on bad faith. And failure to perform being the alternative argument on excuse.

After the closing arguments concluded, the judge then instructed the jury on the law and the issues they had to decide. The judge did not instruct the jury on repudiation, although LPA had previously proposed an instruction on repudiation, neither it nor any other party objected as to the absence of an instruction on this point. The jury deliberated for a day and a half before arriving at a verdict. The jury found that there was an enforceable agreement to purchase and sell the Hayward Parcel between the City and LPA. It further found that LPA had performed its

obligations, and therefore did not address the question whether the City's or the BRA's bad faith or breach of their contractual obligations had prevented LPA from performing its obligations.

The Tribunal will recall that there was a special verdict form that the jury had to go through. That form was prepared by counsel and no party objected to the logic tree set out in the form.

The jury found that this City stood in breach of the contract and awarded $9.6 million in damages against the City. It also found that the BRA had intentionally interfered with contractual relations between LPA and Campeau, and awarded $6.4 million on those grounds. The trial court found that the award of $6.4 million for tortious interference was necessarily subsumed in the award of $9.6 million for breach of contract. The City and the BRA both moved for judgment notwithstanding the verdict on the grounds that they had advanced in their motions for a directed verdict. The City

submitted a memorandum in support of its motion, arguing that no enforceable contract had been proven and that no breach had been demonstrated. The trial court denied the City's motion in its entirety. It granted the BRA's motion, however, finding that the BRA was immune from liability for intentional tort under the Massachusetts Tort Claims Act in a reasoned memorandum decision. It rejected the other grounds for relief advanced by the BRA.

I'd just like to pause for a moment and review for the Tribunal the decisions made by the trial court on LPA's claims. The specific performance claim, as we've seen, was not pursued by LPA at trial and was dropped from the case. A judgment was entered against the City for breach of the contract to purchase and sell the Hayward Parcel. The claim of breach of the implied covenant of good faith and fair dealing was not pursued as an independent claim at trial. Instead it was presented as one aspect of the claim of

breach of contract. As we saw earlier, the trial court entered summary judgment dismissing this claim to the extent that it was based on the refusal to grant Campeau's request for an extension. The trial court entered judgment in favor of the BRA, notwithstanding the verdict on the tortious interference claim, and as we've seen the claims under Chapters 93A in the Civil Rights Act were dismissed on summary judgment.

Now--yes, please?

PRESIDENT STEPHEN: Can I ask you if you can clarify for me this intentional interference with LPA's (?) relations with Campeau?

MR. LEGUM: Yes.

PRESIDENT STEPHEN: It's the relations between LPA and Campeau that were said to have been interfered with by BRA.

MR. LEGUM: That's correct. The Tribunal will recall that in the fall of 1987 Campeau and LPA reached an agreement in principle pursuant to which LPA would sell to Campeau its interests in

the project, and the allegation was that by not acting on the application for approval of that sale for the 56 days that we have discussed the BRA interfered with that agreement in principle between LPA and Campeau.

PRESIDENT STEPHEN: So it's merely the delay?

MR. LEGUM: That's right. You know, I think that my distinguished colleagues would add that there was evidence of bad faith and that sort of thing, but in terms of what the substance of the claim was, it was the delay and the failure to act rather than a refusal.

PROFESSOR CRAWFORD: Since BRA was a part of the Tripartite Agreement, why wasn't judgment entered against it also for breach of contract? It apparently has a claim on its contract.

MR. LEGUM: It's a good question. Professor Crawford, you will recall that under Section 6.02 of the Tripartite Agreement as amended, there was automatically to be created a

contract of purchase and sale between the City and LPA, and the City was the entity that owned the real property rights at issue. So that that contract that was created pursuant to Section 6.02 of the Tripartite Agreement was only between the City and LPA.

PROFESSOR CRAWFORD: [Off mike] It's a question, I suppose, of the Massachusetts [inaudible] might not need to be pursued. The mere fact that the eventual sale contract was going to be between the City and LPA wouldn't necessarily assume the possibility that BRA, in the context of the Tripartite Agreement, might not [inaudible], if an affected party [inaudible], if its conduct had prevented that contract being [inaudible]?

MR. LEGUM: Well, the argument that LPA presented was that there was a contract to purchase and sell the property that was automatically created, and there was not a contract that ultimately needed to be created. I hope that that answers the question.

JUDGE SCHWEBEL: Does the plaintiff here allege that the BRA was under an obligation to approve the sale of its rights to Campeau?

MR. LEGUM: I don't remember an allegation to that effect. I can state that there is no contractual obligation on the part of the BRA under the Tripartite Agreement to approve the sale on any specific amount of time.

JUDGE SCHWEBEL: And would there be any other basis of an obligation, any statutory basis or procedural basis, or is it a matter of discretion of BRA if it wishes to have one prospective buyer of the City's rights substituted for another?

MR. LEGUM: I will reserve a more complete answer on that question after I've had a chance to consult with representatives of the BRA, but my recollection is that the statute does not provide a time limit within which the BRA must act on a given application.

PROFESSOR CRAWFORD: My understanding is

that the reason for the consent had to do with the tax arrangements associated with the development. In other words, it was in effect a legislatively-based consent; it wasn't a contract-based consent.

MR. LEGUM: That is correct.

PROFESSOR CRAWFORD: So there might have been at least implied obligation in the statute to address an application within a reasonable time?

MR. LEGUM: There might have been, and that's the question that I would like to reserve on.

I'd like to underscore here that contrary to what has been suggested over the past two days, as the Tribunal can see, there was never any jury verdict or finding by any court that the City or the BRA abused its regulatory powers or acted in bad faith in connection with the design review process for the Hayward Parcel, with respect the any traffic studies in connection with that parcel, or in dealing with LPA or Campeau concerning their plans for the Hayward Parcel. What we have here is

a judgment of breach of contract against the City and a jury verdict against the BRA based on a 56-day period in December 1987 and January 1988. That verdict of course was never entered as a judgment by any court.

After the trial court had entered judgment, the City and LPA each appealed. LPA requested permission to have the appeal heard directly by the Supreme Judicial Court without having to appeal first to the intermediate appellate court in Massachusetts. The Supreme Judicial Court granted the request. The appeal was limited to only a few of the claims LPA had originally advanced in its complaint, and we have a slide for this. As the Tribunal can see, the appeal was limited to the breach of contract claim, to the intentional interference with contractual relations by Campeau claim, and to the violation of Chapter 93A.

PROFESSOR CRAWFORD: I'm slightly puzzled as to the relationship between the amounts that the

jury awarded in respect to the two claims that it upheld, one of which as you say was not actually entered. But my understanding is that the difference between, at least an estimate of the difference between the amount the Hayward Parcel was worth and the amount it would have cost was about 16 million, and the two amounts actually add up to about 16 million. Is that a pure accident or is this jury equity?

MR. LEGUM: There really isn't a principal basis for saying. The judge did not poll the jury on that point after it rendered its verdict.

PROFESSOR CRAWFORD: The Claimant also made some point about a number of rulings by the court, which no reason was given. You pointed out of course on some important points, they were separate memorandum opinions. Is it common in U.S. Courts for procedural motions to be denied without giving reasons?

MR. LEGUM: It certainly happens, and certainly in terms of purely procedural motions

such as motions for excluding evidence, taking a deposition, that sort of thing, one-line orders are quite common. In terms of more substantive motions like summary judgment motions, there isn't a requirement for a reasoned decision on summary judgment motions, and those are sometimes granted or denied without reason, without reason stated.

[Laughter.]

PROFESSOR CRAWFORD: I can imagine the judge might have reason. If a court gave a ruling which affected the party and didn't give a reason there would be a procedure by which the party aggrieved could get reasons, for example, if it was possible to appeal or seek review?

MR. LEGUM: That's precisely correct. For summary judgment motions, for example--and summary judgment decisions in this case, LPA did appeal, as we've seen, certain of those decisions.

PROFESSOR CRAWFORD: And those reasons were given.

MR. LEGUM: Reasons were given--well, not

for the Section 93A dismissal.

PROFESSOR CRAWFORD: It goes without saying that any questions we ask you, the Claimant is welcome to come back on a second round.

MR. LEGUM: Of course.

I'd like now to turn to the appeal procedure, which consisted in pertinent part of four rounds of written briefing and an oral argument. What I'd like to do is to outline those rounds of briefing and describe the principal arguments advanced--please.

PRESIDENT STEPHEN: I'm sorry. You say four rounds of written?

MR. LEGUM: Briefing.

PRESIDENT STEPHEN: Briefing.

MR. LEGUM: So four rounds of written submissions similar to the Memorials in this case.

PRESIDENT STEPHEN: I see. To the court.

MR. LEGUM: To the Supreme Judicial Court.

So what I'd like to do is to go through those quickly, and as I go through the arguments,

what we'll do is display on the screen the headings from the briefs that correspond to the arguments that are under discussion.

On December 19, 1997 the City of Boston began the briefing process by submitting its opening brief. The City's principal argument was that, quote, "No contract existed between LPA and the City for the purchase and sale of the Hayward Parcel," close quote. The City contended that the existence of the contract was a question of law for the Judge to decide and that the judge had erred by submitting the question to the jury and deferring to its findings. The City also contended, as a subsidiary point under this, that the jury's verdict that a valid purchase and sale contract existed was against the weight of the evidence. The City offered three subsidiary arguments in support of this contention.

First I contended that a binding purchase and sale agreement could not arise until the BRA approval of the Phase II design, Phase II referring

to the Hayward Parcel. In it second and third points the City contended that the Tripartite Agreement didn't sufficiently define the land or the air rights to be conveyed or the purchase price for an enforceable contract to exist. The City's second main argument was that assuming for the sake of argument that there was an enforceable contract, the evidence did not support a finding of breach by the City.

One of the arguments made by the City was that LPA had completely removed itself from the Hayward Parcel project after leasing its rights to Campeau, and therefore repudiated the contract. The City further noted that, quote, "LPA never demanded a deed for the Hayward Parcel from the City, never presented a purchase and sale agreement to the City, and made no claim of arbitration under the Tripartite Agreement for delivery of the land. The City observed that a repudiation by LPA would excuse the City from any failure to perform."

The next brief in the series was LPA's

opening brief and it came about a month later on January 20, 1998. This brief responded to the arguments in the City's opening brief and advanced LPA's arguments in support of its appeal from the trial court's decisions. LPA's principal argument, in support of the jury verdict, not surprisingly, was that Section 6.02 of the Tripartite Agreement constituted a valid option agreement for the Hayward Parcel. LPA pointed to the formula and the appraisal mechanism set forth in the Tripartite Agreement among other things.

As part of this argument, LPA also responded to the City's assertion that no enforceable contract could arise until the design review process was completed. LPA's response was that, quote, "Its purchase of the Hayward Parcel was not contingent upon BRA approval of LPA's development plans."

Now, parenthetically this position is diametrically opposed to Mondev's position here before this Tribunal, and it is pertinent to a

number of issues. Mondev asserts here that the approval of the development plans was inextricably intertwined with the purchase of the Hayward Parcel. That assertion is the premise for three of its contentions here. First, Mondev contends that the BRA's conduct of the design review process, effectively prevented LPA from exercising its right to purchase the Hayward Parcel, and therefore, expropriated that right.

Second, it contends that the SJC committed a denial of justice by not finding that the BRA's conduct of the design review process constituted a repudiation of the contract to purchase the Hayward Parcel.

And, third, it relies on this assertion concerning the design review process to support its contention that the bank did not foreclose on the rights at issue back in 1991.

All of these positions are based on Mondev's position here that its rights to acquire the Hayward Parcel were closely bound up with the

design review process.

Now--please?

PROFESSOR CRAWFORD: It could also be possible for approval in the context of a development arrangement to be a necessary part of the scheme without it being a legal contingency. The argument before the Supreme Judicial Court was precisely whether there was a contractual obligation at all. As I understand it, the Claimant's argument is that there was a close commercial relationship, close commercial link between conduct of the BRA and the satisfaction of the overall scheme. So there's not a fact contradiction.

MR. LEGUM: Well, I think I would disagree. Why don't we see the more precise language that's used by LPA in its briefs, and I'll return to this point.

In the SJC LPA used--or argued that, "Section 6.02 does not condition LPA's acquisition of Hayward Parcel upon the completion of the design

review process or on receipt of any government approvals. Moreover, the undisputed evidence at trial was that both LPA and Campeau were willing to purchase the Hayward Parcel regardless of whether the City or the BRA"--I got that reversed--"approved their development plans." As a consequence, any uncertainties over the development approvals had no bearing on the validity or enforceability of Section 6.02, and as part of this agreement, LPA pointed to sworn testimony by LPA officers in the trial court to the same effect.

Now, the contract rights at issue were rights to close on a real estate parcel, and if you have a contract to purchase real estate and that contract is not contingent on design approval in any way, you go to the closing, you exchange the deeds, you exchange the purchase price, and the rights are given effect.

LPA's position before the Massachusetts courts was that that's the way it could have operated. It did not require the approval of the

BRA to close on the Hayward Parcel.

LPA's second argument in support of the jury verdict was that the record confirmed the jury's finding that the City breached the contract. Consistent with its position before the trial court, LPA did not argue that the City had repudiated the contract. Instead, it pointed to three items as supporting the jury's finding of breach: the City's failure to obtain appraisals for a fractional part of the Hayward Parcel; a never-executed proposal for a street through the Hayward Parcel; and the fact that the City never transferred the parcel to LPA.

PRESIDENT STEPHEN: I wonder if I can interrupt you for a moment.

MR. LEGUM: Please.

PRESIDENT STEPHEN: The Hayward Parcel seemed to have been divided into D-1, D-2, D-3, and D-4 for appraisal purposes.

MR. LEGUM: That's correct.

PRESIDENT STEPHEN: These were distinct

areas of the one parcel, were they?

MR. LEGUM: That's correct. There were different designations for different parts of the parcel.

PRESIDENT STEPHEN: I see. And the totality would be the sum of all four, presumably.

MR. LEGUM: Presumably.

PRESIDENT STEPHEN: Yes. Thank you.

MR. LEGUM: LPA also argued that the record contained evidence to support a finding that the City had bad-faith motives for these supposed breaches. In response to the City's contention that LPA had repudiated the contract, LPA noted that the law set a high standard for a finding of repudiation. The court could find a repudiation only if the record showed a "definite and unequivocal manifestation of intention not to render performance." LPA argued that evidence of no such manifestation appeared in the record.

In support of its appeal of the judgment entered in favor of the BRA, LPA argued that the

BRA should be categorized as an entity not immune under the Massachusetts Tort Claims Act. It also argued that the City and the BRA could not be considered to be a person engaged in--excuse me, should be considered to be a person engaged in trade or commerce and, therefore, subject to Chapter 93A.

The next round of briefing in the series was on February 17, 1998. The City submitted its reply brief, and the BRA, as appellee, submitted the only brief that it was permitted. The briefs responded to the arguments made in LPA's opening brief. In addition, the BRA made a number of alternative arguments in support of the trial court's entry of judgment dismissing the claims against the BRA. Notably, the BRA argued that no reasonable jury could have found based on the evidence that it had tortiously interfered with LPA's contractual relations with Campeau.

The final brief in the series, LPA's reply brief, was dated February 27th. It responded to

the arguments made in the preceding round of briefing.

And I see that we are now at 11:30. Would this be a convenient time to break for coffee?

PRESIDENT STEPHEN: Indeed.

MR. LEGUM: Thank you.

PRESIDENT STEPHEN: We'll adjourn for quarter of an hour.

[Recess.]

PRESIDENT STEPHEN: Mr. Legum?

MR. LEGUM: I will begin by responding to some of the questions that I had reserved on before the break. I am advised that there is no express time period in Chapter 121A, the chapter that would have governed this application. The courts of Massachusetts would interpret that as requiring a decision within a reasonable amount of time. I would also note that there would be a remedy under Massachusetts law, a judicial remedy for failure to act by writ of certiorari or writ of mandamus.

Turning back to the Supreme Judicial

Court, the court heard oral argument on March 9, 1998, and my understanding is that the standard argument time in cases before the court is 30 minutes total. The Supreme Judicial Court issued its decision a little over two months later--

PROFESSOR CRAWFORD: For each side, or the total?

MR. LEGUM: Total.

PROFESSOR CRAWFORD: For both sides.

MR. LEGUM: Both sides. It's a different process, I think, in the U.S., the appellate process, than in some other countries.

The SJC issued its decision a little over two months after oral argument on May 20, 1998.

I'd now like to review the opinion of the Supreme Judicial Court, and because the opinion is important to a number of issues in the case, I would propose, rather than flashing text from the opinion on the screen, that the members of the Tribunal refer to the copy of the opinion that we've included in our binder this morning as I go

through the court's reasoning. We've highlighted the passages that I will refer to, and it is my hope that, as a result of this exercise, the Tribunal will recall not only the portions of the opinion that we believe are important, but also where it can later find those portions in the opinion.

The court begins it analysis of the legal issues on page 516. On the question of the contract to purchase and sell the Hayward Parcel, as often happens in appeals, the court saw the legal issues presented in a light somewhat different from the approach taken by either party. It found that it was necessary to treat together what the parties had addressed as two different issues: "that the Tripartite Agreement was too indefinite to constitute a binding agreement, and that in any event the City was not in breach.

It found that these two issues "must be considered together to come to a fair and sensible view of the arrangements between the parties and

their dealings with each other pursuant to it."

The court then addressed the issues in three different subsections of Part 2 of the opinion.

In Part 2A, the court rejected the City's argument that the Tripartite Agreement was too indefinite to be an enforceable contract to purchase and sell the Hayward Parcel. It agreed with the City that the Tripartite Agreement did not fix essential terms such as the price, which was dependent on future conditions, or the size of the parcel. However, it observed--and this appears on page 518--that "If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding."

PRESIDENT STEPHEN: That should be "too," I take it, "too narrow"?

MR. LEGUM: No. It's t-o.

PRESIDENT STEPHEN: "Narrow" is a verb

there.

MR. LEGUM: That's correct.

PRESIDENT STEPHEN: I see.

MR. LEGUM: It's at the top of page 518.

PRESIDENT STEPHEN: Yes, I see it.

MR. LEGUM: The court found that the Tripartite Agreement did contain such procedures. The agreement provided for a three-person appraisal board to be appointed to determine the price to be paid. It also provided for an arbitration procedure that could have resolved the open questions about the contours of the parcel and the allocation of air rights. And on page 519, the court concluded, "To borrow Justice Holmes' metaphor, the machinery was built and had merely to be set in motion."

it concluded that by virtue of this machinery, the Tripartite Agreement did create an enforceable contract with respect to the Hayward Parcel.

In Part 2B of its opinion, the SJC

addressed what it described as the question of whether LPA can as a matter of law maintain a claim against the City for breach of the bilateral contract for the purchase and sale of the Hayward Parcel.

The court began with the rule stated in its 1954 decision in Leigh v. Rule--and I think we've heard that pronounced "lay" in some cases; I'm going to pronounce it "lee"--that when performance under a contract is concurrent, one party cannot put the other party--other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance.

Under Leigh and its progeny, "Any material failure by a plaintiff to put a defendant into breach bars recovery unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform."

On page 520, the court then examined, viewing the facts in the record most favorably to

LPA, whether LPA as a matter of law was ready, willing, and able to close on the sale of the Hayward Parcel before January 1, 1989, and had made a legally sufficient tender of performance. It found no evidence of a tender before LPA transferred its rights to Campeau in March 1988. The best evidence it found of a tender was Campeau's December 19, 1988, letter advising the mayor that, "We have no recourse but to officially notify the City that we wish to complete the transaction and make payment immediately."

It measured Campeau's half-hearted statement of a wish to complete the transaction against Massachusetts precedents and found it to fall far short as a matter of law from the required tender.

Moreover, the court found that its conclusion would be the same even assuming that Campeau made no tender for lack of a "final delineation of what the parcel contained and an appraisal of what the parcel was worth."

It recalled that the agreement between the parties specified mechanisms for resolving just these open questions. Indeed, the court went on, "It is only because such mechanisms were specified that we have been willing to hold that the arrangement between the parties is definite enough to constitute a binding agreement."

"Because neither LPA nor Campeau ever set in motion the mechanisms that would have resolved the open questions," the court concluded, "LPA cannot as a matter of law have put the City in default."

On page 522, the court then turned to the final part of the analysis under Leigh v. Rule. It examined whether, "Even if its tender was insufficient, LPA and Campeau should be excused of its obligation to tender because the City's tactics and delays demonstrated that it would not perform under the contract."

Thus, even though LPA had not argued that the City had repudiated the contract, the court,

out of an abundance of thoroughness, examined LPA's allegations as to breach and bad faith to see whether they could meet the standard for repudiation, a standard that, as the Tribunal will recall--and it's on the screen in the event that it's of interest--a standard that LPA itself described as one that set a high threshold, a definite and unequivocal manifestation of intention not to render performance.

The court then examined the City's failure to obtain appraisals for a small part of the Hayward Parcel, the City Transportation Department's never-executed proposal for a street through the Hayward Parcel, and other uncertainties relating to the design review process for the parcel.

With respect to the proposal for the street and the design review process, at the top of page 523, the court relied on the position taken by LPA in testimony by Marco Ottieri, LPA's project manager, and repeated--the position that I'm

referring to was repeated, as we've already seen, in the briefs before the Supreme Judicial Court. The position I refer to is that the contract of purchase and sale was in no way contingent on the design review process and that "LPA was committed to purchasing the Hayward Parcel regardless of its ultimate configuration and of restrictions placed on the parcel by the City.

Quoting from page 523 of the opinion, the court concluded that "Unlike a situation in which a defendant clearly expresses an unwillingness to perform, thereby repudiating the contract, here LPA seeks to attribute repudiation to the City based on the mere fact that uncertainties remained that LPA shared responsibility for resolving." The court, therefore, found as a matter of law that the record viewed most favorably to LPA did not establish a repudiation.

In Part 2C of its opinion, which begins on page 524, the court examined whether LPA had demonstrated bad faith by the City or the BRA

sufficient to trigger the automatic extension provided for in the third supplemental agreement to the Tripartite Agreement. That extension would be triggered, the court noted, if "the City and/or the BRA shall fail to work in good faith with LPA through the design review process to conclude a closing."

Because the third supplemental agreement was signed in October 1987, the court scoured the record for evidence of bad faith in the design review process after that date. It found none. It found instead that as soon a Campeau initiated the design review process, in the spring of 1998 it progressed--and I'm quoting from page 525--"smoothly and in a collaborative fashion."

JUDGE SCHWEBEL: May I ask, does the court note that Campeau paid more than LPA was prepared to pay? And if not, is not that a material omission in its scouring of the record?

MR. LEGUM: I don't believe that it is, Judge Schwebel, and the reason for that is that the

contractual provision that we're referring to refers only to good faith in the design review process. And the court looks at the design review process beginning after the third supplemental agreement was signed and found no evidence of bad faith. The fact that Campeau ultimately agreed to pay more than the Tripartite Agreement formula because those rights had expired would not be relevant to that analysis.

JUDGE SCHWEBEL: But would that fact be relevant to the essential thrust of the judgment of the court as to BRA and the City's performance of their part of the bargain?

MR. LEGUM: Mr. Pawlak will have more to say about this later on in the day, but a repudiation, of course, is something different from a mere failure to perform an obligation. A repudiation is where a party indicates by its acts or by an unequivocal verbal act, if you will, to the other party that it will not perform. For example, selling the parcel to someone else would

be a repudiation if that took place before the closing was to occur.

There's nothing like that in the record, and, of course, the fact that the rights expired and Campeau ultimately agreed to pay more for those rights has, I would submit, nothing to do with whether a repudiation could be shown before 1989.

JUDGE SCHWEBEL: Would you say that equally applies to the evidence that's been put in to the effect that the pertinent board of the City recorded that it was unwilling to see the sale go forward on the price set out in the Tripartite Agreement?

MR. LEGUM: I don't believe that that's quite what the minutes said. But, again, a repudiation based on a verbal act can't be based on the mere musing of a party that they might break the contract. For it to be a repudiation, you have to go up to the other contracting party and tell them: I'm not going to perform the contract. If I'm one party to the contract and I tell someone

else in my office, Hmm, I might not want to perform the contract, that's not a repudiation.

JUDGE SCHWEBEL: But when you combine what you call such musings with a course of inaction, could that be fairly read as tantamount to repudiation? Or for there to be repudiation under the law of Massachusetts, must there be an express repudiation, as you say, I will not perform? Actions tantamount will not equate with a repudiation or a substantiated repudiation? There has to be a formal affirmation of unwillingness to perform?

MR. LEGUM: To use LPA's words, which we've seen several times, it must be a definite, an unequivocal manifestation of intention not to perform. And I think that what colored the SJC's analysis throughout is that the contract provided a mechanism for resolving all of these open issues. And we never--we will never know, in fact, whether had those mechanism been invoked there would have been a performance by LPA or a performance by the

City or not. But the mechanisms on their face were adequate to compel performance by either party.

JUDGE SCHWEBEL: Did these mechanisms go to the question of the formula set out in the Tripartite Agreement for the purchase price? Or did they go to other aspects, related perhaps, but not so central, such as the precise dimensions?

MR. LEGUM: The answer to your question, Judge Schwebel, is yes. There were two mechanisms specified. One was an appraisal mechanism, which addressed the purchase price, which would have provided the information necessary to calculate the purchase price. And the second mechanism was an arbitration mechanism that would have filled in the details of the purchase and sale contract as to the contours of the parcel, et cetera.

PROFESSOR CRAWFORD: Did the triggering of the arbitration mechanism, as it were, postpone the expiry of the drop-dead date? In other words, was it effective in respect of the amended agreement to enable the transaction to be completed if one party

refused?

MR. LEGUM: If I understand the question correctly, it is: Was there a condition before the appraisal mechanism or the arbitration mechanism could be invoked?

PROFESSOR CRAWFORD: No. Let's assume that in--I don't know--September, four months before the drop-dead date, LPA came to the conclusion that the City was deliberately dragging its heels and did try to trigger these mechanisms, could it have done so in the time available or was it inevitable that the drop-dead date would expire, anyway?

MR. LEGUM: We have to go back and look at the provisions. My recollection is that there was a relatively short period of time provided for constituting the Tribunals that would be deciding the issues, something on the order of 15 days for one appointment, 15 days for another appointment, 15 days for another appointment.

But as is always the case in an

arbitration, one does have to look at those provisions closely and calculate when it is that one must invoke them if one is going to invoke them.

Let's see. Where was I?

PRESIDENT STEPHEN: Page 525.

MR. LEGUM: Thank you. The court concluded that LPA's bad-faith claim rests on the fact that the BRA refused to extend the drop-dead date, despite Campeau's repeated requests for such an extension.

On page 526, the court held, however, that the City and the BRA were under no contractual obligation to grant an extension and no bad faith could be found in a failure to grant a concession to the other party that it was under no obligation to grant.

In the final analysis, the court concluded that because no party had invoked the mechanisms provided to resolve the uncertainties that divided them, as a matter of law "neither party tendered

performance and neither was in breach or default."

It, therefore, ordered that the judgment in favor of LPA be reversed and that judgment be entered for the City.

The court then turned to LPA's claims against the BRA. Now, because the court's reasoning with respect to those claims is not in dispute in these proceedings, I will simply summarize the court's rulings.

It found that the BRA was a public employer, immune from suit from any claim arising out of an intentional tort, including interference with contractual relations.

With respect to the Chapter 93A claim, it concluded that the trial court's grant of summary judgment was correct because the defendant's involvement in these transactions was wholly in pursuit of the legislatively prescribed mandate of redevelopment of blighted areas.

Now, I'd like to briefly review the Supreme Judicial Court's disposition of LPA's

claims, and we have a slide for this.

The breach of contract claim was reversed. The claim based on tortious interference with contract was affirmed--rather, the resolution of that claim by the lower court was affirmed. And the lower court's dismissal of LPA's Chapter 93A claim was also affirmed.

LPA filed a petition for rehearing in June 1998. It was denied. LPA petitioned for certiorari in the U.S. Supreme Court. That was also denied in March 1998--'99, excuse me.

That will conclude my presentation on the facts. If the Tribunal has no questions, I will ask the President to call on my colleagues, Ms. Svat, who will demonstrate that Mondev's claims here are in large part barred by the passage of time.

PRESIDENT STEPHEN: Thank you.

We look forward to hearing you, Ms. Svat.

MS. SVAT: Thank you. Good morning, Mr. President and Members of the Tribunal. I will be

addressing the matter of time this morning--or this afternoon, I suppose.

As we have already seen, this is a threshold matter of critical importance to this case. Today I will demonstrate why, despite Mondev's appetite to litigate events of the 1980s, the bulk of its NAFTA claims, nevertheless, fall outside the temporal bounds of Chapter Eleven.

During my presentation, I will briefly address the basic principles that are relevant to the topic of time. These are well-established principles reflected in international law generally and in the NAFTA, principles that Mondev does not dispute per se. But I address them, nonetheless, because Mondev has made arguments that, if accepted, would render these principles meaningless.

Next, I will refute Mondev's argument that, in spite of these basic principles, Article 1105(1) operates to save its stale claims. Mondev's premise is that Article 1105(a) is

"double-barreled." It is an obligation not only for the state to accord investments the international minimum standard of treatment, but also for the investor to exhaust domestic remedies. I will show that this premise cannot be squared with well-settled international principles of state responsibility.

Finally, I will conclude with a brief review of Mondev's specific claims of breach under Articles 1102, 1105, and 1110, and I will demonstrate briefly that the bulk of those claims could not be based on treatment of Mondev's investment by the City and the BRA before the NAFTA went into effect and, therefore, are time-barred.

And I'll just note at the outset that I'll be addressing in detail tomorrow the expropriation claim and how time affects that claim.

In international law, it is not unusual for time to play a prominent role in the resolution of claims, just as it does here. As Judge Rosalyn Higgins noted in her 1997 article, "Time and the

Law," which we have provided in our supplement, "The concept of time plays an important role in the international legal system." She noted, "Time affects the jurisdiction of all international Tribunals which derive their authority from the consent of states generally obtained at a specific moment in time."

Time also has an impact on the life span of claims. Among the most well-established principles of law, municipal and international, is that of interest rei publicae ut sit finis litium, or the principle that lawsuits should have an end. It goes without saying that necessary evidence surrounding a delayed claim will not be preserved forever, and, thus, a long lapse of time between events giving rise to a claim and the claim itself can seriously prejudice the defense.

Thus, when it comes to questions of timing, an otherwise trivial difference between one day and the next may have the greatest of consequences for an international claim. The

answer, if such a question should arise, can either spare or take the life of a claim. And we submit Chapter Eleven claims are no exception.

The three NAFTA parties made clear in the text of the Treaty that their consent to engage in Investor/State arbitration would depend to the day on the timing of certain key events. In Article 2203, the parties selected a date certain upon which the agreement and all of its attendant rights and obligations, including those under Chapter Eleven, "shall enter into force." That date, which we have all no doubt committed to memory, is January 1, 1994. And no other provision of the NAFTA suggests any intent to bind the parties before that date. Thus, under Article 28 of the Vienna Convention on the Law of Treaties, there is no basis to apply its obligations retroactively.

Article 2203 does not deprive investors of any rights; rather, it gives rights prospectively.

The date January 1, 1994, also frames the category of investment disputes subject to

settlement under Article 1116 of Chapter Eleven. And if I could direct your attention to the screen, I will demonstrate how Article 1116(1) temporally limits eligible claims.

Paragraph (1) states, in relevant part, an investor of a party may submit to arbitration under this section the claim that another party has breached an obligation of Section A. Thus, eligible claims must allege breaches of an obligation of Section A. And, of course, as we have just seen, there were no such binding obligations that could have been breached before January 1, 1994.

And this is what the Feldman Tribunal found in its decision on jurisdiction, which is in the record, dated December 6, 2000. Explaining the meaning of Article 1117(1), which is identical to Article 116 in this respect, the Feldman Tribunal held, "Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed and the Tribunal's jurisdiction does not extend

before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, the Tribunal may not deal with acts or omissions that occurred before January 1, 1994."

PROFESSOR CRAWFORD: Speaking for myself, I would have some difficulty with the last sentence of that quotation. It doesn't--unless I deal with--deal with allegations of breaches arising from acts or omissions, when it would be acceptable. It's often necessary for a Tribunal to deal with facts that occurred at some distance in the past in order to understand allegations of breach related to circumstances occurring afterwards. So it may just be a problem of formulation, but as it stands--

MS. SVAT: And I would agree with what you noted. In this case, of course, the SJC had before it the record in the case below. Obviously the facts before the SJC pre-dated the NAFTA, and we don't suggest that you shouldn't be considering the facts as part of the record before the SJC--

PRESIDENT STEPHEN: I suppose the simplest

example would be the entry into a contract before, and then the breach subsequently. And, of course, the fact of entry into a contract is vital to any action for the breach, and the fact that it occurred before a Treaty under which proceedings are brought is irrelevant.

MS. SVAT: I agree.

Finally--and as Mondev concedes--Article 1116 also includes a prescription period, after which otherwise eligible claims will expire. And as you can see from the next slide, and I believe we've seen this yesterday or the day before, paragraph (2) or Article 1116 disallows claims if more than three years have elapsed from a single claim-specific date. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor incurred loss or damage.

The aim of this language--

PROFESSOR CRAWFORD: That is a very odd provision, isn't it, because of the word "and"? If I say that you can't do something more than three years after A and B, the question arises when you mean the last occurring of A and B or the first occurring of A and B. Of course, it may well be in many cases they occur at the same time, in which case there's no problem. But they may well not occur at the same time. In the CME case, which has been cited, the Tribunal analyzed the position that the breach occurred in 1996, but the damage occurred in 1999, when the other party concerned, Mr. Zulenia (ph), I think his name was, triggered the change in the contract that had been forced by the Media Council in 1996.

In the context of NAFTA, let's take a case where the alleged breach occurs after NAFTA was entered into force at one point, and then subsequently damage occurs. How do you say paragraph (2) operates in that situation?

MS. SVAT: Well, you said several things

I'd like to respond to.

First of all, I agree with what I think you said earlier in your question, which was that the later of the date is the date that operates. So that if they occur together, it is a single date. If they occur in sequence, then it would be the later date, so that at the time that the investor has knowledge of both.

Now, I would suggest that in this case, this distinction doesn't matter. And, furthermore--and I'll talk about CME tomorrow, but I think--I'll just say that I think on the--for the breach of the expropriation claim in that case, the breach was, in fact, later in time. But, in any event, the distinction that you noted in that oddly drafted paragraph is not relevant here.

PROFESSOR CRAWFORD: In any event, your point, the principle is clear, that it is the last of the two events that occurred which is the triggering point in terms of the time.

MS. SVAT: It is, although I would also

note that it is when the investor first acquires this knowledge. So there is an emphasis on the notice that the investor had.

PRESIDENT STEPHEN: One further question. Is it necessary that the quantum of loss or damage be ascertained or simply that there is some unquantified amount of loss or damage? I suppose it's not really very clear.

MS. SVAT: I think it's clear that the loss has to be quantifiable. The loss must exist. It cannot be--

PRESIDENT STEPHEN: Some loss must exist.

MS. SVAT: Yes.

PROFESSOR CRAWFORD: But no, not necessarily--I mean, one might suggest that what it means is that it's clear to the investor that the investor has incurred some loss or damage, even if the--

MS. SVAT: That's what I meant to say.

PROFESSOR CRAWFORD: --extent of that

wouldn't be determined at that time or may not be able to be determined.

MS. SVAT: But it can't be merely speculative, the loss. There has to be a certainty.

So I'll just pick up where I was. The NAFTA parties, it's clear from this provision that they decided that more than three years was too long and they would not consent to defend themselves in arbitration if an investor waited more than three years after it first acquired the knowledge, constructively or otherwise, of both the breach and the loss.

Mondev, for all of its theories as to why its claims are not time-barred, challenges none of these basic principles which I just went through. It agrees that the United States--with the United States that it cannot submit claims for breaches of anything other than treaty obligations that entered into force on January 1, 1994. It agrees that the NAFTA does not apply retrospectively.

Mondev also agrees, as it must, that Article 1116(2) is intended to preclude the resolution of investment disputes involving claims that are more than three years old.

Mondev's strategy has been to embrace these temporal principles and pledge full compliance with them. At paragraph 46 of its reply brief, for example, Mondev assures the Tribunal that its specific claims in accordance with international law and the Vienna Convention rely only on "obligations, alleged acts or omissions, and supposed breaches that existed under NAFTA or occurred after January 1, 1994."

And this was the passage of Mondev's brief upon with the United States relied in concluding that it was common ground between the parties that claims of breach cannot be based on pre-NAFTA conduct, which Sir Arthur Watts alluded to yesterday.

But what Mondev stated in the reply brief, and I quote here--earlier I quoted only the

beginning quotation mark--that "Mondev's specific claims in these proceedings rely on acts or omissions occurring after" January 1, 1994.

Yet Mondev pays these principles nothing more than lip service. As we have seen, Mondev now disputes this point, arguing that a post-NAFTA breach can somehow be based on acts or omissions that pre-date NAFTA. But this is really nothing new. All along throughout the course of both the written and the oral phases of this proceeding, Mondev has sought to evade the obvious consequences of NAFTA's prospective nature and of Article 1116's prescription period. To do so, it has seized on the so-called two limbs of Article 1116(2), the breach and the loss limbs, to argue that neither finally took place until 1998 and 1999. And I would just add that it was--I'm unsure, but I believe that the second limb argument was a new argument that we heard during the hearing that Mondev did not include in its papers.

Mondev then virtually rewrites the

individual obligations that are alleged to be breached in a creative but ultimately fruitless attempt to sweep allegations that would otherwise be barred within the permissible time frame in this case.

Mondev's theory of Article 1105(1), which I will address next, is particularly original.

Mondev's novel theory of Article 1105(1), although it has changed form somewhat over the course of these proceedings, represents an attempt to fix a problem posed by Mondev's claims from the time it submitted them, and the problem is this: The treatment Mondev principally complains of, the treatment LPA received during the 1980s from the City of Boston and the BRA, could not have breached any NAFTA obligation. How could it? The rules of conduct that would eventually enter force as Section A of Chapter Eleven were not even written, let alone known to the City or the BRA in the 1980s. Nor were the City or the BRA according treatment to LPA on or about January 1, 1994, when

NAFTA did enter into force.

By this point in time, as we saw yesterday, Campeau had already gone bankrupt, the bank had foreclosed on the project, Mondev had sued and received damages from Campeau, and the trial and its suit against the City and the BRA had not yet begun.

Now, this conflict or awkwardness permeates Mondev's case and was evident in Mondev's presentation here this week when Mondev called the "essence" of the case the Boston authorities' determination to steadily and intentionally erode the value of Mondev's investment until it had been deprived of it altogether by 1991. But, also, Mondev argued that the NAFTA breaches and losses that it alleges occurred in '98 or 1999. Indeed, Mondev has continually struggled to find a way to bring the essence of its case within the ambit of Chapter Eleven by bootstrapping them to the decisions by the Massachusetts and United States courts rendered in 1998 and 1999.

And even at this hearing, Mondev continues to try to bolster this theory. I will address two of Mondev's theories here, one formulated in its Reply, which we did not--which Mondev did not rehearse at length in its oral argument, and the second is one that we heard on oral argument yesterday.

Now, in its reply, Mondev argued that Article 1105(1) that the prescription--excuse me--that Article 1105(1)'s prescription to accord investments the customary international law minimum standard of treatment of aliens sweeps within it a separate and very different international obligation and imposes it on the NAFTA parties. And that is the obligation to make reparation for pre-NAFTA violations of customary international law.

Then at this hearing, while reasserting that Article 1105 includes secondary as well as primary obligations--and I will discuss these terms in a moment--Mondev read into Article 1105 the

additional requirement that an alien receive redress in domestic law whenever the minimum standard is not met by a state.

This argument, like the argument in its Reply, simply substitutes as the alleged element--excuse me, as the alleged additional element of the international minimum standard the obligation to make reparations, as it is known in international law, for the completely unprecedented obligation to provide a domestic remedy.

In Mondev's view, the NAFTA parties, notwithstanding their evident intent to agree only to prospective obligations and to limit explicitly their exposure to claims no more than three years old, the NAFTA parties, nevertheless, undertook that the treatment owed investments under 1105(1) would encompass not only the customary international law minimum standard, but also--and it is a bit unclear whether these are cumulative or alternative arguments--but also the obligation to make reparations as a matter of international law

for all past international wrongs and the obligation to redress injury under domestic law.

Either way, Mondev alleges that the purported failure of the United States courts to grant LPA redress for the alleged past wrongs of the City and the BRA is what constitutes the continuing violation of Article 1105(1), that the violation persists until it is remedied.

As far as the United States understands Mondev's argument, Article 1105(1) purportedly requires the exhaustion of available domestic remedies in order to give rise to a breach of that provision.

PRESIDENT STEPHEN: Where does that occur, the obligation to pursue domestic remedies?

MS. SVAT: When is the obligation applicable?

PRESIDENT STEPHEN: It occurs in one of the rules?

MS. SVAT: Forgive me. I'm not sure I understand your question.

PRESIDENT STEPHEN: The obligation of a party--

MS. SVAT: Mondev's argument is--

PRESIDENT STEPHEN: --to first exhaust domestic remedies.

MS. SVAT: Well, we submit that it doesn't apply here, so I'm a little--that's why I'm a little unclear about what your question is. I'm sorry. I'd like you to ask me one more time so I can understand.

PRESIDENT STEPHEN: So you say that there was no obligation to go to the courts of Massachusetts before coming to seek a remedy under NAFTA?

MS. SVAT: Well, if the NAFTA had been in force at the time--

PRESIDENT STEPHEN: Assuming the--yes.

MS. SVAT: --of the original acts, and Mondev alleged the--"misconduct" is the term that it uses, the original misconduct that it alleges here, then in that case there would have been no

requirement for Mondev to go to court. It alleged that the City and the BRA violated the principles that are now enshrined in Article 1105(1) under customary international law.

PROFESSOR CRAWFORD: If I may so, I agree with that answer. It's clear from 1121, 1B and 2B, that the party has a choice. This is the fork in the road provision. Assuming that NAFTA is in force at all relevant times but there's been a breach, you have the choice of domestic courts or--

MS. SVAT: Well, if I could--

PROFESSOR CRAWFORD: --international arbitration.

MS. SVAT: --qualify my answer, it's limited to the facts of this case that we're addressing here. The acts of the City and the BRA that were alleged to be wrongful acts under the customary international law standard would not give rise to the obligation as those breaches are alleged.

PROFESSOR CRAWFORD: One can at least

conceive of a situation where there might have been something odd, something strange, as it were, but not perhaps amounting to a breach, where it would be the failure of the courts to do anything about that situation, which was the gist of the breach.

MS. SVAT: Of course.

PROFESSOR CRAWFORD: That's a conceivable situation.

MS. SVAT: Of course. And in that regard, which is the original reason we had submitted an objection on the basis of a lack of a final judicial act, that would be a case where the breach by the courts of a denial of justice would entail the requirement to exhaust.

So if I could continue then, Mondev is simply wrong on the law here, and my remarks in this respect will be structured as follows:

First, I will show why both the reparations and the domestic redress theories that Mondev has put forward fail because the treatment due foreign investments under--excuse me. They

fail because the treatment that is due foreign investments under fundamental principles of international law and, thus, Article 1105 is limited to primary standards of conduct.

Second, I will show that Mondev's attempt to conflate wrongs and remedies cannot prevail. Mondev cannot simply read into Article 1105 a second barrel, so to speak, requiring payment of compensation and exhaustion of local remedies.

And, third, I will show why either of Mondev's interpretations of Article 1105 would, contrary to settled principles of Treaty interpretation, defeat the plain meaning of the limitations period in Article 1116(2).

So I will address these three points in turn.

To begin, at least one of Mondev's theories is based on the entirely unsupported and circular premise that under international law a secondary obligation that arises only as a consequence of a violation of a primary obligation,

once it arises, becomes a primary obligation in itself. And although Mondev did not focus much on this argument here this week, I will address it, nevertheless, because an understanding of these concepts will help explain the fundamental difference between wrongful acts and remedies.

In its Reply, Mondev argues that under Article 1105(1) the obligation to accord the minimum standard of treatment in accordance with international law includes the obligation to make reparation for pre-NAFTA acts that were internationally wrongful. To support its contention, Mondev relies on the obligation identified by Article 31 of the ILC's draft articles on responsibility of states for internationally wrongful acts, which I have a slide for.

Paragraph 1 of Article 31 states that a responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. But the obligation

to make reparation is not a primary obligation. It is instead a secondary obligation that attaches as a consequence of an internationally wrongful act. Its violation does not generate state responsibility anew. It cannot be as a matter of logic that a primary and secondary obligation could be identical, but that is the result that Mondev urges, for a breach of its purported primary obligation to make reparation could only give rise to a consequence of the exact same nature.

Mondev, thus, completely blurs the distinction between primary and secondary obligations. Yet this distinction between primary obligations and secondary consequences is well settled. Mondev simply chooses to ignore it. The International Law Commission confirmed over 30 years ago the need to maintain a strict distinction between, on the one hand, the primary rules that place obligations on states, the violation of which may generate responsibility, and, on the other hand, secondary principles governing the

responsibility of states for internationally wrongful acts.

Special Rapporteur Ago explained the focus of the ILC's work. The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of states for internationally wrongful acts. It is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of the responsibility proper to which the Commission is to devote itself.

And the work of the Commission, of course, culminated last year under the leadership of Professor Crawford in a set of draft articles on those secondary rules adopted by the ILC.

Part One of the draft articles covers the origin of international responsibility. It explains that responsibility attaches when an act

attributable to a state constitutes a breach of a primary international obligation of that state.

Part Two then sets out the legal consequences of such an act. Together, the provisions of Part Two, including Article 31, on which Mondev relies for the obligation to make reparations, Part Two comprises the set of international state responsibility rules.

I might also add at this juncture that nowhere in Part Two of the draft articles is there any support for Mondev's second theory of a secondary obligation under international law to make appropriate domestic law redress to the injured alien in the wake of an internationally wrongful conduct. This obligation simply does not exist. If Mondev were correct that an internationally wrongful act "carried with it" such an obligation to provide under domestic law redress to an alien, surely there would be some mention of it in the draft articles. The reason there is no obligation is because nothing more is needed

besides conduct attributable to the state and the internationally wrongful act. The availability of domestic remedies is beside the point.

PROFESSOR CRAWFORD: There is, of course, just for the record, a provision in relation to exhaustion of local remedies.

MS. SVAT: Yes.

PROFESSOR CRAWFORD: But it's in neutral terms.

MS. SVAT: Yes, in Article 44--

PROFESSOR CRAWFORD: And I also just for the record say that the word "draft" was taken out by the General Assembly in its resolution in--

JUDGE SCHWEBEL: A little louder, James. I'm not hearing.

MS. SVAT: Thank you.

[Laughter.]

PROFESSOR CRAWFORD: I said that the General Assembly took out the word "draft" in its resolution last December.

MS. SVAT: I appreciate knowing that.

But even if the United States owed a secondary obligation to make reparation under international law in this case--which it did not, we submit--the obligation would remain a secondary one after the NAFTA entered into force. Moreover, the obligation would also be one owed only to other states, not aliens, but Mondev seems to have conceded this point yesterday so I will not belabor it.

In any event, the secondary obligation would not be transformed into a primary obligation merely because the NAFTA became effective. And the Treaty itself provides no support for any other conclusion.

The NAFTA also distinguishes between primary obligations and the consequences that ensure from such a breach. When a NAFTA party breaches an obligation under Section A of Chapter Eleven, which is a primary obligation of the NAFTA parties, Section B of Chapter Eleven and Chapter Twenty operate much like Part Two of the ILC's

draft articles. Chapter Eleven may be invoked by investors and Chapter Twenty by parties to the NAFTA. And I won't discuss Chapter Twenty. But both identify the legal consequences that arise from a breach of an obligation of Section A.

Article 1105(1), upon which Mondev's novel theory relies, sets forth a primary obligation of Section A. It's on the screen now. It requires the NAFTA parties to provide, quote, "treatment in accordance with international law." Last year, as we know, the Free Trade Commission, established, pursuant to Article 2001 of the NAFTA and comprised of cabinet-level representatives of all three NAFTA parties, issued a binding interpretation of Article 1105(1) on July 31st, 2001. And the FTC clarified--and the clarification is also on the screen--that Article 1105(1) prescribes the customary international law minimum standard treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party.

And as my colleague Mark Clodfelter will discuss in more detail later, this minimum standard is an umbrella concept, incorporating a set of rules such as the standards for denial of justice that have crystallized into customary international law.

The minimum does not impose particular--excuse me--it thus imposes particular primary obligations upon the NAFTA states. The rule under 1105 and the content of that obligation are the primary obligation, in the words of Special Rapporteur Ago.

Articles 1102 and 1110 are other examples of the various obligations the NAFTA parties owe to investors of another party and to investments of such investors. These are international obligations entered into force in 1994 of the same sort referred to in Part One of the Draft Articles. Upon an alleged breach of Article 1105(1) or any other obligation in Section A, Section B of Chapter Eleven and Chapter Twenty of the NAFTA set forth

the consequences of such a breach. Among other things, both create a limited remedial scheme for investment disputes. In Chapter Eleven, disputes such as this one, Article 1135 of Section B, for example, allows a Tribunal--and that is on the screen now--allows a Tribunal to make a final award against a NAFTA party and to award, quote, "separately or in combination only monetary damages and any applicable interest, restitution of property," unquote, and also cost.

It does not require the state responsible to make restitution which would require it to re-establish the situation that existed before the wrongful act was committed. In paragraph B of Section 1 it allows for a party to pay monetary damages in lieu of restitution, so it is up to the party whether or not it will comply with the restitution award. In this way the NAFTA deviates somewhat from the secondary rules of reparations set forth under the Draft Articles, Articles 1135, 36 and 37 of those articles explain that the

obligation to make reparation under Article 31 requires a state to make restitution and only allow compensation to the extent restitution does not fully repair the damage. A state may also give satisfaction, but again, only where restitution and compensation prove insufficient.

So by comparison, the NAFTA's reparation scheme constitutes lex specialis among the parties to the NAFTA and replaces the ordinary rules of international state responsibility in this regard.

And I have a slide for Article 55, which explains that the articles won't apply to the extent that the content or implementation of the international responsibility of a state are governed by special rules of international law. And that is what Section B of Chapter Eleven is.

Thus, as the ILC explained in its commentary, the form of reparation due under Chapter Eleven will be determined by the special rule contained in Article 1135 which displaces the more general rule in Article 31.

From this perspective, therefore, Mondev's theory of Article 1105(1) cannot be reconciled with the party's intent. Having provided for specific treaty-based consequences to arise from a breach of Section A, the NAFTA parties cannot possible have also intended that Article 1105(1) would, in addition to the primary obligations, include secondary obligations and also sweep in the full spectrum of those secondary obligations. Much less could it sweep within its obligation to exhaust domestic remedies in the face of the state's failure to accord an investment the minimum standard of treatment.

And now I'd like to address Mondev's newer theory regarding domestic remedies. And here I would like to recall the four short propositions that Mondev set out yesterday, and I might add, without setting any authority, including any provision of the NAFTA other than the unremarkable principle that international law recognizes that certain acts of states may have continuing

character, and Mondev said it to the ILC's commentary to Article 14. Other commentary to Article 14 provides examples of continuing--acts of states that may have a continuing character, but none of these are acts that relate to the facts here.

Mondev's four propositions, as set forth on the screen, establish, according to Mondev, that a breach of Article 1105(1) does not take place until it is established that domestic law redress is not forthcoming.

Proposition No. 1. International law requires a host state's authorities to observe certain standards of conduct in their dealings with alien investors. Now this seems merely to restate the primary obligation under the international minimum standard of treatment, and accordingly it proves too much. If international law requires a certain standard of treatment of aliens. Failure to meet that standard, assuming attribution is not in question, establishes a breach of the international

obligation. Nothing more need be shown.

But Mondev then proposes at point 2, in the event of any misconduct international law requires as part of the treatment to be accorded to alien investors, that there be redress in domestic law. On the one hand, this sounds a lot like the argument that Ms. Smutny made yesterday when she presented Mondev's case that the SJC's application of Massachusetts Law to grant the BRA immunity for intentional tort was a denial of justice. However, there Mondev argued that a violation of the U.S. Law by the United States was the triggering event requiring a domestic remedy, and this is a different question that Mr. Legum will address later today. If, on the other hand, Sir Arthur meant what he said, that international law requires that there be redress in the domestic law for a state's failure to meet international standards of conduct, he failed to point to any source for such an obligation. Of course international law does require states to make reparations to other states

for breaches of international obligations owed them, but Mondev offers no authority for the proposition that it requires any additional obligation other than the internationally wrongful act and attribution before responsibility attaches.

Now, Mondev's third point introduces the concept of exhaustion of local remedies which is under international law a procedural hurdle to advance a claim for a breach of an international obligation. Yet Mondev views it as an element of a breach. And I quote, "Three, misconduct plus non-redress constitutes noncompliance with the requirement of treatment in accordance with international law." Non-redress here translates into a requirement that a Claimant first seek and then be denied before a state can be found to be in breach of an international obligation. But the failure of domestic law to afford redress is nothing other than a requirement to exhaust local remedies. The United States demonstrated, at page 30 of its Counter-Memorial, that these concepts

cannot be conflated as Mondev would like to do. In our Counter-Memorial we cited the United Kingdom's comments on earlier drafts of the Draft Articles, of the articles. However, the ILC agreed with the United Kingdom that it is wrong to suggest that no international wrong arises until the moment that the local remedies have definitively failed to redress the wrong. Where local remedies fail to cure a prior wrong, it is not part of the illness. It may of course represent an additional, a separate internationally wrongful act, if where remedies are sought, the courts themselves effect an internationally wrongful act. But these acts are separate under international law and do not reach back in time and bleed into one seamless package of treatment.

Yet by way of conclusion Mondev asserts at point 4, that the resulting breach of the so-called double-barreled requirements of international law creates a situation of wrongdoing which persists until it is remedied. This is what, according to

Mondev, saves it from the United States' objections that its claims are stale. But no matter what Mondev would like the case to be, we contend that any alleged wrongdoing by the City and the BRA ended before the NAFTA enter into force. Mondev may not have been granted a domestic remedy by the Massachusetts and Federal Courts, and of course, we submit that Mondev was not denied justice in those courts, but this in no way makes the City and the BRA still the wrongdoers as Mondev would like.

Neither Article 1105(1), nor the customary international law minimum standard of treatment requires as an element of breach a showing that an investor attempted and failed to obtain a remedy under domestic law for the losses ensuing from an internationally wrongful act. Mondev has not met its burden of showing that the rules allegedly applicable to the City's and the BRA's conduct are rules to which that requirement applies.

And as I said earlier, this proposition flatly contradicts the well-settled principle set

forth in Part One of the articles on state responsibility. That responsibility arises when an act attributable to a state constitutes an internationally wrongful act.

And now I come to my final point, the third reason why Mondev's interpretation of Article 1105 fails. Plainly stated, the application of the obligation Mondev purports to identify with Article 1105(1) would run afoul of well-settled principles of treaty interpretation. If Article 1105(1) encompassed the obligation to exhaust and be denied local remedies for past international wrongs, it would defeat entirely the plain meaning and purpose of the prescription period set forth in Article 1116(2). In a hypothetical we'll demonstrate this point.

Assume for argument's sake that a hypothetical eligible Claimant experienced misconduct, to use Mondev's term, in the year 2000. For example, an unruly mob opposed to foreign investment burned to the ground the Claimant's

property on January 1st, 2001 while the national and sub-national officers of the state sat by and watched. In such a case, we submit, the Claimant would be free to submit a claim for breach of Article 1105(1) so long as it did so within the three-year period. Mondev submits, however, that it could let the prescription period lapse while it pursued local remedies, and if those remedies did not lead to compensation, it could then submit a claim under Article 1105(1), alleging breach of the secondary obligation to make reparations.

Article 1116 would serve no meaningful purpose, and whether we view the purported failure to remedy the past wrongs as a failure to make reparations under international law, or the failure to provide redress under local law, the result is the same. Under either continuing violation theory, the breach occurs only when the remedy is sought and finally denied. Although 1116(2) would operate in the sense that it would be triggered, it would still be rendered ineffective because

Mondev's interpretation would allow a claim identical to one that Article 1116(2) intended to bar, namely a breach for the original obligation.

In my hypothetical how else would the Claimant establish a violation of the obligation to make reparations except by establishing that the original misconduct of the mob and the state standing by doing nothing was an internationally wrongful act. Thus the elements needed to prove a claim for breach of the obligation to make reparations and any compensation that might be due would be the same as it would be for a claim of the original breach, which Article 1116 meant to bar.

Established principles of treaty interpretation compel the rejection of this theory. It is well established in international jurisprudence that treaty provisions must be given a construction that renders them effective, and we have cited cases in our rejoinder at page 13. Thus, because Mondev's new theory renders the three-year prescription period ineffective, it must

be rejected.

The notion that the NAFTA parties agreed to compensate investors for any unremedied past breach of an international obligation, no matter how stale, is nothing short of shocking. And just as far reaching are Mondev's claims before this Tribunal for breach of the United States' alleged obligations to make reparations for alleged wrongdoings by the City and the BRA prior to the NAFTA's entry into force.

PROFESSOR CRAWFORD: Can I give you another hypothetical. Let's assume that a NAFTA state prior to January 1994 wrongfully froze assets belonging to an investor, and that that freezing order was still in force after the entry into force of NAFTA, and remained in force, notwithstanding the lack of any justification for it, so it was in effect an arbitrary freezing order. How would you apply 1116(2) to that situation, assuming that whatever might be an investor of a state party, and that the assets frozen would be an investment of an

investor of the state party? Would you say that, assuming that the freezing order began to have effect, let us say, in 1989, that the effect would be to bar any--the effect of 1116(2) would be to bar any NAFTA claim, notwithstanding the continuation in force of the freezing order after January 1994?

MS. SVAT: I missed the second half of your question.

PROFESSOR CRAWFORD: Take a case of a freezing order which comes into operation in 1989 and stays in operation and is still in operation on the 1st of January, are you saying that the effect of 1116(2) is to preclude any NAFTA claim ever being brought by an investor in relation to that conduct? I realize talking about hypotheticals may be somewhat unfair. I'm not asking for long-term concessions from the other states--

MS. SVAT: It's a case I haven't considered.

PROFESSOR CRAWFORD: I'm just trying to work

out how this--the idea of a continuing wrongful act is of course well accepted, and it is in the ILC articles. Papamichalopoulos, which I assume you may address tomorrow, is an example. I'm interested as to how 1116(2) would operate in relation to a continuing wrongful act.

MS. SVAT: My colleague is anxious to answer.

MR. LEGUM: I think the example that you've given is really not that different from a measure that was--that entered into force before the NAFTA itself went into force, and yet was applied--was maintained, in the words of Article 1101(1), and was applied after the NAFTA, and it would be the parties' maintenance of that measure and application of that measure to the conduct at issue that would give rise to a NAFTA violation.

PROFESSOR CRAWFORD: So on that hypothesis, the point of time which would be the trigger for 1116(2), would be the 1st of January 1994 because that would be the time at which the

investor could have notice that there was a breach--that it wouldn't be a breach.

MR. LEGUM: As in the example you gave the measure was being applied to the investment in question on the date that the Treaty went into force. If it were, for example, a statute that had been enacted many years prior and yet was not applied to an investment until afterwards, then it would be the application. Thank you.

PROFESSOR CRAWFORD: Thank you.

MS. SVAT: And just before I conclude my remarks on Article 1116, I just wanted to briefly address Mondev's point about the second limb, that of loss. Yesterday Mondev said that Mondev could not have known of its loss until 1988 and 19--excuse me, the years here are really--until the court's decisions in 1998 and 1999. And we submit that of course the loss occurred much earlier. It was the failure to obtain compensation which occurred in those years. But under Mondev's theory, if taken to its logical extreme, how could

its claim even be ripe today, as it still does not know whether it has finally lost the compensation that it's seeking?

And so to conclude, Mondev simply cannot ignore the explicit text of the NAFTA. Treaty provisions, we submit, must be given the meaning and the effect that the parties intended them to have, and that intent is to bar nearly all of Mondev's Article 1102, Article 1105 and Article 1110 claims.

With respect to Article 1102, for example, Mondev conceded that there was no treatment less favorable by the U.S. Courts. Indeed the shreds of evidence that Mondev alleges, statements of the City and the BRA, allegedly establishing a biased state of mind, could only demonstrate to the extent they demonstrate anything, treatment of LPA before the NAFTA entered into force.

And likewise, Mondev's Article 1105 claims that are not based on a denial of justice allegation, they relate only to the City's and the

BRA's pre-NAFTA dealings with LPA, and so to with all of Mondev's allegations under Article 1110, which I will discuss tomorrow.

Each of the acts and facts upon which Mondev relies for these allegations were completed and ceased to exist before 1994. For all of Mondev's effort to dress up these stale claims as timely, they cannot be salvaged under the clear language of the NAFTA and should be dismissed. My colleagues and I will revisit these particular claims in more detail, but if the Tribunal has no questions at this time regarding my remarks, I would ask it to call on Jennifer Toole. Oh, it's lunchtime. I will not ask the Tribunal to call on anyone. Thank you.

PRESIDENT STEPHEN: Well, your timing has been immaculate. Thank you.

We adjourn now until 3 o'clock.

JUDGE SCHWEBEL: Could I ask a question?

PRESIDENT STEPHEN: I'm sorry, yes.

JUDGE SCHWEBEL: I have a question, not

for Ms. Svat, but for Mr. Bettauer and his colleagues, and that is this. At some point in your exposition, will you address the matter of the interpretation of the three parties to NAFTA of 1105?

MR. BETTAUER: Yes, Judge Schwebel. We are planning to do that.

[Whereupon, at 12:57 p.m., the hearing recessed, to reconvene at 3:00 p.m. this same day.]

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

(2:58 p.m.)

PRESIDENT STEPHEN: Well, if anyone fees uncomfortably warm, we have no problems about the degree of disrobing.

[Laughter.]

PRESIDENT STEPHEN: Thank you, Ms. Toole.

MS. TOOLE: Thank you, Mr. President and Members of the Tribunal.

First I'd like to say it's an honor to appear before you today, and I will address the procedural defects found in Mondev's Article 1117 claim. These defects this Tribunal of jurisdiction in this case.

I will divide my presentation into three parts. First I will take a few moments to note the status of Mondev's claim of standing under Article 1116. Second, I will explain the interplay or the purposes of Articles 1116 and 1117. And finally, I will demonstrate why this Tribunal does not have jurisdiction to consider Mondev's new Article 1117

claim.

JUDGE SCHWEBEL: Could you bring the microphone a little closer to you, please?

MS. TOOLE: Oh, I apologize.

Well, to begin, I would like to note the status of Mondev's claim under Article 1116. Article 1116 allows an investor to submit a claim on its own behalf for damage the investor suffered directly. And if you recall, the sole jurisdictional basis pleaded in Mondev's notice of intent and in its notice of arbitration was Article 1116. But Mondev alleged injury only to LPA.

Now, the United States objected to Mondev's standing because Article 1116 provides no basis for an investor to assert a claim for itself that properly belongs to its investment or enterprise. And in its Memorial, Mondev claims that it could establish damages to support its claim on behalf of itself, but provided no evidence. So the United States, in its Counter-Memorial, reserved its rights, should it ever

become necessary, to submit argument on that issue, that is whether Mondev has met its burden of establishing the loss or damage required by Article 1116. And in its reply and in its case-in-chief before this Tribunal on Monday, Mondev has asserted it would attempt to meet its burden only if the Tribunal allows this case to proceed to the damages phase.

In Ms. Smutny's presentation on Monday, however, she addressed at some length the United States' objection under Article 1116, and objection as to which the parties have yet to submit written arguments, and Ms. Smutny's remarks address this issue in the abstract as a matter of principle and not based on any specific allegation of evidence of direct injury in the record.

So the difficult now faced by this Tribunal and the United States is that Mondev has asserted a claim of direct injury, a claim that it has never withdrawn and that if ultimately proven would be sufficient to vest this Tribunal with

jurisdiction, but the United States submits that unless and until this issue can be addressed in the context of actual facts and actual evidence, it is not ripe for decision. And since the United States has nothing to respond to at this point, the United States therefore reserves its right to submit argument on this issue should it ever become necessary.

With that said, the Tribunal clearly had questions about this general area on Monday, and I therefore believe it would be useful to go through the purpose of both Article 1116 and Article 1117. Articles 1116 and 17 serve distinct purposes. Article 1116, as I just mentioned, provides recourse for an investor to recover for loss or damage suffered by itself. And we see this expressly provided for in Article 1116(1), which is projected on the screen in pertinent parts. And I'll read that for you.

"An investor of a Party may submit to arbitration under this section a claim that another

Party has breached an obligation, and that the investor has incurred loss or damage by reason of or arising out of that breach."

Now, Article 1117, on the other hand, permits an investor to bring a claim on behalf of its enterprise for loss or damage suffered by that enterprise. And I'll read that for you as well.

"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 under this section a claim that the other Party has breached an obligation and that the enterprise has incurred loss or damage by reason of or arising out of that breach."

The two articles are not interchangeable. They clearly deal with injury to two different entities. One deals with injury to the enterprise and the other deals with injuries to the investment.

PROFESSOR CRAWFORD: Ms. Toole, you're

using the word "injury", but in fact articles use the words "loss of damage."

MS. TOOLE: Correct.

PROFESSOR CRAWFORD: It doesn't seem to me that loss of damage are necessarily the same as injury.

MS. TOOLE: But it's loss or damage arising out of a breach, so I guess--

PROFESSOR CRAWFORD: Yes, of course.

MS. TOOLE: I guess I'm saying shorthand for--okay.

PROFESSOR CRAWFORD: It may be helpful if we don't use the word "injury" because it is a legal term which is used in various contexts, and the point was made this morning that these articles are in a sense the secondary lex specialis of NAFTA and that's probably right. Let's use the term "loss" or "damage."

MS. TOOLE: Okay.

PROFESSOR CRAWFORD: Sorry. The difference between is not--the first part of 1116

or 1117, the claim on behalf of an enterprise is a claim because the enterprise has suffered loss or damage. The claim on behalf of party is because the party has suffered loss or damage. The breach of the obligation aspect seems to be the same under both sections, under both articles, and that's presumably because at some level the obligation is actually owed to the other state parties to NAFTA, and what this does is to create a procedure whereby the investor can invoke that obligation itself.

MS. TOOLE: That is correct. In fact--

PROFESSOR CRAWFORD: The point I'm making is that let's take a situation where an investor has--is the sole owner of a local corporation, and the whole of the enterprise of that corporation is wiped out by behavior in breach of Article 1105. You're saying that such a claim can only be made under 1117. Why shouldn't the investor say, "I've lost the whole value of my investment, even if the investment was through an investment vehicle which was a juridical person of the host state."

MS. TOOLE: Well, first, I will get to the principles which--

PROFESSOR CRAWFORD: That question is premature.

MS. TOOLE: Right. Just a little bit, I'm going to be discussing Barcelona Traction and Barcelona Traction did recognize that principle as somewhat of an exception as to when a shareholder would or would not have rights to bring a claim based upon injuries to the corporation in which it owned shares, when it's a foreign shareholder. So I will get to that.

PRESIDENT STEPHEN: And can I perhaps ask another question that you might deal with? It seemed to me reading 1116 that the breach doesn't have to be a breach of an obligation owed to the investor, but simply the existence of a breach of some obligation, as long as it causes damage to the investor.

MS. TOOLE: Right.

PRESIDENT STEPHEN: So that it might be a

breach of an obligation owed to a subsidiary which causes damage to the investor. Would you agree with that? Don't answer it now. But just bear in mind.

MS. TOOLE: Right. Well, let me address the principles upon which these articles were drafted, and consider the background principles.

The first of these principles is that a corporation has a distinct legal personality from that of its shareholders, and I alluded to that just a moment ago. And this is a principle recognized by the vast majority, if not all developed legal systems around the world. It was specifically addressed by the International Court of Justice in the Barcelona Traction case. And if I may again turn your attention to screen, the ICJ in Barcelona Traction said, "The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights."

So to go to your question, there might be an interest that a company or a shareholder has in a company, but that's distinct from that shareholder's rights. And then a corollary of this principle is that a shareholder ordinarily cannot act on behalf of the corporation, and I'll quote again from Barcelona Traction. "An act directed against and infringing only the company's rights does not involve responsibility towards the shareholders even if their interests are affected." It kind of goes to that same point.

And while it is true that there are some exceptions to the general rule, and for example, in common-law countries a shareholder may bring a derivative suit in certain circumstances, and I think that civil-law countries have similar principles and rules. The ICJ noted in Barcelona Traction that customary international law provides no equivalent exception to the general rule that shareholders do not have standing to assert derivative claims on behalf of a corporation.

PROFESSOR CRAWFORD: But the question is whether a claim brought under 1116 is a derivative claim on behalf of a company. I mean clearly it's not. But if you read 1116 literally, all it requires is that there have been a breach within the relevant time period, and that the breach have caused loss or damage to the investor.

MS. TOOLE: To the investor.

PROFESSOR CRAWFORD: There's no requirement that the loss or damage be exactly equated to a deprivation of legal rights under international law vested in the investor. The only question is whether the investors incurred loss of damage. Whereas 1117 could be read as giving the investor--I mean as it would by derivation from the Barcelona Traction Rule. The right to represent the company even though the investors' interest in the company isn't 100 percent interest, but rather it's sufficient to amount to control.

What's wrong with that reading of those articles?

MS. TOOLE: Well, if you'll let me continue.

PROFESSOR CRAWFORD: I'm sorry. Please continue.

MS. TOOLE: No. It's certainly fine. I'm going to walk through, there's these two competing principles, and once we get through those principles, we'll see that these articles were drafted specifically to resolve the conflicts with those issues, and not only that, if you look at the United States' Statement of Administrative Action you'll see that the United States, at least in its interpretation of why these articles were drafted, did explicitly say that 1116 was for the purpose of direct injuries to an investor, whereas 1117 was drafted for the purpose of providing standing for an investor to bring a claim on behalf of its investments for direct injury suffered by that investment. But I'll get to the next principle, and then we'll see if that resolves your question.

Let's go to the second background

principle of international law that influenced the drafting of Articles 1116 and 17, and that is a Claimant does not have standing to bring an international claim against a state for acts by the state against its own nationals. And some refer to this as the non-responsibility principle. And I'll quote from Oppenheim. "It may accordingly be stated as a general principle, that from the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or series of persons"--and if you'll notice the highlighted portion--"not having the nationality of the states whom it has put forward." And that would be, for our purposes, the enterprise.

So we can see that the problem that the drafters of Chapter Eleven faced was that under these background principles of customary international law, a common situation could be excluded from investor state arbitration under the NAFTA. This is because, not infrequently,

investors choose to make investments through a corporation incorporated in the country in which they are investing.

If the drafters provided only a right of action for an investor to bring claims for direct injuries to that investor, the investor could be without a remedy where the investor owned or controlled a corporation incorporated under the laws of the Respondent state, and that second corporation sustained an injury.

So Articles 1116 and 17 resolve these concerns. Article 1116, as we have seen, provides a claim for an investor to assert loss or damage for itself. Article 1117 expressly addresses the situation where an alleged violation of Chapter Eleven has a direct impact upon a locally-incorporated subsidiary. It allows the foreign investor to make a claim on behalf of that subsidiary.

Now, the purpose of 1117 is to create a new derivative right of action that is not found in

customary international law. The right of action is in favor of an investor of another party, thus ensuring that the Claimant will be of a nationality different from that of the Respondent state, so we resolve the non-responsibility problem.

PROFESSOR CRAWFORD: I can see that. When I say so in relation to 1117, that's clearly a special right of investors to act on behalf of enterprises and is therefore a special derivative action.

The problem is that on your reading there's a serious gap between 1116 and 1117 in investor protection. Let's assume that an investor has a substantial minority share holding in a local company which is expropriated. Let's assume for the sake of argument that it's expropriated in part because of the nationality of the foreign investor by reason of minority share holding. They wouldn't have a right under 1117--when I say the company is expropriated I mean the property of the company is expropriated.

MS. TOOLE: So the shares themselves?

PROFESSOR CRAWFORD: They wouldn't have a right under 1117 because the company wouldn't be controlled by the foreign investor. Under your interpretation they wouldn't have a right of action under 1116 because the damage would be done to the company.

MS. TOOLE: Mr. Legum would like to address that question.

MR. LEGUM: I think the answer to the question is that under that circumstance the minority shareholder would not be able to pursue a claim. It's correct that the derivative claim, if you will, that is granted by Article 1117 is limited to the shareholder that owns or controls the enterprise, and that was something that was considered, and the decision was made that's as far as the rights granted would go.

PROFESSOR CRAWFORD: On that interpretation the--I mean on the ordinary interpretation of the words, the foreign minority

shareholder would have suffered loss or damage. They would have lost the entire value of their investment.

PRESIDENT STEPHEN: And there would have been a breach under 1116, not of a duty owed to it, but a breach, which is all that 1116 requires.

MR. LEGUM: If I could perhaps respond to that. I don't believe there would have been a breach under the circumstances that you've just described, because it would not be an investment of an investor of another party. That terms I defined as an investment that is owned or controlled directly or indirectly by an investor of a party. Now--

MS. TOOLE: A minority shareholder doesn't own or control--own part of, but certainly doesn't control.

MR. LEGUM: On the other hand, if what is at issue is a taking of the shares of the minority shareholder--

PROFESSOR CRAWFORD: That is understood.

MS. TOOLE: Yes, we understand that's a direct injury.

PROFESSOR CRAWFORD: [Off mike].

PRESIDENT STEPHEN: Would you like to repeat what your answer to my proposition is? You say that there would be no breach because--

MR. LEGUM: There would be no breach of a NAFTA obligation under the scenario that I believe you posited because the enterprise at issue, which is the locally incorporated company, would not be owned or controlled by an investor of another party. It would be a true, a national company, and therefore, expropriatory acts directed to the assets of that company would not be a taking of an investment of an investor of another party.

PRESIDENT STEPHEN: And for that purpose you rely on some definition of breach?

MR. LEGUM: No, no. It's a definition of the investment.

PRESIDENT STEPHEN: Of the investment?

MR. LEGUM: Yes. Perhaps I should walk

you through it. Let's turn to Article 1110.

PRESIDENT STEPHEN: But there's no mention of investment in 1116. All you have is an investor and two other features, a breach and loss.

MR. LEGUM: That's exactly correct. However, if one turns to the substantive obligations of Chapter Eleven, all of those are tied to investors of another party or to investments of investors of another party. Now, obviously, if there's a breach with respect to the investor, then we don't have the issue that we're discussing here because there is direct loss or damage. Are you with me so far?

PRESIDENT STEPHEN: Yes.

PROFESSOR CRAWFORD: I think we should resist the temptation to try to interpret NAFTA beyond the means of this case.

MS. TOOLE: Yes.

PROFESSOR CRAWFORD: Nonetheless, the purpose of these provisions is to give effect to real investment protection.

MS. TOOLE: Right.

PROFESSOR CRAWFORD: And enterprise--sorry--an investment is defined inter alia as an enterprise. Take the minority shareholder in a joint venture. It's not a stretch of the imagination to describe the minority shareholder as having an enterprise that is the enterprise of participation in a joint venture, albeit as a minority shareholder, if all of the property of the joint venture is expropriated. It doesn't seem to go beyond the scope of 1116 to say that the investor has had the enterprise taken away and has suffered loss of damage.

MR. LEGUM: Clearly, if all of the enterprises taken, if the entire value of it is destroyed, then that would affect the rights directly of the shareholders.

PROFESSOR CRAWFORD: Well, it wouldn't. We're talking about the property of the joint venture company on this hypothesis. And it's true that the whole property of the joint venture

company has been taken. The joint venture company has local nationality as is common in joint ventures. The consequence is that the investment of the foreign shareholder has been gutted of all of its financial value, but of course the shares still exist. They're worthless.

In any event, as I say, I think it may be that we don't have to go into this depending on where we are as between 1116 and 1117. It's an interesting problem.

MR. LEGUM: Agreed.

MS. TOOLE: Well, to get back to the right of action created by Article 1117, it's clearly a derivative one. Article 1117 provides that the right can only be exercised where the investment has incurred loss or damage by reason of or arising out of the alleged breach. And the addition of Article 1117 does not alter the principle that a corporation has a legal personality distinct from that of its shareholders and that a shareholder cannot recover for an injury suffered by a

corporation in which it owns shares.

And to the contrary, the NAFTA recognizes this principle. It is for this reason that Article 1135(2) provides that any award on a claim under Article 1117 must be paid to the enterprise and not the investor. And I've projected that article for you on the screen, where a claim is made under Article 1117(1), "An award of restitution of property shall provide that restitution be made to the enterprise. An award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise. And the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law."

Professor Crawford asked on Monday whether there would be practical ramifications of proceeding under Article 1117 as compared to Article 1116, and suggested taxes an area where there might be a significant difference. Now, Ms. Smutny's response, the Tribunal will recall, was

that Chapter Eleven Tribunal, in calculating any award due to an investor for derivative losses would have to calculate a recovery net of other claims such as taxes.

Now, Mondev's position both makes no sense and is contrary to the express terms of the treaty. It makes no sense to transform an investor state arbitral tribunal into a tax court and have it attempt to adjudicate the rights of third parties such as creditors that might have an interest in the proceeds of an award for losses to the enterprise.

It is a task of tribunals such as these, it is a task that they are ill equipped to address. This Tribunal, so far as I know--but correct me if I'm wrong--has no expertise in municipal tax law and cannot order the interpleader of creditors or other persons who might have such an interest in the award. An arbitral Tribunal such as this can only address the rights of the parties before it. It makes far more sense as an administrative matter

for an award for an injury to an enterprise to be paid to that enterprise, and leave it to the municipal legal system to adjudicate creditors' rights and taxes due. And indeed, that is precisely what the text of NAFTA contemplates.

Article 1135(2)(c)--now I've highlighted that--expressly provides for adjudication of third-party claims such as these. "The award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law."

By so providing, the article clearly rejects Mondev's suggestion to this Tribunal, in addition to the other difficult task before it, should also decide issues of United States Federal and state and local taxation as well as creditor or other rights?

I would now like to turn to the third and final portion of my presentation, and that is that an investor may submit a claim only if it complies with Chapter Eleven's procedural requirements.

Unless the Tribunal has any other questions on the purposes of the articles? No?

Those requirements are essential in gaining a NAFTA party's consent to arbitrate, and Mondev did not, with respect to its new claim under Article 1117, secure the United States' consent to arbitrate in this case.

The Chapter Eleven mechanism for obtaining a NAFTA party's consent to arbitrate is clear, and if I may turn your attention back to the screen, Article 1122(1) provides each party consents to the submission of a claim to arbitration in accordance with the procedures set out in this agreement. And I should add that Article 1121, Sections (1)(a) and (2)(a) require the same in order to gain the consent of an investor.

In other words, Mondev must comply with the procedures set out in the NAFTA in order to gain the United States' consent to arbitrate, and the parties intended these procedural provisions to be complied with according to their terms, and that

makes them a prerequisite to this Tribunal's jurisdiction.

PROFESSOR CRAWFORD: Obviously, that's right to have some level of principle.

MS. TOOLE: Yes.

PROFESSOR CRAWFORD: International Court has held in a number of cases that where the substance of a particular provision is complied with, and any deficiency is a pure question of form which could readily be remedied by the submission of a new claim, that it can in effect be ignored as de minimis. They did that, I think in the Bosnia case amongst others. And if that's right as a matter of general international, why would that not apply to Article 1117? I mean my understanding is that it's not in dispute that Mondev did indirectly control the investor that is LPA within the meaning of 1117, so it may have omitted a particular form of words in the application, but that's all. Had it put the right form words in, there would have been no difficulty.

MS. TOOLE: That's right, but as I think you yourself recognized earlier that the procedural provisions of NAFTA are lex specialis, and so any decisions made by the International Court of Justice on this point wouldn't apply to the procedures of the NAFTA, and the parties to the NAFTA have expressed their intent that these procedures be complied with by their terms.

PROFESSOR CRAWFORD: I can see that there is a serious question of substance as to 1135. So Tribunals should be alert to ensure that, to the extent that a claim is, in reality, one under 1117, that it should be pursued under 1117 and not under 1116, but you can do that by saying, by in effect applying the sorts of rules that domestic courts apply in looking for substantial compliance and ensuring that all of the, as it were, real interests, as distinct from perhaps formal interests are complied with or are we simply compelled to adopt the strictest possible interpretation?

MS. TOOLE: We submit that you are compelled to adopt the interpretation that the United States has asserted here, which is that these procedures be applied by their terms. If you want to call that strict, we would just call the procedures by their terms.

If we look at Article 1119, I will explain that a little bit more. One of those procedures is that the disputing investor shall deliver to the disputing party written notice of its intention to submit a claim to arbitration, which notice shall specify the provisions of this agreement alleged to have been breached and any other relevant provisions.

As you have noticed, and even Mondev has admitted, it has not complied with that procedure. As you have also just noticed, it is essential because it identifies what entity suffered damages and, thus, under Article 1135, what entity will receive restitution or payment of damages.

So, if Mondev sought to submit a claim

under Article 1117 on behalf of LPA, the United States required notice of that fact before giving its consent, and Article 1119(b) requires Mondev should have specified that it sought to make a claim, on behalf of its investment, in its Notice of Intent.

By the way, you will find Mondev's admission that it hasn't complied in its reply at paragraph 18.

PROFESSOR CRAWFORD: You say, Ms. Toole, before giving its consent. My understanding of the legal position is that the United States has already prospectively given its consent to any claim brought in accordance with NAFTA. It is not the case that there is any subsequent room for the United States to say, oh, we don't like this claim, we can withdraw our consent.

MS. TOOLE: Correct. I guess I should say before the United States' consent is triggered.

So, as I have just kind of mentioned, Mondev believes it did not have to abide by the

plain meaning of NAFTA's procedural requirements in its Notice of Intent, and we heard on Monday that Mondev thinks that the United States' consent to arbitrate should be construed so liberally as to contradict the express terms of Articles 1122 and 1119 that I have shown to you already, and in order to support its point, Mondev brought the Ethyl decision to the Tribunal's attention.

That NAFTA Tribunal quoted from a jurisdictional award in an ICSID case, Amco Asia Corporation v. Indonesia, and I have the relevant passage on the screen. It cited this case for the proposition that Chapter Eleven's procedural requirements should not be construed literally. However, if we look at that passage, we find that the point made in Amco supports the United States' interpretation of Chapter Eleven's procedural requirements. I will read that for you.

"Like any other convention, a convention to arbitrate is not to be construed restrictively nor, as a matter of fact, broadly or liberally. It

is to be construed in a way which leads to find out and to respect the common will of the parties."

Now the common will of the NAFTA parties was, as I have mentioned earlier, for the procedures of the NAFTA to be construed by the NAFTA's terms. This was misinterpreted by the Ethyl Tribunal and later explicitly clarified by the parties themselves in their subsequent practice.

The United States has consistently taken the position that the procedural requirements should be interpreted by their terms, and Mexico took the position, for example, in the Waste Management case, and Canada has taken the position in this case through a formal submission pursuant to Article 1128. Let's look at that 1128 submission, put that on the screen. I will read that for you.

"As in Article 1121, under Article 1122," which we are really discussing here, "consent to arbitration only exists if the submission of the

claim is `in accordance with the procedures set out in this agreement,'" and that is meaning NAFTA, of course. "It is clear that fulfillment of the condition's precedent is a mandatory obligation. A party's consent to arbitrate is premised on adherence to the procedural requirements of NAFTA."

So we can see that all of the NAFTA parties have taken the position that the procedural requirements under Chapter Eleven are mandatory.

Now Mondev criticized the weight of the parties' shared position because they were "defensive submissions of the state's parties made in their capacities as respondents in Chapter Eleven proceedings."

Not all of the examples I just gave refer to NAFTA parties in defensive positions. The screen we just viewed was a submission pursuant to Article 1128 made by Canada, and Canada is not a respondent in this case. It is not taking a defensive position here.

Moreover, the United States has made

similar assertions in its Article 1128 submissions, and rather than reflecting merely the parties' defensive interests, the positions taken by the three parties reflect their interest in the sound and efficient functioning of the Treaty's dispute resolution mechanism according to its express terms.

PROFESSOR CRAWFORD: I am sorry. This may be off the point, could you just now, or at some appropriate time, explain to me what Article 1117, paragraph (4), means. "An investment may not make a claim under this section."

I mean, obviously, some of the things defined as investments are not legal entities and can't make claims anyway. Some are, for example, an enterprise may be a legal entity.

MS. TOOLE: Right, the enterprise. Right.

PROFESSOR CRAWFORD: An enterprise which is an enterprise of another state could make a legal--could make claim, but presumably that claim would be made under 1116.

MS. TOOLE: I think that 1117(4) goes to that nonresponsibility principle that I was addressing earlier. It is consistent with that.

PROFESSOR CRAWFORD: So it is the local investment.

MS. TOOLE: Correct.

I am going to--did you have a question?

PRESIDENT STEPHEN: No. I'm just following--

MS. TOOLE: Okay. All right. Wonderful.

So, in sum, because Mondev did not adhere to Chapter Eleven's procedural requirements, because it ignored the ordinary meaning of its terms, Mondev's Article 1117 claim is not within the United States' consent to arbitrate. Thus, the Article 1117 claim is not within this Tribunal's jurisdiction.

PROFESSOR CRAWFORD: I understand your submission on 1117, and, in effect, you say that there was noncompliance with the notice requirements in 1119, such as to invalidate the

claim to the extent that it may be brought under 1117.

MS. TOOLE: Correct.

PROFESSOR CRAWFORD: Could you just, again, describe succinctly what your position is under 1116. Are you saying that they have no standing under 1116 either or are you saying that they can only succeed under 1116 if, in the end, they prove loss of damage to the investor which, on the face of it, doesn't exist, but it's a matter for such a subsequent phase if such a phase should occur?

MS. TOOLE: In a sense, I would say your second point is more correct. We are reserving our right to submit argument on that issue because they have yet to plead or prove that.

PROFESSOR CRAWFORD: Without obviously expressing any concluded view, it would seem to me very odd to say that an investor is not injured, if injury is required, by discriminatory action against its minority shareholding, even if the

discriminatory action takes the form of the treatment of the local company. If a local company is discriminated against by reason of a foreign minority shareholding, it seems to me the foreign shareholder is injured by that.

So whatever the position might be with respect to 1105, with respect to 1102, surely, it is not consistent with NAFTA that governments be able to discriminate against local companies because they have foreign shareholdings, even if minority shareholdings.

MS. TOOLE: Oh, that's certainly not the purpose.

PROFESSOR CRAWFORD: It probably doesn't arise, since on the position you are taking under 1116, it says that we're a contingency to be confronted, if necessary, at a later stage.

MS. TOOLE: Correct.

So, if there are no further questions, I would ask the Tribunal to call on Mr. Legum, and he will demonstrate why Mondev has not established and

even owned the rights with respect to the Hayward Parcel at issue in this case.

Thank you.

MR. LEGUM: Mr. President, members of the Tribunal, I will now address this issue of Mondev's ownership of the rights with respect to the Hayward Parcel that it has asserted and that are at issue here.

Those rights formed the basis of the bulk of its claims before this Tribunal, and I will begin by noting what is common ground between the parties. Both parties agree that Mondev bears the burden of proving that it owns or controls, directly or indirectly, the rights at issue here.

The parties agree that in 1987, LPA granted Manufacturers Hanover Bank a mortgage that included a security interest in all rights and benefits under a long list of agreements. Specifically, the text of the mortgage provided, in pertinent part, as follows:

"To secure a $50-million loan, LPA grants

to the bank all rights and benefits, if any, of whatsoever nature now or here and hereafter derived or to be derived by the mortgagor," that being LPA, "under or by virtue of the following instruments, including, without limitation, all rights to exercise options, including, without limitation, options to purchase and lease."

And then in the list of agreements, there is included "the Tripartite Agreement, excluding any rights of the mortgagor thereunder to develop parcels adjacent to the premises."

There is no dispute that in 1990 the bank commenced foreclosure proceedings on the mortgage, and in 1991 a judgment of foreclosure was entered, thereby extinguishing all of the rights of LPA that it had provided to the bank as collateral.

The parties agree that if the rights at issue here were included within the clause in the mortgage on the screen, any claim by Mondev, based on those rights, would be inadmissible in these proceedings.

The parties further agree that the grant of all rights and benefits of whatsoever nature is broad enough to encompass the rights at issue.

Where the parties and their experts differ is on whether the excluding clause for rights to develop parcels adjacent to the premises carves out the rights at issue from that grant.

Now the issues of municipal law that underlie this question are discussed in considerable detail in the reports of the United States' expert and in the U.S.'s pleadings. I don't propose to repeat that discussion here. What I would like to do instead is to review the principal issues in dispute on this point before the Tribunal and answer any questions that the Tribunal may have.

I'd like to begin by responding to Professor Crawford's question to Ms. Smutny on Monday. What does this municipal law issue have to do with the international law issues before this Tribunal?

First, the issue is relevant to the question of whether Mondev was an investor with respect to the rights at issue and whether those rights could be considered an investment of an investor of another party at the time the NAFTA went into effect in 1994 and thereafter.

Chapter Eleven, by its terms, applies only to investors and investments of another party that are existent during the period it has been in force. I now have a somewhat busy slide on the screen.

The first provision is Article 1101, which is the chapter's Scope and Coverage provision, and the second is Note 39 to the NAFTA which, in case you hadn't noticed, there's a number of notes that appear after the text of the NAFTA. This particular note appears on Page 393 of the blue CCH publication that I think all of us have.

PROFESSOR CRAWFORD: And the status of these notes, they are agreed interpretations of the parties or are they organically part of NAFTA?

MR. LEGUM: I believe they are organically part of the NAFTA.

PROFESSOR CRAWFORD: [Off microphone.] [Inaudible.]

MR. LEGUM: That is my understanding.

Chapter Eleven, as we can see on the screen, applies only to investments and investors of another party. It does not apply to investments that were not investments of investors of another party on the date the NAFTA went into force. If LPA did not own or control those rights in 1994 and thereafter, Mondev's claims concerning those rights are not within the scope of Chapter Eleven.

A similar result would obtain, even considering LPA to be the investment. To the extent Mondev's claims are based on treatment LPA received in the Massachusetts courts with respect to those same rights, it is difficult to see how the claim could proceed. How could Mondev be entitled to damages here based on the Court's refusal to find a breach of the rights in question

when, as I will show, LPA did not own those rights in the first place.

One final note on this point. We have provided the Tribunal this morning, in the binder of authorities, with copies of the Great Britain and United States arbitral decision in the case of Rio Grande Irrigation and Land Company v. the United States, a 1923 decision, which I will just describe briefly. Feel free to look at it if you'd like right now, but it is not necessary.

The Rio Grande decision is useful to the issues here in two respects. First, it confirms what is not, in fact, disputed. If, under municipal law, the Claimant does not, in fact, possess the rights that are at issue before an international tribunal, the international tribunal lacks competence over international claims premised on those rights.

Second, the decision undermines Mondev's argument based on the fact that although in the litigation in the Massachusetts courts, the City

and the BRA denied that LPA owned the rights at issue, they never moved to dismiss LPA's claims on that ground. The Rio Grande Tribunal considered, and rejected, a similar argument on Page 137 of the copy that we have given you, finding that the contention did not accord with "the view we take of our power or duty in relation to a clear point of jurisdiction raised, as this is, on the face of the record." Just so here, we would submit.

The second general point I would like to make is also one that is not contested. It is Mondev's burden to establish its ownership of the rights at issue under the Tripartite Agreement. If, after reviewing the parties' arguments and the contentions of the parties' experts the Tribunal finds that it is unsure of the effect of the exclusion or rights to develop, Mondev will not have carried that burden.

PROFESSOR CRAWFORD: The exclusion exists in the agreement between LPA and Manufacturers Hanover.

MR. LEGUM: A mortgage, yes.

PROFESSOR CRAWFORD: A mortgage. Well, a mortgage is an agreement.

MR. LEGUM: Or an instrument. It is not signed by both parties. I don't disagree with you.

PROFESSOR CRAWFORD: You are saying it is based upon a bilateral relationship.

MR. LEGUM: Correct.

PROFESSOR CRAWFORD: If it is the case that Manufacturers Hanover did not take a particular view of a clause of which different plainly intelligent people can take different views, why should this Tribunal, as it were, second guess Manufacturers Hanover? I mean, if they weren't concerned to assert particular rights, why should we be?

MR. LEGUM: Well, it is an agreement, but there was also a court proceeding on that agreement that resulted in a judgment of foreclosure of the rights under that agreement, and court proceedings such as that are proceedings in rem, and therefore

do bind all concerned parties. So it is not--

PRESIDENT STEPHEN: I'm sorry. You are saying corporate dealing?

MR. LEGUM: I am saying, a court proceeding.

PRESIDENT STEPHEN: Court proceeding.

MR. LEGUM: There was a complaint in forfeiture that resulted in a judgment. So it is more than just a mere contract that binds those two parties. It is--

PROFESSOR CRAWFORD: But the judgment didn't address this particular question.

MR. LEGUM: Well, it did. It entered judgment foreclosing on the rights that were specifically listed in the mortgage grant.

The second point that I'd like to make is the plain meaning of the terms of the mortgage does not support Mondev's contention that rights to develop means option or right to purchase. As Professor Holtzchue, United States expert, notes, based on his 30 years of experience as an attorney

and counselor to parties involved in major real estate transactions in New York and elsewhere, and we have this displayed on the screen, in the ordinary parlance of business persons and lawyers involved in large real estate transactions, rights to develop has a different meaning from that of a right to purchase or an option to purchase.

The text of the mortgage confirms this common-sense understanding of these two different forms of right. If we turn our attention back to the projection screen, we can see that the drafters of the mortgage purposefully used different words to describe these different concepts. The mortgage, unsurprisingly, uses the phrase "options to purchase" to describe options to purchase. It uses the different expression "rights to develop" to describe the rights encompassed by the exclusion.

Under general principles of contract interpretation, the drafters' use of different words to describe the rights encompassed by the

exclusion is presumed to indicate an intent to encompass different rights.

Paragraph 23 of the mortgage further confirms that the plain meaning of the mortgage does not include the right or option to purchase the Hayward Parcel in the exclusion for rights to develop. That paragraph, which is displayed, in part, on the screen, provides that "Without first obtaining the prior written consent of the bank, LPA shall not exercise any right or option, under the Tripartite Agreement, to purchase or lease any property."

If, as Mondev contends, the bank had no security interest in any such right or option, what possibly could be the purpose of providing the bank with a right of advance consent? What business of the banks would LPA's exercise of such an option be if, as Mondev contends, the bank had no interest in the right?

PROFESSOR CRAWFORD: The bank had interest in the solvency of LPA in respect of the property

it did own. It seems to me that argument is equivocal as to the question, and I say this again tentatively, equivocal as to the question of what the extent of the security interest is because the bank may not have wanted--they may have wanted to have some control over whether LPA overreached itself. Of course, the purchase price was unclear at that stage, and they may have felt that it was going beyond LPA's capacity to bear. So it's possible to construe Article 23 without reaching a conclusion.

MR. LEGUM: Although that premise would be based on the assumption that in October of 1987, there was a commercial view of the rights under the Tripartite Agreement that it was not really such a valuable asset.

On Monday, Mondev made two arguments on the plain meaning of the provision. First, Mondev contended that there is no right to develop provided in the Tripartite Agreement. It contended, instead, that in fact the mortgage's

reference to rights to develop was to certain rights in Section 6.02 of the Tripartite Agreement, which provided a right and option to purchase air rights, and "such rights appurtenant thereto as are necessary to make the air rights commercially viable."

Mondev argued that rights to develop referred to the rights appurtenant that I have just mentioned. Because the reference to air rights and to rights appurtenant thereto appear in this same clause, Mondev argued that the rights to develop and the right to purchase were inextricably intertwined.

These positions cannot be reconciled with either the text of the Tripartite Agreement or LPA's own past positions.

First, the Tripartite Agreement makes quite clear what sort of rights the parties had in mind in referring to "such rights appurtenant thereto as are necessary to make the air rights commercially viable." It is clear that those

rights cannot be considered rights to develop.

Section 1.01 of the agreement, which is now displayed on the screen, defines the air rights that were to be conveyed at the closing of that agreement. That is back in 1979 there were air rights that were to be conveyed pursuant to the Tripartite Agreement at that time.

The definition includes a description of certain rights appurtenant thereto, which are necessary and appropriate to ensure the commercial viability of the air rights. The description refers to various rights and easements in different volumes of space needed for support, mechanical, storage, utilities and other nuts-and-bolts-issues that arise when one decides to build a large building in the air without rights to the ground on which the building will sit. These rights and easements, quite obviously, have nothing to do with right to develop, as anyone would ordinarily understand that term. Mondev's contention, based on rights appurtenant to air rights, cannot be

credited.

Second, Mondev's other arguments on plain meaning cannot be reconciled with what LPA told the Supreme Judicial Court. Before this Tribunal, Mondev has asserted that the rights to purchase and to develop were inextricably interconnected.

LPA took a very different position before the Supreme Judicial Court. It asserted that, in fact, its right to acquire the Hayward Parcel was eminently separable from the question of what would be developed on that parcel. This was, the Tribunal will recall, the cornerstone of LPA's argument that it did not repudiate the contract by failing to pursue the design review process for future developments on the site, an argument that the Supreme Judicial Court accepted.

LPA specifically told the SJC that the right to purchase and the future development of the site were legally distinct. In the interest of saving time, I will not read the language on the screen, if that is all right.

Similarly, Mondev's position before this Tribunal is that, "There is no right to develop provided in the Tripartite Agreement." But LPA told the Supreme Judicial Court that in its lease with Campeau, it had "delegated its rights to develop Phase II to Campeau."

Now how is it that LPA could have delegated its rights to develop the Hayward Parcel if, as Mondev now contends, LPA had no such rights. Indeed, I would recall the arguments made repeatedly by Mr. Hamilton and Sir Arthur to the effect that it was scandalous for the BRA to question whether LPA was the designated developer for the Hayward Parcel under the Tripartite Agreement and there could develop it.

How can you reconcile that argument with Ms. Smutny's contention that there was no right to develop provided LPA in the Tripartite Agreement?

PRESIDENT STEPHEN: I thought Ms. Smutny was merely saying there was no express right in those terms to develop. The words "you have a

right to develop" don't appear. That was as far as she was going, wasn't it?

PROFESSOR CRAWFORD: Moreover, it was also clear that LPA was going to have to get whatever permissions were required to actually go ahead and develop. So in the sense of a perfect right to develop, there was no perfect right to develop. But in the context of the mortgage, one has to give some meaning to the exclusion. The exclusion specifically relates to adjacent parcels in respect of this particular Tripartite Agreement.

So, although it's true that there is tension from, I'll put that way, within the Claimant's argument, it's not clear that there's inconsistency.

MR. LEGUM: Well, I will leave it to Ms. Smutny to clarify what their position is. But if their position is that the words "right to develop" merely don't appear in the Tripartite Agreement, that I would submit doesn't get them very far.

PROFESSOR CRAWFORD: I'll raise a more

basic question. Is this submission associated with, in effect, the transitional question whether the Claimant has standing under Chapter Eleven because you say that it lost all of the rights which might have entitled it to be an investor before NAFTA came into force or are you saying that your argument is generally true over all NAFTA claims, irrespective of any question of transitional problems?

In other words, does a person cease to be an investor if it loses the municipal law right which constituted its investment? Is that your submission or are you simply saying that this is yet another problem that the Claimant faces because of the gist of what it complains of took place before NAFTA entered into force?

MR. LEGUM: Well, I think that because of the timing in this particular case I don't, at least I don't believe that I need to answer the question, since the answer would be that they had no rights, in any event.

PROFESSOR CRAWFORD: I'm, if I may say so, somewhat worried about the implications of an argument if it is not a transitional argument, as it relates to 1110. Because, by definition, if there has been an expropriation, the investor will have lost the subject of the investment at the time of the expropriation. It would be self-defeating if the word "investor" in 1116 was construed to mean persons who still own the thing, and there you had a cause of action based upon expropriation.

MR. LEGUM: It is certainly not the United States' position that an investor whose investment is expropriated by the state during the period that NAFTA is in force cannot bring a claim for relief. Of course, that is not our position.

Mondev's principal contention on this issue is that this Tribunal can look to the conduct of the bank and LPA long after the execution of the mortgage to determine the intent of the parties at the time of its execution. That conduct, Mondev asserts, requires this Tribunal to interpret the

mortgage in a manner inconsistent with the ordinary meaning of its terms.

Mondev, we submit, is wrong on two counts here. First, it is wrong that the subsequent conduct of the parties is relevant and, second, it is wrong that the subsequent conduct supports the conclusion that it advocates.

The first issue is one of governing law. If the real property law applies, consideration of post hoc events is not permitted to construe the mortgage. On the other hand, if Article 9 applies, certain forms of the subsequent conduct may be taken into account. I would just briefly like to note the Supreme Judicial Court found here that because the Tripartite Agreement, as amended, was an enforceable contract upon LPA's exercise of its option, there arose a bilateral contract for the purchase and sale of the Hayward Parcel. This is a classic form of real property interest, and I would leave this particular point now and just refer the Tribunal to the submissions of the parties' experts

on it.

Even if one accepts, however, that Article 9 of the UCC applies, Mondev's reliance on the subsequent conduct it identifies here does not compel a different result. The UCC provision relies on is Section 2.208, which is now on the screen. That provision states that where a contract for sale involves repeated occasions for performance by either party, with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Now several elements readily appear as conditions precedent for this provision even to apply. One is that the contract must contemplate repeated occasions for performance; the other is that the party must know of the performance by the other party for it to be considered part of any course of performance.

I would refer the Tribunal to Professor Holtzchue's rejoinder opinion on Page 10, where he makes clear that what you are talking about is a mortgage. There really isn't any opportunity for repeated occasions for performance. It is just not the type of agreement that calls for that. In fact, Mondev has not even attempted to explain how the various memoranda and conversations it relies on involve performance of the mortgage. Its silence on this subject, we submit, speaks volumes.

Now, even if one were to examine individually the four subsequent acts that Mondev relies on, it is clear that none of them establishes a course of performance, and I'd like to just go through them very quickly.

PRESIDENT STEPHEN: Just before you do that, I know nothing about the legislation that we are concerned with, but both the real estate legislation and the UCC are state acts, not federal; is that so?

MR. LEGUM: Yes, why don't I briefly--

PRESIDENT STEPHEN: Or is the UCC federal?

MR. LEGUM: The UCC is a Uniform Commercial Code that has been adopted by various states--

PRESIDENT STEPHEN: Yes, I see.

MR. LEGUM: --which have principal responsibility for property law in the United States.

PRESIDENT STEPHEN: And has no application to real estate pleadings, using that term in its appropriate and narrow meaning.

MR. LEGUM: Yes. There is a specific provision of Article 9 of the Uniform Commercial Code that says that it doesn't apply. Its scope of application is limited, and it does not apply to real estate transactions.

PRESIDENT STEPHEN: And there would be general agreement that--no, I withdraw that question. Thank you.

MR. LEGUM: The reason why the parties are referring to New York law is the mortgage contains

a choice of law provision.

PRESIDENT STEPHEN: Yes, I appreciate that. Thank you.

MR. LEGUM: I am just going to go through these very quickly. The first item in Mondev's course of performance is a memorandum by a bank employee named Frederick Kelly to other bank employees. It, on its face, is not a course of performance. There is no way that LPA would have known about this until discovery in the litigation that it later commenced against the bank, and it is mysterious how this could reflect a course of performance in any event. It addresses the option granted by LPA to Campeau, not the option under the Tripartite Agreement that is covered by the mortgage.

The next item is a memorandum by one G. Kravitz of a consultant to the bank. It is addressed to a bank officer. It addresses potential liabilities to the bank in taking over as a mortgagee in possession prior to obtaining title

to the collateral. Again, it doesn't reflect any performance under the mortgage and cannot satisfy the requirement of knowledge of the nature of the performance by the other party, and there is no reason why the consultant, in a memo on the potential liability of the bank, would have mentioned the Hayward Parcel right in any event.

If we could have the next slide, please.

The third instance is a statement made by Mr. Ransen, Mondev's chief executive officer, to an officer of the bank in October 1990. That statement which was, in effect, that only LPA had rights in the Hayward Parcel was before the foreclosure, and therefore it was not inaccurate at the time it was said.

Finally, there is a letter from Hale & Dorr, LPA's litigation counsel. It was addressed to the bank, the City, and the BRA. It is dated April 1993. This is after the mortgage had been foreclosed and no further performance under it could be contemplated. Obviously, this could not

contribute to a course of performance under the mortgage.

In sum, even if one were to consider a course of performance to be relevant in interpreting the mortgage, Mondev has not come close to establishing a course of performance that supports its reading. There is no occasion here for disregarding the plain terms of the mortgage. Those terms, as we have seen, establish that the bank's foreclosure in 1991 extinguished all of LPA's rights under the Tripartite Agreement, including its rights to purchase the Hayward Parcel.

In the end, Professor Holtzchue has it exactly right when he concludes, at Page 17 of his Rejoinder opinion, as follows:

"It is perhaps understandable that 14 years after the mortgage was executed, the record is devoid of reliable evidence of the parties' intent, other than the language of the mortgage itself."

Indeed, that is precisely why New York law views the written expression in the instrument as the best evidence of the parties' intent. That evidence, of course, demonstrates that rights to develop and the right to purchase are different, and the right to purchase and the attendant right to sue for breach was not excluded from the collateral that the bank foreclosed upon.

PROFESSOR CRAWFORD: Mr. Legum, it's a shame that notwithstanding its venerable age, the Supreme Judicial Court had said, but of course if this had been an American company we would have upheld the appeal, but it's a Canadian company, and so we rejected it.

I'm sorry, whichever way, the other way around. In other words, that there was reliable evidence that the Court had discriminated against the LPA on the grounds that it was Canadian. That would, on the face of it, be a breach of NAFTA. Wouldn't you, nonetheless, say that we couldn't hear the claim because, on the interpretation of a

mortgage deed from 1991, LPA shouldn't have been there at all?

MR. LEGUM: I wouldn't say that it would defeat the jurisdiction of the Tribunal, but it would certainly raise serious questions about the admissibility of the claim because if LPA didn't own the rights in question, how could a judgment against it, saying that it would not be granted those rights, give rise to any compensable damages?

PROFESSOR CRAWFORD: I can see that there may be a question about damage, although that wasn't, I mean, it's not in dispute that it was LPA, and behind LPA/Mondev that was pursuing the litigation in the Court.

MR. LEGUM: There is, of course, no dispute that LPA was the plaintiff.

For all of the reasons that I have explained, and for those explained in the United States' pleadings and the expert opinions of Professor Holtzchue, we submit that Mondev has not discharged its burden of proving that LPA owns the

rights under the Tripartite Agreement at issue here. Its claims, based on those rights, are therefore inadmissible.

Unless the Tribunal has any further questions, I will ask the President to call upon my colleague, Mr. Clodfelter, who will begin the United States' presentations on the merits.

PRESIDENT STEPHEN: Thank you.

Mr. Clodfelter?

MR. CLODFELTER: Thank you, Mr. President.

We will now turn to Mondev's allegations with respect to breaches of specific substantive provisions of Chapter Eleven.

Mondev has alleged breaches of three such provisions: Article 1102, Article 1105, and Article 1110. Mondev has, of course, dropped its attempt to add a late claim for breach under Article 1103.

I will begin by addressing Mondev's claim under Article 1102. NAFTA's national treatment requirement, and more specifically Article 1102(2), relating to the treatment of investments. This

will not consume a great deal of time, given Mondev's own half-hearted efforts with regard to this national treatment claim.

The lack of conviction behind the claim is evident from the short shrift it was given by Claimant's in their oral presentation. Indeed, if you were distracted even briefly at the single moment where 1102 was mentioned at all, you would have missed the Claimant's entire discussion. Mondev's Memorials hardly do more.

I will not be that brief, however. The claim has not been withdrawn, and so we feel compelled to make a number of points to demonstrate why the claim is totally devoid of merit.

First, let's take a look at the relevant text. As you can see on the screen, that text, Article 1102(2), provides as follows:

"Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords in like circumstances to investments of its own investors with respect to

the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

Under the facts of this case, the provision can be rendered as follows, also on the screen:

"Each Party [here, the United States] shall accord to investments [here, LPA] of investors [here, Mondev] of another Party [here, Canada] treatment no less favorable than it accords in like circumstances to investments of its own investors [here, investments owned by Americans], with respect to the various features of investments listed."

Thus, the United States was required to accord treatment to LPA that was as favorable as the treatment it would accord to investments in like circumstances of an American investor. Of course, under Article 1116, which you have already seen and discussed, the less-favorable treatment that is alleged to be a breach must also be alleged

to have caused a loss or damage. I almost said injury.

Article 1116 provides, "An investor of a Party may submit to arbitration under this section a claim that another Party has breached an obligation," et cetera.

And in the last lines, "And that the investor has incurred loss or damage by reason of or arising out of that breach."

Mondev's claim under 1102 can be fairly reduced to the following proposition; that because of a single statement allegedly made by a former director of the BRA in 1987 and three statements made by the City's lawyers at the time of and after the court proceedings, all allegedly showing anti-Canadian animus, LPA somehow received treatment that caused it a loss and that violated Article 1102(2) because that treatment was less favorable than that accorded to investments in like circumstances owned by Americans.

This claim cannot withstand analysis, for

many reasons, and I'll restrict myself to making three points.

First, the four allegedly biased statements do not relate to any treatment that can be the basis of a claim. Therefore, they are completely irrelevant. What loss-causing treatment is it that LPA received that is evidenced by these four statements to be less favorable or, more particularly, what loss-causing treatment is it with respect to the establishment, acquisition and so on of investments that is evidenced by these statements to be less favorable? What is the relevant treatment at issue?

Well, the statements themselves are not treatment, and Mondev does not allege that they are, so the statements can be excluded. The conduct of the City and the BRA, with regard to the project, cannot be the treatment because, as has been shown, no treatment prior to NAFTA can be a violation.

In the last sentence of the last Mondev

pleading on Article 1102, there was a suggestion that the statements related to a new category of conduct, namely, the conduct of the City and the BRA "during the course of the various judicial proceedings." That is at paragraph 277 of Mondev's Reply.

But Mondev has never made the litigants' own litigation conduct a basis for this claim, and they could not do so since there is no allegation of any loss or damage attributable to that conduct nor would such conduct have anything to do with the establishment, acquisition and so on of LPA.

That leaves the conduct of the Massachusetts courts, but none of the four statements is attributable in any way to the Massachusetts courts. Indeed, Mondev itself makes it very clear that none of the four statements relates to the treatment accorded to LPA by those courts.

As you can see on the screen, at paragraph 227 of its Reply, Mondev stated, "Mondev did not

and does not attribute bias to the courts of Massachusetts." Therefore, the four statements are completely irrelevant to any treatment that can give rise to an Article 1102 claim.

Now the second point I want to make is that Mondev has not even attempted to demonstrate that an investment in like circumstances of a U.S. investor would have been treated any differently and that therefore LPA received less-favorable treatment. In fact, you will see very little analysis of the terms of Article 1102 at all in Mondev submissions.

Mondev's excuse is that it is unable to identify any U.S.-owned investment that received more favorable than LPA received because its circumstances were so unique. But this failure alone is fatal to its claims. If it cannot show better treatment with regard to a U.S.-owned comparator, it cannot show less-favorable treatment to LPA.

In any event, the suggestion is highly

suspect. There are literally thousands of litigants in Massachusetts courts every year, including real estate developers--

PRESIDENT STEPHEN: I'm sorry. Including what?

MR. CLODFELTER: Real estate developers.

And even though it is not relevant, Mondev has gone to great lengths to show how much the Boston real estate development business was booming in the 1980s, and yet it has not pointed to any disparate treatment with respect to a single U.S.-owned investment that litigated in U.S. courts or developed property in Boston, in any respect. It is difficult to escape the conclusion that Mondev has failed to do so because there was no such disparate treatment.

Now let me turn to my last point. Even if the acts of the City and the BRA were relevant to Article 1102, these four statements do not show an anti-Canadian animus in any event. References to national origin do not, ipso facto, and I would

submit, more than rarely indicate such animus. Even the suggestion of such an animus strikes an American as strange, given the universal prevalence of warm feelings between the peoples of the two countries.

Moreover, if it were, in fact, an anti-Canadian animus, one would think that its cause and context would be explained, but we have no such explanation here.

One would also expect more than four rather anodyne statements to be offered in evidence, but this is all the Claimant could come up with over a period of more than 10 years. Indeed, the record includes evidence that directly contradicts the notion of an anti-Canadian animus, and that is the treatment given to Campeau.

Sir Arthur's response to this, when it was raised by Professor Crawford on Monday, was that, well, Campeau wasn't really a Canadian company after all, it was a multinational company. So, after reading in Mondev's briefs on numerous

occasions that Campeau was Canadian, it has apparently become denationalized as of Monday.

We have explained at great length in our briefs why, in context, all of the statements cited are innocuous, and we do that at our Counter-Memorial at Pages 63 and 67, and at our rejoinder at Pages 53 to 54, and we're content to rely on our briefs for that showing.

But I would like to note that in light of the weakness of this evidence, the accusations of discriminatory intent are serious charges. Having made them, Mondev really had a moral duty either to support them or to withdraw the claim. To do otherwise is grossly unfair to the people involved. There is nothing to this claim, and Mondev might better have just withdrawn it and be done with it. In the absence of such a withdrawal, we ask you to dismiss it in the strongest terms.

Mr. President, we are going to turn to our responses to Mondev's claim under Article 1105, and I can begin that, but I cannot finish my opening

presentation in the time remaining before break. I am perfectly disposed to taking that break now.

PRESIDENT STEPHEN: That sounds like a very sensible course. Thank you.

We will adjourn now for a quarter of an hour.

[Recess.]

PRESIDENT STEPHEN: Mr. Clodfelter, you were about to start on a new area.

MR. CLODFELTER: Yes, Mr. President. Thank you.

We are going to turn now to the arguments presented by Mondev to support its Article 1105(1) claim. Our presentation will be divided into three parts. First, I will begin by explaining that the standards that apply to Mondev's claims, under Article 1105(1), are those found in customary international law; more specifically, the standards that apply here are those of denial of justice.

I will also address the FTC interpretation, and because this will be our first

opportunity to do so, I hope I can cash in on some of the credit I got for being brief in my first presentation for an indulgence in my second presentation.

[Laughter.]

MR. CLODFELTER: Then Mr. Pawlak will show why the decision by the Massachusetts Supreme Judicial Court, dismissing LPA's contract claims against the City of Boston, amply met or exceeded the minimum standard of justice applicable in this case.

Finally, then, Mr. Legum will show that, in litigating for 7 years its tort and unfair trade practices claims against the BRA, in both state and federal courts, Mondev clearly received full and fair access to the court.

Let's begin with the standards applicable to Mondev's Article 1105 claim. I will first show that, as has been authoritatively established in last year's Free Trade Commission interpretation, Article 1105(1) sets forth no more than the

customary international law minimum standard of treatment; second, I will deal with what we find to be Mondev's curious comments about that interpretation; and, third, I will show that the only relevant set of principles applicable to Mondev's claim are those captured under the rubric denial of justice.

Let's begin with the now-familiar text once again. As you can see on the screen, Article 1105 is entitled, "Minimum Standard of Treatment." Paragraph 1, the paragraph at issue here, requires each of the NAFTA parties to accord to the investments of investors of the other NAFTA parties, "Treatment in accordance with international law, including fair and equitable treatment and full protection and security."

It has now been conclusively established just what the NAFTA parties meant by this language. The binding interpretation promulgated by the Free Trade Commission last July settled that question, mooting all of the debate that had gone on before,

both in NAFTA cases and in the literature. By operation of Article 1131(2), that interpretation is binding on this and every Chapter Eleven Tribunal and represents the definitive statement of what the parties intended from the source designated by the Treaty as the ultimate and most authoritative source of its meaning, the parties themselves.

By thus acting as contemplated by the Treaty, the parties have clarified the obligations that are incorporated in Article 1105(1). It would be worthwhile to take a minute to consider again the main provisions of the interpretation.

As you can see on the screen, paragraph B(1) of the interpretation confirmed what all three NAFTA parties have consistently been telling Chapter Eleven Tribunals all along; namely, that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another

party."

Among other things, this makes clear that the reference to treatment in accordance with international law is a reference to the established body of customary law commonly known as the international minimum standard of treatment.

In paragraph 2, the interpretation confirmed that, "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."

In doing so, the interpretation makes clear that the parties were not trying to be creative here. The obligation of Article 1105(1) was intentionally limited to that preexisting body of customary international legal obligations. The reference to fair and equitable treatment and full protection and security was, to the established sets of principles, subsumed within the international minimum standard that are described

by those terms.

The individual words used in the phrases "fair and equitable treatment" and "full protection and security" are not themselves expressions of standards, but serve as labels or reference for the established sets of principles that supply the content of the standards.

JUDGE SCHWEBEL: Mr. Clodfelter, I find this presentation very interesting, but, in a measure, puzzling. Is it your understanding that the position you are expressing now and that, indeed, of the three governments, that Article 1105(1) relates only to customary international law?

I have noted that repeatedly counsel for the United States these last few days have referred to customary international law as being the standard. If that is, indeed, the position, what is the point of the article? I mean, if it means no more than customary international law means and if, by definition, customary international law is

the custom which, by reason of the custom, binds states, why have a provision in the Treaty that simply repeats what those states are bound by, absent the provision in the Treaty?

MR. CLODFELTER: A very good question, Judge Schwebel.

Of course, it is well known that treaties frequently are merely confirmatory of preexisting principles of customary international law. By incorporating those customary principles in NAFTA, a new situation was created that would not otherwise exist, and that is investor-state dispute resolution became available for violations of those customary rules, and that's a significant change, obviously.

You are right. That is our position very much, that the article is limited to customary international law, and I have a few more things to say about that as well, and see if maybe I can anticipate your questions maybe in the answers and, if not, please ask.

Before we do, let's look at paragraph B(3) of the interpretation. B(3) made clear that "A breach of another provision of the NAFTA or of a separate international agreement does not establish that there has been a breach of Article l105(1). This paragraph reaffirms the provisions of paragraph B(1) by making clear that Article 1105(1) is about obligations under customary law and not conventional law.

Thus, it is settled that the obligations under Article 1105 are those, and only those, under the customary international law minimum standard of treatment. This may be a disappointment to investors, and states have sometimes agreed to submit themselves to investor-state dispute resolution under broader conventional obligations. The NAFTA parties did not so agree, and they have limited themselves to customary international law obligations.

PROFESSOR CRAWFORD: Can you give us an example of such a broader standard?

MR. CLODFELTER: Well, of course, looking at any BIT is a matter of interpretation, and I would rather not venture into, with respect to any particular provision of a BIT, but a review of BIT provisions on minimum standards shows a wide variety of terminology, and I think that it's difficult to exclude the possibility that states have not gone further than the customary international law standard in those provisions.

PROFESSOR CRAWFORD: It's certainly true that the word "minimum" standard of treatment doesn't occur in many BITs. The word "minimum" doesn't occur. Indeed, sometimes there is no specific reference to standards in accordance with international law. There is simply a reference to general standards--

MR. CLODFELTER: Operational standards, yes.

PROFESSOR CRAWFORD: --whatever it may be.

MR. CLODFELTER: I guess what's relevant here is that the parties did not do so and have

made it clear that they did not do so.

On Monday, we heard Mondev's reaction to the interpretation, and because it was the first time, I do want to take a little more time in answering the points of that reaction.

Unfortunately, Mondev's position is still not very clear. Sir Arthur said on Monday that Mondev was bewildered at the interpretation, and he said such things as it "needs careful scrutiny," and "requires care," and that it raises "questions." But at the end of the day, he merely said that Mondev leaves it to the Tribunal to deal with the issue as it sees fit and does not call for any particular course of action at all.

We can only conclude that Mondev's refusal to take a position, after all of the comments made, reflects a lack of conviction, and rightly so, since we do not believe these aspersions have any merit whatsoever. Mondev cast three such aspersions on the interpretation.

First, it questions the manner in which it

was made; second, it questions whether or not it is, in fact, an authorized amendment, rather than a proper interpretation; and, third, it questions whether it is binding on this Tribunal. We'll look at each of these questionings in turn.

First, Mondev implies that the manner in which the NAFTA parties exercise their prerogatives under Article 1131 was somehow improper. Indeed, Sir Arthur suggested that it was done in bad faith, leveling once again Mondev's favorite accusation.

Sir Arthur went further, and he blamed the United States for the interpretation as if it arranged the interpretation for the sole purpose of dashing Mondev's hopes once again, but nothing could be further from the truth. The interpretation was agreed to willfully by all three NAFTA parties, including Mondev's own government.

PROFESSOR CRAWFORD: I think you don't mean willfully.

MR. CLODFELTER: No, I mean willingly, excuse me.

[Laughter.]

MR. CLODFELTER: Willful would be a violation of 1105.

[Laughter.]

MR. CLODFELTER: Willingly by all three NAFTA parties. Indeed, it must be remembered that Canada and Mexico were the parties who suffered directly from the misinterpretations of early Chapter Eleven Tribunals. Indeed, Mexico brought a domestic court action to set aside the Metalclad case and Canada did the same with regard to the S.D. Myers case.

With all respect, Mondev's case was not at the foremost of any of the parties' minds when they rendered the interpretation. It does not matter that the interpretation was made after Mondev had made arguments on 1105 in this case. Indeed, as will be seen in a moment, there was nothing in Mondev's Memorial, the only pleading filed by the time of the interpretation that is addressed by the interpretation.

More importantly, Article 2001 of the NAFTA, which sets forth the duties of the Free Trade Commission and which anticipates the making of Article 1131 interpretations provides, as you can see on the screen, that the Commission shall resolve disputes that may arise regarding NAFTA's interpretation and application. In other words, it is in the very circumstance when arguments have been made and differences have appeared that the FTC is called upon to act to resolve questions of interpretation.

Finally, the argument that investors were shut out of the process is a canard. Chapter Eleven exists not just because the NAFTA parties allowed themselves to be Respondents in investor-state arbitrations brought by the investors of the other parties, but because they all sought protections for their own investors as well. The NAFTA parties wear two hats, and they wore two hats when the interpretation was issued.

Investors were very much represented in

the FTC process by the very states that won for them the protections of Chapter Eleven to begin with.

Finally, on this point, Sir Arthur accused the United States of "seeing fit to try to change the rules in mid-game," and thereby, "once again, disregarding its obligation of fair and equitable treatment."

It seems to have been overlooked that Article 1131 has been a part of Chapter Eleven since NAFTA was first concluded. It is itself one of the rules of the game, a rule designed just so that the parties could assure that what they meant by NAFTA's terms could be made known whenever there were misinterpretations. The possibility of an interpretation at any time is built into the very fabric of Chapter Eleven investor-state dispute resolution. There was no changing of the rules mid-game. Indeed, there is nothing questionable about the manner in which the interpretation was rendered at all.

Second, Mondev questions whether the FTC did not act in excess of authority by rendering what is really an amendment. This suggestion is absurd. Sir Arthur argued Monday that the FTC improperly conflated two elements of Article 1105(1), the title "Minimum Standard of Treatment," and the term "international law," implying that the conclusion that the article is limited to customary international law is somehow erroneous, but surely it is reasonable to describe the customary international law minimum standard of treatment in this manner, by a combination of title and reference to international law.

Regardless, one must wonder what all of the fuss is about anyway. Mondev itself acknowledged the limitation of Article 1105 to customary international law in its reply, as Sir Arthur quietly acknowledged Monday in his answer to Professor Crawford's question. As you can see on the screen, in paragraph 48 of its Reply, Mondev stated, "Both parties agree that the standard of

treatment set forth in Article 1105(1)," and then it repeats the standard, "requires states to provide treatment in accordance with principles of customary international law.

Moreover, Mondev's own government made clear in its January 1st, 1994, Statement of Implementation, as you can see on the screen, "Article 1105 provides a minimum absolute standard of treatment, based on longstanding principles of customary international law."

Finally, just to round out the point, I would like to cite an article by Mr. Daniel Price, one of the chief American negotiators of Chapter Eleven in the Canada-United States Law Journal. That article is in the supplemental materials that we distributed.

As you can see on the screen, Mr. Price made the same observation, as did Canada, "The last two guarantees, those of NAFTA Articles 1105 and 1110, are really quite critical and have been the subject of the most controversy. The first is the

so-called international minimum standard. The NAFTA, as every other investment agreement with which I am familiar, incorporates explicitly a customary international law floor."

Thus, the interpretation's confirmation of the article's limitation to customary international law standards was not an amendment.

JUDGE SCHWEBEL: Mr. Clodfelter, isn't Mr. Price there speaking of a floor, but is he speaking of a ceiling as well?

MR. CLODFELTER: I believe, in context, and I will refer you to his article, that he is, indeed, speaking of a ceiling. He is speaking of the be-all and end-all of the principles reflected in Article 1105. There is nothing to suggest otherwise.

JUDGE SCHWEBEL: Are you familiar with an affidavit which appears on the Internet of the Mexican opposite number of Mr. Price that takes a rather different view of what was intended?

MR. CLODFELTER: Well, we are very

familiar with the amendment. It has been completely repudiated by the Mexican Government. There is no record of any such--for the other members' benefit, it's a 10-year-old recollection of one of the Mexican negotiators that somebody proposed the word "customary" in Article 1105, which was thereupon rejected.

No one else shares that recollection. There is no paper record of any such proposal whatsoever, and all of the governments have repudiated that completely, even if it were relevant in light of the interpretation, but it's not. It's a misrecollection, unfortunately.

PROFESSOR CRAWFORD: I think part of the problem is the equivocation in the word "minimum standard." We are talking about a floor precisely in the sense that this is the standard below which treatment must not go.

Of course, that was part of the debate about national standard versus minimum standard because it was said that there was no minimum

standard provided the foreign investors were treated the same as local investors, that it's perfectly clear that 1105 is inconsistent with that proposition, and the United States and the other parties to NAFTA intended it to be inconsistent. The United States has always taken the view that the minimum standard--

JUDGE SCHWEBEL: Could you speak up?

PROFESSOR CRAWFORD: Sorry. The United States has always taken the view that there is an absolute standard to be extended to foreign investment, irrespective of the treatment of locals.

It doesn't necessarily speak to the content of the standard which is whatever it is, and having regard to customary international law. Of course, it's not a uniform law. It's not a requirement that the standard be only the minimum. In that sense it's a minimum as well.

JUDGE SCHWEBEL: Mr. Clodfelter, as you know so well, there are now approaching 2,000

bilateral investment treaties, and very large numbers of them contain provisions very similar to those found in Article 1105(1). Would you say that the concordance of such a large number of treaties concluded by such an extraordinary variety of states, east, west, north, south, of themselves are sufficient to give rise to a rule of customary international law.

MR. CLODFELTER: Well, Judge Schwebel, of course, that raises a more general question of when conventional acts can crystallize into customary law, and it's a double-edge question of course, because if in fact they crystallize into customary law, there's no need for a conventional agreement. And the fact that there are so many of these agreements suggest that parties do not feel that they are obligated under pre-existing law other than by convention. And in light of the fact that there are such major dissents to that question, dissents among even the NAFTA parties, it's difficult to say that in fact all those disparate

provisions, and they are quite varied in their statements, similar, but they're quite varied nonetheless, can amount to new principles of customary international law.

We'll have the await developments in state practice in that respect.

PROFESSOR CRAWFORD: And perhaps an arbitral practice.

MR. CLODFELTER: Which is based on state practice of course.

We think that this evidence shows that the interpretation's confirmation or the article's limitation to customary standards was not an amendment.

Now, the second reason for questioning whether the interpretation was an amendment, was that in Sir Arthur's words, it, quote, "states that the fairness and protection requirements are subsumed within the reference to customary international law." Sir Arthur said that by doing so, the FTC, quote, "said that they may be

disregarded since they add nothing." Again, we ask what is all the concern about? Mondev itself has made the very same point that was made by the FTC. As you can see on the screen, in paragraph 146 of its Memorial, Mondev stated, quote, "On its plain terms Article 1105(1) requires states provide treatment in accordance with international law. Fair and equitable treatment and full protection and security are examples of the content of such law." It is difficult to see how Mondev can now fault the FTC for saying pretty much the same thing.

Sir Arthur's third reason for questioning whether the interpretation was an amendment relates to paragraph B(3). The effect of that paragraph is that in Sir Arthur's words again, quote, "An article which requires treatment in accordance with international law is now said not to cover treatment in violation of a treaty," something that Sir Arthur found was truly astounding. But of course this paragraph merely reflects the article's

limitation to customary international law obligations.

Moreover, it's impossible to square any other interpretation with the jurisdictional limitations of Chapter Eleven's investor state dispute resolution provisions. As you can see on the screen once again, Article 1116(1), which is identical in this respect to Article 1117(1), provides that an investor of a Party may submit to arbitration under this section a claim that another Party has breached an obligation under Section A, that is Section A of Chapter Eleven, or Article 1503(2) or Article 1502(3)(a). Now this is a carefully spelled out and fairly narrow list of obligations that may be the subject of investor state arbitration under Chapter Eleven. Clearly though there are many other provisions in the NAFTA that constitute international law between the parties. And the NAFTA parties were well aware that there were other provisions in other treaties that constituted international law for them.

Take a look at Article 103, which is on the screen, and which is entitled "Relation to Other Agreements." Article 103 notes and reaffirms the parties existing obligations under the GATT and quote, "other agreements to which such parties are party." But the NAFTA parties decided not to allow any of those provisions to be subject to investor state arbitration. Reading Article 1105(1)'s reference to international law as incorporating such conventional obligations would obviously be completely inconsistent with the unmistakable intent of the parties plainly expressed in Articles 1116(1) and 1117(1). Thus the interpretation did not amend the article merely by confirming that it excludes conventional obligations.

In short, the FTC did not add words or eliminate words from Article 1105. It did not amend. It gave an interpretation.

Now, the third of the aspersions cast upon the interpretation was to question whether or not it is binding on existing tribunals like this one.

Sir Arthur did not elaborate on his concern to any degree, so perhaps it is enough of a reply merely to note the language of Article 1131 itself. As reflected on the screen, Article 1131(2) states, quote, "An interpretation by the Commission of a provision of this agreement shall be binding on a Tribunal established under this section." As a Tribunal established under Section B of Chapter Eleven of NAFTA, this Tribunal is clearly bound by the interpretation.

I referred earlier to Sir Arthur's comment that Mondev was bewildered by the interpretation. For our part, we are bewildered as well. We're bewildered by the aspersions Mondev has cast upon it, and we're just as bewildered by Mondev's decision to leave to the Tribunal the task of dealing with it without any particular action having been requested. There is no action to take except of course to honor the interpretation as binding.

Now, the third thing I want to do this

afternoon is to talk a little bit about the content of the international law minimum standard of treatment as it applies in this case.

To begin with, as Professor Brownlee has noted, under the international minimum standard of treatment, quote, "There is no single standard, but different standards relating to different situations." This is a page 531 of his "Principles of Public International Law," which apparently did not make its way into our supplemental materials that we will provide. In other words, the international minimum standard is an umbrella concept, incorporating sets of rules to have over the centuries crystallized into customary international law in specific context. Mondev's duty in attempting to establish a violation of Article 1105 is to demonstrate that the relevant conduct at issue violates established rules that relate to that particular conduct.

There is some common ground between the parties. First, we concur that the standard

adopted in Article 1105 was that as it existed in 1994, the international minimum standard of treatment, as it had developed to that time. We also agreed, like all customary international law, the international minimum standard has evolved and can evolve. Finally--and we are surprised to hear that Sir Arthur could believe otherwise--we agree that the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.

These points, however, only begin the inquiry. They don't answer the question of which particular standards are applicable. But here too there is an additional area of common ground. Mondev's claims raise the question of whether the system of justice provided to LPA by United States accorded with the standards of justice required by international law. The relevant rules of customary international law applicable here therefore, are those that address the treatment of aliens by the

courts of the host state. The rules that are generally grouped under the heading "denial of justice."

Indeed Mondev does not dispute that denial of justice rules are relevant standards under the customary international law minimum standard of treatment. I refer you to paragraph 61 and 101 of Mondev's reply.

Beyond this point, however, the two sides part company. On Monday we heard Sir Arthur attempt to establish that Article 1105 incorporates a subjective standard under which arbitrators could hold sovereign states to have violated international legal obligations merely because those arbitrators subjectively felt that the conduct at issue was unfair or unjust. He called this test the smell test. He said that, quote, "If it doesn't pass the smell test, it doesn't pass the NAFTA test." What Mondev has failed to do, however, is to demonstrate that such a subjective test is part of the customary international law

minimum standard, which is what Article 1105 sets forth, and he has failed to do so in a number of ways.

First, Sir Arthur based his attempt in part on what he said was the need to interpret the words in the phrases "fair and equitable treatment" and "full protection and security", according to their ordinary meaning. But of course the FTC interpretation makes clear that these phrases are merely references to known sets of principles that make up the international law minimum standard of treatment. Thus the words used in the phrases are not themselves an independent source for interpretation and decision making outside of that context.

PROFESSOR CRAWFORD: Mr. Clodfelter, I have to say my impression--and please correct me if I'm wrong--but if you go back to the sort of pre-BIT period--well, let's say pre-1939. You wouldn't find the phrase "fair and equitable treatment" or "full protection and security" in the cases. You

would find other formulas. Those formulas are very common in BITs, and it may well be that in that sense there has been an infiltration of a more elaborate standard established through the practice of entry into these agreements over about 50 years. But I'll be very interested if you could point me to decisions say of the Mexican Tribunals of the '30s in which those phrases are used.

You don't have to take that on now.

MR. CLODFELTER: Very kind. Yes, I'm not prepared, obviously, to give a history of the term, but it is not a term of ancient vintage, clearly. There's no issue there, and we will look and see if we can delve into the origins of it.

But the debate is the relationship between the term "fair and equitable treatment" and the minimum standard of treatment under customary law, and I was going to point out that Professor Vasciannie, in the article cited by the Claimant--and this is at their Legal Appendix 38, pages 103 to 105--lays out two approaches. One is the plain

meaning approach advanced by Sir Arthur. The other is that approach that equates the fair and equitable treatment standard with the international law minimum standard. And of course the FTC interpretation made clear that Article 1105 adopts this second approach. So there are two approaches out there. One calls for interpretation of the words in those phrases, and one says it's a reference to established bodies of law only. So the two are contrasted, that advocated by Sir Arthur on Monday is opposite to the one which the interpretation makes clear is reflected in Article 1105.

Second, the attempt to lift random phrases from a mixed assortment of cases fails to distinguish what was relevant from what was not, and what rules pertain to what situation. And a number of cases were discussed on Monday. I'm not going to spend a lot of time talking about them, but let me just make a few comments.

The Chattin case was denial of justice

case that was cited by Sir Arthur. And that case actually sets a very high threshold under customary international law for a violation. The Amco-Asia case applied the stringent Chattin test as well as tests cited in other cases including the stringent and objective language of the ELSI case to a procedural denial of justice claim. It is difficult to see how either of these cases supports Mondev's subjective test. Most of the other cases cited were not addressing customary international law standards at all. The ELSI case of course itself actually interpreted the meaning of the term "arbitrary" as it was used in the treaty at issue. It did not set up a customary law obligation of non-arbitrariness. It should be noted though again that in interpreting that conventional term, it set a very high threshold for the violation.

PROFESSOR CRAWFORD: I think it would be fair to say that the term "arbitrary" or terms like arbitrary were very much used in the cases of the '30s in the mixed tribunals where the standard was

coming from customary international law. So although it's true that ELSI was concerned with a treaty provision, the notion of arbitrariness--

MR. CLODFELTER: We would have thought that more of those cases, if so, would have been cited. The Maffezini case, a modern case, was cited. But it suffers the same defect as ELSI. It was an issue of compliance with rather unusual provisions of the Spain-Argentine BIT, not the customary international law standard. Mondev's reliance on various of the NAFTA Chapter Eleven cases is equally unavailing. All were decided before the FTC interpretation. The S.D. Myers and Metalclad cases did not cite any customary international law authority in holding that violations of other NAFTA provisions amounted to a violation of Article 1105(1), and thus neither case was decided on the basis of a violation of a customary international law rule.

And finally on the cases, Mondev's reliance on the Pope & Talbot case is particularly

puzzling, since that case contradicts the whole notion that there is in customary international law a subjective standard of fairness or protection. The Pope Tribunal, you'll recall, held that Article 1105(1) incorporated certain undefined subjective fairness elements they called it, but did so only because it rejected the other notion that Article 1105 set forth customary law standards at all. Instead the Pope Tribunal held that the terms "fair and equitable treatment" and "full protection and security" were additive to customary international law. But in light of the FTC interpretation, it can no longer contended that Article 1105 establishes obligations that exceed those of the customary standard. Therefore, the so-called fairness elements, which Mondev argues include the duty of full protection and security, and which is very much like Sir Arthur's subjective test, exists only if Article 1105 could be read as not limited to customary international law, but because we know that it is so limited, no such subjective elements

apply.

Sir Arthur also cited--

PROFESSOR CRAWFORD: Mr. Clodfelter, you're using the phrase "subjective" which always gives me the creeps because it is set against some hypothetical objective standard, the existence of which has to be postulated. At some level arbitrators have to make decisions, and the decisions are obviously made in the minds of the arbitrators acting, one assumes, fairly and in good faith by reference to the tradition of those sorts of cases, so that there is at some level an inevitable element of subjectivity because there is in any human judgments. Obviously, the judgments are to some extent fact dependent. If by "subjective" you mean the arbitrators can decide for themselves what is fair or equitable in the best of all possible worlds, then I have to agree with you entirely that's not what the standard means, that the--

MR. CLODFELTER: Sir, the smell violation.

PRESIDENT STEPHEN: The word "subjective"--well, smell. Smell is the words of an advocate pleading a case of course. But at some level you just have to make a decision, and the decision is going to depend to a significant extent on the facts of the particular case which vary immensely, as you've already pointed out.

MR. CLODFELTER: Of course, we cannot contest the notion that subjective judgment has to be brought to bear, but the question is, what is the judgment? What is the comparator? Is it conduct versus one's own intuitive feeling of what's just and fair, or is it conduct versus a judgment of some objective standard, a judgment of a reasonable person's perception, or a judgment of a general conscience that can be shocked, for example. So there's a difference. And maybe not always clear, and maybe there is even some overlap, but we can't exclude the idea of personal judgment. And we're not arguing that 1105 does. But a comparator is necessary to make it objective, and

the plain meaning approach clearly calls for subjective judgment.

PRESIDENT STEPHEN: One of the curious concepts is the reasonable man walks around the street within his mind these very concepts. Who is this reasonable man that has entered into these abstruse topics?

MR. CLODFELTER: The questions are approaching philosophy of law more and more.

PRESIDENT STEPHEN: Yes.

MR. CLODFELTER: These are very, very big questions, of course, and this is a question that approaches--that faces every domestic legal system as well, but they have all worked it out fairly well, and there is a difference. We all make a judgment--we all make perceptions about how other people in general make perceptions, and that's kind of what I think is meant by a reasonable man standard. And that perception can be very different from what our own references would be, our own intuitions.

JUDGE SCHWEBEL: Mr. Clodfelter, as you know better than I, the United States is a party to a number of bilateral investment treaties and treaties of friendship, commerce and navigation, some of which at least I believe contain phrases like the entitlement of nationals of each party in the territory of the other to fair and equitable treatment and full protection and security. Is it the position of the United States in respect of such treaties that those provisions afford American nationals nothing more than the minimum standard of international law?

MR. CLODFELTER: I'm afraid I'm going to have to disappoint, because we're not prepared to state a definitive position on that here, and fortunately, you don't have to decide that because there's no doubt with regard to the provision at issue in this case.

PROFESSOR CRAWFORD: Could you say something about the--what I call the margin of appreciation problem? Some of the earlier cases--I

can't remember which one it is now, actually expressly uses the phrase "margin of appreciation." It's a term which has been used very much by the human rights courts and has been controversial when used by them, but is there any room for margin of appreciation argument in the application of the 1105 standard or is that an unnecessary intrusion from another body of law?

MR. CLODFELTER: I think more frequently you would encounter a similar, a sister concept perhaps in cases dealing with the minimum standard, and that's the concept of deference, the notion that a state will not be--will not be presumed to have bad motives or intent or have acted wrongfully. It takes proof. It takes a showing in accordance with the respect that sovereign entities deserve. And to that extent there clearly is a margin of appreciation for the acts of states. I think we've cited some of the cases which in the same text talk about objective standards for fair and equitable treatment and the need to accord

deference to states for their actions.

JUDGE SCHWEBEL: Mr. Clodfelter, is there any jurisprudence of the Iran-U.S. Claims Tribunal interpreting phrases of the Treaty of Amity between the United States and the Iranian Government with respect to the standards we have here of fair and equitable treatment and full protection and security. Do you know that?

MR. CLODFELTER: As you know, Judge Schwebel, the (?) Accords have a governing law clause which has interesting standards of its own there, and those have been applied, and the question of the applicability of the Treaty of Amity has arisen mostly in connection with standards of expropriation. And on that question the Tribunal has unequivocally held that the standard states that of customary international law, so allowing them to avoid a number of questions like the validity of the Treaty and so on. Whether or not they have interpreted questions more precisely like the one you posed, if you'll

give us the evening to check, we'll be happy to look.

Let me quickly run through the secondary sources that were cited. One is Professor Vasciannie and his article was quoted in support of a notion of a subjective standard or plain meaning approach, but I think if you look at the excerpt quoted, you'll see that he was simply characterizing that approach, not adopting it as an interpretation of customary international law at all. And in fact, Professor Vasciannie article actually undermines the reliance upon Professor Mann, whose views are well known to push the envelope on this question I think. But as Professor Vasciannie points out at page 142 of his article, the plain meaning concept of fair and equitable, quote, "goes far beyond the minimum standard," unquote. And in allowing an inquiry into whether, quote, "in all of the circumstances the conduct at issue is fair and equitable or unfair and inequitable," the kind of intuitive or

subjective judgment that we think is being proposed by Mondev.

But we know that goes far beyond the minimum standard, and we know that 1105 is the minimum standard.

Finally, and I won't belabor this, but Sir Arthur's reference to the commentary to Article 1 of the OECD Draft Convention might be confusing. We defended the sin of conflation earlier, but this--with a bit of conflation, which was kind of confusing, and we suggest that you look closely if you find the OECD draft convention particularly relevant. All that OECD commentary says with regard to fair and equitable treatment is that it reflects a customary international law standard. The actual operational standard quoted yesterday was with regard to an entirely separate concept relating to the proposed conventional standard of interference resulting from unreasonable measures. And the standard that was read was the term under "unreasonable measures" and not full protection and

security and not fair and equitable treatment.

Let me close by saying that undefined subjective fairness elements do not form any part of the customary international law obligations undertaken by the parties in 1105. Mondev has failed to establish that such a subjective standard exists. The only relevant standard that it has identified is the set of rules generally grouped under the heading of denial of justice. However, it is our position that neither the SJC's dismissal of LPA's contract claims, nor the dismissal of Mondev's tort and unfair trade practices claim by the Massachusetts courts constitutes a denial of justice under that standard.

And if there are no more questions, I would like to turn the floor over to Mr. Pawlak, who will address the dismissal of Mondev's contract claims under that standard.

PRESIDENT STEPHEN: Thank you, Mr. Clodfelter.

Mr. Pawlak.

MR. PAWLAK: Thank you. Good afternoon, Mr. President, Members of the Tribunal.

PRESIDENT STEPHEN: Perhaps before we go any further, what is your assessment of time factors, just thinking of what's going to happen tomorrow.

MR. LEGUM: My understanding is that Mr. Pawlak's presentation, depending on the quantity of questions, should be about 40 minutes, and we're about 35 minutes away from--

PRESIDENT STEPHEN: Well, that looks as if we might finish it, stop tonight with Mr. Pawlak. Then?

MR. LEGUM: And then tomorrow I think that we should be fine to begin at 10 o'clock. It's conceivable we might go a little bit over 1 o'clock, but I think we're in good shape. And of course we don't want to discourage questions in any way.

PRESIDENT STEPHEN: Thank you. Mr. Pawlak.

MR. PAWLAK: Thank you, Mr. President.

As Mr. Clodfelter has mentioned, I will discuss Mondev's claims of denial of justice under Article 1105. My presentation will be divided into two parts. First I will address the denial of justice standards applicable here. Next, I will review the SJC decision, rejecting LPA's contract claims, and demonstrate that Mondev's characterization of that decision as a denial of justice is entirely without merit.

As the United States set out in its Counter-Memorial, and that is at page 43, there are two types of denial of justice claims. There are claims of procedural denial of justice and claims of substantive denial of justice. A court's actions may constitute a procedural denial of justice when, for example, an alien is wrongly denied access to a Tribunal or a Tribunal acts in such a dilatory fashion that no justice is forthcoming. A court's actions may constitute a substantive denial of justice when a court renders

a decision that is so manifestly unjust as to violate the minimum standard of treatment required under international law.

Under established principles of customary international law, an international challenge to a decision by a municipal system of justice may be upheld only upon a showing of a manifestly unjust decision, a decision so outrageous and unjust that a presumption of bad faith arises. In other words, the decision must be so obviously wrong and unjust that no court could honestly have arrived at the conclusion. By contrast, mere judicial error on the part of the national court cannot serve as the basis for an international claim. What is required is manifest injustice or gross unfairness, flagrant and inexcusable violation or palpable violation in which bad faith, not just mere judicial error, seems to be at the heart of the matter.

Thus, contrary to Mondev's approach to the issues, this Tribunal is not a court of appeal or the Supreme Court of North America. The issue in

this forum is not, as Mondev suggests, whether there was a misapplication of municipal law. The issue is whether there was a manifest failure of the system of justice provided to Mondev, such that the United States can be said to have failed to provide a minimally adequate system of justice as required by customary international law.

Let's consider four cases relied upon by Mondev in its written submissions and again yesterday. Contrary to Sir Arthur's suggestion that extreme circumstances are not required for a finding of denial of justice, these cases identify the types of extreme circumstances that Mondev contends are required to establish a claim of denial of justice. According to Mondev, a denial of justice may be found--and I refer you to the screen, and this is from the Martini case, "where the defects in a decision caused the inference of bad faith on the part of the judges," or according to Mondev again, from the Rihani case, "where the decision of the court was lacking in good faith."

Or "When a Tribunal, which is always most reluctant to interfere, determines the evidence is so far from proving the case, that the decision must be characterized as so unfair as to amount to a denial of justice."

And lastly, and this is Mondev at reply, paragraph 106, quoting from the Jalapa case, "When the conduct complained of to the municipal court indisputably constituted an arbitrary and confiscatory breach, and the municipal court had withheld decision for several years beyond the time permitted under law."

As these cases, which again were cited by Mondev, reflect, procedural or substantive denials of justice may be found only in extreme circumstances such as inexcusable delay or bad faith. As Judge Tanaka of the International Court of Justice explained in the Barcelona Traction case, again I refer you to the screen, "It is an extremely serious matter to make a charge of denial of justice vis-a-vis a state. It involves not only

the imputation of a lower international standard to the judiciary of the state concerned, but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which states are not inclined to make if some other formulation is possible."

As I will explain, there is no basis for such a grave charge against the Supreme Judicial Court of Massachusetts, as we have heard, one of the most respected and perhaps the oldest appellate court in the western hemisphere, and particularly not so in that court's issuance of an unremarkable and unanimous decision applying a decades-old rule of contract law. There are no such extreme circumstances identified in the record here. In fact, as the Tribunal already has heard, the SJC's decision at issue here was routine. Mondev's claim of denial of justice is entirely unwarranted.

I now will begin with the--

PRESIDENT STEPHEN: Can I just come back to what you said about the grave step that we would

be taking. It's a step that's taken daily by the media, of course. It's a step that's taken weekly by politicians, taking decisions of the court and say, "This shows obvious bias." Is there some particular restraint that arbitrators should adhere to as distinct from those other groups that I've referred to?

MR. PAWLAK: I think among the restraints that the arbitrators should adhere to are the customary international law obligations that Mr. Clodfelter has elaborated on, and in addition to that, the case law that we have seen establishes the types of circumstances which are required before a denial of justice charge can be sustained. Mondev has not demonstrated that anything other than the extreme cases of the type that I've just referred to for you, are the types of case which would warrant such a charge.

PRESIDENT STEPHEN: Yes.

MR. PAWLAK: I will now proceed with the second part of my presentation. This part of my

presentation will focus on the SJC's rejection of LPA's contract claim, which Mondev characterizes as a denial of justice.

Mondev's claim of denial of justice centers on the following two aspects of the SJC's decision. One, Mondev complains that the SJC applied what Mondev contends is a new rule to the LPA case. Two, Mondev complains that the SJC violated Massachusetts procedural rules when it found that LPA failed to prove a repudiation on the part of the City. According to Mondev, the SJC instead should have allowed a jury to consider the issue on remand. As I will demonstrate, taking each of these two complaints in turn, Mondev's contentions have no basis in fact, and cannot establish a violation of international law in any event.

Let's consider Mondev's first contention, that is, that the SJC applied a new rule to LPA's case. Yesterday in response to a question from Professor Crawford, counsel for Mondev stated that,

quote, "The SJC did apply a new rule of law." Although Ms. Smutny acknowledged that that is not enough for an 1105 breach, I will dispel the notion that the SJC announced a new rule of law in the LPA case. As I will now demonstrate, Mondev's assertion simply has no basis in fact.

As we've heard, there's no dispute among the parties regarding the applicable rule of Massachusetts contract law. Indeed, as Professor Crawford noted yesterday, that applicable rule is the same that is followed in England. As we see on the projection screen, the rule requires, "When performance under a contract is concurrent, one Party cannot put the other in default unless he is ready, able and willing to perform, and has manifested this by some offer of performance."

At page 520 of its opinion, the SJC stated the rule as follows: "To place a seller in default, a buyer must manifest that he is ready, able and willing to perform by setting a time and place for passing papers, or making some other

concrete offer of performance."

PROFESSOR CRAWFORD: My understanding of the complaint on this head--and I heard Claimant's argument the same way you did. They said that the enunciation of a new rule may not, per se, be a breach of 1105, but nonetheless the new rule they were concerned about was not the Leigh v. Rule rule, but the square corners rule as it applied to government contracts. They were saying that under the law of Massachusetts the government is subject to the same contractual liability as anyone else, and that that was in effect an imposition of a heightened standard of proof in respect of the Claimant against the government in a contract, and not so much this rule as the other rule.

MR. PAWLAK: Right. I believe that we plan to address that a bit later.

PROFESSOR CRAWFORD: Okay, fine.

MR. PAWLAK: But I can direct you to positions taken in the written submissions, demonstrating that that's not the case, and also

the SJC decision on its face makes it clear that there was not any standard imposed on account of the contracting party was a government entity.

But I will continue and demonstrate the absence of foundation to the notion that this rule is new, which is an assertion that I understand Mondev has maintained in its pleadings, and I think may still at this point.

I refer again to the Leigh v. Rule rule up on the screen, and I note that it is this language from the SJC decision upon which Mondev bases its complaint that the SJC pronounced a new rule. And granted, there may be other new rules that Mondev has now identified.

MR. PAWLAK: However, the very same words that you now see reflected on the screen are found in the SJC's 1957 decision in LeBlanc v. Malloy. As reflected on the projection screen, there, the Court found that one party to the contract had placed the other in breach by designating the place for the performance of the agreement and the

passing of the papers necessary to complete the transaction.

In fact, in a 1991 decision, the Appeals Court of Massachusetts, citing the same cases as those relied upon by the SJC in the LPA case, stated the supposed new rule in the same words that the SJC later used in its 1998 decision. Again, I call your attention to the projection screen. The 1991 decision of the Court of Appeals reads, "To place the seller in default, the buyer was required, before the deadline for performance, to manifest that he was ready, able, and willing to perform by setting a time and place for passing papers or making some other concrete offer of performance."

It is not a coincidence that the 1991 Appeals Court decision and that of the SJC in LPA's case describe the rule in exactly the same way. Rather, it is because the same rule, established by a series of decisions from the 1950s and 1960s, cited by both courts, had been in place in

Massachusetts law for decades.

Thus, as we see, for at least the last several decades it has been clear, to maintain a breach of contract claim, a party is required to show that it is ready--we are now clear that for the last several decades in Massachusetts, to maintain a breach of contract claim, a party is required to show, one, that it is ready, able, and willing to perform, and, two, that it has manifested some offer of performance.

The only new aspect of the SJC's decision was the application of this decade's old rule to the facts of the LPA case. As Judge Kass pointed out in his Rejoinder opinion, and this on Page 3, "Mondev's theory that the SJC propounded a new rule in the Lafayette Place case would have as a consequence that any application of an accepted principle of law to a particularized set of facts constitutes a new rule."

As Judge Kass pointed out, that is not the way common law jurisprudence works. Indeed, the

essence of the judicial task in any system is the application of the law to the facts of the case.

As we have heard from Mr. Legum, the SJC applied the law in the LPA case and found that because LPA had failed to invoke the arbitration mechanism to fix the contract's terms, LPA failed to meet the first prong of the rule. In other words, LPA was not, as a matter of law, ready, willing and able to perform. As a result, LPA could not maintain its claim of breach against the City.

Considering the second prong of the rule, the SJC found that LPA had not manifested any intention to perform. Upon full review of the record, the SJC determined that the best evidence of an attempt to tender was the December 1988 letter to the mayor of Boston, sent just two weeks prior to the expiration of LPA's rights under the Option Section of the Tripartite Agreement. That letter was determined to be an empty gesture that the City could not possibly have acted upon in a

timely manner.

Having failed to tender, LPA, therefore, failed to satisfy the rule's second prong. The SJC rightly determined that LPA was not in a position to maintain a claim that the City breached the contract.

Massachusetts precedent confirms that the SJC's application of the law to the facts in LPA's case was eminently reasonable and just. Consider, for example, the SJC's 1969 decision in Mayer v. Boston Metropolitan Airport. The Mayer case involved an option to acquire land adjacent to an airport. The size of the parcel to be conveyed was subject to certain exclusions to be set by the seller.

In Mayer, in contrast to LPA, the parties actually met at the Registry of Deeds, and the buyers tendered payment for the land that the buyers claimed they were entitled to buy. However, the SJC found that this attempt to tender was not sufficient to put the seller in default. According

to the SJC, despite the buyers' offer of payment, the buyers had not established, at the closing, that they were ready and willing to accept less than all of the land that was described in the option. Therefore, the buyers had not established that they were prepared to perform.

It is clear that LPA did far less in this case. LPA failed to invoke the arbitration mechanism, and thereby failed to fix the unresolved terms of the contract. Moreover, the SJC found that LPA made no effort to tender; that is, LPA made no offer of payment, no statements of the land it claimed it was entitled to buy, nor the price to be paid for it. In fact, LPA did not argue before the SJC that it had tendered, and for that proposition I refer you to the SJC decision at Page 520.

PRESIDENT STEPHEN: When you speak of LPA, of course, it would have been its successor that would be doing that, wouldn't it?

MR. PAWLAK: Correct, but the SJC did

point out, before reviewing the Campeau letter that I referred to, that LPA had not tendered nor did LPA argue that it had tendered.

Thus, the SJC was correct to apply the decade's old rule of Leigh v. Rule and deny LPA's breach of contract claim. In doing so, the SJC violated no principle of customary international law. Common law courts developed principles of law through incremental decisions. That the interpretation of the law adopted in such decisions applies to the parties before it does not give rise to a violation of international law.

Mondev's counsel acknowledged as much yesterday in stating courts, especially in common law jurisdiction, apply new rules and, "We have judicially developed law. That is not an 1105 breach."

Thus, Mondev cannot maintain a claim that the SJC's application of law to the facts of the LPA case constitutes a retroactive application of law or that such application constitutes a

violation of international law.

In fact, even if the SJC decision had announced a new rule of law--and it did not--the application of a new rule of law or even the wrong rule of law is, at best, near judicial error. It would not constitute so grave an error as to render the decision manifestly unjust. Therefore, Mondev's new law contention under Article 1105 should be rejected in its entirety.

Now I will focus on Mondev's second complaint; namely, that the SJC should have remanded to a jury the question of whether the city repudiated its contract with LPA.

Repudiation may occur when one party to a contract renounces, by words or deeds directed to the other party to the contract, its obligations under the country. A repudiation is an outright refusal to comply with the contract's terms and notification of as much to the other contracting party.

It bears emphasis that LPA never suggested

to the SJC that the City repudiated the contract to sell the Hayward Parcel. I think Mr. Legum has gone into that in some detail in his discussion of the facts. LPA had a full opportunity to argue that it was excused as a result of repudiation, but as Judge Kass points out at Page 6 of his Rejoinder opinion, and I quote, "LPA did not press for a jury instruction on repudiation. That issue was not part of the case as LPA had framed it at the state level, either at trial or on appeal." Rather, and again as Mr. Legum explained, it was the City that had argued LPA had repudiated the contract.

In responding to the City's argument that LPA had repudiated, LPA provided the standard for determining whether or not a repudiation has been established under Massachusetts law. LPA advised the SJC that only a definitive and unequivocal manifestation of intention not to render performance could establish a repudiation.

As I will show, viewed in light of that standard LPA's standard, Mondev has no basis to

question, before this Tribunal, the reasonableness of the SJC ruling that the City did not repudiate its contract with LPA.

Based on the evidence offered by LPA, even viewed most favorably to LPA, no reasonable finder of fact could have ruled in LPA's favor on the repudiation issue. Thus, it was entirely appropriate, under Massachusetts procedure, for the SJC to reject a repudiation theory without remanding the issue to a jury.

Mondev, however, contends, one, that the SJC violated Massachusetts procedure in failing to remand the case and, two, that the SJC overlooked overwhelming evidence in finding that there was no repudiation. In reality, the SJC did no such thing. I will address each of Mondev's two contentions in turn.

First, Mondev's contention that the Supreme Judicial Court of Massachusetts usurped the role of the jury has no basis in fact, and even assuming it did, it would not give rise to a

finding of denial of justice, in any event.

In Massachusetts, as in most, if not all, jurisdictions within the United States, the judge and jury served distinct functions at trial. In many jurisdictions, the plaintiff has a right to a jury trial for civil actions. In such cases, the jury assesses the credibility of any witnesses and the facts presented by the parties to determine if the evidence supports the plaintiff's claims.

The judge, on the other hand, determines questions of law and instructs the jury as to the law that applies. In a civil jury trial, the judge does not act as a finder of fact. Under the Massachusetts Rules of Civil Procedure, and those of most, if not all other jurisdictions in the United States, there are circumstances in which the judge may upset the jury's findings of fact. Two such circumstances are as follows:

First, if either party to the case believes that the trial suffered from a defect, upon that party's motion, the Court may order a new

trial.

Second, and most relevant here, in cases where there is not sufficient evidence on which a reasonable juror may find in favor of the plaintiff, a Court may enter judgment for the defendant. There are two junctures during a trial particularly relevant here, at which time Massachusetts' judges may enter judgment. I think Mr. Legum also referred to these in his description of the facts.

One, at the close of all evidence, but before the case goes to jury, the judge may enter a directed verdict; two, after the jury returns its verdict, the judge may enter judgment notwithstanding the verdict.

The standard that applies in determining whether judgment is appropriate is the same in both instances, taking all of the evidence in the light most favorable to the party against whom the motion is directed. If the judge determines that a jury could reasonably find just one way, then the judge

should allow the motion for judgment.

Likewise, if an Appellate Court determines that on the entire record, taken in a light most favorable to the plaintiff, the plaintiff has not adduced sufficient evidence to take the case to the jury, then that is the end of the case. This is so because the plaintiff, by definition, has not met its burden of proof. Thus, the Appellate Court can enter judgment, even in the face of a contrary jury verdict. Absent a defect in the first trial, no second trial is warranted.

As Judge Kass makes clear in his Rejoinder opinion at Page 10, it is the duty of the Court, when the plaintiff has not met its burden of proof, to enter judgment for the defendant. Indeed, in Massachusetts, as in many other jurisdictions, it is the responsibility of the Courts to determine whether there is sufficient evidence to take the case to the jury.

So, far from being a usurpation, it is a judicial duty provided for by Massachusetts Court

Rule and, as Judge Kass points out, a practice "time-tested and universally approved."

Moreover, even if the SJC erred in its decision and violated Massachusetts procedure, and the SJC did not, its mere error would not give rise to a claim of denial of justice. There is no customary international law rule establishing that a jury must make any determinations. In fact, such civil jury trials are not the norm in many jurisdictions, including the United Kingdom.

The recent case of TP and KM v. the United Kingdom before the European Court of Human Rights provides further support for the conclusion that determinations such as that made by the SJC in LPA's case cannot give rise to an international claim.

PRESIDENT STEPHEN: Can I ask you, your references to Judge Taft and what he said--

MR. PAWLAK: Judge Kass.

PRESIDENT STEPHEN: Kass.

MR. PAWLAK: Yes, beg your pardon.

PRESIDENT STEPHEN: I thought you said Taft, thank you.

MR. PAWLAK: Continuing my reference to the TP and KM v. the United Kingdom, that case is included in the packet of supplemental materials that we distributed earlier today.

I am going to cast a selection from this case on the projection screen, so it is not absolutely necessary that you refer to it, but of course I will give you time if you'd care to. This is at Page 90 of the case that I will refer to.

In TP and KM, the European court, sitting as a chamber of 17 judges, unanimously made the following determination regarding what is termed the "striking-out procedure" contained in Part 3.42 of the English Civil Procedures Rules.

The European court stated as follows, "The decision of the House of Lords did end the case without the factual matters being determined on the evidence. However, if, as a matter of law, there was no basis for the claim, the hearing of the

evidence would have been an expensive and time-consuming process which would not have provided the applicant any remedy at its conclusions. There is no reason to consider the striking-out procedure, which rules on the existence of sustainable causes of action as, per se, offending the principle of access to court."

Mondev has offered no contrary evidence of state practice establishing any prohibitions on final determinations by a court.

I now turn to Mondev's contention that the SJC overlooked overwhelming evidence in determining that the City had not repudiated. As I will explain, the SJC did no such thing. Here, it is important to note that while the standard required the SJC to view the evidence in a light most favorable to LPA, the standard for establishing repudiation is rather demanding and specific. As we have heard, it requires a definite and unequivocal statement of an intention not to perform.

Thus, with that standard in mind, with an abundance of caution, the SJC combed the record for the specific evidence that might support a finding of repudiation. Indeed, Pages 522 and 523 of the SJC decision, on their face, establish that the Court carefully considered various grounds that could have supported a finding if the City had repudiated the contract.

The SJC considered, for example, the City's failure to obtain appraisal for a small portion of the Hayward Parcel and the City's involvement in determining the street layout in and around the parcel.

After considering each of the City's actions complained of by LPA, along with LPA's other assertions concerning the City's and the BRA's conduct, the SJC found that whether taken alone or together, these facts did not establish that the City would not perform under the contract.

The SJC quite rightly observed that LPA sought to attribute repudiation to the City based

on the mere fact that the uncertainties remained that LPA shared responsibility for resolving through the very mechanisms established in the Tripartite Agreement. There is not even a hint of support here, nor was there any evidence presented in the Massachusetts court, suggesting that the arbitration mechanism was inadequate or that either parties' reliance on that mechanism to resolve the contracts uncertainties would have been futile.

Mondev now asserts other evidence that LPA cited to the SJC could have resulted in a finding of repudiation on the part of the City. For example, LPA cited an internal memorandum and minutes of City officers to the effect that LPA would realize a windfall from the sale of the Hayward Parcel.

The internal memo also stated that certain of the officers desired to obtain fair-market value for the Hayward Parcel. LPA cited the memo, however, only as evidence of the City's alleged bad faith and motivation to breach the contract.

It was not offered as evidence of repudiation. In any event statements such as those in the memo could not have established the City's repudiation because such statements plainly fall short of a definite and unequivocal statement of intention not to render performance.

In addition, as the United States made clear in its rejoinder--and this is at paragraph 39--internal statements such as those contained in the memo cannot amount to repudiation. A statement of repudiation must be made by one contracting party to the other that the first contracting party will not perform.

And for more specific reference to that proposition, I refer you to the Kass Rejoinder Opinion, Exhibit 7, which is a citation to the restatement second of contract, Section 250.

The internal memorandum--

PRESIDENT STEPHEN: I suppose conduct of an appropriate sort would be amply sufficient to show it without any statement?

MR. PAWLAK: Certainly it--

PRESIDENT STEPHEN: There must be a statement, but you may have conduct which is unequivocal.

MR. PAWLAK: Certainly. A communication by either word or deed would suffice.

PRESIDENT STEPHEN: Yes.

MR. PAWLAK: The internal memorandum referred to by Mondev does not reflect that the City official stated an intention to breach the City's contract with LPA, and it clearly was not directed to LPA. Given the evidence, the SJC's decision that no reasonable jury could find a repudiation was amply reasonable and correct.

And I would like to take a moment to compare the Hastings case relied on fairly heavily yesterday by Mondev. Hastings involved a lease agreement for the King Hill Hall, Dance Hall and Club--

PRESIDENT STEPHEN: Perhaps when you refer to taking a moment, how much longer will you need

all together?

MR. PAWLAK: About 5 or 10 minutes at most.

PRESIDENT STEPHEN: What would the parties wish to do, to adjourn at 6 o'clock, or to go on for another 10 minutes.

MR. WATTS: We would be quite content to go on for another 5 or 10 minutes, if that would be convenient for the Tribunal.

PRESIDENT STEPHEN: Would that be convenient as far as you're concerned?

MR. LEGUM: It would be certainly convenient for me.

MR. PAWLAK: I wanted to compare the evidence cited by Mondev and the decision made based on that evidence by the SJC in the LPA case to the Hastings case that has been relied upon heavily by Mondev. And as I was mentioning, the Hastings case involved a lease agreement for a bar that had open terms, and the open terms were to be resolved by a comparatively very unsophisticated

device that would be--that would resolve those terms.

The important point about this case, which wasn't made clear in its review yesterday, is that the defendant in this case terminated the lease and notified the lessee of that termination quite explicitly. And it was not in contention that the repudiation was unclear, so I refer you to page 166 of the Hastings case for that particular point which may not have been noted yesterday. And I would like to also add that you might consider the Kass Rejoinder Opinion with respect to the Hastings case. You could look at pages 7 and 8, where, as Judge Kass pointed out, "The defendant's termination in that case was a real no for an answer."

If we compare here the LPA's evidence, which is quite weak--in fact it is so weak that LPA, though aware of the issue of repudiation in the trial court as well as before the SJC, did not choose to pursue that finding from any court. In

fact, it did not object to the absence of a jury instruction on repudiation presented to the jury with the jury charge.

Of course the SJC's decision, finding no repudiation, should be evaluated by this Tribunal in light of the arguments LPA made to the SJC, and not in light of Mondev's arguments to this Tribunal. But even considering Mondev's arguments to this Tribunal, it is clear that the SJC's decision was correct in amply that or exceeded the international minimum standard of justice that is incorporated into Article 1105.

Let's consider Mondev's assertions before this Tribunal regarding the record evidence supporting a finding that the City indicated a definite and unequivocal, unwillingness to convey the Hayward Parcel.

In paragraph 124 of Mondev's reply, and again, yesterday, Mondev claims that evidence was overwhelming. Mondev cites the internal memos and minutes that I already have discussed. Mondev

cites other evidence that also cannot be credited in support of a finding of repudiation.

For example, Mondev cites three instances of actions taken by the BRA as evidence of the City's repudiation. That evidence cannot support a finding of repudiation by the City, particularly in light of the finding that the BRA was not acting as the City's agent in connection with the contract, a finding LPA never contested.

In addition, Mondev cites to this Tribunal allegations of bad faith on the part of the City and the BRA, particularly in connection with the design review process. Indeed, after a complete review of the evidence, the SJC in Section 2C of its decision, determined that LPA--I'm quoting--"LPA cannot argue the BRA or the City acted in bad faith with regard to the design review process." Thus, even considering Mondev's arguments to this Tribunal, including arguments LPA did not make to the SJC, there is no basis for a finding of a definite and unequivocal statement of intention not

to perform.

Far from being, quote, "nothing short of inconceivable" that the SJC could reach the, quote, "incredible conclusion that no repudiation had been established," Mondev's asserted grounds for a finding of repudiation by the City, taken alone or together, do not satisfy that standard.

Additionally, Mondev cannot predicate its claims that it was denied justice in the course of municipal judicial proceedings on the basis of a position that it could have taken in those proceedings, but did not. To the contrary, there has been a translation into international law of the rule common to municipal systems that a litigant cannot have a second try if, because of ill preparation, he fails in his action. That principle applies particularly when a litigant seeks a second round to use a strategy abandoned in the first one.

A holding of the appeals chamber of the International Criminal Tribunal for the former

Yugoslavia from early last year is on point here. In Prosecutor v. Dalalich, the appeal chamber held, quote, "A party should not be permitted to refrain from making an objection to a manner which was apparent during the course of the trial and to raise it only in event of an adverse finding against that party."

So to here. Mondev's claims cannot be entertained to the extent that they are based on positions LPA never advanced in the Massachusetts courts.

Before I conclude, with respect to the SJC's square corners comment at page 524 of its decision, I note that Mondev stated that comment could not give rise to a violation of Article 1105. Nevertheless, I would like to direct the Tribunal to Judge Kass's submissions on this point which make it clear that the SJC did not hold LPA to any higher level of contract compliance. In particular I refer the Tribunal to Judge Kass's opinion submitted with the Counter-Memorial at paragraph

61. And in his rejoinder opinion at page--

PROFESSOR CRAWFORD: Paragraph 61?

MR. PAWLAK: Paragraph 61 of the Counter-Memorial submission. Rejoinder opinion at page 10. And I can also refer the Tribunal to the rejoinder, footnote 66 and the accompanying text. And suffice it to say that Mondev has not demonstrated any customary international rule of principle that would establish that a higher level of contract compliance, which is not present here, would violate a rule of customary international law.

In conclusion, for the reasons I have stated, and for those reasons set forth in the United States' written submissions, it is evidence that the SJC decision amply met or exceeded international standards of justice. Mondev's attempt to find flagrant procedural deficiencies or gross defects in the substance of the judgment itself should be rejected by this Tribunal.

Thank you.

PRESIDENT STEPHEN: Thank you very much,

Mr. Pawlak.

Well, we adjourn now until 10 tomorrow morning.

MR. LEGUM: Very good. Thank you.

PRESIDENT STEPHEN: And I take it that as far as time is concerned, you look as if you are up to date, do you?

MR. LEGUM: I suspect that we will be fine.

PRESIDENT STEPHEN: Good.

MR. LEGUM: We will scream and yell and plead in the event that we will not.

PRESIDENT STEPHEN: Yes, well, I'll try to ignore you if I can.

[Laughter.]

PRESIDENT STEPHEN: Thank you.

[Whereupon, at 6:05 p.m., the hearing recessed, to reconvene at 10:00 a.m. on Thursday, May 23, 2002.]