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 V

Friday, May 24, 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

APPEARANCES:

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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: Good morning.

MS. SMUTNY: Good morning.

PRESIDENT STEPHEN: Are you ready to start?

MS. SMUTNY: Yes. I will begin this morning by addressing those points of substance rather than the great quantity of invective presented by Respondent in its submissions over the past two days.

On the preliminary objections, as to Article 1116, the arguments presented by Respondent are largely those set forth in their written submission, so there is not much that needs to be said beyond what was already addressed on Monday on this point. I also note that Respondent accepts that Mondev has presented, under Article 1116, and it simply reserves its right to address the question of whether Mondev has suffered any loss should this Tribunal conclude that Respondent has breached its NAFTA obligations.

A few additional observations, however, are warranted. Respondent's position fails to address the significance of the definition in NAFTA Article 1139 of "investment" as including investments that are owned indirectly. On this point the Tribunal may find interesting the discussion in a book written by Kenneth Vandevelde, formerly of the United States Department of State, a book written in 1992 that is a survey of U.S. investment treaty practice as of that date. Mr. Vandevelde--and we'll have a copy of this section of his book for the Tribunal at the end--Mr. Vandevelde describes the significance of the definition of "investment" contained in those treaties as of 1992, the definition of "investment" contained in those treaties as including indirect ownership. This definition of investment, he said, was in part a response to the decision of the International Court of Justice in Barcelona Traction Light and Power. The BIT definition of "own or control" thus renders the Barcelona

Traction decision inapplicable to covered investments. Investment owned or controlled by United States nationals is covered regardless of whether it is owned or controlled through a company incorporated under the laws of another State.

In any event, we'll have the section of Mr. Vandevelde's book for the Tribunal to consider for itself.

The type of derivative claim permitted by Article 1117 is not made necessary by the Barcelona Traction case. It is made necessary, as discussed on Monday, by Article 1117(4), a provision not found in other U.S. investment treaties. This was discussed on Monday and need not be revisited here.

When an investor makes a claim under 1116, as Claimant stated in response to a question from Professor Crawford, of course the investor will bear the burden of proving its losses, that is the amount of loss suffered by the investor itself. The Claimant also stated clearly that a Chapter Eleven Tribunal is not a forum for tax counter-claims, and

in the same vein, it certainly is not Claimant's position that claims of intervening creditors would have to be considered as well. Of course, any rights that any third parties may claim to have in the proceeds of an arbitral award must be resolved in the appropriate municipal forum.

Claimant did not mean to suggest, in response to Professor Crawford's question, that the investor would have to prove losses net of third-party or tax claims against any of the vehicles through which the investor might own its investment. I hope that Claimant's position in this regard is clear to the Tribunal.

As to Article 1117, I believe Claimant's position was clearly enough understood. Claimant reiterates its position as stated on Monday.

I'm going to turn not to the--I'm sorry.

PROFESSOR CRAWFORD: Again, it may not actually arise, but let's assume for the sake of argument Manufacturers Hanover had a claim against--it would be LPA, wouldn't it--in respect to any

recoveries that LPA might make in respect of the claims associated with the project. Let's assume further that Mondev succeeds in its claim here. Therefore the United States has a direct obligation to pay Mondev. This is an 1116 proceeding, not an 1117 proceeding. What's the situation?

MS. SMUTNY: If then Manufacturers Hanover felt it had a claim to the proceeds, Manufacturers Hanover would have a right of action in an appropriate U.S. Court against Mondev. The cause of action might be any number of things. If they believe there was fraudulent conveyance or any such this, these matters can resolve--be resolved through any number of municipal court remedies. It's not an unusual situation.

As to the mortgage exclusion, no doubt the Tribunal will first recall the limited nature of Respondent's objection on this score as relating at most to the SJC's review of LPA's contract claim against the City. The Tribunal also will recall that the parties' dispute on this issue begins on

the initial question of the applicable rules of contract interpretation relevant to discerning the scope of the mortgage exclusion. The Tribunal may have noted that Respondent points to the contract that arose as a consequence of Mondev having exercised its option to purchase the Hayward Parcel. Respondent argues that that contract right is an interest in real property, importing therefore the rule that only the plain text of the provisions should be considered. Claimant's expert, Professor Scott, addresses that very point at very great length, and refutes that contention vigorously in his two opinions.

As discussed on Monday, however, even assuming, as Respondent urges, that only the plain text may be considered to interpret the parties' agreement, in addition to what already was stated on Monday, two observations may be made. Respondent misleads the Tribunal when it claims that Mondev takes the position that there is no right to develop in the Tripartite Agreement. I

should think it was perfectly clear, even to the Respondent, that it is Mondev's submission that the only right to develop contained in the Tripartite Agreement is the one contained in Section 6.02 of the Agreement. Respondent urges that it is only the plain text that can be considered on this point, yet has utterly failed to indicate which right of development contained in this Tripartite Agreement was intended to be excluded.

As demonstrated on Monday, neither Section 4 nor Section 9, to which Respondent had pointed to and relied upon in its submissions, neither of those sections provides, even remotely, any such right. And even relying on the plain text approach, basic principles of contract interpretation urge that provisions be read in such a way as to render them effective. One must seriously inquire what the point of that mortgage exclusion then could be. Section 6.02 of the contract in that context makes the most sense. Indeed it is the view attributed to the mortgage by

the only parties to the mortgage, the bank and LPA.

As to the evidence other than the text that might be considered, taking into account the circumstance as a whole, that is assuming the UCC or Uniform Commercial Code were applicable, that is if the rights at issue were considered, quote, unquote, intangible property rights, let me make the following observations.

The Tribunal might recall that Respondent took great pains to demonstrate that the various materials offered as further evidence of the fact that in all these years Manufacturers Hanover Trust never took the view of its own rights that Respondent urges in these proceedings, a fact, by the way, that is indisputable in any event. Respondent took great pains to demonstrate that the various documents that Claimant submitted as evidence on that point did not fit the category of evidence defined in the UCC as a so-called course of performance. This fine distinction, even if Respondent were correct however, does nothing to

advance Respondent's objection. As noted on Monday the UCC, where applicable, requires an assessment of the circumstances as a whole to discern the bargain of the parties in fact. We point to a slide.

This also can be found in Professor Scott's opinion. This is Professor Scott's Reply Exhibit No. 9, a section of the UCC. This is the basic rule in the UCC for interpreting what the content of a party's agreement is. One can see clearly Section 1-201 of the UCC, an agreement under the UCC means, quote: "The bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing, usage of trade, course of performance," These are terms defined by the Act, but it's not exclusive.

In other words, consistent with the UCC's approach to contract interpretation, the content of the parties' agreement can be understood by reference to the text of their agreement, or by

quote, "implication from other circumstances." Those other circumstances here demonstrate that the bank itself did not act as though it ever considered the Hayward Parcel option to have been conveyed. Neither should this Tribunal.

Moreover, the fact that the foreclosure was ultimately made effective by Court action does nothing to enhance Respondent's objection on this point. No Court ever considered the argument raised by Respondent in these proceedings.

Finally, a point regarding the burden of proof on this issue. It is the Respondent that bears the burden of proof on the merit of the objection that it has raised. Claimant has amply satisfied its burden of demonstrating a prima facie case that at all material times it owned the contract rights at issue, at the very least by the fact that in all these years the bank itself never took the position that it owned those rights. Nor did the City or the BRA ever advance this argument as a basis for dismissing LPA's contract claims.

It is the Respondent that has objected on this ground and it is the Respondent that bears the burden of substantiating the merit of its objection, a burden Mondev would submit, it has failed to meet, but in any event, I doubt this Tribunal will have to decide this point on the technicality of burden of proof.

I'm going to turn now to the breaches of 1105. I now redirect your attention to Mondev's submission that the failure to provide a means of recourse against the BRA's wrongful conduct in the circumstances of this case violates NAFTA 1105(1).

A number of points must be made in response to Respondent's submissions. First point: we are not dealing here with a question of foreign sovereign immunity. This is an immunity granted to a municipal organ of the State. The Respondent has made quite a number of misleading assertions regarding the nature of Mondev's claims and the authorities relied upon for support in that context. But what Respondent apparently fails to

recall is that it was the Respondent who introduced into these proceedings the entirely irrelevant comparison to foreign sovereign immunity in its Counter-Memorial at page 53, in which it presented arguments on the basis of its reference to what it called the "familiar and recognized doctrine of foreign sovereign immunity."

And it was in responding to that misguided line or argument that Claimant made certain observations that demonstrated that Respondent's points were not only irrelevant, but were erroneous as well, and I would direct you to the Reply paragraphs 81 through 84.

The second point: Mondev does not dispute that the United States, as well as its constituent subdivisions, including Massachusetts, may enact and maintain laws granting immunity from suit to its state organs consistent with international law. Throughout these proceedings Mondev has observed the fact that many states do choose to do so in various circumstances. For that reason a good deal

of Respondent's submissions on that point to the effect that there is no rule of international law prohibiting such grants of immunity, while perhaps interesting, do not speak to the point, of which of course it is--the point is, of course, that it is the application of the law to a particular set of circumstances that needs to be examined.

The third point: in enacting such laws granting immunity, it is entirely a matter of the State's own domestic policy priorities to consider whether an appropriate balance has been struck between the needs for a government to govern effectively and the rights of individuals to have access to courts for wrongs they may have suffered. The Respondent, in its Rejoinder, introduced references to decisions of the European Court of Human Rights, and to the jurisprudence under Article 6(1) of that Convention.

In Claimant's submission those cases are not relevant to the question presented in this case. The State's parties to the European

Convention on Human Rights have agreed to hold their domestic systems up to the uniform standard set forth in that Convention, including, obviously, vis-a-vis their own nationals. Those States' parties have thus agreed to measure the reasonableness, for example, of grants of State immunity, among other things, by reference to the principle of proportionality embodied in that Convention and subject to the review of the European Court of Human Rights. Thus for those States' parties the otherwise domestic policy analysis is subject to that external Convention check.

The significance of the rulings in the cases decided under the European Convention is that they illustrate the manner in which the balance might be struck between laws limiting access to Courts and the citizen's right to have a fair hearing within the meaning of 6(1) of the Convention.

That however leaves open entirely the

question of whether a national's right to a fair hearing within the meaning of Section 6(1) is the same substantively as a foreign investor's right to treatment that is fair and equitable and in accordance with full protection and security as set forth in Article 1105 of the NAFTA.

Even in the United States there no doubt are constitutional limitations on the degree to which a State may choose to immunize itself from suit where it has interfered with the property of its nationals before it encroaches upon the U.S. Constitutional protections against takings of property.

As noted previously, however, whereas a State may immunize itself from suit by private litigants in its own Courts subject to the limitations imposed upon it by whatever domestic constitutional limitations may be in place vis-a-vis its own nationals, a foreign national is in a different position. A State's obligations towards foreign investors are not defined by the State's

domestic laws. Rather, where a treaty for the protection of foreign investment is applicable, the State's obligations are defined by reference to the applicable international standards.

Even were this Tribunal to conclude, however, that Article 1105 of NAFTA permits States to limit recourse to foreign investors so long as such limitations were consistent with the principle of proportionality as reflected, for example, in Article 6(1) of the European Convention on Human Rights. As detailed on Tuesday, the particular immunity granted to the BRA in this case solely on the basis that the BRA was a, quote, "public employer," to shield it from suits even where it intentionally interferes with a foreign investment would fall afoul of Article 6(1).

PROFESSOR CRAWFORD: Ms. Smutny, isn't the answer to that in the context of NAFTA that NAFTA itself provides a remedy? Let's assume that an immune entity such as BRA in respect of non-contract claims has done something which is a

breach of 1105, then you can go straight off to arbitration. You don't have to test the immunity in local courts. So isn't that a sufficient answer, that NAFTA itself provides a remedy?

MS. SMUTNY: If what we were addressing here was the underlying treatment of the BRA and the City, the answer would be yes. What we are addressing here is the requirement that the States provide a remedy for wrongful conduct, and so it's at a slightly different level.

PROFESSOR CRAWFORD: The argument is that 1105 guarantees that there will be a remedy in the receiving State in respect to breaches of the receiving State's laws that are not themselves breaches of NAFTA?

MS. SMUTNY: That's right, but there needs to be a remedy when a State breaches its own laws in a manner that's aimed directly at and interferes with a foreign investment.

PROFESSOR CRAWFORD: Even though that conduct is not itself a breach of NAFTA?

MS. SMUTNY: That's right.

In this regard, talking about Article 6(1) of the European Convention which Claimant referred to the Matthews case which was submitted to the Tribunal on Tuesday, because it is instructive as it demonstrates that where an immunity is too broad, it falls afoul of Article 6(1). However, since Respondent observes that the Matthews case was not decided by the European Court of Human Rights itself, Claimant would draw the Tribunal's attention to the case of Osmond v. the United Kingdom, in which the Court held that a similar blanket grant of immunity is inconsistent with Article 6(1), and if the Tribunal would wish, Claimant can provide a copy of Osmond v. the United Kingdom.

Fourth point: although a State is free to grant itself immunity, when a State does so it opens itself to the possibility that if a State organ violates its own laws so as to deprive a foreign investor of its investment, and does so in

such a manner that its conduct falls within the scope of an immunity, the State will be exposed to liability as a matter of international law for failing to provide recourse to the foreign investor against such violations. In short, it can grant itself immunity, but it does so at its own risk internationally. That is, when a State does grant itself an immunity from suits in respective conduct taken in violation of its own laws, that is willfully directed at and does injure a foreign investor, the State obviously thereby denies recourse to the affected foreign investor for the wrong suffered. A State that concludes a treaty for the promotion and protection of investment and promises to accord, among other things, full protection and security to such foreign investment in order to promote and encourage such investment, that State must not act in derogation of its own laws towards such investments. But if it does, it must provide a means of claim when losses are sustained as a consequence.

Before moving entirely to the next topic, Claimant feels compelled to point out to the Tribunal that in presenting its argument, Respondent apparently has considered it advantageous to accuse Mondev and its counsel of misrepresenting points of fact and law in the presentation of the case. There are, unfortunately, many example, and it would be tedious and time consuming to refer to all of them and to clarify the record. To illustrate one in connection with the immunity issue, Respondent, in its oral argument on Thursday claimed that Mondev sought to mislead this Tribunal with its reference to the United States Supreme Court case of Larson v. Domestic and Foreign Commerce Corporation. As may be seen in Mondev's Reply, paragraph 78, Mondev cited to the Larson case for the undeniable proposition that State practice has been, in the last several decades, to increase the transparency of State conduct and the accountability of State organs and to find objectionable in principle

immunities that in effect deny a legal remedy in respect of what may be a valid legal claim.

Respondent sought to discredit Mondev's point and its reliability more generally by protesting that the, quote: "full quote from the case demonstrated this was a position not taken by the Court, but by a party arguing to the Court." And Respondent purported to provide the full quote as follows, and here is what they say. "It is argued." And that's the point.

Of course, if the Tribunal were to consult the full text provided by Mondev at Legal Appendix 66, it could see the full quote for itself, which is as follows.

"It was argued that the principle of sovereign immunity is an archaic hangover, not consonant with modern morality, and that it should be limited wherever possible. There may be--there may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the

sovereign, and we, the Court, should give hospitable scope to that trend. But the reasoning is not applicable to the suits in that particular case."

Here the Supreme Court clearly expresses its support for restricting the immunity of the government against claims for damages, which was Mondev's point in referring to it.

As I said, there simply is not enough time, and it would be quite tedious, to point out the many other similar mischaracterizations misleadingly advanced by Respondent. Claimant, however, has faith this Tribunal will not be so easily misled and distracted by the substance of the claims and arguments presented. Claimant trusts that the Tribunal will turn to the actual texts of the legal authorities if there is any doubt on any point.

Going to now redirect the Tribunal's attention to the manner in which the Supreme Judicial Court of Massachusetts dismissed LPA's

contract claims.

As a preliminary observation, however, the Tribunal will recall that Respondent began its presentation by expressing its indignation at Mondev's audacity to contend that the treatment by the SJC of Mondev's claim could constitute a denial of justice. Mondev trusts that this Tribunal is fully aware that even the most respected courts are not above, on occasion, rendering a defective decision. It would not shock this Tribunal, I am sure, to hear that the decisions of the SJC in fact have been reversed and vacated by the United States Supreme Court no less than 18 times in the past several decades. The point is there clearly comes along a case now and then that even the SJC mishandles.

As to Respondent's suggestion that it is hard to conceive of any decision of the highest appellate courts of England, Canada, Australia or the United States being found to constitute a denial of justice under international law, one

might observe the fact of the limited number of occasions on which these States have subjected themselves to an international Tribunal in which a claim by a foreign investor for denial of justice even could be brought. And that may have something to do with the apparent absence of precedents involving these States.

But just to think of one very famous case out of U.S. history, the Dred Scott decision of the United States Supreme Court, which essentially found slavery to be lawful, is one very egregious example that illustrates the point well enough. It will come as no surprise to this--

PROFESSOR CRAWFORD: I think to be fair, the United States was making a more limited claim. It was saying that there never had been a case where those courts have been held internationally to have committed a denial of justice, as distinct from to have made a decision countered international law. I can think of about two dozen decisions of the courts of Australia and the United

Kingdom which were wrong as a matter of international law.

MS. SMUTNY: All quite right and I--

PROFESSOR CRAWFORD: It started with Mortenson v. Peters.

MS. SMUTNY: Right.

PROFESSOR CRAWFORD: And Politaise (?) and the Commonwealth, et cetera, but of course they were decisions on substantive points as the Dred Scott case.

MS. SMUTNY: Quite right. And I think the point is simply to illustrate that even the SJC is not infallible. No Court is infallible, as the judges are human.

And as Professor Crawford has observed, this Tribunal is fully aware that the decisions of the highest courts of many European countries, including that of England, are routinely held to stand in opposition to applicable requirements of international law. Indeed a non-exhaustive search reveals that at least on 50 occasions the European

Court of Human Rights has found a violation of the European Convention on Human Rights in cases originating in the Courts of England alone. That's just simply the point.

As to Mondev's claim regarding the SJC's treatment of LPA's contract claim, however, Mondev first of all stands by its submission on this ground as set forth on Tuesday.

PRESIDENT STEPHEN: You don't simply claim that there was an error of law, do you?

MS. SMUTNY: No.

PRESIDENT STEPHEN: No.

MS. SMUTNY: And I'm about to review that very quickly.

A few points I would say may need clarification following Respondent's submission. The SJC's holding that in case involving contracts like the Tripartite Agreement that leave terms such as "price" to be determined by formulae and procedures, that a plaintiff must, as a matter of law, invoke such formulae and procedures in order

to be ready, able and willing, and in order to put the defendant in default, was new as a matter of law. It very clearly, in any event, was not the basis upon which the Trial Court handled the law below.

At this point an observation regarding retroactive application of new rules of contract. There's nothing wrong with a Court, particularly in a common-law jurisdiction, articulating a new or refined rule of law. However, having articulated a new rule, established principles of Massachusetts Law required the SJC to consider whether LPA could have been expected to have foreseen that rule 10 years before it was announced and whether that rule could fairly be applied retroactively to LPA. That is the requirement, that it invoke the formulae and procedures in the contract in order to sustain a claim for breach.

PROFESSOR CRAWFORD: I am slightly confused as to which is the new rule. Is it the rule in the case with the rule about contract or is

it the square corners rule, as I have been calling it?

MS. SMUTNY: I must say, as Professor Coquilette addresses in his opinion, there were quite a number of startling and new rules, if you will, in the SJC's analysis. It was a very surprising decision.

Respondent's--

PROFESSOR CRAWFORD: So your answer--

PRESIDENT STEPHEN: What is the answer to the question that has been put to you--all of the above?

MS. SMUTNY: All of the above. This is not something that we're just stating now. This has been stated in the Memorial, and in the Reply and in Professor Coquilette's two opinions. He sets forth very clearly where he takes the view that there was a significant and serious departure, and at what point the retroactivity analysis might have taken place.

PROFESSOR CRAWFORD: With respect to the

principle of retrospectivity, that's a well-established principle of Massachusetts law, is it that when a court develops what amounts to a new rule of domestic law, it must consider whether it's fair to apply that retrospectively?

MS. SMUTNY: Exactly. That was the very next point I was going to make, exactly. The general principle is that new decisional law will not be applied retroactively in contract and property cases simply because parties need to know the rules governing complex contractual relationships and what will be necessary to protect those contractual rights in the event of a dispute. The SJC made no policy analysis as to retroactivity, although the record was clear that Campeau and LPA had taken affirmative steps to protect their contract rights vis-a-vis the City, on the advice of counsel, based on the law as it existed at that time.

This, therefore, was a classic case where retroactive application of a new rule of law might

have been considered unfair and therefore appropriate, but ultimately the consequence of applying the new rule to LPA was that the SJC was left to consider whether, viewed in the light most favorable to LPA, evidence was sufficient for a reasonable jury to conclude that LPA should have been excused from any further performance.

The standard for finding excuse did not require a verbal repudiation by the City. It was, as the SJC stated itself, the law does not require a party to tender performance if the other party has shown he cannot or will not perform. The law does not insist on futile ceremony. In this case, that meant whether a jury might reasonably have concluded that for LPA to have invoked the appraisal and arbitration mechanisms in the circumstances of the case would have been a futile ceremony.

So what was the evidence in the record for the SJC to consider? It was, in a word, overwhelming. First, the appraisal and arbitration

mechanisms themselves, which were obviously limited and not a solution for a party to "abandon" the Tripartite Agreement. Moreover, there is nothing in those provisions that would have extended the drop-dead date, as Professor Crawford inquired, so that any arbitration ran the risk of running past January 1, 1989, nor could those arbitration provisions order specific performance by the City to deliver on a sale.

The City's Real Property Board minutes, another piece of evidence, from January 1988, in which there is the recording that the Board expresses its desire to receive fair-market value for the Hayward Parcel, abandoning the Tripartite Agreement formula; a memorandum from the Chairman of the City's Real Property Board to the City's Mayor, describing the Tripartite Agreement formula as giving a windfall to LPA that should have been avoided; repeated statements to LPA, even in the newspaper, by BRA Director Coyle that he wanted to change the Hayward Parcel deal to reflect a much

higher price for the City.

Here, a word about the BRA. The contents of the parties' stipulation that the BRA Director Coyle was left by the Mayor to act as he saw fit, and that the Mayor considered the BRA as being responsible for dealing with the Lafayette Place Project, thus, making all of the evidence as to the BRA's intentions, acts, omissions relevant to assessing the likelihood of the City's willingness to convey the Hayward Parcel at the Tripartite Agreement price in the face of BRA resistance. This evidence was before the SJC, and in the record, and might have been considered on a remand on the issue of excuse.

Evidence of the coercive manner in which the BRA placed various zoning restrictions on the development project, including arbitrary building height limitations, all of which, by the way, magically disappeared the moment Campeau agreed to pay the market price, this the jury need not have overlooked.

The fact that these zoning obstacles were used to coerce LPA to conclude an amendment to the Tripartite Agreement was a conclusion the jury would have been free to make, establishing a drop-dead date by which the time the parties had to close on the Hayward Parcel. That amendment established an expiration date on LPA's option and closure rights, where no such expiration date had existed previously and which provided no benefit to LPA whatsoever, other than the hope that BRA actually would work to meet the deadline in good faith, as it promised it would. An issue for the jury was whether or not LPA was coerced into entering into that agreement.

The minutes of September--

PROFESSOR CRAWFORD: Sorry. You say an issue for the jury was whether it was coerced.

MS. SMUTNY: In other words, when one is reviewing the evidence, in a light most favorable to LPA, one could consider whether the jury might have reasonably concluded, in the face of all of

the evidence, that LPA is correct in characterizing the circumstances under which that amendment was concluded.

PROFESSOR CRAWFORD: It's one thing to say that it was coerced, as it were, as a relevant fact in terms of a more general cause of action. You never--neither Mondev nor LPA--took the position that it was coerced in the sense of being invalid or voidable.

MS. SMUTNY: No, it is the circumstances of why that agreement was entered into and what it reflected, in terms of the parties' intentions, and whether or not that was or was not a vehicle used by the BRA to squeeze LPA into forcing basically an accepted deadline, whether or not that was just, in the end, a tool used by the BRA to put additional pressure on LPA to agree to pay the market price or this development is, in effect, never going to go forward.

The circumstance, as a whole, the jury was free to look at and make its conclusions for itself

as to what the story revealed. Was this a set of circumstances that, in any reasonable world, would have likely have led to the City being willing to convey the Hayward Parcel at the agreed contract price, that is the general point that could have been submitted to the jury.

PROFESSOR CRAWFORD: Is there anything to be inferred from the jury verdict against BRA, which was not formally recorded, in respect of the question of coercion?

MS. SMUTNY: I think that there is, and I actually am going to address that in a moment.

But going on to more evidence that was available. The minutes of the September 25, 1987, meeting of the City's Real Property Board, in which the third supplemental agreement, this drop-dead amendment that imposed the drop-dead date for closing on the Hayward Parcel, was described by the City as being "totally in the City's favor. In fact, would free the City to dispose of the parcel to another development company if LPA were unable

to perform satisfactorily within the option period."

There was evidence that the BRA Director Coyle expressly refused to approve the transfer of LPA project to Campeau unless it, and LPA, agreed to pay the market price for the Hayward Parcel, rather than the Tripartite Agreement formula, in which context, the BRA Director stated bluntly that he would not approve the sale until I get a higher value for the land, and I don't want you to take all of that profit and run back to Canada.

The evidence presented by LPA that the BRA sought to place false tax claims as obstacles, and a word on this point. There is ample evidence in the record, and I noted that the Respondent was careful to refer to unsubstantiated or uncorroborated statements by LPA that sworn statements by the BRA. The fact is that there was evidence in the record for the jury to consider that the SJC could have read, in the light most favorable to LPA, that LPA's claims of false tax

claims were justified.

Evidence of the arbitrary manner in which the City and the BRA repeatedly created obstacles in the design review process applicable parcel, including evidence of the City's extraordinary plan to route a road through the middle of the Hayward Parcel that would have destroyed its commercial development potential and which, while it remained a live proposal, interjected uncertainty over what the BRA would approve by way of a design, but yet again, magically, disappeared overnight as an issue the moment Campeau paid the market price.

There were erroneous allegations about the need for obtaining final designation before LPA could proceed with the development. There were demands that LPA perform repeated traffic studies, to which the BRA never responded, but which the BRA conveniently pointed to as an excuse that the design plan could not be established.

There were attempts to require a residential building after a major department store

had been obtained and its participation had been publicly announced for the Hayward Parcel.

There was testimony that when LPA complained of the many delays, the BRA Director responded by saying, "That's because you went to see the Mayor. Next time you go around me, you won't be building in Boston any more. I look after development, not the Mayor."

The trial judge himself--

PROFESSOR CRAWFORD: Which is presumably something he would have said to an American as well.

MS. SMUTNY: Well, quite possibly.

The trial judge himself ruled post-trial that there was sufficient evidence in the record to support a jury finding that the BRA had unlawfully attempted to exact a higher price for the Hayward Parcel than would have been obtained using the Tripartite Agreement formula. In short, the record was very clear that the parties all well understood the approximate price of the Tripartite Agreement

formula, that that formula would yield. How else could the BRA have concluded that the formula price was inadequate without having to go through the exercise of an appraisal process to get an exact calculation?

The record equally showed that it was with such a very clear understanding of that price that the City deliberately resolved not to complete the sale of the Hayward Parcel at the contract price formula, but rather, in the City's own words, to abandon the Tripartite formula.

It is nothing short of inconceivable that the SJC could have applied the standard of appellate review, viewed such evidence in the light most favorable to LPA, as Massachusetts law required, and still conclude that there was not sufficient evidence upon which a reasonable jury can conclude that the City had expressed an unwillingness to perform its obligations under the Tripartite Agreement, thereby excusing LPA from commencing the futile ceremony of an appraisal

arbitration.

The SJC clearly did not apply that standard; instead--and this is where the square corners comes in--instead pronouncing that private parties need to be particularly assiduous in dealing with government entities. This is particularly evidence that they did not view the evidence in the light most favorable to LPA.

Private parties must be particularly assiduous in dealing with government entities. The SJC finds that this--well, it finds that this mountain of evidence was not enough for a reasonable jury to conclude that any effort to invoke arbitration would have been a futile exercise, particularly where such arbitration could not have ordered specific performance by the City.

It's an incredible and surprising result. The SJC's dismissal of LPA's claims was arbitrary and profoundly unjust.

Finally, I wish to make several observations regarding the facts in this case as

presented to this Tribunal. Remarkably lacking in Respondent's handling of the facts--

I'm sorry?

PRESIDENT STEPHEN: Can I ask you something?

MS. SMUTNY: Yes.

PRESIDENT STEPHEN: What difference did it really make, as a matter of law, to apply the square corners, if that's what it's called, rule? The other general proposition that the SJC put forward would have been sufficient in itself without any reference to square corners, would it not, to find against Mondev?

MS. SMUTNY: That--

PRESIDENT STEPHEN: That is, the general proposition that it put forward about it is that--

MS. SMUTNY: The appraisal procedures, that that would have been enough?

PRESIDENT STEPHEN: Yes.

MS. SMUTNY: Yes, I think the square corners was pile-on by the SJC--

PRESIDENT STEPHEN: Square corners really adds nothing, does it, to the requirements that Mondev would have had to comply with?

MS. SMUTNY: It was the nail on the coffin on the question of whether or not there was sufficient evidence to refer back to a trior of fact on the question of excuse. Because, basically, what happens is that the SJC determines that LPA could not have shown ready, able, and willing, could not have put the City in breach unless it invoked the arbitration procedures.

So then the question is, okay, well, what about excuse? Is there enough evidence in the record to submit this question back to the jury? And in analyzing all of that evidence, which it should have been doing in the light most favorable to LPA, and it parses out just pieces of evidence, clearly, disregarding enormous quantities of evidence that would have been relevant to the point.

It is in that context that it throws in

the observations and, in any event, here's a private party dealing with a government. They should have been particularly assiduous to comply with the obligations, and for that reason it's sort of the nail on the coffin of saying, you know, we're just not persuaded that this could have been enough. This I think is indicative of how the SJC was viewing the evidence not in the light most favorable to LPA.

Well, the general several additional obligations regarding the facts in this case. Remarkably lacking, in Respondent's handling of the facts, is any discussion of the undeniable evidence that the City and the BRA resolved not to accept the Tripartite price for the Hayward Parcel. It is proverbial elephant sitting on the table. The City and the BRA were determined to get market price. Everything that ensued flowed from that fundamental fact.

Viewed through the lens of that essential point--

PRESIDENT STEPHEN: Sorry. We Australians, the elephant on the table has just been explained to me.

MS. SMUTNY: Oh, I'm sorry.

[Laughter.]

MS. SMUTNY: Viewed through the lens of that essential point, the jury saw right through the arguments that the City and the BRA had presented at trial, arguments that Respondent has rehearsed for you again in these proceedings, no doubt with the active assistance of the lawyers for the City and the BRA who argued the case below and who have been present during these hearings.

If this Tribunal is a not supreme appellate court, it is also not a supreme jury. The jury saw the witnesses for themselves, they observed their demeanor, made assessments about whose version of the story was more credible, who was shifting in their seat when speaking and who was not, and the jury was persuaded that LPA's version of the story is the truthful version.

Indeed, the jury was persuaded that LPA suffered losses in the amount of $16 million, as a consequence of the City's and the BRA's conduct towards it.

The unrebutted evidence in the record demonstrated that $16 million was the difference between the market price for the Hayward Parcel and the formula price from the Tripartite Agreement, representing the value of that contract right as it was deprived to LPA.

In addition, the jury answered the special questions presented to them in such a way as to make it clear that they were persuaded that the evidence demonstrated that both the City and the BRA played a hand in depriving LPA of the value of its rights. Of course, this Tribunal is not bound by the jury's verdict. Entry of judgment would not have made a difference, however, in that regard.

As the Tribunal in the Amco Asia v. Indonesia case noted at paragraph 177, and I'm not sure if it's already in the record, but we have an

extra copy if it's not, in any case, an international tribunal is not bound to follow the results of a national court. The point is the jury's verdict is evidence, and highly compelling evidence. I will address certain basic questions now that were touched upon in the presentations.

The significance of the jury's finding that the BRA had tortiously interfered with LPA's contract dealings with Campeau. It is quite evident that the jury was persuaded, as the trial court noted the evidence amply supported, that the BRA had unlawfully attempted to exact a higher price for the Hayward Parcel, and that it was strong-arming LPA.

One of the ways in which it sought to exact the higher price was by blocking the sale to Campeau. The evidence of the BRA's intentions on that score is very clear. The jury clearly was in a position to conclude that the BRA's demonstrated bad-faith motivation tainted the exercise of its governmental authority through its acts and its

omissions. The jury was clearly in a position to conclude that the tortious interference consisted of the many acts and omissions of the BRA that served ultimately to prevent Campeau from ever being able to exercise the Hayward Parcel option in LPA's place.

Respondent's 56-day argument quite simply is nonsense. In short, following more than two years of dealing on this issue with LPA, in which the BRA made its views abundantly clear, the BRA clearly manifested its intent to use the 121 approval process among the many other tools in its bag as another means to coerce the higher payment it demanded.

Another point I think that needs some clarification. Let us dispel the notion that there is anything inconsistent about LPA's position in the Massachusetts proceeding and these proceedings regarding the significance of the delays in the design review process and the fact that the City manifested its unwillingness to convey the Hayward

Parcel at the Tripartite Agreement price.

The alleged inconsistency relates to the arguments regarding the scope of the mortgage, which the Tribunal will recall, of course, was never an issue in the litigation below. Be that as it may, Claimant has explained that in trying to assess what is meant in the mortgage by excluding rights to develop parcels adjacent, it becomes clear that it can only refer to the option contained in Section 602; that is, the right to purchase is the right to purchase the development rights. In that sense, the concepts are linked.

But whether LPA could purchase those rights to develop something was not dependent on what ultimately that something would look like. These are the separate questions. Thus, the purchase of the Hayward Parcel was not contingent upon obtaining approval for particular development plans. That was the position taken in the Massachusetts courts, and that's completely correct.

For all of Respondent's melodrama on the point, there is nothing inconsistent in Claimant's case. Of course, one must bear in mind that LPA was pursuing several things at the same time, as one would expect in a project such as this. It sought to purchase the air rights, which it absolutely was entitled to purchase. LPA could not get the City to close on that sale. The jury was confronted with the question of why that was.

At the same time, of course, LPA continued to pursue, with the BRA in the so-called design review process, what it was that would be developed on the site, which required a spirit of cooperation if progress was to be made. Here, the BRA refused to cooperate, interjecting one obstacle after another. It, thus, became clear that even if LPA could force the point on the sale, which it could not, the project would be in jeopardy, in any event, as the BRA refused to move forward on design review as a means of trying to exasperate LPA to the point that it would agree to pay the market

price.

These delays are not, by the way, without costs to developers. The uncertainties that were perpetuated were already jeopardizing the orderly completion of the project. And partners, like Bloomingdale's, which were hard to attract in the first place, could threaten to walk out, and existing partners, like Swissotel and other retailers that had faith that the completed project was going to start to have problems. The whole project is jeopardized with such delay and uncertainty regarding the terms of its completion.

Also, the enormous loss to a developer when a major project fails should also not be overlooked. So, to keep it alive, LPA agreed to the drop-dead date when that was insisted upon. The alternative was to accept complete loss at that point. When Campeau surfaced, as a means of both litigating losses and possibly keeping the project going, LPA sought to transfer to Campeau, which it ultimately did, accepting sizable losses in the

process. Empty references to the millions that were agreed with respect to the transfer is beside the point. If something is worth $30 million and you accept $5 million, how do you not suffer tremendous losses?

The point is that the City and the BRA continued to abuse their regulatory authority in an effort to coerce LPA, and then Campeau, into paying market price. Indeed, the evidence that the BRA abused its governmental authority is there, and overwhelmingly so, likewise, the City. Note the stipulation regarding the BRA's role. This is the stipulation regarding earlier, which this Tribunal need not ignore.

In any event, even if the City did not breach its contract obligation, as defined by Massachusetts law, the evidence is very strong that it, together with the BRA, its developmental arm, abused its government's authority to cheat LPA out of its contract rights. The BRA was the City's development arm. Mayor Flynn let BRA Director

Coyle, "act as he saw fit," and so he did. He broke contracts because he felt like it.

And when he had LPA strapped over a barrel, holding LPA's project development hostage with delays that were themselves costing LPA enormous sums of money, the BRA coerced a drop-dead date. Here, one may note that the notion that placing a limitation on otherwise unlimited rights added value to the right is nothing short of fanciful. Obtaining a contract promise in exchange that the government agency will exercise its governmental authority in good faith is a very sad reflection on what might have been if the BRA had not promised to do so.

Sir Ninian Stephen earlier inquired, what of the famous reasonable man and how might the Tribunal take stock of the case before it objectively and without subjective prejudices?

Claimant would submit that the law does not require this Tribunal to be blind to the commercial realities. The only reason the Second

Amendment was concluded was to force a concession out of LPA to hand BRA another tool to coerce market price.

Finally, for all of the regulatory issues that hampered the completion of the design review process that Respondent insists on repeating were within the authority of the BRA and the City to raise, this Tribunal need not ignore, as this jury certainly did not, that every one of those regulatory obstacles disappeared overnight the moment Campeau paid the price. The proposed road through the parcel that hung as a cloud of uncertainty over the project for years dissolved immediately. The IPOD restrictions became a nonissue. Traffic flows are immediately resolved and so on.

The jury saw right through the entire line of argument resuscitated for you here by Respondent, and this Tribunal can do so as well.

Finally, this Tribunal need not ignore the compelling evidence of the intended connection

between Phase I and Phase II. When the City and the BRA deprived LPA of the benefit of adding Phase II, the foreseeable consequence is that they placed the entire project in jeopardy.

I will now turn to Sir Arthur Watts, unless we want to stop for a coffee break first, who will complete the--

PROFESSOR CRAWFORD: Ms. Smutny, you have just argued very persuasively, if I may so, that there was an abuse of regulatory authority by BRA, which amounted to an abuse in 1105 terms. In order to understand that, there are two essential elements: One is the jury verdict, which is necessarily implied a judgment by people who had seen the evidence and heard the witnesses that something like that must have happened; and, secondly, the commercial realities.

The problem is, of course, that NAFTA wasn't in force at the time. My understanding is that the Claimant accepts that there couldn't have been a breach of NAFTA, in respect of the acts of

the BRA as such, and therefore, fortunate or unfortunate, doesn't that reduce Mondev's claim, in effect, to a claim to be properly treated in respect to whatever its Massachusetts law rights may have been on the 1st of January 1994?

Isn't that the gist of the NAFTA claim? And could you argue that claim, just briefly, before hearing Sir Arthur Watts? Could you argue or perhaps even repeat, just synthesize that claim, in terms of 1105.

MS. SMUTNY: Of course. Well, of course, first of all, the issue of the denial of the recourse is I think clear on how that works, but that relates to the Massachusetts law.

Insofar as this Tribunal concludes that the acts of the City and the BRA were in violation of international law, tantamount to an expropriation, if I might use the words, this Tribunal can consider what Sir Arthur Watts will discuss more fully, as to how that will relate to Mondev's claim under 1110, and insofar, also, as

Sir Arthur Watts will discuss, the temporal issues on the additional 1105 claim.

So the point here is that to the extent that this Tribunal concludes that the underlying acts of the City and the BRA not only were violative of Massachusetts law, but at the same time, in a parallel, if you will, violation of--well, a taking, a taking at that time, that lays the basis for this Tribunal to consider the 1110 arguments that will be discussed in a moment, in particular.

PRESIDENT STEPHEN: But my question really relates to 1105. I assume that Sir Arthur will deal with 1110. But if you were to take the view, hypothetically, that the project had been terminated by a combination of events prior to 1994 and that what was left out of all of that was a series of claims by LPA/Mondev arising from those events, the key premise of those claims was actually upheld by the Massachusetts trier of fact--in respect, presumably, there was at least an

inference of bad faith of lack of regulatory law or improper purpose in the jury finding, even though it was set aside.

The question is what's the basis for an 1105 claim in respect of the treatment of that Massachusetts claim, as from 1st January 1994?

MS. SMUTNY: I want to make sure that I'm following you correctly. So Mondev's claims are that the denial--and I'm just going to repeat and cover ground again.

The denial of a remedy for the violations of Massachusetts law, the grant of immunity in the circumstances of this case, that's an 1105 violation due to the failure to provide the remedy under Massachusetts law. Obviously, we are not talking now about the contract claim and the SJC's treatment. That's one manner in which 1105 was violated.

The other manner, again, apart from the SJC's contract claim treatment, is the one that I know Sir Arthur Watts will deal with again, as he

dealt with before, is the continuing failure to provide a remedy for the Massachusetts law, well, the continuing failure to provide a remedy that Sir Arthur Watts will discuss again. I don't want to try to cover it in the short ground because it takes some explanation, and I know that this is exactly what Sir Arthur Watts intends to address for you. Of course, together with that, the Article 1110 claim.

PROFESSOR CRAWFORD: I wouldn't dare to suggest that I would prefer to hear you answer the question than Sir Arthur Watts.

[Laughter.]

MS. SMUTNY: Fair enough.

Well, if there are no further questions, at your disposal, whether we should break or continue.

PRESIDENT STEPHEN: Is there any reason why we should not break for coffee? How does that affect your time schedule?

MR. WATTS: Mr. President, from a time

point of view, subject to any questions that might be posed by the Tribunal, we are all right.

PRESIDENT STEPHEN: In that case, we adjourn now for a quarter of an hour.

MR. WATTS: Thank you.

[Recess.]

PRESIDENT STEPHEN: Sir Arthur?

MR. WATTS: Thank you, Mr. President.

Mr. President and members of the Tribunal, this is the last oral pleading on behalf of the Claimant in this arbitration. At the end, I will summarize the Claimant's case as it now appears in the light of this week's hearings, and then I will set out, formally, the Claimant's final submission, but, first, I will respond, necessarily briefly, to a number of points raised by the Respondent during its first round oral pleading.

The present statement will, therefore, be a matter of response and summary. It will add no new arguments to those which are already familiar to the Tribunal and the Respondent. As this is the

Claimant's last opportunity to address the Tribunal, I venture to express the hope that the Respondent's closing statement will similarly be limited to response and summary and will avoid the presentation of any new arguments to which the Claimant will, by then, have no opportunity to respond. The Claimant is confident that it can rely on the Respondent and the Tribunal in this respect.

Mr. President, I should first like to deal with certain factual matters, particularly insofar as they concern that aspect of the Respondent's breach of Article 1105, which involved the misconduct of the City and the BRA.

So far as the Respondent has troubled to deal with the facts relating to the way the City and the BRA behaved in their dealings with Mondev and LPA, one thing is notable. The Respondent did nothing to deny the fundamental point in the story; namely, that after taking office in January 1984, the new City administration of Mayor Flynn and

Director Coyle made up its mind to get around LPA's contract right to the favorable price for its option to purchase the Hayward Parcel. The City and the BRA were determined to get out of their contract with LPA, even though LPA had completed everything it was obliged to do in Phase I. That's the basis for everything that happened thereafter.

In my opening statement on Monday, I put it like this, the Boston authorities, I said, and I quote, "determined steadily and intentionally to erode the value of Mondev's investment under the Tripartite Agreement until the stage was reached when Mondev had been deprived of its investment property altogether. It had, quite simply, determined, from the moment the new administration took over, to disregard the Tripartite Agreement, thereby depriving Mondev's investment of value."

I continued, "That was the essence of the matter. Understand that, and everything else falls into place." I, then, the Tribunal may recall, made an observation about the "smell test." That's

in the transcript, Volume I, at Page 20.

Not a word from the Respondent has contradicted or altered the essential centerpiece of the story. While Mondev has relied for its factual presentation almost entirely on testimony and documents introduced in the Massachusetts trial, as heard, reviewed, and passed upon by 12 jurors over 14 days of trial, leading to the resulting verdicts with which we are all so familiar, it is the United States which has repeatedly and selectively used excerpts and snippets of that evidence, while ignoring much of the evidence that was plainly so damaging to the City and the BRA.

In fact, it is particularly notable that the United States, in nine hours of presentation this week, has not so much as devoted one sentence to the extensive trial evidence that the City and the BRA had decided by late 1987 that LPA, and later Campeau, would never be allowed to close on the Hayward Parcel within the option period without

paying full-market value and abandoning the Tripartite Agreement formula.

The record is unequivocal. The City's intent to deprive of LPA of the formula price for the Hayward Parcel, and deferred lease payments for the garage, are recorded in public statements by Director Coyle to the press, in official minutes to BRA Board meetings and in direct conversation with LPA's executive officers, all put in evidence before the jury and accepted by it.

Instead, what we had was an exercise in highly selective deconstruction, a fashionable form of literary criticism these days--fashionable, but not necessarily valid or effective as legal analysis. The Respondent chose to go through some of the items invoked by the Claimant to discuss whether they were, themselves, wrongful or whether they amounted to a taking and also was mentioned of the changing building height restrictions, the constantly evolving traffic review problems and so on.

This approach is quadruply defective. In the first place, it is selective. Go through all of the evidence presented by Mondev, as the jury did, and then the approach might have some validity. But, in fact--and this is the second defect--even then it is without validity, for Mondev does not deny that in certain of those matters the City and the BRA acted within powers and discretions which they lawfully possessed. That's not the point, however.

Mondev's argument, which the Respondent singularly failed to deal with, is that one must take all of those individual exercises of bureaucratic regulation as a whole, look at them as a package, as the jury did, and it is then apparent that the City and the BRA, in pursuit of their initial determination that they had made to deprive LPA of its rights under the Tripartite Agreement, embarked on a course of harassment of LPA, using and abusing their regulatory powers to achieve their ends. The Respondent has been counting the

trees, without realizing that it is lost in the woods.

The third defect in the Respondent's approach is that, if it is going to be selective, it might at least, in trying to present the facts in a different light than that in which Mondev presented them, in fairness, take the trouble to present a credible picture of the actual events. Instead, some notable distortions have been allowed to creep into the Respondent's account. Let me give an example, one of which the Respondent was so found that he's referred to it more than once.

The Respondent indicated that the jury's finding that there had been a tortious breach of contract depended solely on the fact that there had been a 56-day delay when the LPA needed the BRA's approval for the sale to Campeau. That is quite simply nonsense. It completely ignores what was going on at the time. The full facts were explained to the jury.

The jury heard that when LPA needed

exactly the same approval in order to sell the 50-percent interest in Hotel Lafayette to Swissotel. The transfer was approved very quickly in a matter of weeks.

The jury heard that Director Coyle had said privately to LPA, and publicly to the press, that the City and the BRA wanted full present-market value for the Hayward Parcel, as well as other extracontractual concessions before BRA would approve the sale. The jury had before it relevant minutes of the Real Property Board meeting, from which it could draw the conclusion that without those concessions, no approval would be given.

The jury heard LPA Project Director Ottieri testify that after the public announcement of the Campeau sale in November, all commercial activity at the mall was frozen and that further delay after January would destroy the mall as a viable commercial entity.

It was also the fact that two BRA Board meeting cycles in December and January had passed

with Director Coyle refusing to put the application before the Board, before it was then withdrawn in early February 1988. Equally, there was no indication by early February that Director Coyle would ever put approval of the transfer on the BRA Board agenda.

Previously, Campeau/LPA, having reluctantly agreed, by mid-January, to all of the extracontractual sessions demanded by BRA, except the full-market price for Hayward Parcel, they had written to Director Coyle to say that, for business reasons affecting direction of the mall, they had to have the BRA's decision by the Board meeting on 25 January, latest.

There was, therefore, a whole saga before the jury. To suggest that the only reason why the BRA was found to have acted tortiously in relation to the contract with Campeau was that there was a 56-day delay, grossly underrepresents the truth of the matter. There was a whole record of dealings concerning this claim, involving the BRA, LPA and

Campeau, which was deployed in full before the jury, in a trial which lasted 14 days, from which the jury was able to conclude that the BRA's conduct did amount to tortious interference.

They heard all of the evidence, they saw all of the documents, they saw and heard the witnesses and observed their demeanor, and they then said, yes, the BRA did wrong. It did tortiously interfere with the contract.

Now counsel for the Respondent made a point of suggesting that it was disadvantaged by the unavability to it of relevant records of the trial period. Mr. President, the most powerful government in the world can't get hold of the relevant records? And in any event, the list of the parties' representatives at these hearings includes, for the Respondent, Mr. Shapiro, the chief trial counsel for the BRA in the Massachusetts proceedings we've heard so much about. Their Respondent knows perfectly well what happened at the trial.

The fourth point I'd make relates to the Respondent's rather cavalier disregard for the Massachusetts jury. It doesn't count, says the Respondent. It's findings on tortious interference was never a binding judgment. Massachusetts courts, with their long history, are proudly held up as models of right-thinking decision making. The decisions of a jury, with an even longer democratic tradition can, on the other hand, be disregarded.

Mr. President, Mondev does not assert that this Tribunal is, in some way, legally bound by the jury's findings, but Mondev does assert that they are the best and most compelling evidence of what actually happened. On all of the factual issues which Mondev has put before the Tribunal, the jury has already considered the evidence in depth. The jury saw the documents, heard the arguments, saw and heard the witnesses, all of this over 14 days, and it reached its clear findings that the City had breached the Tripartite Agreement and that the BRA

had tortiously interfered with the sale contract with Campeau, and the trial judge was satisfied that there was ample evidence to support the jury's findings, and those findings were not, to say the least, favorable to the City and the BRA.

This must be compelling evidence for this Tribunal. Lest the Respondent is really seeking to elevate the Tribunal to the position of a super jury which can assess the situation better than the real jury, which saw and heard the evidence over an extended period. Respondent implicitly invites the Tribunal to reach conclusions on matters of fact which are different from those reached by the jury that without the advantages which the jury itself had.

This Tribunal has sat for a week, and much of the time has been devoted to nonfactual argument. The Massachusetts court sat for twice as long and dealt almost entirely with factual matters. The jury's findings cannot be, and have not been, set aside as factually incorrect.

The Respondent has sought a further way to avoid the jury's findings by saying that the BRA had strong arguments to show the SJC that the jury's findings were unsupported by the evidence--perhaps. But however that may be, if the BRA had arguments to show that the jury was wrong, it can safely be assumed that LPA had equally, at least, strong arguments to show that the jury was right.

The only facts you have are that the jury decided as it did, and that the trial judge, who also sat through all of the evidence and witness hearings, concluded that there was ample evidence to support those findings.

Overall, the Respondent has sought to represent the City and the BRA as having behaved as normal bureaucracies, going about their business in a normal and, if I may so, in a normally dilatory way.

This is not a convincing response to Mondev's demonstration of a whole course of systematic and intentional misconduct, pursued with

the clear and publicly-expressed intention of depriving Mondev of its reasonably expected benefit from its investment.

Of course, normal bureaucracy is precisely the argument that the City and the BRA urged so very unsuccessfully on the jury. The Tribunal, in the recent award in CME v. Czech Republic, had the right response to this line of argument, and I quote:

"The Council's," that's the Media Council, the Tribunal will recall, "The Council's actions and inactions, however, cannot be characterized as normal broadcasting regulations in compliance and in execution of the law. Neither the Council's actions in 1996, nor the Council's interference in 1999, were a proper part of administrative proceedings. They must be characterized as actions designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment in 1996 and of action in 1999, supporting the foreign

investor's contractual partner in destroying the legal basis for the foreign investor's business in the Czech Republic." That's at paragraph 603 of the award.

Let me now turn to the question of what Article 1105 means and, in particular, to four matters.

First, there is the notorious interpretation of 31 July 2001. I do not need to say anything at length in response to Respondent's comments on this. Nothing which Mr. Clodfelter said suggested in any way that the interpretation ran counter to any substantive argument advanced by the Claimant. One respect in which it might have done so has been clarified by Mr. Clodfelter's remarks, and to that I will now turn.

For the second aspect of Article 1105's meaning, which I should like to mention, is the reference to full protection and security. In my remarks last Monday, I raised the question whether that phrase applies to investments. Mr. Clodfelter

expressed surprise that I should have any doubts on the matter. What he said was, and I quote, "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." That's in the transcript, Volume III, at Page 683.

It seems to be clear that there is no reason to doubt that the full protection and security applies to investments. The Claimant, and I trust the Tribunal, takes note of his remarks in that sense. I make this point because, as I made clear, my original comment in which I raised the issue was derived from what the Respondent very clearly said in its Counter-Memorial at Page 37, which was in a different sense.

The Claimant is glad to note that the Respondent has withdrawn that previous statement and now accepts that full protection and security applies to an alien's investments just as much as to other aspects of an alien's interests.

The third aspect of the meaning of Article 1105, of which I would like to comment is Mr. Clodfelter's dislike of what he referred to as the merely subjective quality of the fairness and protection provisions, which he so evidently would like to interpret out of existence. This was linked to his criticism of the Claimant's preference for the ordinary meaning of the terms used.

There is a whole lot of confusion here. The worry, apparently, is that words like "fair and equitable" might be given a meaning of the kind which the nonlegal person in the street would give them, rather than a meaning which would reflect the legal framework within which they were being used. This, of course, interesting that the Respondent is frightened at the prospect of what the man in the street might think, but leave that aside.

If that is the Respondent's worry, then I think it may be set aside. Claimant is sure that the Tribunal would have recognized, in the

Claimant's reference to the ordinary meaning of the words, a reference to Article 31 of the Vienna Convention on the Law of Treaties, which talks of interpreting treaty terms by giving them their ordinary meaning in their context and in the light of the object and purpose of the treaty.

Mr. Clodfelter's further objection to the "fairness and protection phrases," that they were too subjective, is equally misplaced. Of course, they are phrases which call for a measure of appreciation by the Tribunal, equally, of course, by the parties in presenting their cases.

Of course, that appreciation is, in a sense subjective, even within the international legal framework within which the terms are used, the Claimant says what it means that they mean, just as the Respondent counters with what it considers them to mean, and ultimately the Tribunal will say what they really do mean. But that process is not a ground for criticizing the employment of the terms in question.

Any adjective calls for appreciation. It's an inescapable process, and that appreciation is what Tribunal's are for, amongst other things. Fair and equitable are no more to be criticized for being subjective than are such common legal notions as the reasonable man, due process of law and so on.

In using the term "subjective," counsel really seemed to mean simply that they were phrases which could lead the appreciation of their application to particular circumstances wholly at the unfettered discretion of a Tribunal, but that would never be the case with treaty terms which, both because they are treaty terms and because Article 1102, paragraph (2), of NAFTA says so, have to be interpreted in accordance with international law, including the particular framework established by the context in which they are used and the object and purpose of the treaty in question.

Moreover, linking the "fairness and protection" phrases to the phrase "treatment in

accordance with international law," does not solve the subjectivity problem, insofar as one exists, for the standard contained in that level of treatment is replete with words calling for appreciation, "due diligence," "arbitrary" "unjust," and so on.

From a practical point of view, the Respondent has advanced no argument showing that, by incorporating the "fairness and protection" phrases within the notion of treatment in accordance with international law, any substantive argument advanced by the Claimant is affected. As I have noted, the one argument to that effect has now been withdrawn. Even if had not been, it was, as I showed on Monday, wrong. The reference is to the transcript, Volume I, Page 230.

Accordingly, it really is enough that terms used in the Treaty are to be understood in their context as part of the particular Treaty in question. It is in that sense, that the Claimant will continue to rely on the "fairness and

protection" phrases.

PROFESSOR CRAWFORD: Sir Arthur, I think it's fair to summarize Mr. Clodfelter's argument as being that the words "fair and equitable," and so on, in 1105 are sort of hieroglyph, that they're not an operative phrase, they are a reference to a standard contained in the traditional cases dealing with protection of aliens going under the rubric minimum standard of treatment, and therefore that it's an error for a NAFTA Tribunal to ask the question was this treatment fair and equitable or even to ask the question was it unfair and inequitable; rather, to ask the question can we find evidence of a specific standard in the traditional case law, whether using phrases like "arbitrary" or whatever against which to judge the particular conduct.

Obviously, the framework within that argument was mostly put was the concept of denial of justice, where there are cases saying that denial of justice has to be something relatively

outrageous.

How do you respond to that argument?

MR. WATTS: Well, I think, if I may say so, Professor Crawford, the primary answer has to be that Article 1105 says what it says. It talks about treatment in accordance with international law, including full protection and security or including fair and equitable treatment. So far as the Claimant is concerned, those phrases have a meaning, they may have a meaning within the context of the international law standard of treatment, but they are not to be disregarded in relation to investments.

I could, perhaps, at this stage, Mr. President, just avert to a question which Professor Crawford put yesterday, when he inquired about the origin of fair and equitable treatment, and Claimant would like to draw the Tribunal's attention to a recent study prepared by the UNCTAD Secretariat as to that term's origins. We do have a copy which we will make available to the

Tribunal.

Mr. President, that now brings me to the fourth aspect of Article 1105's meaning, which I'd like to address briefly, and it concerns the content of the customary international law standard of treatment of aliens and its application to the circumstances of this case.

Here, I have to say that the Respondent has failed to grasp the Claimant's argument. Perhaps that's the Claimant's fault, but I don't think so, and has consequently misunderstood the significance of the distinction which it itself introduced into the argument between primary and secondary rules of international law.

The Claimant's argument is simple. It maintains that customary international law sets standards for the treatment of aliens. As part of that treatment, States are obliged to protect aliens in their property as much as their persons.

PRESIDENT STEPHEN: I'm sorry. I missed that last word. As much as?

MR. WATTS: In their property as much as their persons.

PRESIDENT STEPHEN: Their persons, yes. Thank you.

MR. WATTS: The protection which States are obliged to afford an alien has a twofold aspect. On the one hand, there is the protection from wrongful conduct affecting the alien's rights; on the other hand, there is the judicial protection of the alien's rights should they, unfortunately, be subject to misconduct. That double aspect to the protection due to an alien is part of the treatment required in accordance with international law.

Accordingly, a primary rule of international law stipulates that a host State must, as a part of the treatment it is required to give aliens, protect aliens' rights. That primary rule of international law is in two parts. Protect aliens' rights from wrongful conduct and allow them redress should wrongful conduct occur.

What the Respondent fails to see or at least to appreciate is that that reference to redress is not, from the point of view of international law, part of a secondary rule, that reference is to domestic law redress as part of the primary international rule stipulating, as part of the treatment to be accorded to aliens, that they be protected.

Now, when that primary international rule is violated, then there comes into play the secondary international rules about forms of reparation at the international level. The Respondent's failure to appreciate this leads it to fail equally to address adequately, or even at all, the proper significance of the Claimant's argument that the breach of the primary obligation constituted a continuing violation of international law which lasted until well after the entry into force of NAFTA.

Equally, the Respondent failed to respond to the Claimant's argument that nothing in the

Claimant's argument was inconsistent with Article 28 of the Vienna Convention on the Law of Treaties. That is the article about nonretroactivity; indeed, on the contrary, that the Claimant's position was fully in accordance with how the International Law Commission explained that article.

Well, I'm strictly correct. There was a response. It amounted to a one-sentence repetition of the bold and unsupported proposition that the Claimant's argument is contrary to Article 28. That's in the transcript, Volume III, at Page 538. That is not a response, it's a capitulation.

The Respondent also repeated, scarcely without variation, its written contention that the Claimant's argument involved importing into NAFTA the full panoply of remedies known to customary international law; whereas, NAFTA carefully limited the available remedies. This, again, reflects the Respondent's total failure to appreciate or address the Claimant's argument regarding the relationship between domestic law and the international level.

As I have explained, the primary international rule requires that aliens be treated to an approved standard, and if they are not, be granted appropriate redress. That redress is, in the first place, a matter of domestic law. It will decide what kind of redress is appropriate in the light of domestically available procedures.

If that domestic redress is not forthcoming, then there will be a breach of the primary rule of international law which, in its turn, will call for, if the breach is indeed established, the application of reparation in accordance with the secondary rule of international law.

That secondary international rule will, of course, be governed by whatever other rules of international law are relevant. If they exclude certain forms of reparation and only allow others, as in NAFTA, so be it. In no way whatsoever are the remedies available in customary international law incorporated either into domestic law or into

whatever Treaty prescriptions may be applicable at the international level.

Let me now turn, Mr. President, to the Respondent's observations on the temporal issue, namely, how it is that there is, in all of the circumstances, a breach of Article 1105 during the time when NAFTA has been in force; i.e., since the 1st of January 1994.

The Respondent's arguments fail totally to take proper account of two separate sets of distinctions, both of which are very straightforward. The first distinction is that, again, between international law and domestic law; the second is that between the occurrence of certain facts and the breach of a relevant obligation under NAFTA.

Under Article 1105, it seems to be agreed that we are really, in this context, talking about what I may call the misconduct claim, for it is, I am sure, agreed that the judiciary claim, if I may call it that, is not troubled by a time-bomb

problem.

The misconduct claim involves the rules of international law about a host State's conduct towards aliens. One of those rules prescribes that a host State must afford aliens the standard of treatment required by international law. That is the primary rule. But, as I've said, it's a primary rule in two parts: The required treatment must match up to the appropriate standard of conduct, and if it does not redress, must be afforded or at least access to suitable procedures whereby redress may be sought.

PROFESSOR CRAWFORD: Sir Arthur, it's perfectly clear that 1105, in particular circumstances, could be breached by a failure to provide for local judicial procedures, in accordance with the rule of law, but it's not clear why that aspect of the 1105 duty should be contingent upon any prior conduct in breach of NAFTA. Indeed, Ms. Smutny, in response to an earlier question from me, said it didn't have to

be.

In other words, there's an independent element of 1105 that requires a functioning judicial system, in the absence of which there will not be full protection and security, but the functioning judicial system operates in its terms and in respect of whatever rights exist under that system.

That being so, as you say, the judiciary claim presents no problem because that goes to the question of the functioning judicial system, but it's not clear, if that's right, how you can, as it were, preserve the misconduct claim over the period concerned.

MR. WATTS: The reason, the Claimant submits, is that the rule of international law which is being violated is a rule in two parts. The State must behave properly, and if it doesn't, it must afford redress. The affording of redress is not dependent upon there having been a misconduct. Their behavior could be perfectly

proper. Redress of the behavior, of course, can well be a self-standing breach of international standards of treatment, but if there is some kind of misconduct, then it is part of the same rule that the remedy for that misconduct must be available.

PROFESSOR CRAWFORD: In terms of that two-part rule, the word "misconduct" is, in effect, misconduct at-large. It's not misconduct contrary to NAFTA because, at the time when the misconduct occurred, NAFTA wasn't in force.

MR. WATTS: Yes.

PROFESSOR CRAWFORD: It's either misconduct of a general character or possibly misconduct in terms of the State's own law or, alternatively, misconduct in terms of customary international law.

MR. WATTS: Yes.

The Respondent seemed to suggest that the need for redress is not established in international law. Transcript Volume III, Page

560, what the Respondent said was, and I quote, "Mondev's 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 simply does not exist."

That vividly illustrates the confusion under which the Respondent labors. Mondev has advanced no such theory. What Mondev submits that I have just explained is that the requirement for domestic law redress is part of the primary rule of international law which lays upon States the obligation to accord aliens treatments in accordance with international law.

It is precisely because that primary rule of international law, regarding treatment of aliens, requires proper conduct towards them and redress in the event of misconduct that the breach of the rule of international law continues until the redress is forthcoming or in some way shown no longer to be necessary.

Here, let me interject because the matter was the subject of some comment by the Respondent, that the reference to the need for redress for wrongful conduct is not, in itself, a reference to the rule of exhaustion of local remedies. That is a rule which plays a quite different role as a procedural bar to the espousal of claims, not as part of the substantive primary rule regarding the treatment of aliens.

To return to that subject, it follows from the primary rule, as I've set it out, that the failure to apply the appropriate standard of conduct begins the breach of the rule of international law, but the breach does not end at the same moment when it starts, when the misconduct occurs, partly because the wrongfulness itself continues until remedy, but also because the second limb of the rule of international law about the treatment of aliens has to be satisfied before the breach of the rule can be said to come to an end.

In our present case, the rule of

international law regarding the treatment to be accorded to aliens was, in Mondev's submission, violated when the City's and BRA's misconduct began. That same rule, however, was still being broken in the absence of suitable redress, and that was the position which had been reached when NAFTA entered into force. At that moment, the situation as it existed under customary international law, was that Mondev's investment was not, at that very time, being treated in accordance with the requirements of international law.

The breach, having thus been shown to involve, indeed, a breach of NAFTA, Mondev was in no position to have acquired knowledge--which implies certainty--of whatever loss it had incurred--which implies actuality, until the final rejection of its claims in the local courts had demonstrated that losses had indeed been incurred.

Mondev's prompt action in commencing these arbitration proceedings was then sufficient to satisfy the three-year period prescribed in

Articles 1116 or 1117.

Throughout the misconduct to which Mondev was exposed it's apparent that the City and the BRA had very much in mind the fact that Mondev was Canadian, not only in a formal sense of incorporation, but also in the personal sense of its senior executive personnel. They said as much and made it clear that it was the thought of what they saw as a windfall benefit which was, in fact, a contractually agreed risk reward going to Canada which was high, in their calculations.

Mondev has shown evidence in this in a number of statements made to different audiences over a period of years, but it's not the specific occasions or specific statements which are significant. You don't make an anti-Canadian statement today, and another in three months, and another three months after that, while forgetting all about the matter in the intervening periods. Those periodic statements are clear evidence of a state of mind which continued throughout the period

and influenced conduct and events.

Now the Lafayette Place Project was unique, both in its timing in relation to the regeneration of the blighted downtown area and in its design and development characteristics. There was no other developer engaged "in like circumstances," to use the language of Article 1102, paragraph (2). There were other developers in other parts of Boston engaged in very dissimilar projects. Most of them were no doubt U.S. companies. There is no record of any of them being given the runaround by the BRA in the way which Mondev was.

As a practical matter, it seems an inescapable conclusion that if the Lafayette Place Project had been undertaken by a wholly U.S. development, the City and the BRA would have treated it more favorably than it treated Mondev. It is this state of affairs which leads Mondev to submit that the treatment it received involved a breach of Article 1102, paragraph (2).

PROFESSOR CRAWFORD: Let me just bring you back to the--that isn't, if I may say so, totally clear. Can I just come back to the question of knowledge that the investor has incurred loss or damage? Your position is--Mondev's position is that it was impossible for you to have that knowledge prior to the loss in the U.S. Courts, because until that point you might--and in fact, of course, until the SJC decision, at least a significant part of your loss had been met by the decision on the contract claim. And so you would interpret the word knowledge that the investor--or the phrase, "knowledge that the investor has incurred loss or damage" as being certain knowledge?

MR. WATTS: Yes.

PROFESSOR CRAWFORD: That's going to have the effect of postponing the occasion for the beginning of the three-year time period in most or many claims, isn't it?

MR. WATTS: It may have that effect, but

that appears to be what Article 1105 requires. Sorry, not 1105. It's 1116 and 17. If that's what NAFTA says, so be it. It's difficult to have knowledge or something which is at present only speculative. When the object of the knowledge has to be something as specific as losses have been incurred.

PRESIDENT STEPHEN: I find it rather difficult to follow why we should conclude that it was because Mondev was Canadian, rather than because Mondev was getting what the local municipality obviously thought was an undeservedly good barter that influenced Boston. You say if Mondev had been an American corporation it might have been very different. There was a lot of evidence to show the intense concern of Boston at the effect of the rise in real estate values and the extraordinary bargain that, as it turned out that Mondev was getting. Apart from these occasional references to go back to Canada and so on, that's all there is to show that also there was

an anti-Canadian motivation.

MR. WATTS: I think that's right, and I think that the Claimant's submission in effect boils down to two plus two equals four, and one has a course of conduct going in a certain direction, leading to certain results. One has clear statements which underlie the state of mind of those embarking on that course of conduct, and it does appear that the one leads to the other.

PRESIDENT STEPHEN: In fact, I've just got to divorce from my mind the feeling that the U.S. and Canada are twin souls.

MR. WATTS: I wouldn't wish to comment on that, Mr. President.

[Laughter.]

MR. WATTS: Let me now turn, if I may, to expropriation, and let me first seek to clarify in the light of various comments which have been made by the Respondent and certain questions put by the Tribunal. The extent of Mondev's claims in this arbitration, not all of these claims of course

concern expropriation. Nevertheless this is a convenient time to deal with the matter as a whole. I won't go into the details of the calculation of the monetary value of the various claims because that will be a matter for the next phase of this arbitration.

What I do want to do is to point out the distinction between the $16 million initially awarded in the Massachusetts Courts and the sums at issue in this arbitration. That initial award of damages related to two issues only, the breach of contract, the Tripartite Agreement by the City, $9.6 million; and the tortious interference with LPA's contact with Campeau, $6.4 million. It will be readily apparent that Mondev's claim in this arbitration is much more extensive. In the first place that initial award of damages was related to Mondev's claims under domestic law. What is now in issue is a claim under NAFTA for a breach of its obligations. The two are not the same. The substantive law is different. The available

remedies are different.

Secondly, so far as concerns the wrongful conduct claim under Article 1105(1), it is clear that Mondev's international NAFTA claim goes further than the two heads of claim which were initially upheld in the Massachusetts Courts. Thus there were aspects of Mondev's domestic law claim which were disregarded by the Massachusetts Courts. Had they been allowed, and Mondev argues of course that their disallowance was wrongful, then it follows that the damages in domestic law would almost inevitably have been greater. Moreover, the NAFTA claims embraces issues which were not before the domestic courts such as the impropriety of the whole course of the City and BRA's conduct in terms of customary international law.

PROFESSOR CRAWFORD: Sorry to interrupt. If that was true, why couldn't you at least be certain that you had suffered loss or damage in relation to the aspects of the claim that were not before the Massachusetts Courts for the purposes of

1116(2). Why couldn't you--if that was true, that the domestic causes of action were narrower than the international cause of action, see that that's obviously right--why couldn't you be certain at least that you had suffered loss or damage to the extent that it was covered by the international claims and not by the domestic--

MR. WATTS: Why I think there are two answers to that. One I think is that Mondev in fact engaged upon the litigation it was in practice engaged upon. And for that litigation it was focusing on those matters in respect of which it believed it had good grounds of claim under domestic law.

However, having moved from that domestic law level because of the way matters eventually evolved, Mondev had a different claim or a more extensive claim at the international NAFTA stage. Its losses--and it could have known of possible losses, but its possible losses were closely related to the consequences that would flow from

the domestic litigation on which it was already embarked. And I think this is one of the factors in this case which has to be borne in mind in a number of contexts. In effect, NAFTA came into the picture in the middle of the story. Mondev had already embarked on a course of conduct. NAFTA comes in. That creates some of the problems which we've been discussing, but it's also a highly unusual circumstance, just as it's highly unusual circumstances that we have the benefit of a jury finding about certain facts that would normally be the case.

PROFESSOR CRAWFORD: So the effect is that for practical purposes the U.S. litigation was treated as being about the dispute until it was resolved, and until it was resolved, whether they would be as resulting loss of damage was unclear.

MR. WATTS: There was also, in addition to that point that I mentioned, the failure to grant access to the Courts, which of course was part of what was involved in the ongoing litigation. The

failure to allow proper opportunity to Mondev to present its case to the courts, the failure of the SJC to deal property with the issue before it. These additional NAFTA bases of claims carry with them of course additional heads of damage.

Third and in particular, Mondev's NAFTA claim for expropriation was not before the Massachusetts Courts. That claim is for what Mondev lost as a result of the City's and the BRA's conduct, and must then ask, what then did Mondev have in the first place? What did Mondev's investment consist of at the time when things started to go wrong? That's to say 1984 when the new administration in Boston took over. It comprised principally three elements.

First, there was the completed Phase I project consisting of a 40-year lease on the garage, the luxury hotel jointly owned with Swissotel, and the retail mall. That was an inviable part of the whole Lafayette Place project. It was never a self-contained fully-realized part

of the project, and its value ultimately depended on the successful completion of Phase II.

Then the second element was that Mondev had a bundle of contractual rights, in particularly of course the right to acquire the Hayward Parcel, and thereby to complete the project by developing Phase II. The Phase II development in itself would be a valuable component in the investment. But more than that, and third, the right thereby to complete and render economically viable the project as a whole was a right to realize the full value, the full economic value of the completed project. The sum will be greater the nearly the value of the individual parts.

These three principal components, and I must emphasize this is not intended to be an exhaustive list, who clearly that Mondev's NAFTA claim is in no way limited to, although it does include, the claims in respect of which it was initially awarded $16 million by the Massachusetts Courts. At the damages phase Mondev will show that

Mondev's NAFTA claim is substantially greater than that $16 million. As I've said above and as the Tribunal can appreciate, the acquisition of the Hayward Parcel and its development so as to complete the entire Lafayette Place project as envisaged by the City, the BRA and LPA from 1978 onwards would have resulted in a project value greatly in excess of the $16 million awarded by the jury on claims limited to breach of the Hayward Parcel contract option and interference with the 1987 distress or salvage sale to Campeau. That is why Mondev, in its notice of intent to submit a claim to arbitration claimed damages of not less than $50 together with costs and pre-award and post-award interest. That explains what it was in substance that Mondev through LPA lost, and it was clearly a sizeable loss.

Let me turn now, Mr. President, if I may, to some factual aspects of the expropriation. I've already commented on the Respondent's treatment of the facts of this case, the way in which the City

and the BRA behaved, resulting in Mondev effectively being deprived of its investment. At this stage there is little for me to add. All the facts were before the jury. The jury concluded that the facts fully supported the claims which the jury was being asked to consider, and it found comprehensively that the City and the BRA had behaved wrongfully. The Trial Judge agreed that the facts fully supported the jury's findings as to Boston's wrongful conduct. And the Tribunal will also recall the SJC's remarks about Boston's dishonest and unscrupulous behavior. There really cannot be serious room to doubt the soundness of the jury's findings.

What the jury did not consider of course was whether the conduct it had passed upon amounted to expropriation, but essentially it was the same conduct, the same pattern of behavior, the same systematic purpose to deprive LPA of its rights. And why did the jury not find those facts amounted to expropriation? Because there was no suitable

procedural vehicle in Massachusetts Law for a claim to that effect, and therefore the claim could not be presented.

But this doesn't affect the fact of the deprivation. NAFTA is different. That fact of deprivation can, under NAFTA, be the basis for a claim under Article 1110, and in relation to that NAFTA claim, the facts as found by the jury in the separate context of the contract and tort claims before it still stand. The jury's findings, supported on the evidence by the Trial Judge, remain compelling for this Tribunal. In assessing the facts, I've already shown that those facts are to be considered as a whole, as a single package of wrongdoing, rather than as a separate series of isolated acts or omissions.

That's important not only in itself, but because it highlights the realities behind the individual items of conduct. For it has to be understood that in a major development like the Lafayette Place project, the developer, LPA, is at

all times very dependent upon the design and regulatory approval of the BRA. The BRA's authority was extensive. Certain aspects of that authority have surfaced in specific instances which have been mentioned in these proceedings. But it goes much wider than that.

The BRA's approval of every aspect of the design process was required, the architectural plans, the construction materials used, the methods of construction, even aesthetic details such as the brick face and art work. Clearly, a cooperative working relationship between the developer and the regulatory authority was essential.

It is readily apparent that throughout the City and the BRA consistently frustrated LPA's efforts to complete the project on the basis agreed in the Tripartite Agreement. At every turn they procrastinated. Wherever possible they put obstacles in LPA's way. They engaged in a pattern of creating artificial, arbitrary and unnecessary hoops for LPA to jump through, and they did so in

order to bring down a contract which they did not like, and they were absolutely clear about that being their aim, and ultimately they coerced LPA into agreeing to a fixed deadline, a drop-dead date by which it had to complete its Hayward Parcel acquisition or see its contractual option expire. And it's clear that the BRA never had any intention of approving any such deal on the contractually-agreed basis, which it in turn said it considered too cheap.

Since I've mentioned the matter, let me say a word more about the Respondent's response to this coercion argument. How could it be coercion, it was said, when the draft of the amendment was prepared by LPA's own lawyers, and when the draft having been approved and sent back to LPA, it was signed within a day. But anyway, it was said, the insertion of a drop-dead date was doing LPA and Campeau a favor. They now knew where they stood.

This response, it will be noted, does not address the issue of substance at all. Mondev drew

attention to the context of this transaction, namely a refusal by the BRA to let the project go ahead unless it agreed to amend the contract so as to include the drop-dead date. This, of course, against the background of some years of systematic attempts by the BRA to get out of its contractual commitment. LPA was presented with an ultimatum. Of that there's no doubt. In the reality of the commercial developer's world, the last thing a developer wants is a failed project. Apart from the immediate financial consequences, there's the question of reputation.

So the choice before LPA in the real world was accept the drop-dead date with the prospect of still getting the project through, or see everything fail because of the BRA's determination to block the project until it got what it wanted. That was the substance of the matter. In the light of that substance, what is so odd about the LPA drafting the amendment and signing the approved amendment as soon as it was returned to LPA?

Remember, LPA wanted to get a move on. It was in June 1987 that the BRA and LPA had reached agreement on the drop-dead date. The only way to keep things moving was to do the drafting yourself. In self cause LPA prepared the draft. Just imagine what delays would have ensued if the BRA had been left with that task. LPA prepared and then signed the amendment on 20th of July, and straight away sent it to the BRA. It took until October for the BRA to approve it, and then it did so only with an amendment by which the originally agreed 18-month period was unilaterally cut short by a month. So the amended text had to be sent back to LPA for another signature. Of course LPA signed it right away. They had already been waiting three months. They wanted to get a move on.

As for the Respondent's suggestion that the introduction of the drop-dead date was in fact doing LPA and BRA a favor, I can only invoke the well-known McEnroe response: "You cannot be serious." To exchange an open-ended option for a

fixed-limit option is of no favor to anyone other than the City. As the BRA itself recognized in subsequently telling the City's real property board that the deal done was, I quote: "Totally in the City's favor and in fact would free the City to dispose of the parcel to another development entity." That's paragraph 72 of the Claimant's Memorial.

Let me finally, Mr. President and Members of the Tribunal, say a few words about the so-called temporal problem in relation to the expropriation of Mondev's investment. Again, the Claimant's argument has either not been understood by the Respondent or has been willfully distorted, and again the Respondent fails to make two essential distinctions. But since this is Article 1110, rather than Article 1105, the distinctions are in part different. There is first still a failure to distinguish between an occurrence, a mater of fact, and a breach to which it gives rise a matter of law. And second, there is a

distinction between NAFTA and non-NAFTA situations.

Mondev's argument again is straightforward. Let me set it out once again in brief. Given that we are dealing with something which is properly considered an expropriation, then that occurrence, that deprivation does not constitute a breach of NAFTA until it can be shown that no compensation is going to be available. There may be various ways in which that showing can be made, but in our present case it was made clear, upon the definitive failure in 1998 or '99 to secure any redress through the local courts. The Respondent sees in Mondev's argument some so-called novel theory, which Mondev has advanced without any supporting authority, but it's neither novel nor a theory, with its somewhat pejorative overtones, nor is it unsupported.

Mondev's argument is based fairly and squarely on the terms of Article 1110 of NAFTA. It is supported by the well-established notion of continuing wrongs for which Mondev gave ample

authority, and by Article 31 of the Vienna Convention on the Law of Treaties concerning the interpretation of treaties. For all that, Mondev's argument involves is reading Article 1110 and drawing the appropriate consequences as to its meaning. That article omits expropriation provided that there is a payment of compensation. Consequently, no actual payment of compensation means that the expropriation is not permitted. It means that the expropriation that has taken place involves a breach of NAFTA. But that breach cannot be established until the denial of compensation is clear one way or the other. In our case the denial became definitive in 1998 or '99. Only then was there a breach of NAFTA. And one might test this by looking at the possibility of a claim being presented immediately after the appearance of an expropriation. Inevitably, the defense would rightly be your primatur, go away and wait till you have or haven't got compensation. The breach doesn't occur until it's shown that there will be

no compensation.

The Respondent cited a number of cases where it was held or at least said or implied that the expropriation then in question took place on a date which was related to the occurrence of the expropriatory conduct rather than a date related to the non-payment of compensation. But this is where the Respondent has not take proper account of the fact that we are in our present case dealing with NAFTA, which has laid down specific terms governing expropriation claims. Those NAFTA terms, as Mondev has shown, established that there has only been a breach of NAFTA upon a showing of an absence of compensation. The difference between the occurrence of the expropriation and the breach of NAFTA is crucial.

The Respondent advanced two other contentions to show that Mondev's argument was wrong, but both are without merit. First, it was said that there had to be some kind of express recognition by the expropriating authorities that

there had been an expropriation. This can't be so. Otherwise all indirect expropriations could be avoided by the simple device of saying nothing, even though NAFTA expressly contemplates indirect expropriations as falling within the scope of Article 1110. The existence of an expropriation is determined by the facts, not just by the word of the expropriating authorities.

And then second, it was said that Mondev's argument was somehow inconsistent with paragraphs (2) to (6) of Article 1110. But those paragraphs are simply about the modalities of calculating and then paying compensation. They're not about the NAFTA obligation to pay compensation in the first place or the NAFTA prohibition against the uncompensated deprivation of investments.

Is it in fact and in short clear that what took place amounted to an expropriation as that term is used in Article 1110, and that Article 1110 prohibits expropriation unless compensation is paid, and that consequently, that article is only

breached when it can be shown that that condition is not satisfied, which in this case was after the entry into force of NAFTA.

Mr. President, let me now, if may, round off the presentation of the Claimant's case in these oral proceedings. First I should like to summarize the state of the case as it now appears to the Claimant. The story which has unfolded before this Tribunal is strongly based on the facts which have been brought to the Tribunal's attention. Mondev set out the facts in considerable detail, and they have not been seriously challenged by the Respondent. Yes, the Respondent has tried to show them in a different light, but, Mondev would submit, not entirely successfully. The Respondent's explanations have at times been difficult to reconcile with what actually happened as evidenced by the record before the Tribunal.

The Respondent has repeatedly tried to get this Tribunal to look again at the facts which were

already put to the jury and on which the jury reached the findings which it did in LPA's favor. Those facts have been thoroughly examined already, and little purpose is served by Respondent's attempts in this arbitration to reargue them. The fundamentals of the Claimant's account of the facts are intact. It has not been denied that the City and the BRA took the view, when the new Boston administration took over in 1984, that the agreed contract terms were too generous. It has not been denied that in forming that view Boston disregarded all that had gone before. In particular the high risks involved in moving into the Combat Zone area in the first place, and then Mondev's additional risk taking when it agreed to a Phase I/Phase II division of the project at the City's request. It has not been denied that Boston set about finding ways of walking away from its contract with LPA, or that it broke its contract with LPA. It has not been denied that when LPA turned to another developer, Campeau, Boston interfered with that

contract in such a way as to lead a jury to find that the interference was tortious. These events, not denied, are the cornerstones of the story which underlies the Claimant's claims in this arbitration.

The rest of the story followed inexorably from that essential start. Boston's systematic and sustained efforts to frustrate LPA's enjoyments of its contractual rights, its coercion of LPA and its eventual success, a somewhat Pyrrhic success, as it turned out, in getting the market value for the Hayward Parcel out of Campeau. That story provides the basis for Mondev's claim that there was a breach of Article 1105(1). In the first place the conduct or misconduct on the part of the City and the BRA in relation to Mondev's investment fell below the standard of treatment which international law prescribes for the treatment of aliens. That standard of treatment required also that Mondev should have redress for the injury suffered. That standard of treatment is enshrined in Article 1105

by the reference to treatment in accordance with international law. Consequently, that misconduct, take together with the absence of redress, violated Article 1105.

And that state of affairs, that unredressed misconduct lasted until NAFTA entered into force. On 1 January 1994 Mondev's investment was suffering treatment which on that date was not in accordance with the treatment required by international law. And there was accordingly a breach of NAFTA, when NAFTA was in force.

But there is another dimension to the Respondent's breach of Article 1105. Insofar as it requires redress to be afforded for wrongful conduct suffered by Mondev, which it does by reference to its--by virtue of its reference to treatment in accordance with international law, Mondev was in significant respects denied access to any such redress, and the opportunity to present its arguments to the Courts before decisions were handed down.

But there was yet a further dimension. The SJC dealt with Mondev's claims in a manner which did not match up to the standards required by international law. It was said that that Court had a historic and eminent status. And that may well be so, but the propriety of a Court's conduct is not determined by its status, but by the way in which in some particular case it has behaved. In a number of respects the SJC's treatment of Mondev's claims was defective. The retroactive application of the new rule and the failure to remand facts, fact issues to the jury, both of which points were decided without having first heard argument on the point, on the latter of which the failure to remand further deprived Mondev of the opportunity to present its arguments to the one body qualified to assess matters of fact, the Massachusetts jury.

And these complaints as to the judicial process are, as recognized by the Respondent, not affected by any NAFTA time bar. All these aspects of the wrongful conduct suffered by Mondev, those

involving the wrongful conduct of the City and the BRA, and those involving the defective judicial processes, make up, taken together, a single package. That single package is what is covered by the word "treatment" in Article 1105 paragraph (1), and that single package is the treatment which has to be in accordance with international law. But it was not, and thereby, the breach of Article 1105 is established.

Throughout the misconduct to which Mondev was exposed, it's apparent that the City and the BRA had very much in mind the fact that Mondev was Canadian. It is Mondev's submission that had Mondev been a wholly United States corporation it would have received more favorable treatment than it did in fact receive as a Canadian investor. And on this basis, it submits that the Respondent is liable for a breach of Article 1102 paragraph (2) of NAFTA.

The City's and the BRA's conduct not only amounted, in Mondev's submission, to conduct which

failed to meet up with the standard set by international law, but it also had the clear effect of depriving Mondev of its investment in a manner amounting to expropriation. By March 1999 it was clear that no compensation was going to be forthcoming. At that stage, therefore, the deprivation became an uncompensated expropriation, and as such a breach of Article 1110.

Mr. President and Members of the Tribunal, I summarized again the main elements in Mondev's claim in this arbitration in the light of the comments made by the Respondent, and as I stated, Mondev finds no reason to depart in any substantial way from the claim which from the beginning it had advanced. The Respondent has suggested from time to time that since the beginning of these proceedings, the Claimant has varied its position in certain respects. That's true, but that is precisely the result to be expected from successive pleadings and the interplay of oral argument and questions from the Tribunal. In the same way the

Respondent's argument has changed. The Claimant makes no complaint about that.

But what has not changed in this case from the very beginning is the Claimant's assertion that it had a valuable investment in Boston, and that it was in effect deprived of that investment by the gross misconduct of the Boston authorities, for there can be no mistake by reason of a continuous and intentional of unprincipled, even deceitful conduct by the City and the BRA, Mondev is left with no project and no compensation. Instead of receiving fair and equitable treatment, instead of receiving full protection and security, instead, in short, of receiving treatment in accordance with international law, Mondev has been exposed to a myriad of technicalities and creative arguments, all expressly designed to deprive it of its substantial investment, the result of many years hard work in the Commonwealth of Massachusetts.

The Tripartite Agreement was signed in good faith. It cannot then be acceptable after the

change of administration and after Phase I had been completed, that the Boston authorities can turn round and say, "We're going to break our contract because we feel like it." Nor is it acceptable that the Boston authorities can embark upon a course of conduct which can later be described by the highest Court in the Commonwealth as, I quote, "engaging in dishonest or unscrupulous behavior as they pursue their legislatively-mandated ends."

In the end, Mr. President and Members of the Tribunal, there was no fair play, nor was there any compensation in any way. More to the point in this arbitration, there was equally no observance by the Respondent of its NAFTA obligations. It is to this distinguished Tribunal that Mondev looks for a finding to that effect, so bringing this affair to a reasonable and fair conclusion in accordance with the requirements of international law and the protections which, under NAFTA, the Canadian investor enjoys in the United States.

Mr. President, let me now set out the

Claimant's formal submissions to this Tribunal. For all the reasons set forth in Mondev's written pleadings and in its oral arguments this week, Mondev respectfully requests that the Tribunal should judge and declare, one, that the Tribunal is competent to hear Mondev's claims and that those claims are admissible; two, that the United States' objections to the competence of the Tribunal and the admissibility of Mondev's claims are dismissed; three, that the United States is in breach of its obligations under Chapter Eleven of NAFTA in particular, its obligations under Articles 1102, 1105 and 1110; four, that the United States is liable to pay damages to Mondev for the loss and damage incurred by Mondev by reason of or arising out of those breaches; and five, that the issue of quantum of damages with interest be disposed of in a subsequent phase of this arbitration in accordance with such procedures and timetable as the Tribunal may determine.

Mr. President, I can make a text of that

available to the Tribunal in a moment.

It only remains for me, Mr. President, to express very sincerely the Claimant's thanks, first to the staff of the World Bank, and in particular Ms. Eloise Obadia, for all the helpful and efficient assistance that the Claimant has received from the World Bank, not only in these proceedings, but throughout the course of this arbitration. I'd also like to thank colleagues on the Respondent's side for their professional collaboration in these proceedings, and finally, but by no means least, Mr. President and Members of the Tribunal, to express the Claimant's thanks to the Tribunal for the courtesy and patience with which you have listened to our presentations, and if I may say so, for the stimulating interesting questions which you have put to us and the answers to which I hope you have found have met your concerns.

Thank you very much, Mr. President.

PRESIDENT STEPHEN: Well, thank you, Sir Arthur. I noticed for the first time I'm afraid,

that we seem to have a very long lunch hour predicted according to the schedule that I have in front of me, in the sense that we only resume at 3:30.

MR. CLODFELTER: [Off mike, inaudible.]

PRESIDENT STEPHEN: That's correct, is it? Very well. Thank you very much, Sir Arthur.

PROFESSOR CRAWFORD: Have more lunch.

PRESIDENT STEPHEN: Yes. And do I take it that the Respondent wishes to commence now, having 10 minutes available until 1 o'clock?

MR. BETTAUER: We would prefer to begin when we return from the lunch break.

PRESIDENT STEPHEN: At 3:30?

MR. BETTAUER: Yes.

PRESIDENT STEPHEN: Very well. We adjourn now until 3:30.

[Whereupon, at 12:45 p.m., the hearing recessed, to reconvene at 3:30 p.m. this same day.]

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

(3:30 p.m.)

PRESIDENT STEPHEN: Mr. Bettauer, please.

MR. BETTAUER: Thank you, Mr. President. Mr. President, Members of the Tribunal, I am happy to begin our rebuttal.

The first thing I'd like to do is to explain to you how we intend to handle the rebuttal, what order of presentation is so that you can have in mind how we will address the topics. I will first make a number of general remarks, a brief opening. Thereafter, Ms. Toole will address the points under Articles 1116 and 1117. Thereafter, Ms. Svat will come back to the time bar and temporal issues, and to the Article 1110 issues. Next Mr. Clodfelter will deal with 1102 and the general standard of treatment under 1105. Next Mr. Pawlak will deal with the SJC decision in terms of 1105, Article 1105. Then Mr. Legum will deal with the issue of denial of access by Courts, the ownership of the rights at issue, and questions

of fact that are relevant to the claims in the 1980s and to the NAFTA claims and to the expro claims. At the end I will come back and make a brief statement as well.

As you see, that generally follows the breakdown of assignments that we had for our presentation in chief, and we shall try to be succinct and not take undue amounts of time at it.

I would like to start by an observation about what happened. Sir Arthur said that the centerpiece of this story is that Mayor Flynn and Mr. Coyle made a purported decision to thwart the contract and to prevent closing on the Hayward option, and that is the story that exists, and that is a story he asserts that we have not touched or denied.

Now, repeating it multiple times does not make it so, and in fact, we have told a different story. We do not agree with that story. Let me be clear, we do not see the events as having occurred that way. That should be clear from our briefs,

and it should be clear from what we have said to this point.

The real story is different. LPA had a contractual means to achieve the Hayward option if it wanted to. It did not. That is what the Supreme Judicial Court of Massachusetts found. The real story is that neither Mondev nor LPA were deprived of any rights. In effect, LPA sold them to Campeau. Campeau went bankrupt, and the rights were compromised that way. And it is a fantasy to think something else happened. There was no violation of NAFTA when NAFTA was in force by these events.

Mondev's rebuttal presentation puts forward a series of rather striking propositions, and I'd like to address three of them and then turn the floor over to my colleagues. First, Mondev really made clear again, as it has throughout, that it is seeking to relitigate events that occurred in the 1980s, and is asking this Tribunal to act as a reviewing court. The facts were heavily stated in

the rebuttal, as they were heavily stated in the main presentation. To do this, they argue repeatedly that the SJC is not infallible. It has in fact, they say, previously made defective decisions in the past, but a mere defect is not a grounds for review here. They said the SJC has been reversed 18 times in the past few decades. Well, they are asking you to reverse it here, but that is not your function. They argue that you should accept the jury's verdict and reject the decision of the Supreme Judicial Court of Massachusetts, which we think fully and fairly considered the matter.

As you know, the jury finding was never entered, and then was found by the Massachusetts Courts to not be warranted as a matter of law. Here is what Mondev--

PRESIDENT STEPHEN: I'm sorry. What do you mean was never entered?

MR. BETTAUER: Well, the motion was for finding a finding contrary to the jury verdict, so

the jury verdict never became a judgment of the Court.

PRESIDENT STEPHEN: I see what you mean, yes. Thank you.

MR. BETTAUER: Here's what Mondev is asking you to do. They want you to accept, without question, the appreciation of a lay jury on mixed questions of fact and law, and they want you to accept it by a jury that couldn't even get its instructions right. On the face of it, if you look at jury verdict form, they did not understand what they were doing. The form said, "If you answer this question, then skip to the next," they couldn't figure that out. They did it wrong. So they ask you to accept that jury verdict without question, and they want you to reject the unanimous opinion of the seven members of the Supreme Judicial Court of Massachusetts. That, it seems to me, is a tall order for this Tribunal.

And of course this Tribunal has the ability to decide matters of fact and mattes of law

as it wishes. That, in our view, does not make it a super-jury. In fact the last thing the United States wants is for this Tribunal to micro manage domestic law, and we would hope that that is the last thing that the Tribunal itself wants.

What the Tribunal has before it are allegations of breaches of specific provisions of NAFTA. The key allegation is one of denial of justice. To assess that, the Tribunal needs to look at the decision of the Supreme Judicial Court and the system as a whole, not merely at whether there was error, and we have no doubt that we will find that this was not the denial of justice. Mr. Pawlak will return to this matter.

Second, what else is Mondev asking you to do? They are asking you to rewrite the Law of State Responsibility in a rather fundamental way. They say now, in their most recent intervention, that a requirement of treatment is not breached when treatment inconsistent with that requirement is accorded.

JUDGE SCHWEBEL: Say that again. I didn't understand that.

MR. BETTAUER: They say now that a requirement that somebody be treated, that an entity be treated in a particular way, is not breached. You don't breach a requirement if the treatment is inconsistent with the requirement. They say that the breach only occurs where there's a failure to obtain domestic redress. That's the fundamental point they've been making all along. That's how they've been trying to shift, time shift many of the events from the 1980s into a NAFTA claim. Now, this is a breathtaking assertion of what international law is. It is, I would submit without any basis whatsoever, it is a courageous but unavailing attempt to get the claims before this Tribunal. The Members of this Tribunal, I am confident, recognize this. The Tribunal has deep expertise in this area, and I am sure you understand the wide implications of such a move. Ms. Svat will come back to the temporal issues that

are before us.

Another way they want to change international law concerns domestic immunity. In their rebuttal Mondev's counsel admitted that they were not prepared to say it was a breach of international law to provide domestic sovereign immunity in situations such that occurred here, tortious interference of contract. But they went on to say, to argue, that a State, if it does so, must pay compensation. This would be a rule that says compensation is required in the absence of breach, and I submit that it would be a novel proposition for a State to be liable to pay compensation where there is no breach, but this is what they are seeking a finding on by this Tribunal. Mr. Legum will return to the sovereign immunity issues.

Third, Mondev's allegations keep shifting, and it's the fundamental nature of its claims and its theories that keep shifting. This morning Sir Arthur admitted that, that they have changed their

method of arguing what their claims are, what it is that constitutes a breach. At one point they say it's one thing. At another point they say it's another thing. This brings home the following point. Mondev merely wants to assert to this Tribunal that it thinks something went wrong. That is, Sir Arthur's famous smell test, which he repeated again. Mondev has no firm theory or explanation for why a breach occurred. That keeps shifting for convenience. Mondev, in effect, is trying to shift the burden to this Tribunal. It is asking the Tribunal to figure out some basis to let it recover. I submit that this Tribunal should not do so for three reasons.

Under NAFTA, as we have shown, it is the Claimant's function to define its claim, it is not the Tribunal's function. Second, if the Claimant can't figure out what its claim is, the Tribunal has every reason to be dubious about that claim. And third, as we have shown and will review briefly this afternoon, those claims are without merit in

any event.

With that said, I would like to turn the floor over to Ms. Toole to address the 1116, 1117 issues. Thank you.

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

Ms. Smutny began her presentation this morning by noting the United States' reservation with respect to Article 1116, and I will briefly state the United States' position on that issue. Unlike Mondev's new Article 1117 claim, Mondev did take the necessary procedural first step of including Article 1116 in its notice of intent. However, as an evidentiary matter, and as a practical matter, Mondev has not show how it suffered direct damages arising out of any NAFTA breach. Left with nothing to respond to, the United States reserves its right to object with respect to this issue should it ever become necessary to do so.

And as to the purpose of Articles 1116 and

17, Ms. Smutny would appear to have this Tribunal adopt the mechanism for standing under the U.S. BITs, a mechanism that the drafters of the NAFTA never agreed to. She referred the Tribunal to the Mr. Vandevelde's treatise on bilateral investment treaties, specifically the chapter that discusses the definition of an investment. The very unremarkable point made was that an investment may include a subsidiary under the BITs. And the same is true under NAFTA. That's not in dispute here. What Ms. Smutny failed to mention in her presentation is that the BIT mechanism for dealing with the Barcelona Traction rule is completely different from the NAFTA Article 1116, 1117 mechanism. Under the BITs, investments may assume the nationality of the investor that owns or controls the investment. And an investment may do so in order or for the purpose of bringing a claim on its own behalf when it suffers an injury. As we know, the NAFTA explicitly prohibits such a thing, so the BITs are irrelevant to this discussion.

Professor Crawford, I think your question to Ms. Smutny this morning, really gets to one of the key reasons of why we must distinguish between a claim under Article 1116 and 1117. You asked about the effect on creditors if Mondev were to be paid directly for a derivative loss. And if that were to happen, we submit, LPA's creditors would suffer prejudice. Now, Ms. Smutny disagreed, saying there would be municipal remedies for creditors such as an action for fraudulent conveyance. Well, first of all, what would be the fraudulent conveyance?

And secondly, I would ask you to consider this: how would the U.S. collect any taxes owing to LPA if the award were made to Mondev? As the Tribunal may well know, the familiar revenue rule, I believe it's called, would effectively prevent the U.S. from collecting such taxes from Mondev in Canadian Courts.

And finally, Mondev did not respond to the United States' arguments regarding the procedural

bar to its new Article 1117 claim. Nor did it, in its prayer for relief, mention it was claiming on behalf for loss or damage to LPA. Thus, I will rest upon what is already in the record with respect to that issue.

And if the Tribunal has no questions, I will turn the floor over to Ms. Svat.

MS. SVAT: Good afternoon, Members of the Tribunal. I'm going to address temporal matters, as I'm sure you might guess.

It is clear now, after the close of Mondev's case, that Mondev is asking this Tribunal to award compensation in the year 2002 for damages allegedly sustained by LPA in the 1980s. Mondev would like this Tribunal to award compensation for alleged misconduct of the City and the BRA that occurred more than a decade ago.

Now, Mondev suggests that the United States does not understand its temporal arguments under either Article 1105 or Article 1110. But we do understand them. They simply do not hold.

There is in fact no basis for Mondev's arguments. They both turn on their head well settled notions of when a breach occurs under international law, and eviscerate the prescription period set forth under NAFTA Article 1116(2).

I will first address Mondev's claim of continuing breach under Article 1105(1). Mondev's theory is that Article 1105(1) is a twofold primary obligation that protects against wrongful conduct on the one hand and requires that domestic law remedies by granted for such misconduct. And I assume that the arguments that Mondev made in its Reply brief regarding 1105(1), sweeping within it the customary international law obligation to make reparations, is no longer an argument that it puts forth.

Now, we agree, of course, that Article 1105(1)--

JUDGE SCHWEBEL: Excuse me, Ms. Svat. Why do you say that?

MS. SVAT: Because earlier this morning

Mondev did not resume that argument, and in fact agreed that of course the secondary obligations under customary international law are not within this primary obligation, the twofold primary obligation that they rely on now.

PROFESSOR CRAWFORD: Well, of course, the second limb of the twofold primary obligation, if I can put it in those terms, is an obligation to make reparation or at least to provide a remedy.

MS. SVAT: It is, but it is not, according to Mondev, customary international law secondary obligation, but a primary obligation under U.S. law to provide--

PROFESSOR CRAWFORD: Well, the primary obligation to provide through U.S. law--

MS. SVAT: Through U.S. law, exactly--

PROFESSOR CRAWFORD: --a remedy. Of course they have to say that consistent with NAFTA because NAFTA modifies the secondary rules in respect to reparation.

MS. SVAT: Yes. I'm merely just noting

that this is in contract to what they did argue in their reply, as we understand their argument then. Now, with respect to the twofold obligation that they allege here, we agree, of course, that Article 1105(1) and customary international law protect against conduct that falls below the minimum standard. We do not agree that it protects against misconduct at-large, but I will leave it at that for now.

We also agree that Article 1105 protects against denials of justice by requiring a functioning judicial system, but no rule of international law applicable here requires the twofold obligation that Mondev claims to exist. The twofold obligation, Mondev argues, is not breached until domestic law remedies are exhausted. Nowhere in anywhere of Mondev's briefs or in any argument here this week has Mondev cited any authority whatsoever to support this proposition, and perhaps that is why we may be allowed to refer to it as a theory and not an argument.

But in order to find in favor of this theory, the Tribunal would have to accept not merely one, but two, unprecedented and unsupported constructs: First, that the alleged wrongdoing by the City and the BRA, the alleged breach, that this continues in time, and, second--

PRESIDENT STEPHEN: I am sorry. Would you just repeat that. I did not catch it.

MS. SVAT: Yes, I will.

The first construct that we would have to accept is that the alleged wrongdoing continues in time.

PRESIDENT STEPHEN: Yes.

MS. SVAT: And that is the alleged breach and, second, that no ensuing loss or damage could be known to LPA until it brought and concluded litigation in the U.S. courts.

Now, of course, Mondev needs to put forth the first construct of continuing breach in order to get around the fact that the NAFTA does not protect investments retroactively. If we take

Mondev's allegations to be true, indeed, if we accept Mondev's argument that the misconduct of the City and the BRA was akin to the Media Council's misconduct in the CME case, then nothing more need be shown to establish that internationally wrongful conduct occurred; in fact, that that conduct ceased and constituted a breach that ended before the NAFTA entered into force. Mondev simply has not provided any authority to show otherwise.

Now, turning to Mondev's second construct, and here we can assume, for argument, that the breach is a continuing breach, indeed, it would be a breach that, in theory, would continue forever. This Tribunal would then have to find also that Article 1116(2) was not triggered on January 1st, 1994, and did not expire on January 1st, 1997. Mondev's suggestion is that LPA did not have certain knowledge of any loss or damage until the SJC and the U.S. Supreme Court denied any redress.

We submit this a revolutionary concept of loss. If LPA did not know that it suffered a loss,

what basis did it have to seek damages under U.S. law in 1992, when it did, in fact, claim damages from the City and the BRA. We know of no rule of prescription that works in such a way. Thus, even if the alleged internationally wrongful conduct of the Boston authorities did amount to a continuing breach on January 1, 1994, Mondev's claim is time-barred, in any event, under Article 1116(2). Its definition of loss or damage simply cannot be credited.

PROFESSOR CRAWFORD: To some extent, this definition of loss or damage, to a greater extent, is the definition of knowledge, sort of an epistemological argument that because the court proceedings may have recompensed, in whole or at least in part, therefore, they couldn't have had the knowledge until they knew whether there had been a failure of the court proceedings.

How would you construe the word "knowledge"?

MS. SVAT: I would construe--well, the

reason I say it's the wrong definition of loss or damage is because the way I would characterize it is that they are looking at compensation as if that is loss, and so I believe that they knew of their losses when, indeed, prior to the time they brought their claims under U.S. law.

The uncertainty, whether or not they would be compensated is something else altogether and, in fact, compensation presumes that you have loss or damage. Therefore, this is why I characterize it as a wrong definition of loss or damage. I would admit that Mondev is not certain whether or not it would be compensated for any alleged loss or damage. They certainly needed to allege loss or damage to be here today.

PRESIDENT STEPHEN: Does that mean, in essence, what you are saying is that compensation in the agreement is not the same thing as loss?

MS. SVAT: I would say that is correct. They are not the same thing.

PRESIDENT STEPHEN: And that's really

fundamental I think to the argument that we have heard put on behalf of Mondev.

MS. SVAT: I think compensation makes one whole when there is a loss.

I would like to turn now to Mondev's theory of breach under Article 1110. Again, Mondev's theory here finds no support under either international law or Article 1110.

First, Mondev cannot deny that its allegations, if taken as true, would prove an unlawful and compensable taking under international law in 1991. I will examine these under Article 1110 first.

Paragraph (1) of Article 1110 is breached when an expropriation is discriminatory. Mondev alleged the City and the BRA took LPA's nationality into account when its misconduct allegedly took place in the 1980s. Mondev also alleged that the "package of treatment" that LPA allegedly received from the City and the BRA was gross misconduct, and unprincipled, and fell below the minimum standard

in the 1980s. Now, again, this alone, if true, would establish a breach of Article 1110, paragraph (1).

Now, turning to the central claim, which is expropriation not on the payment of compensation, which is under subparagraph (d) of paragraph (1), Article 1110, paragraph (1), is likewise breached when an expropriation occurs where, as in this case, there is no doubt that it occurred without either payment of compensation, in accordance with paragraphs (2) through (6), or adequate provision that such payment, in accordance with paragraphs (2) through (6), would be forthcoming.

I would like to clarify something that Mondev said earlier today. The United States does not assert that what is recognized is a recognition of the taking and the obligation to compensate in order to assert a breach. What we showed, rather, is that international law only looks beyond the date of an expropriation, where such recognition is

made. In other words, it will consider a breach, after the date of the taking, where such recognition is made. We do not argue that you'd have to recognize that a taking occurred in order to bring a claim for an indirect expro.

Now, just as the cases establish, the cases that the United States has cited in its briefs and at oral argument yesterday, a denial that compensation is due is sufficient to establish a wrongful expropriation under international law and under Article 1110. There is no reason for this Tribunal to ignore the case law and the state practice that evidences this proposition.

Article 1131 of the NAFTA instructs that international law shall govern the issues in dispute, and cases decided under Chapter Eleven that Mondev itself relies on under Article 1110 say the same.

Thus, to answer Mondev's question from this morning, if Mondev had brought this case in 1991, an allegation of an expropriation, and if the

NAFTA were in force at that time, the City and the BRA would have said the same thing that they effectively did say in 1991, which is there was no expropriation and such a denial of an expropriation is a denial that compensation is due or that it will be forthcoming.

Nothing more need be shown under international law or under Article 1110. I would quickly as an aside that Mondev also suggested that there would be no way for them to allege an expropriation under U.S. law, and we have submitted, in Appendix Volume XI, at Tab 48, the Massachusetts general law that does provide an action for compensation seeking an inverse condemnation. So there is such a law.

PRESIDENT STEPHEN: I'm sorry. Would you repeat that last comment. I didn't follow it.

MS. SVAT: Earlier today, Mondev said that there would have been no domestic cause of action for a taking that they could have brought. I just wanted to refer you to the record where we did

submit the statute under Massachusetts law where such an allegation could have been made under Massachusetts law. It's not a major point, just a minor point.

Finally, I would just like to make one last point, which is that Mondev did not respond to the argument that the United States made yesterday that the investment that Mondev alleges was taken, the Lafayette Place Project, no longer existed on the date that the NAFTA entered into force. Thus, it is not explained how that investment could have been protected under Article 1110. We submit no investment of Mondev's was protected under Article 1110, nor has Mondev alleged an expropriation after January 1st, 1994.

There may be a question.

PROFESSOR CRAWFORD: Your position is, of course, more fundamental than just in relation to 1110. It is that because there was nothing left of the investment in 1993, it was never an investment to be protected by any provision of NAFTA.

MS. SVAT: No, I wasn't make that broad point just then. I was just making the point--

PROFESSOR CRAWFORD: A narrower version of it?

MS. SVAT: Well, merely that under Article 1110, Mondev has alleged the taking of an investment that was taken before the NAFTA entered into force. We talked yesterday at length about whether or not a claim might have existed that could have, upon the entry into force of the NAFTA, continued in time and been an investment itself, but it's not an investment that Mondev has alleged was taken here.

That's all I have. Thank you.

PRESIDENT STEPHEN: Thank you, Ms. Svat.

Mr. Clodfelter?

MR. CLODFELTER: Mr. President, I will respond to the Claimant's rebuttal with regard to two issues, the claim under Article 1102 and the applicable standard under 1105.

This morning, in the rebuttal

presentation, on the last day of the hearing on liability, we heard Mondev's very first attempt in almost three years since this claim was first noticed, to analyze its national treatment claim in accordance with the terms of Article 1102(2). Sir Arthur said very little in response to the points I made on Wednesday, so I will not review them now, but I just want to make two other points.

First, Sir Arthur tried to reinject some significance to the four statements upon which they rely to show anti-Canadian animus by pointing out their periodicity, the fact that they were made over a period of time. Of course, periodicity is irrelevant if the statements themselves don't show anti-Canadian animus to begin with. On this, Sir Arthur had nothing more to add.

But in connection with this, let me just say to you, Mr. Chairman, that we would encourage you not to suspend your understanding that Canada and the United States are twin souls, at least until you hear evidence to the contrary, and I

don't think you have seen any such evidence in this case.

Second, and this is the effort to analyze the case, in terms of Article 1102 itself, Sir Arthur restated his doubtful claim that there just was no U.S.-owned investment against which to compare the treatment received by LPA. I will repeat what I said on Wednesday, that that alone is sufficient to dispose of this case because a comparison is required.

PROFESSOR CRAWFORD: Is that slightly odd? I mean, if you have a prohibition such as that contained in 1102, paragraph (2), let's take a case obviously there are some problems here because of the times at which those statements were made, but let's assume there's no inter-temporal problem and a municipal authority says to a Canadian entity, "We're not going to grant you this permit because you're Canadian," and there's no evidence that any other entity has ever applied for such a permit. Nonetheless, it would prima facie be a breach of

1102, paragraph (2), for a U.S. authority to refuse to do something to a Canadian, which it was lawful to do to an American, as it were, on grounds that they were Canadian.

MR. CLODFELTER: Well, it's such an extreme case. I think you can infer from the express statement that an American would be treated differently, and you have your comparison built into it. We have nothing like that, of course, here.

What was incumbent Mondev to do here was not--let me just note Sir Arthur amazingly said that the record was devoid of any indication that American-owned developers received the kind of treatment that LPA received, and that has it exactly reversed. It's Mondev's burden to show, in order to prove less-favorable treatment for LPA better treatment for some U.S.-owned developer. No effort has been done to submit anything into the record on this. The record is devoid, but it's devoid of the proof necessary to sustain the claim.

That's all I wanted to say on Article 1102.

I return now to the standards for an Article 1105 violation. First of all, let me dispose of this curious issue of whether the set of principles grouped under the rubric "full protection and security" applies to investments.

Now, on Monday, Sir Arthur said that our position was that it didn't. He didn't say why this was significant though.

On Wednesday, I expressed surprise and assured him and you that we do think that full protection and security applies to investments.

Today, Sir Arthur stated, with an air of significance, that this was taken note of, and that this meant that we withdrew the comments that we had at Page 37 of our Counter-Memorial. Now I would not blame you if you thought that Sir Arthur and I were engaged in some kind of secret debate using code, but let me try to let you--

PROFESSOR CRAWFORD: Not hieroglyphs.

MR. CLODFELTER: Not hieroglyphs, no, that's something else entirely.

Let me let you in on what this is all about. We have never said that the requirement of full protection and security in Article 1105 does not apply to investments. How could we? The terms, express of Article 1105, say that such treatment must be accorded to investments. We don't disagree with Mondev on the application of the requirement to investments. We disagree on what the requirement is. Let me read to you what we say on Page 37 of our Counter-Memorial.

"Cases in which the customary international law obligation of full protection and security was found to have been breached, however, are limited to those in which a State has failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien." Obviously, property of an alien can very well be an investment.

This case does not resemble any of those international decisions in the slightest, neither physical harm or invasion or criminal activity is involved, and this Tribunal can, and should, summarily dismiss Mondev's full protection and security argument.

Full protection and security has a well-known content in customary international law. At Footnote 41, on Page 37, of our Counter-Memorial, we list the many leading cases in this area, and they all share the characteristics that we describe there.

Mondev--

PRESIDENT STEPHEN: I'm sorry. The characteristic being protection against criminal activity?

MR. CLODFELTER: Against physical persons or property.

PRESIDENT STEPHEN: Yes. When I said criminal activity, I meant physical criminal activity.

MR. CLODFELTER: Mondev has not cited a single authority for the proposition that full protection and security applies to acts of a nonphysical nature directed to intangibles such as contract rights in dispute here. The concept simply does not apply to the facts of this kind of investment dispute.

PRESIDENT STEPHEN: International law may be laggard, but it's not completely static, if I may say so. Take an example where a receiving State paid no respect whatever to the intellectual property rights associated with an investment, surely, that could be regarded as, in principle, a failure to give due protection and security to those rights.

I mean, they are, in effect, imported, they may be very valuable rights, they're imported as part of an investment and then they are simply flouted. Surely, that could be covered by full protection and security, in principle. I mean, it may be much more damaging than having your windows

broken.

MR. CLODFELTER: There's no question, and that would be a matter of demonstrating that State practice has evolved to the point where, in fact, States do accord such protection out of a sense of obligation. That's what's missing in this case. any evidence that the principal has developed to that point, and that's what has to be shown before it can be declared to be customary international law. No effort has been made in that regard whatsoever.

Sure, concepts of customary international law evolve. They evolve with State practice. No such State practice has been shown in this case.

Second, on the question of subjectivity, it's a pity that your question this morning wasn't given a better answer, and that is the question concerning the position that the terms "fair and equitable treatment" and "full protection and security," as used in 1105, are merely referenced to sets of principles established in customary

international law.

I showed on Wednesday how the FTC interpretation limits the meaning of these phrases to their meaning within customary international law and the minimum standard under customary international law. Parenthetically, you will recall that I showed on the screen, in fact, Mondev said something very similar in its Memorial.

Since they are referenced to established concepts, there is no need, under the rules of interpretation set forth in the Vienna Convention, to determine what the word "fair" means or what the word "equitable" means, as Sir Arthur would have it. Indeed, this sounds very much like the deconstructionist approach that he earlier condemned.

The point is that there are two approaches in applying these concepts. One is that which Professor Vasciannie called the plain-meaning approach. That's the approach advanced by Mondev, applying notions of fairness or notions of justice

in isolation. The other approach is that taken in Article 1105, as confirmed by the FTC interpretation, applying established standards.

Of course, both involve some subjective judgment, but there is no comparison in the degree of subjectivity required. Let me give an illustration of that. Under Mondev's approach, the test would be, for example, as applied to the actions of the Massachusetts courts, is this conduct fair or is this conduct equitable?

But under the approach of the customary international law minimum standard of treatment, the question would be like it was put perhaps in the Chattin case, which was cited Monday by Sir Arthur. You can see on the screen how the Chattin Tribunal stated it.

"Since this case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to willful neglect of duty or to an insufficiency

of government action, recognizable by every unbiased man."

The answer there was yes. We suggest that applying the proper level of subjectivity to the questions here, the answer has to be no.

MR. SCHWEBEL: Mr. Clodfelter, under that approach, what meaning does the United States, and I would take it its two partners have agreed with it on the interpretation, accord to "fair and equitable"? Couldn't the phrase simply have stopped with the words "in accordance with international law," period?

MR. CLODFELTER: Yes, clearly, they could have, and drafters of treaties have many different approaches. Given the confusion that does reign in some of the literature in this area, and it is clearly an area where the contours of concepts are not entirely clear, the parties clearly wanted to make it clear what they were talking about.

They wanted to make it clear that, as between these three parties, the established rules

of fair and equitable treatment are part of the minimum standard, and they will comply with them, and call it the belt-and-suspenders approach, but this is how they felt they needed to state it to make it clear.

Now what does it include? I mean, beyond the obvious elements of the concept, which are well known and accepted, the customary international law requirements, with respect to expropriation, are elements of fair and equitable treatment, quite apart from what we say in 1110. The notions of denial of justice come within the rubric of fair and equitable treatment.

There is developing law on various kinds of contract questions, when contract breach may arise to an international dealing. Those are the areas covered by this set of principles called "fair and equitable treatment."

PROFESSOR CRAWFORD: Of course, if Article 1105 had stopped after the word "international law," the only way you could have said that 1105(1)

took what had previously been the U.S. and Canadian position on the question would have been by reference to the title of the article because the position that was taken by the majority in the charter of economic rights and duties was that what international law required was national treatment, full stop. So you clearly needed the extra words on any view of things.

MR. CLODFELTER: The title is not without significance, however.

PROFESSOR CRAWFORD: No, but it would have been a very unwise thing for drafters to rely on the title for a point of such importance.

MR. CLODFELTER: Agreed.

PRESIDENT STEPHEN: --as the U.S. treaty is of such importance.

MR. SCHWEBEL: I would observe that the title says "Minimum Standard of Treatment." It doesn't say "Minimum Standard Under International Law." Even the title is not terribly clear. But when you said a moment ago, Mr. Clodfelter, what

the parties intended, were you referring to what they intended when they drafted and adopted the article or to the interpretation subsequently adopted?

MR. CLODFELTER: Those are one and the same thing, I submit. The interpretation was telling the world what they meant when they drafted it.

PROFESSOR CRAWFORD: Part of the problem with minimum, I mean, the standard of treatment is minimum in this sense that it's not a maximum standard of treatment. We are not talking about uniform law or uniform rules, and, secondly, that it's a minimum standard of treatment irrespective of the treatment afforded to nationals under local law. Whether it's minimal standard of treatment is another question.

MR. CLODFELTER: Exactly.

PROFESSOR CRAWFORD: I don't expect you to answer that.

[Laughter.]

MR. CLODFELTER: Well, I will make a comment about that because I alluded the other day to disappointment of some investors on how these parties looked at this obligation. It's easy to forget the enormous achievements made for investors in Chapter Eleven.

You can call the minimum standard of treatment as applied by the parties minimal, but I think that would be unjust to the drafters. Actually, it affords a great deal of protection.

Thank you. I would like to turn the floor over to Mr. Pawlak.

It might be a good time to take a break, if the President would rather do that.

PRESIDENT STEPHEN: I would just ask that we do seem to be going quite quickly through this; is that so?

MR. LEGUM: We do, but I'm going to go last, and we all know how verbose I can be.

[Laughter.]

PRESIDENT STEPHEN: We'll rely on you, Mr.

Legum, to keep things going.

[Recess.]

PRESIDENT STEPHEN: Mr. Pawlak, are we going to hear from you?

MR. PAWLAK: Thank you, Mr. President. I will be brief in discussing the arguments under 1105 regarding the dismissal of LPA's contract claims. The reason? Mondev has offered nothing new this morning to establish that the dismissal of those claims constitutes a violation of the customary international law standards of denial of justice that are incorporated into Article 1105.

This morning, the President of the Tribunal asked Mondev, "You don't simply claim error, do you?" Mondev's counsel stated rather emphatically "no." However, the remainder of Ms. Smutny's remarks belie that response.

Mondev again this morning, as in is Reply and on Tuesday, presented points of evidence that Mondev claims only now rendered the SJC decision inconceivable. In the interest of time, I will not

again explain why each of the points of evidence relied upon by Mondev to establish that the City had repudiated do not establish that fact. Rather, should the Tribunal find it necessary to consider that evidence, I ask that you bear two principles from Massachusetts law in mind.

First, the SJC, despite the requirement that it review the evidence in a light most favorable to LPA, was looking for specific evidence. That was evidence that could establish a definite and unequivocal statement of an intention not to perform.

The second point I'd like to have the Tribunal keep in mind is that with respect to most, if not all, of the evidence offered, Mondev has not responded to the additional hurdle to establishing a repudiation. As explained in our Rejoinder at Notes 64 and 65, as well as in the opinion of Judge Kass submitted with the Rejoinder, particularly at Exhibit 7, a statement of repudiation must be made by the one contracting party to the other

contracting party. Most of the points of evidence relied upon by Mondev are not such statements.

Let me now turn to Mondev's evolving new law contention. Mondev apparently is confused over what rule it is that Mondev is asserting is a new one. When pressed by the Tribunal this morning, Mondev's counsel merely referred to the Coquillette opinion, suggesting that it highlighted "very surprising aspects of the SJC decision."

As the U.S. has made clear, even if the SJC decision was surprising--and it was not--it would not give rise to a denial of justice under the standards of customary international law. But let us consider what Mondev suggests may possibly be new rules in the SJC's decision.

First, as we demonstrated on Wednesday, the rule requiring that a party be ready, able, and willing to perform and that a party manifest some offer of performance is by no means new. In fact, it is decades-old. In 1991, the Court of Appeals in the Simpson case, as I pointed out in my prior

presentation, announced the rule in the very same words that the SJC used in 1998 in the LPA case.

Second, to the extent that Mondev suggests that the square corners rule, as we have come to describe it in the last few days, is at all new, the SJC decision itself establishes that there is nothing new about it. Indeed, at page 524 of the SJC's decision, the SJC notes that the origin of the square corners rule is a statement in 1920 by Justice Holmes, of the U.S. Supreme Court.

In any event, as Judge Kass points out at page 10 of his Rejoinder opinion, the SJC mentioned the square corners rule parenthetically only after establishing what the standards for contract performance were.

In concluding this point, I refer the Tribunal to Rejoinder Footnote 66 addressing the square corners rule, and note that even assuming that the square corners rule was new and was applied to the LPA case, Mondev has not met its burden of proof to establish that such an

application would be a violation of the denial of justice standards under customary international law.

Finally, a word about the purported retroactive application of a new rule. On this point, I have just a few remarks. First, Mondev concedes that the SJC's application of law to the parties before it is reflective of common law practice and in and of itself not enough to establish a violation of Article 1105.

Moreover, it bears emphasis that Mondev never suggested to the SJC that the SJC should not apply the supposed new rule to the parties before it. If LPA really had no desire to have the rule in question applied to it, LPA could have said as much in its petition for rehearing to the SJC. It did not.

And for this point, I can refer the Tribunal to the U.S. Rejoinder at Note 51, and there you can be directed to the Oleskey statement. I believe it's Exhibit 27 to Volume II of the

Oleskey statement which contained--

PRESIDENT STEPHEN: What are you suggesting that it might have done? It might have said we don't want this rule to apply to us because it's retrospective, in effect?

MR. PAWLAK: On that point, the point at which LPA sought rehearing on the case before the SJC, they certainly could have suggested that the SJC should not have applied the rule because it was a new one to its own case.

PRESIDENT STEPHEN: It could only have done that if it had been successful in getting rehearing, I suppose. They would do it at the rehearing. Is that the point?

MR. PAWLAK: Right, but the exhibit I direct you to is the letter for the grounds that LPA--

PRESIDENT STEPHEN: I see.

MR. PAWLAK: Thank you.

Finally, LPA in its petition for certiorari to the United States Supreme Court

conceded that there is no prohibition under U.S. law on retroactive application in civil common law cases. And for that proposition, I direct you to the LPA petition for certiorari, which is again the Oleskey statement Volume II, and that is Exhibit 27. The other statement that I referred to, the letter for the petition for rehearing, is not Exhibit 27.

As the U.S. made clear at page 34 of its Rejoinder, even had there been a retroactive application of the law, State practice does not support Mondev's position that the retroactive application of law constitutes a violation of international law.

To close, the U.S. submits that it has demonstrated that the SJC's decision was amply correct and reasonable. But even if the SJC had erred, Mondev has not demonstrated so gross an error or any manifest injustice sufficient to establish that there was a violation of the standard of denial justice incorporated into

Article 1105.

Those are all my remarks. Thank you.

PRESIDENT STEPHEN: Thank you, Mr. Pawlak.

Mr. Legum.

MR. LEGUM: Mr. President, Members of the Tribunal, I'd like to begin my remarks this afternoon by addressing the question of the alleged denial of access to the courts.

Mondev began its presentation this morning by acknowledging that States may grant immunity to their organs, and that that grant of immunity does not violate international law. Now, this concession accords with the United States' views on the subject and to my mind disposes of their claim.

Mondev went on, however, to contend that, nonetheless, if a State organ violates its own laws, it cannot grant itself immunity. Now, I personally don't understand how it can make both assertions at the same time. They seem to me to be irretrievably inconsistent, but it is possible that I am misunderstanding their argument.

In any event, the whole point of immunity is to immunize government conduct from suit where that conduct might otherwise be viewed as wrongful. So if granting immunity to a governmental organ is not internationally wrongful, then that, as I said before at the outset, necessarily means that there has been no denial of access here, because here there is a grant of immunity and that grant of immunity is not internationally wrongful for the reasons we have explored at length.

The second point I'd--please.

PROFESSOR CRAWFORD: I don't want to put the Canadian--sorry--Mondev's case, and I may well not have understood it either, but it seemed to me there were two different ways in which they put it.

They said, first of all, that, in general, a State may grant immunity to--at least qualified immunity to individual organs, but to the extent that that immunity prevents the inquiry into matters specifically affecting investments covered by NAFTA, it potentially raises NAFTA questions.

Secondly, and I think a narrower formulation, was that at least they couldn't do so if the effect was to immunize inquiry into the acts of that entity in respect of conduct which would be a breach of a NAFTA obligation.

MR. LEGUM: Well, if it's the first point, then there's certainly no support for it in the text of the NAFTA, which Article 1105(1), as we have explored at length, incorporates customary international law. So if customary international law does not make a grant of qualified immunity, which is indeed what we have at issue here--if that is not internationally wrongful under customary international law, then the mere fact that the conduct at issue relates to an investment doesn't prove a violation of Article 1105(a).

As for the second proposition, I would submit that there is no support for it in either international law or in the text of the NAFTA. I think that what we have shown through our review of authorities is that if conduct is internationally

wrongful, a claim may be pursued internationally immediately and there is no obligation to exhaust local remedies that do not exist where, as is the case here, the relevant organ is a immune. But there is no obligation under international law to de-immunize States for conduct under municipal law that would be internationally wrongful.

I'd like to conclude on this point by simply noting what Judge Kass notes in his opinion. And I mentioned the specific paragraph yesterday, so I will not repeat it today, also in part because I don't remember what it is.

But much of what the government does in economic regulation necessarily interferes with private parties' contracts. It is inevitable that a wide variety of governmental acts in the economic sphere will have that effect, and it would cripple government if in every case where there was such an effect a lawsuit could be brought, particularly, as Judge Kass notes, in a society that is as famously litigious as that of the United States.

If there are no questions on this issue of denial of access to courts, I will move on to my next point, which is the ownership of rights.

Could I have the first slide, please?

This is the familiar text of the mortgage, and I'm casting it on the screen to show that the mortgage does not take a definite view as to whether there are rights of the mortgagor under the Tripartite Agreement to develop parcels adjacent to the premises. The phrase that it uses is "excluding any rights of the mortgagor thereunder to develop parcels adjacent to the premises.

By contrast, by its use of different terms to describe rights and options to purchase and lease, and rights to develop, the mortgage suggests strongly that those terms have different meanings, and we submit Mondev's view of the mortgage language is inconsistent with that.

PROFESSOR CRAWFORD: Mr. Legum, most of my experience with mortgages has been regrettably personal, but it's not too much of an inference to

suggest that the opening language there is boilerplate language of the bank's mortgage, whereas clearly the reference to the Tripartite Agreement was drafted for the purpose of this particular mortgage as a particular reference. That seems to me to reduce the strength of the inference one might otherwise draw as between the different use of the language.

MR. LEGUM: Well, I would respectfully disagree. As the Tribunal will recall from our review of paragraph 23 of the mortgage, that paragraph set forth a notice obligation with respect to rights and options to purchase under the Tripartite Agreement.

I believe there was one other agreement that was referenced there, but clearly the reference to--or rather the fact that there were rights and options to purchase under the Tripartite Agreement was something that was foremost in the parties' mind when they were drafting this.

PRESIDENT STEPHEN: I suppose in a sense

it's a question of where the boilerplate wording ends in this particular clause. The opening words obviously are.

MR. LEGUM: Well, I guess the question is also how much of the opening words are boilerplate and how much of them are specific. I, too, cannot profess to have vast experience in dealing with mortgages, but I don't think there are many provisions that include specific references to options to purchase and lease and exercising options when there's not an option that the parties are thinking about.

I'd like now to move on to my next point. We heard this morning for the first time an argument based not on course of performance under the Uniform Commercial Code, but instead relying on Section 1-201, paragraph 3's phrase, quote, "by implication from other circumstances."

This is the first time that we have heard an argument based on that particular phrase. It is not addressed in the parties submissions, and

therefore I would submit should not be considered.

Finally, on the question of burden of proof, Mondev's assertion is that the United States bears the burden of demonstrating that Mondev does not have an investment that is covered by the NAFTA. That is, I submit, an extraordinary proposition. Clearly, Mondev has the burden of proving every element of its claim and it cannot prove a claim if it cannot prove that it has an investment that is covered by the NAFTA.

Therefore, I submit that under the rules that normally apply in such circumstances, it is Mondev's burden, not that of the United States, to convince the Tribunal on this question of its ownership of the rights.

Unless there are further questions on that subject, I will turn to the question of the different versions of the facts relevant to what happened in the 1980s and whether there was an expropriation here.

What the facts show here is that LPA owned

certain rights under the Tripartite Agreement and to the project. It sold those rights to Campeau in 1988. Campeau ultimately did not perform its obligations under the instrument that conveyed those rights because it went bankrupt, but the United States had nothing to do with Campeau's entering into bankruptcy.

And if I could just have the first slide on the screen, please, this is an excerpt from LPA's sworn answers to interrogatories in the case that it brought against Campeau after things went sour with Campeau. And what I have this on the screen for is simply that it confirms what I stated yesterday and what was not disputed in Mondev's presentation this morning that the lease was intended to be tantamount to a present sale of LPA's interests.

Now, as we've seen, the lease was different in some respects from the 1987 proposed contract of sale. But the differences between the two, I hope that I have established, are not on the

order that any kind of showing of an expropriation of LPA's rights could be demonstrated.

PRESIDENT STEPHEN: When you say differences, differences in money payments involved in the two transactions that you showed on the screen?

MR. LEGUM: That's correct.

PRESIDENT STEPHEN: Yes, I see.

MR. LEGUM: Now, Mondev contended very briefly this morning that the 1987 sale was a, quote, "distress or salvage sale." In fact, if the Tribunal reviews Mondev's Factual Appendix where it discusses its dealings with Campeau--and that is paragraphs 73 to 88--it will find no mention of any contention that the sale to Campeau was a, quote, "distress or salvage sale."

There is no evidence in the record, and, in fact, there has been no allegation in the parties' pleadings, that the sale to Campeau or the lease to Campeau was done at for anything less than fair market value.

Now, after, as we have seen, this effective sale of LPA's interests, Campeau went bankrupt, but as I mentioned at the outset, we are not responsible for that. We submit that if the Tribunal looks at the broader picture here at what happened, there can be no finding of an expropriation, just based on the facts that I've mentioned so far.

Now, I'd like to turn to a number of the more disparate issues that have been raised in the course of the morning's presentations.

PRESIDENT STEPHEN: Does it come to this then, that you say that whatever loss was incurred was incurred essentially because of the bankruptcy of Campeau rather than from any other fate?

MR. LEGUM: Yes. The record before the Tribunal shows that LPA sold its interest to Campeau. It received consideration, or it agreed to consideration in an arms-length transaction, and ultimately Campeau didn't perform, but it's undisputed that the United States had nothing to do

with that, so any loss that LPA may have incurred because Campeau did not perform cannot be attributed to the United States.

I'd like to begin with the issue of coercion, this notion that--please.

PRESIDENT STEPHEN: Of course, that ignores the whole question of what sort of financial profits would have been made had Mondev been encouraged, let's say, or at least permitted to go ahead with the whole of its project.

MR. LEGUM: Had it been able to go forward with its project earlier in 1986 and 1987.

PRESIDENT STEPHEN: Yes. I mean the financial consequences, we don't know what they might have been, but they might have been very much more desirable from Mondev's point of view than the amount that was promised by Campeau, although not paid.

MR. LEGUM: They might have been. There's certainly no evidence in the record to suggest that. Also there's no evidence to suggest that

they might not have been lower than what it got from Campeau, but what we're talking about here is an allegation that the United States expropriated LPA's interest in the project, and the fact that it got 95 percent of what it might have gotten otherwise, rather than 100 percent under well-established precedent, cannot constitute an expropriation. It has to be a taking of their interests, and there has been no taking of their interests. What we have here is an arms-length voluntary sale of its interests to a third party, and a third party that did not perform on its obligations for reasons that have nothing to do with the United States.

So I turn now to the question of coercion, this notion that Mondev was somehow coerced into signing the third supplemental agreement to the Tripartite Agreement in October 1987.

Let's talk about the evidence to support this. What Mondev has pointed to in its factual appendix, and this appears at paragraph 67 and in

the following paragraphs, is the fact that the BRA or actually the City Zoning Board, put into effect an interim planning--I'm going to forget what the words are that are associated with the other two-- essentially new zoning restrictions that are know by the acronym IPOD. Well, that was a measure, as we have seen, that applied to all developers in the area. It can hardly be seen as effecting coercion in any legally relevant sense.

The second thing that we have is a statement by one of Mondev's officers that the BRA informally delivered a, quote, ultimatum to Mondev, that unless Mondev agreed to the amendment, the drop-dead date, the project could not go forward. Well, of course the BRA emphatically denied that was the case, and there is no evidence in the record of any kind of direct or immediate threat that would normally be necessary to show any form of coercion as that sense is known in law.

Moreover, LPA's suggestion, or rather Mondev's suggestion here is based on the premise

that LPA indisputably had a perpetual right to close on the Hayward Parcel as long as the garage that was to be constructed on the adjacent lot had not been constructed. That was very much in dispute between the BRA, the City and LPA, and it is not at all clear from the text of the Tripartite Agreement that LPA had any such right, and I refer the Tribunal to pages 4 to 5 of the U.S. observations on the facts that are appended to its Rejoinder for a description of the legal issues surrounding that uncertainty. So there was real uncertainty as to the survival of the option after the 6-month period concluded, after the option period itself had concluded.

I'd now like to turn to--yes, please?

PRESIDENT STEPHEN: On the coercion factor, what if any weight do we give to the jury's verdict?

MR. LEGUM: Let me turn to that next. In its presentation this morning Mondev faulted the United States for saying that the verdict on

tortious interference was limited to a 56-day period. It then described a number of alleged events, all of which occurred in December 1987 and January 1988. It did that because the tortious interference claim did in fact focus on a 56-day period. It is limited in time to this one episode, and it does not and cannot be seen to address any aspect of the design review process, traffic studies, negotiation of amendments to the Tripartite Agreement, or Campeau's request for extension. The tortious interference claim addressed only what happened from December 4, 1987 through February 1, 1988, during the time that Campeau's application for approval of the sale was pending.

It does not speak to anything that happened before that. It does not speak to anything that happened after that. It therefore does not speak to the bulk of the issues that are raised by Mondev's claims.

PROFESSOR CRAWFORD: Nonetheless, in

relation to that period, and of course the verdict wasn't entered for reasons we know, but it was a decision by a finder of fact, that there had been some sort of improper conduct by BRA in that period in relation to the sale, and my understanding is that certainly the laws of inducing breach of contract and similar that I'm aware of do have a sort of proper purpose defense. So the jury must have thought there was no legitimate regulatory purpose in the BRA doing what it did.

MR. LEGUM: We certainly don't dispute that the jury verdict is what it is, and I only don't dispute that the jury was instructed on improper purpose. That is, that was one of the elements of the claim, in fact. However, that issue was vigorously disputed before the Trial Court. The BRA appealed to the Supreme Judicial Court--excuse me, they did not appeal. They argued in the alternative in support of affirmance, that the jury had not seen the issues correctly, and under Massachusetts law, under municipal law, that

verdict has no binding effect, and I would submit that municipal law has certain requirements before a finding of a Court can be binding. And it does that for good reason. The reason is that the BRA never effectively never had an opportunity to have that verdict reviewed by a reviewing court.

PROFESSOR CRAWFORD: Because of the immunity.

MR. LEGUM: Correct.

PRESIDENT STEPHEN: I'm sorry. Because of?

PROFESSOR CRAWFORD: Of the immunity.

PRESIDENT STEPHEN: Oh, yes.

MR. LEGUM: Right.

PROFESSOR CRAWFORD: But of course to the extent that it might be relevant for our assessment of the overall situation, the jury verdict is some evidence of what Mondev alleges, which is a longer-term course of conduct of the same character. The point you're making is that the jury was only asked to determine in relation to a shorter period. The

allegations are of the same character in relation to a longer period, albeit that they're not support by unentered jury verdicts.

MR. LEGUM: I lost the question part of what you just said.

PROFESSOR CRAWFORD: Well, it is really conversation rather than a question, but it could be argued that the jury verdict, though related, though confined in time, was of the same character as Mondev alleges, and therefore it doesn't--the limits in period isn't a conclusive argument against Mondev on that point.

MR. LEGUM: Well, I would disagree. Certainly there's an established evidentiary principle that one cannot assume, just based on one episode, that something similar happened on other episodes, and I submit that there's no reason to give more weight to this jury verdict that was never reviewed by any Court than is required under the circumstances. And we submit that there is no requirement that it be given weight.

One final point on the jury verdict. It's been suggested on a number of occasions that the jury did not add up the numbers--excuse me--that the jury added the numbers that it awarded to arrive at $16 million. They were not required to add the numbers, and as I noted on Wednesday, the Trial Judge found that the only reasonable way of reading the verdict was to review them as one subsumed within the other.

On the topic of the intent of the City and the BRA, there's been a number of references to certain Board minutes that express a desire on the part of the City to receive fair market value for the Hayward Parcel, rather than the Tripartite Agreement formula price, and it's been submitted that that is either an expropriatory act or evidence of evil intent on the part of the City or the BRA. I would submit that neither can be inferred from that.

Any contracting party is entitled to dislike the terms of a deal that it has struck, and

to seek to modify that deal through negotiations with another party. There is nothing that smacks of bad faith in wanting to do that. Similarly, any contracting party may wish that the other side will not make a tender of their performance, so that it does not have to perform.

To give one rather prosaic example, one can imagine circumstances in which a panel of arbitrators, for example, that has agreed to stay until, say, 6:30, listening to counsel argue, might fervently wish that counsel would stop arguing so that they could leave earlier, even though they're obligated to stay until 6:30. And in fact, that might actually be verbally expressed by one member of the panel to another, but that expression of a desire that the other side not put them to perform is not an act of bad faith in and of itself.

PROFESSOR CRAWFORD: Well, that's a relief.

[Laughter.]

MR. LEGUM: It has been suggested that

obstacles mysteriously disappeared for Campeau because Campeau eventually agreed that it would pay market value for the Hayward Parcel. The record does not support that. What happened here is that Campeau did the work that LPA seemed unwilling to do. It sought, documented, and obtained an exception to the zoning requirements so it could build a tower or towers of the height that it had planned to build. It prepared an environmental impact assessment that analyzed in considerable depth the environmental impacts of its proposed project. It completed all four stages of the BRA's design review process.

The fact that Campeau did all of these things and the BRA approved its proposal does not show that LPA was given different treatment because LPA did not do all of these things. It did not get past the first stage of the design review process formerly set out in BRA documents.

What's more, the BRA worked in good faith with Campeau for months during a time when Campeau

had not agreed to pay market value. The Tribunal will recall that the letters, the letter--I believe it was a letter December 30th, 1988, Campeau reserved its rights under the Tripartite Agreement and took the position that it continued to have rights to get the price set forth in the formula. During the time both before that point and after that point, the BRA worked collaboratively with Campeau to get the project approved.

And I'd like to close with a very small point, which is--if we could actually have not the next slide but the one after that, please.

We have heard a number of times during the course of the presentations an allusion to this sentence in the Supreme Judicial Court's opinion, what says, quote: "It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively-mandated ends."

Of course it's quite clear that the Supreme Judicial Court was not expressing a view

about the conduct of the City or the BRA. It was simply stating this proposition in an abstract term before rejecting it with respect to the application of Chapter 93A.

Unless the Tribunal has any questions on the facts relevant to this question of an expropriation in the 1980s, I will ask the President to call on Mr. Bettauer.

PRESIDENT STEPHEN: Thank you very much, Mr. Legum.

Mr. Bettauer.

MR. BETTAUER: Thank you, Mr. President, members of Tribunal.

After a week of oral presentations, we are reaching the end of our presentation in rebuttal, and I should like to conclude our argument by making a brief summary of the points we think we have shown and by giving you our submissions.

We think it is clear by now that Mondev has not demonstrated that the facts or the law warrant a finding of breach of NAFTA by the United

States. We have shown, we think, that Mondev's claims are without foundation. Mr. Legum has just reviewed that no expropriation took place in the 1980s. He has shown that, in effect, what happened was the investment was sold, through the lease agreement, to Campeau and that we are not responsible for Campeau's bankruptcy.

In fact, even after the termination of the lease agreement, even after that, counsel for Mondev has said the reason the property was not viable was that Campeau had emptied out the existing mall, and demolished it and there was no income stream. That was Campeau's fault, it was not any action by the U.S. Government.

In any event, we have shown that the expropriation claims arising in the 1980s and any other of its claims arising from alleged breaches before NAFTA entered into force are time-barred in their entirety and that Mondev's novel theories of time switching for the date of breach don't work. They have no basis in customary international law,

they have no basis in the NAFTA.

We have also shown that the rights that LPA may have had, and therefore Mondev's rights as an investor, were transferred to its mortgage lender before NAFTA entered into force, and that, thus, no NAFTA claim can be made on the basis of those rights.

I will also note that we have questioned under Article 1116 the fact that Mondev has shown no damage or loss to itself. Although we have reserved that to the damage phase, we note that that is an essential element of the claim surviving under Article 1116, and Mondev has admitted that it has not taken the steps required by the mandatory procedures under NAFTA to bring a claim on LPA's behalf under Article 1117.

Once NAFTA entered into force, we have also shown that nothing was expropriated. No facts were alleged that would constitute a new expropriation, and we have shown that the theories put forward, as I said, to time-shift don't work.

We have shown, also, we believe, that there is no factual or legal basis for a denial of justice claim. The court decisions were correct. Mr. Legum has responded just now, and we have responded previously on the sovereign immunity point.

Therefore, there was no denial of access on those points under customary international law or the NAFTA, and we have shown that the Supreme Judicial Court's decision was well reasoned and justified, and that even if it wasn't, Mondev has not shown treatment that can constitute a denial of justice under long-established principles of customary international law.

Indeed, we find the charge that the SJC decision constituted a denial of justice nothing short of astonishing and urge this Tribunal to reject it in the strongest terms, nor, as Mr. Clodfelter has repeated, is there any foundation for a charge of less-favorable treatment under Article 1102. Mondev has not shown facts to

demonstrate any treatment less favorable than a U.S. national would have received.

Mr. President, members of the Tribunal, the United States continues to rely on its written statements. I want to remind you that we have not abandoned them or changed our positions. On the authorities cited therein, we refer you to them, as well as the oral submissions we have made this week. Based on these submissions, we ask you to dismiss all of Mondev's claims.

Our formal submissions are found at Page 63 of our Rejoinder. They are a request that this Tribunal render an award in favor of the United States and against Mondev, dismissing Mondev's claims in their entirety and with prejudice, and pursuant to Article 59 of the Arbitration additional facility rules, ordering that Mondev bear the costs of this arbitration, including the fees and the expenses of the members of the Tribunal, the expenses and charges of the Secretariat, and the expenses incurred by the

United States in connection with this proceeding. We ask this because we think you will recognize that this was a frivolous series of claims.

With that, I conclude our presentation, and all that remains is for me to thank the members of the Tribunal, you, Mr. President, Professor Crawford, Judge Schwebel, for your indulgence; to thank the Secretariat and ICSID for its help and facility in these hearings.

Thank you very much.

PRESIDENT STEPHEN: Well, if I may, on behalf of my colleagues, really do no more than repeat that, in reference to counsel on both sides, the gratitude that we feel for the very adequate arguments, the conciseness of those arguments, and we are grateful, indeed, to you all for that.

It does remain to inquire of Mexico and Canada whether either or both of you would wish, here and now, to say anything by way of a submission or, alternatively, would wish to submit any written submissions. If you are concerned with

written submissions, and you may not, at the moment, know whether that is so or not, it would be appreciated if we could have them within, say, a fortnight.

What's the position as far as any oral statements are concerned?

MS. KINNEAR: Mr. President, Canada would have no oral statement at this point, but we would appreciate being able to consult at home before determining whether an 1128 is necessary, and we'd certainly live within the two-week guideline.

Thank you.

PRESIDENT STEPHEN: Thank you.

MR. BEHAR: On behalf of Mexico, I will reserve my right to submit, if we consider necessary, any 1128 submission.

Thank you.

PRESIDENT STEPHEN: Thank you very much.

Well, that being the situation we now adjourn sine die.

Yes, Mr. Legum?

MR. LEGUM: Just to clarify the state of things, as I understand it. What will happen is, within a fortnight Canada or Mexico will advise of whether they will be making an 1128 submission or will they be making an 1128 submission?

MS. KINNEAR: I'd understood that we would do both within a fortnight.

PRESIDENT STEPHEN: That was certainly my hope.

MR. LEGUM: Very good.

PRESIDENT STEPHEN: Sir Arthur?

MR. WATTS: Mr. President, simply to say that if there is an 1128 submission, I presume that the parties will have an opportunity to express their views upon it.

Thank you.

PRESIDENT STEPHEN: Yes, I'm sure that's so.

MR. LEGUM: And could I also just clarify that, of course, aside from potential proceedings on this, the potential submissions under Article

1128 and the parties' views on it, the written procedure in this case has, of course, concluded, and absent an indication from the Tribunal that it is interested in receiving more submissions from the parties, no submissions will be made, absent an order from the Tribunal; is my understanding correct?

PRESIDENT STEPHEN: I'm sorry. What you're saying is, subject always to any observation that may be made by either party in response to an 1128 submission by one of the other two countries, that the Tribunal will not entertain other submissions?

MR. LEGUM: I wasn't ruling out the possibility. Of course, if the Tribunal wants to hear from the parties, we'd be happy to respond. I just wanted to make clear that, absent an order from the Tribunal, ordering for the submissions, there will be none.

PRESIDENT STEPHEN: I think we will control our anxiety for further submissions.

[Laughter.]

MR. LEGUM: Thank you.

PRESIDENT STEPHEN: It now does seem appropriate to adjourn sine die, if that's the right terminology internationally.

[Whereupon, at 5:24 p.m., the hearing was adjourned sine die.]

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