IN THE ARBITRATION UNDER

THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

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

Thursday, May 23, 2002

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

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

SIR NINIAN STEPHEN, President

PROFESSOR JAMES R. CRAWFORD

JUDGE STEPHEN M. SCHWEBEL

ELOISE M. OBADIA, Secretary of the Tribunal

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Presentation by Respondent/Party:

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Ms. Svat 793
Mr. Legum 841
Mr. Bettauer 881

1 P R O C E E D I N G S

2 PRESIDENT STEPHEN: Now we will be hearing
3 you, Mr. Legum.

4 MR. LEGUM: You will certainly be hearing
5 me and I hope it will be a pleasure.

6 [Laughter.]

7 MR. LEGUM: Mr. President, Members of the
8 Tribunal, I will now turn to Mondev's claim that it
9 was denied access to the courts.

10 Mondev bases its contention solely on the
11 Massachusetts Court's dismissal on legal grounds of
12 two of the six claims asserted in LPA's amended
13 complaint. And if you'll turn to the projection
14 screen, you'll see the now-familiar slide of the
15 claims in question. The two claims, I will simply
16 note, are those for intentional interference with
17 contractual relations in violation of Chapter 93A.

18 It is important to note that here Mondev
19 is not challenging the reasoning of the
20 Massachusetts Courts. It does not dispute that the
21 Supreme Judicial Court correctly resolved the

1 issues of Massachusetts Law raised by these two
2 claims. Instead, Mondev's challenge is to the law
3 itself. It asserts that the Massachusetts Tort
4 Claims Act, that that Act's provision of municipal
5 sovereign immunity for intentional torts like
6 interference with contractual relations violates
7 customary international law. Its contention with
8 respect to the Chapter 93A claim is similar. Its
9 complaint is with the result that the SJC reached,
10 not with its reasoning.
11 This morning I will demonstrate that there
12 is no merit to Mondev's arguments that LPA was
13 denied access to the courts. I will review four
14 separate reasons why the Tribunal should reject
15 Mondev's contentions.
16 First State practice, as reflected in
17 contemporary regimes for government liability, does
18 not support Mondev's assertion that there is a
19 customary international law bar to sovereign
20 immunity against the conduct at issue here. To the
21 contrary, the predominant State practice today is

1 that the liability of a State in its municipal
2 courts is governed by different rules than those
3 that apply for private persons. Second, the
4 decisions of International Tribunals and the
5 writings of publicists do not support the existence
6 in customary international law of a requirement
7 that a State permit individuals to bring suit
8 against it as if it were a private party. Third,
9 emerging norms of foreign sovereign immunity relied
10 on by Mondev support a conclusion contrary to that
11 advocated by Mondev. And finally, I will briefly
12 respond to Mondev's assertion that there was a
13 finding of tortious conduct by the BRA in the
14 Massachusetts Courts that is of significance to the
15 issues here.
16 I turn to my first general point: State
17 practice is not consistent with Mondev's thesis
18 that municipal sovereign immunity for the conduct
19 at issue is internationally wrongful. Now, by
20 conduct at issue I mean what the common law knows
21 as tortious conduct and what the civil law systems

1 describe as delictual conduct. It is that genre of
2 conducts to which my remarks this morning will be
3 addressed.
4 I will show that although the past half
5 century has seen a relaxation in the scope of
6 municipal sovereign immunity in tort, the
7 prevailing State practice today continues to
8 recognize sovereign immunity in tort for selected
9 tortious acts and activities. State practice does
10 not, however, reflect any general consensus as to
11 what acts or activities may or may not be immune in
12 municipal court. The state of State practice today
13 does not support Mondev's contention that municipal
14 sovereign immunity is internationally wrongful.
15 My examination of State practice should be
16 considered in the light of the established rule
17 that the party asserting the existence of a rule of
18 customary international law bears the burden of
19 establishing the existence and content of that
20 rule. In our Rejoinder at page 16, note 17, we
21 cited a number of authorities for this established

1 proposition.

2 Mondev, not the United States, bears the

3 burden of showing that State practice supports the

4 proposition that municipal sovereign immunity is

5 internationally wrongful. It is a burden that, as

6 we will see, Mondev has not and cannot discharge.

7 I begin my review of State practice with

8 recent comparative law scholarship. In 1991 John

9 Bell and Anthony Bradley published a work in book

10 length entitled Governmental Liability, A

11 Comparative Study. As the title suggests, the Bell

12 and Bradley book presents a comparative review of

13 government liability law. It surveys the laws of

14 12 jurisdictions: England, Scotland, Canada,

15 Australia, New Zealand, the United States, Ireland,

16 Belgium, France, Italy, Germany and the European

17 community. As we can see on the projection screen

18 the Bell and Bradley study finds that, quote: "The

19 disappearance or weakening of sovereign immunity

20 does not mean that all immunities for particular

21 State bodies have disappeared." Close quote. To

1 the contrary, Bell and Bradley conclude as follows,
2 quote: "In no legal system today is government
3 liability the same as that of private individuals
4 or corporations. The reasons for this are partly
5 historical, linked to the reasons for sovereign
6 immunity. But other reasons continue to be valid.
7 Thus, government exists for the benefit of the
8 community, not just for private advantage. The
9 acts of government determine important aspects of
10 public and private well being. Its special
11 responsibilities need to be reflected in the scope
12 of its liability. Its activities, being intended
13 for the welfare of society must not be unduly
14 restricted or encumbered."
15 Now, let us study this for a moment. In
16 this 1991 study of 12 developed legal systems, the
17 authors conclude that, quote: "In no legal system
18 today is government liability the same as that for
19 private individuals or corporations." Let us
20 compare this conclusion for a moment to Mondev's
21 thesis. Mondev asserts that where a State's laws

1 do make it wrongful to engage in a particular
2 course of action--referring in the parenthetical to
3 Massachusetts laws governing the liability of
4 private persons--then, Mondev concludes, the State
5 has an obligation in international law to afford a
6 foreign national the right to seek redress for that
7 wrong through legal proceedings.
8 Now, Mondev's application of this
9 principle in the context of municipal sovereign
10 immunity is as follows. And we have this on the
11 screen as well. Any immunity from judicial
12 scrutiny limits and pro tanto renders ineffective
13 the possibility of recourse to domestic courts in
14 pursuit of claims, a State which by its laws in
15 that deprives a foreign national of recourse
16 through domestic courts in pursuit of claims based
17 on the wrongful conduct of a governmental entity
18 thereby lays itself open at the international level
19 to a claim for denial of justice.
20 Now, how can we reconcile Mondev's
21 supposed rule with State practice today? According

1 to Mondev, if a State makes it wrongful for private
2 persons to engage in particular conduct, a State
3 must, under international law subject itself to
4 suit for that same conduct in its courts, and may
5 not assert any immunity from judicial scrutiny.
6 yet according to the 1991 survey I have just
7 referred to, in no legal system today is government
8 liability the same as that for private individuals
9 or corporations. The answer is clear, one cannot
10 reconcile the two. Mondev's supposed rule finds no
11 support in the reality of State practice today.
12 PROFESSOR CRAWFORD: The statement is
13 undoubtedly, to my knowledge at least, true, and
14 I'm not a comparative lawyer, but of course it's a
15 very general statement, and there are certainly
16 legal systems in which governments are subject to
17 exactly the same rules as private individuals in
18 respect of contract and tort. But, for example,
19 they're not liable to immunity, they're not liable
20 to execution. So I think you would find on a
21 comparative study that the level of immunity from

1 execution of governments was very wide indeed. And
2 that it is by no means unusual, indeed it may now
3 be more common than not, but governments are liable
4 to the same general principles of contract and tort
5 as private individuals.
6 So the problem I find with that, although
7 I have no difficult with the proposition in
8 general, is that it may be too generalized in
9 relation to our situation.
10 MR. LEGUM: Well, first of all, for
11 purposes of the analysis that we're doing right
12 now, which is looking at State practice and seeing
13 whether it's consistent with the rule that Mondev
14 espouses, I don't think that it really matters what
15 the modality is or the method used by a given
16 municipal law system to achieve the result that I
17 think this statement is really quite accurate in
18 describing. It doesn't really matter whether the
19 limitation on government liability takes the form
20 of a limitation on the standard of conduct or
21 whether there's a limitation on immunity from suit

1 or immunity from execution. For the purpose of the
2 analysis that we're doing right here, I don't think
3 that it makes a difference.
4 PROFESSOR CRAWFORD: I notice at the
5 beginning you said you said you were only dealing
6 with delictual responsibility, but let's
7 hypothesize the government said the Crown is immune
8 in respect of--say for contractual responsibility.
9 Would that be consistent with 1105?
10 MR. LEGUM: Well, I would acknowledge that
11 there are customary international law authorities
12 that suggest that a State does have an obligation
13 to subject itself to suit in its courts for breach
14 of contract. That of course is not an issue here,
15 and therefore I would refrain from expressing a
16 definitive opinion on the subject.
17 PROFESSOR CRAWFORD: I obviously don't
18 want to go into issues we don't have to go into.
19 The point is though that as soon as you accept that
20 there may be limitations, then doesn't the inquiry
21 move from the general categorical assertion there

1 are no rules of international law in this area to a
2 more focused inquiry? You may well be able to show
3 that many countries would only allow limited forms
4 of action in contract and tort, for example,
5 traffic accidents or something. And that would
6 clearly be relevant to this issue. But the idea
7 that there is a blanket, a blanket absence of
8 international law seems to be contraindicated by
9 what you just said.
10 MR. LEGUM: Well, the Bell and Bradley
11 study, as I understand it, was limited to the
12 subject of noncontractual obligations, and
13 therefore, I think it certainly supports the
14 proposition I've just stated, and the fact that
15 there is at least some evidence of State practice
16 coupled with opinion juris and with respect of
17 contract does not mean that there is the same thing
18 with respect to tort. So I think that it is not
19 inappropriate to focus on the issue that is
20 directly presented before this Tribunal.
21 The second point on State practice that I

1 would like to note is that--and this is a point
2 that in some ways is the point I just made--differing States
3 have devised widely varying
4 systems of liability for government acts. In
5 common-law countries the tendency has been to base
6 government liability on the law governing private
7 wrongs with a number of exceptions. In civil-law
8 jurisdictions, a different approach has generally
9 been taken. In France, for example, as Messrs.
10 Bell and Bradley note, government liability is
11 regarded as a matter of public law and is entrusted
12 to the administrative courts and not to the
13 ordinary civil courts. The Conseil d'Etat, which
14 is France's highest court in public law matters,
15 has developed through its case law rules of
16 government liability that differ extensively from
17 the ordinary law of civil obligations governed by
18 the Code Civil. This observation is of consequence
19 to the issues before this Tribunal.
20 First, as both parties have noted in their
21 pleadings, Massachusetts Law provides rules of

1 liability for constitutional torts that are
2 different from the ordinary law of torts applicable
3 to private persons, and there is of course no
4 dispute that the BRA was not immune from suit for
5 constitutional torts.
6 As the Tribunal will recall from my
7 discussion of the facts, LPA in fact brought a
8 claim in constitutional tort in the Massachusetts
9 Courts and never challenged the dismissal of that
10 claim. As the French practice demonstrates, as
11 does that of other countries addressed in the Bell
12 and Bradley book, the fact that Massachusetts Law
13 provides different rules of liability for the BRA
14 than for private persons is in no way dissident
15 with State practice today.
16 Second, and as the United States observed
17 in its Rejoinder, the laws of many legal systems
18 throughout the world, would, like the Massachusetts
19 Tort Claims Act, restrict a State's liability under
20 the precise circumstances presented here. We have
21 collected in Footnote 30 of our Rejoinder several

1 such laws and authorities from other jurisdictions
2 that confirm this view. The record of State
3 practice simply does not support the rule of
4 customary international law that Mondev urges this
5 Tribunal to recognize as a matter of first
6 impression.
7 Now, before concluding on this point, I
8 would like to address the only case on municipal
9 sovereign immunity that Mondev has cited in support
10 of its position, the 1949 decision by the U.S.
11 Supreme Court in Larson v. Domestic and Foreign
12 Commerce Corporation. Mondev's reliance on this
13 case I submit shows just how little support exists
14 in State practice for its position. I call your
15 attention to the projection screen. What we have
16 here is a quote from Mondev's reply, paragraph 78,
17 in which it asserts that, quote: "The U.S. Supreme
18 Court lent its support to the view that"--and then
19 Mondev quotes the Larson case--"the principle of
20 sovereign immunity is an archaic hangover not
21 consonant with modern reality, and that it

1 therefore should be limited wherever possible,"
2 close quote.
3 Now, what we have on the screen is the
4 quote of Larson and the reply on the top. However,
5 as the full quotation from the Larson case
6 reflects, the U.S. Supreme Court lent no such
7 support to the view that Mondev ascribes to it.
8 The full quotation reads, quote: "It is argued
9 that the principle of sovereign immunity is an
10 archaic hangover, not consonant with modern
11 morality, and that it should therefore be limited
12 wherever possible." Indeed, far from following the
13 plaintiff's view in that case, that the principle
14 of sovereign immunity is an archaic hangover, the
15 holding of the Larson Court was that, quote:
16 "Because it is a suit against the government in the
17 absence of consent, the Court has no jurisdiction."
18 Larson, the sole case cited by Mondev does not
19 support its position.
20 Now, I'd like to respond before moving on
21 to my second point, to the question that Professor

1 Crawford asked concerning how common this sort of
2 exception for the tort of intentional interference
3 with contractual relations is in municipal
4 liability regimes. It is a common device that is
5 used. It is reflected interested Federal Tort
6 Claims Act. And as federal laws generally serve as
7 the model for a number of State enactments, it has
8 been followed in a number of State jurisdictions.
9 Some of those jurisdictions are collected in our
10 Counter-Memorial at page 53, Note 70.
11 I'd now like to turn to my second general
12 point. Oh, please?
13 PROFESSOR CRAWFORD: Conceptually, there
14 are two different sorts of immunity. There is an
15 expression of immunity which basically means that
16 there is no wrongful act, and there is a form of
17 immunity where as where the act is wrongful, but
18 you can't sue the individual. Most international
19 immunities are of the second kind, although not all
20 of them. And, for example, immunity from taxation
21 in respect of diplomats is an immunity from the

1 application of the law, not an immunity from being
2 saved for a tax which is in principle owing.
3 Whereas the immunity in relation to criminal
4 conduct of a diplomat is an immunity from the
5 application of proceedings, not an immunity from
6 the law itself.
7 Which of the two is this, and does it
8 matter?
9 MR. LEGUM: I'm not sure that it does
10 matter, and I'm also not sure which of the two it
11 is. My understanding is that it is an immunity
12 from suit. Now, whether that expresses a view as
13 to whether there is a cause of action that exists
14 or not, I am not prepared to answer that at this
15 point.
16 PROFESSOR CRAWFORD: Yes. I suppose the
17 answers can't really make a difference, but you
18 might say that the argument for a violation would
19 be stronger if under the legal system this is
20 wrongful conduct for which there is no redress, not
21 thought (?) the odd form of protection in that

1 case; whereas, it may be reasonable for the
2 government to say, well, there are certain sorts of
3 torts which can't be committed by these entities
4 because they have public purposes which make
5 tortious liability, and in principle, indefensible.
6 MR. LEGUM: Again, I think that that
7 reflects a focus on the means rather than the end
8 that is in appropriate for the analysis that we're
9 engaged in. Why should it make a difference that
10 in France they have a different court system with a
11 different set of rules that applied to governments?
12 And under that system the government might not be
13 subject to suit, or a suit might not be able to
14 proceed against a government, whereas in the United
15 States and some other jurisdictions the device used
16 is an immunity from suit. I really don't think
17 that it makes a difference for the purpose that
18 we're addressing here.
19 I'd now like to turn to my second general
20 point. Customary international law does not
21 support Mondev's assertion that any immunity from

1 judicial scrutiny renders ineffective the
2 possibility of recourse to domestic courts in
3 pursuit of claims, and thereby lays the State open
4 at an international level to a claim for denial of
5 justice. Sorry, I read that rather quickly. I was
6 just stating the position of Mondev that I flashed
7 on the screen earlier.
8 To the contrary, the weight of authority,
9 including even commentators cited by Mondev,
10 confirms that the application of the municipal law
11 doctrine of sovereign immunity and tort does not
12 give rise to a denial of justice.
13 I'd like to begin my discussion with the
14 most recent authority, the jurisprudence of the
15 European Court on Human Rights. Now, as reflected
16 on the projection screen, Article 6, paragraph 1 of
17 the European Convention on Human Rights provides
18 that, quote: "In the determination of his civil
19 rights and obligations, everyone is entitled to a
20 fair hearing by an impartial and independent
21 Tribunal established by law." Now, this obviously

1 is an obligation in an international convention.
2 It is not one of customary international law.
3 Moreover, the European Court of Human
4 Rights has developed constructs in interpreting
5 this and other provisions of the Convention that
6 are not necessarily based on customary
7 international law. The jurisprudence of the
8 European Court, meaning the Strasbourg Court, is
9 admittedly of a specialized regional nature. We
10 nonetheless submit that the jurisprudence of that
11 court does serve as a useful if rough barometer.
12 It is hard to imagine that a State conduct that
13 does not violate the specific provisions of the
14 Convention would nonetheless violate analogous
15 principles of customary international law.
16 Now, with this context in mind, I return
17 to the conventional obligation on the screen.
18 Article 6 provides without qualification that,
19 quote: "In determination of his civil rights and
20 obligations, everyone is entitled to a fair
21 hearing." Despite the unqualified nature of this

1 provision, the European Court held, in the
2 Ashingdane v. United Kingdom case, that the right
3 of access to courts is not absolute, but may be
4 subject to limitations. The Court found in that
5 case that a United Kingdom Statute granting
6 immunity from liability and suit to hospital
7 authorities with respect to certain activities, was
8 a appropriate limitation on the right of access to
9 courts, as it was in pursuit of the quote,
10 "legitimate aim," close quote, of avoiding the
11 quote, "mischief of government officials being
12 unfairly harassed by litigation," close quote.
13 And I would refer the Tribunal to the
14 opinion of Judge Kass, where at paragraph 72 he
15 demonstrates that the Massachusetts Tort Claims Act
16 was enacted with the same legitimate aim and the
17 same purpose of avoiding the mischief of government
18 officials being unfairly harassed by litigation.
19 In the recent case of TP and KM v. United
20 Kingdom, which my colleague David Pawlak mentioned
21 yesterday, the European Court, sitting as a grand

1 chamber of 17 judges, unanimously reaffirmed this
2 general principle, and did so in a manner pertinent
3 to Mondev's contentions concerning the
4 Massachusetts Court's reading of Chapter 93A. The
5 TP and KM case is noted in the packet--excuse me--is
6 included in the packet of supplemental
7 authorities that we distributed yesterday. In that
8 case the House of Lords had found, as a matter of
9 municipal law, that local authorities could not be
10 held vicariously liable for the negligence of
11 doctors and social workers in their employ in
12 matters concerning the protection of children from
13 sexual abuse. The European Court rejected the
14 Claimant's argument that House of Lords' ruling on
15 the law effectively deprived them of any remedy.
16 And what we have on the screen is, I believe, the
17 same slide that Mr. Pawlak showed yesterday. The
18 Court's holding was that the decision of the House
19 of Lords did end the case without the factual
20 matters being determined on the evidence. However,
21 if as a matter of law there was no basis for the

1 claim, the hearing of evidence would have been an
2 expensive and time-consuming process which would
3 not have provided the applicants any remedy at its
4 conclusion. There was no denial of access to
5 court, and accordingly, no Article 6 violation
6 under the convention.
7 JUDGE SCHWEBEL: Was the reasoning of the
8 Court that because of the degree of sovereign
9 immunity the hospital, et cetera was immune, but
10 nevertheless there was no denial of access to the
11 court because the court was there to say that? If
12 so, that seems a rather hollow access.
13 MR. LEGUM: I guess two points. First of
14 all, this is not a sovereign immunity case. It's a
15 case in which the House of Lords' decision was that
16 for reasons of public policy the hospital authority
17 had no duty of care, which arrives again at the
18 same result as if it had been immune from suit.
19 The court, in its analysis, as I recall
20 it, and I may be confusing it with another case
21 that I'll discuss in a few moments, as I recall it,

1 it did briefly go through the steps that you just
2 identified, of, you know, saying the Claimant had
3 an arguable cause of action at the time that it
4 brought it, and access to the courts was provided
5 for that purpose. But it then went on to evaluate
6 whether the decision of the House of Lords on the
7 law in that case, which deprived the Claimant of a
8 remedy, violated the Convention, and concluded it
9 did not.
10 So the answer to your question is, it both
11 went through what you've described as a hollow
12 analysis, but then also engaged the issue on the
13 substance.
14 JUDGE SCHWEBEL: And do you recall in
15 engaging the issue on the substance, what its
16 reasoning was?
17 MR. LEGUM: I believe that it's reasoning
18 was that in matters such as this, where there are
19 interests of public policy that justify a
20 government's limitation of government liability
21 with respect to certain acts, and having mind, I

1 believe--and again, I may be mistaking this for
2 this other case--I believe there was also a mention
3 of the measure of appreciation for government
4 activity that Professor Crawford mentioned earlier
5 in the week. It could not find on these facts a
6 violation of the construct used there which is the
7 principle of proportionality under European
8 Convention jurisprudence.
9 PROFESSOR CRAWFORD: The European court
10 did say there was a violation of Article 13, in the
11 context of an effective remedy, though it adopted
12 the analysis you described in relation to Article
13 6. Of course, the House of Lords' decision had
14 said there was no duty of care. It wasn't a staff
15 immunity, it was just that there was no substantive
16 underlying rise and therefore nothing for Article 6
17 to protect.
18 MR. LEGUM: Right. Article 13, I believe,
19 is a substantive provision that deals with parental
20 rights, doesn't it? The facts, if I recall it,
21 were that--

1 PROFESSOR CRAWFORD: [Off microphone.]
2 Remedy to enforce prevention [inaudible].
3 MR. LEGUM: I see, but the right that was
4 at issue is not the right of access to the courts,
5 but rather the right of a parent to not have its
6 child taken away from them without good reasons.
7 So the conclusion, the relevance, we
8 submit, of this TP and KM case is that the
9 dismissal of LPA's Chapter 93A claim on summary
10 judgment, like the House of Lords' decision in TP
11 and KM, found as a legal matter that the law did
12 not impose liability with respect to the government
13 conduct in question.
14 The decision left LPA, like the applicants
15 in TP and KM, without any ability to hear its
16 claims on the merits or any remedy, but the Grand
17 Chamber of the European court, nonetheless, found
18 unanimously that that result did not violate even
19 Article 6's explicit provision requiring access to
20 the courts. This Tribunal, we submit, should reach
21 the same result under customary international law.

1 Now, before leaving the European
2 Convention, I would like briefly to respond to
3 Mondev's reliance on the Matthews case, which,
4 incidently, is styled Matthews v. Ministry of
5 Defense, not Matthews v. United Kingdom. It is not
6 a decision by the European court, but an
7 unpublished decision by an English court of first
8 instance. It addresses a very different situation
9 from what we have before this Tribunal, and it has
10 been appealed to the Court of Appeal, where I
11 understand argument was heard last month. Little
12 weight can, or should, be given to this decision by
13 a municipal court of first instance.
14 I would now like, briefly, to address the
15 authorities that Mondev relies upon in its
16 pleadings.
17 First, Mondev relies repeatedly on Alwyn
18 Freeman's 1938 treatise on International
19 Responsibility of States for Denial of Justice. It
20 relies on this treatise for the general rule that a
21 State is obligated, under customary international

1 law, to provide access to a minimally adequate
2 system of justice for resolving disputes between
3 private parties. The United States, of course,
4 agrees that it is obligated to provide access to
5 such a system of justice under customary
6 international law.
7 But that is not the issue that is
8 presented before this Tribunal. The issue here is
9 whether the assertion of sovereign immunity,
10 municipal sovereign immunity in tort, is per se
11 inconsistent with that obligation. Freeman,
12 however, in no way supports Mondev on that issue.
13 Here is what Freeman has to say on the subject:
14 "There are cases in which it cannot be
15 said that any international obligation has been
16 violated by the failure to give a remedy. This is
17 true, for example, when complaints are directed
18 against the highest authorities of the State for,
19 as most States do not furnish adequate remedies in
20 such cases, it seems difficult to deduce from any
21 general principles of law an international duty to

1 provide means of redress."

2 Far from supporting Mondev, Freeman fully

3 accords with the United States' view. State

4 practice does not support a customary international

5 law obligation barring municipal sovereign

6 immunity.

7 Mondev's reliance on the 1929 Harvard

8 Research Project's Draft Convention is similarly

9 misplaced. I won't go into that, but the Tribunal

10 will find that, like Freeman, that Draft Convention

11 also notes the general obligation of a State to

12 provide aliens' access to a minimally adequate

13 system of justice for resolving private wrongs.

14 But also like Freeman, it provides no support to

15 Mondev with respect to the issue here and the

16 application of that obligation to government

17 liability.

18 Mondev's reliance on Clyde Eagleton's 1928

19 article on Denial of Justice is misplaced for a

20 different reason. Let me show you why. On the

21 screen we see the sentence in which Mondev, at

1 paragraph 64 of its reply, quotes Eagleton as
2 supporting its position. Mondev asserts, and this
3 is a quote of Eagleton, "Thus, international
4 responsibility may be incurred, for example, `when
5 a State has failed to provide a remedy to meet a
6 certain situation as, for instance, an arbitrary
7 act by the head of State which results in injury to
8 an alien.'"
9 However, the complete Eagleton quotation
10 says something very different. It says, "When a
11 State has failed to provide a remedy to meet a
12 certain situation, as for instance an arbitrary act
13 by the head of State which results in injury to an
14 alien, diplomatic interposition may take place at
15 once."
16 Now, with the benefit of the complete
17 quotation, it is clear that Eagleton is merely
18 stating the unremarkable proposition that when a
19 State is immune from suit in its own courts, there
20 is no requirement to exhaust local remedies that do
21 not exist before a claim may be brought

1 internationally. This aspect of a local remedies
2 rule, however, in no way supports Mondev's
3 assertion that delictual acts of a State that are
4 not in themselves internationally wrongful become
5 so merely because the State is immune from suit for
6 such acts in its own courts. Mondev's presentation
7 of truncated quotations does not change this
8 reality.
9 I would like to conclude my examination of
10 international law authorities addressing municipal
11 sovereign immunity by considering the thoughtful
12 lecture on denial of justice given by Judge Charles
13 de Visscher at The Hague Academy of International
14 Law in 1935. Judge de Visscher, like Freeman,
15 reaches the following conclusion on the issues
16 before this Tribunal:
17 "...one cannot consider a denial of
18 justice the absence of judicial or administrative
19 recourse against the measures taken by the higher
20 authorities of the State, the legislature or the
21 government as long as this absence results from the

1 general legislation of the State and not from a
2 measure of discrimination against aliens."
3 In sum, none of the authorities on
4 customary international law before this Tribunal
5 support Mondev's proposition that municipal
6 sovereign immunity in tort is internationally
7 wrongful. Not a single instance of State practice,
8 not a single decision of an international Tribunal
9 has been put before this Tribunal that has found
10 sovereign immunity in tort to be internationally
11 wrongful.
12 By contrast, those authorities that have
13 specifically considered the question, as we have
14 seen, support the view that customary international
15 law does not bar such immunity. There is no basis
16 whatsoever for the rule that Mondev asked this
17 Tribunal to recognize for the first time.
18 I now turn briefly to address the laws on
19 foreign sovereign immunity. Mondev relies on
20 emerging international norms governing the
21 jurisdiction of courts over foreign States to

1 support its view that municipal sovereign immunity
2 in tort is internationally illegal.
3 Such international norms concerning
4 foreign sovereign immunity, of course, do not
5 address the issue before this Tribunal. Those
6 norms address the conditions under which a State
7 may, if it deems it advisable, expose other States
8 to suits in its courts. They do not address or
9 suggest that a State must expose other States to
10 such suits, and they certainly do not address
11 whether a State must subject itself to suit in its
12 own courts.
13 In any event, as I will demonstrate, to
14 the extent that is relevant at all, State practice,
15 with respect to foreign sovereign immunity,
16 supports a conclusion contrary to the one Mondev
17 advances here. First, let us look at the
18 provisions of the statutes of the various
19 jurisdictions Mondev cites on foreign sovereign
20 immunity, with a particularly emphasis on their
21 treatment of tort claims.

1 I begin with the United States Foreign
2 Sovereign Immunities Act, Section 1605(a)(5)
3 provides an exception to the general rule of
4 foreign sovereign immunity for claims in tort.
5 That exception, however, is limited by the proviso
6 that is on the screen. "This paragraph shall not
7 apply to any claim arising out of malicious
8 prosecution, abuse of process, slander,
9 misrepresentation, deceit or interference with
10 contract rights."
11 Nothing in this provision is inconsistent
12 with the municipal sovereign immunity that the
13 Supreme Judicial Court recognized with respect to
14 the BRA. If the BRA had been an agency of a
15 foreign State, which of course it is not, LPA's
16 suit for interference with contractual relations
17 would have been dismissed under the Foreign
18 Sovereign Immunity Act, just as it was under the
19 Massachusetts Tort Claims Act.
20 The United Kingdom State Immunity Act,
21 which is now on the screen, would call for the same

1 result. It does provide an exception from the
2 general rule of immunity for tortious conduct, but
3 only with respect to death, personal injury or
4 "damage to or loss of tangible property."
5 The corresponding provision of the
6 Australian Foreign States Immunity Act contains
7 almost identical wording.
8 The European Convention on State Immunity,
9 which Mondev also cites, similarly limits its tort
10 exception to damage to tangible property. A claim
11 for tortious interference with contractual
12 relations could not proceed under any of these
13 regimes. These regimes, if they were relevant to
14 the issue before the Tribunal, would support the
15 conclusion that the Massachusetts courts' dismissal
16 of LPA's tortious interference claim fully accorded
17 with international law.
18 Equally telling, in terms of State
19 practice on foreign sovereign immunity, is that a
20 significant number of States continue to provide
21 for absolute or near absolute foreign sovereign

1 immunity. Authorities concerning the laws of such
2 States are collected in the United States Rejoinder
3 at Footnote 35. Again, to the extent that
4 authorities on foreign sovereign immunity are
5 relevant, they certainly do not support Mondev's
6 assertion that a claim to immunity amounts, in
7 fact, to a denial of justice.
8 I would notice, as further support for
9 this proposition, the decision of the Grand Chamber
10 of the European Court of Human Rights in Al-Adsani
11 v. United Kingdom, which is included in the packet
12 of supplemental authorities we distributed
13 yesterday, that case found that the U.K.'s grant of
14 foreign sovereign immunity, with respect to torts
15 committed by another State, did not deny access to
16 the courts in violation of Article 6 of the
17 European Convention on Human Rights.
18 PROFESSOR CRAWFORD: Of the three
19 decisions on that issue on that day, Fogarty is
20 probably stronger in your favor because Fogarty,
21 which was the employment case, involved an arguable

1 breach of local public policy in terms of
2 discrimination in employment, and yet the same
3 result was achieved. It seemed to be a much more
4 losable case in a way.
5 MR. LEGUM: Well, I certainly won't
6 comment on that, as the United States had some
7 interests in that case.
8 Finally, I note that Mondev erroneously
9 relies on an article by Professor Hersch
10 Lauterpacht to assert that a greatly restricted
11 measure of foreign sovereign immunity has been
12 adopted over the last half of the 20th century. In
13 stark contrast to Mondev's suggestion, however,
14 Professor Lauterpacht's article does not contend
15 that the absence of immunity is customary
16 international law. Rather, Professor Lauterpacht
17 merely acknowledges that the doctrine of absolute
18 foreign sovereign immunity has already been
19 jettisoned by the majority of States, but so to has
20 the Massachusetts legislature jettisoned absolute
21 State immunity in Massachusetts courts.

1 Thus, the principal proposition advanced
2 by Professor Lauterpacht is one with which the
3 Massachusetts Tort Claims Act is in full accord.
4 The doctrine of absolute immunity has been
5 abandoned.
6 Now, before I come to my last point, I
7 would like to make a few short observations on
8 Mondev's argument concerning waiver. Mondev argues
9 that there is an international wrong that can be
10 derived from the fact that, under Massachusetts
11 law, a State entity may assert immunity at a later
12 point in the proceedings than at the pleadings, at
13 the pleading stage.
14 There is no support, we submit, for the
15 proposition that customary international law
16 requires a State to adopt a particular view of when
17 a claim of immunity must be raised in its own
18 courts. In fact, the prevailing practice in the
19 United States, and it is certainly the case with
20 respect to foreign sovereign immunity, is that
21 immunity presents a question of subject matter

1 jurisdiction that cannot be waived.
2 The approach under federal law is that
3 only Congress can waive sovereign immunity, members
4 of the Executive Branch cannot. It goes to the
5 jurisdiction of the courts, and therefore is
6 something that cannot be waived, except by
7 Congress.
8 I now come to the final point in my
9 presentation. Mondev errs in suggesting, as it
10 does repeatedly in its reply, that the jury verdict
11 against the--
12 JUDGE SCHWEBEL: Let me just ask,
13 regarding the point you are making, because I am
14 not sure how pertinent it is to our concerns, but
15 it puzzles me, cannot the United States, if it is
16 sued in a foreign court, waive its immunity without
17 going to Congress? Surely it's an executive
18 decision.
19 MR. LEGUM: With respect to foreign
20 courts, I believe that is correct. But with
21 respect to domestic courts, the position is that

1 Federal courts have limited jurisdiction, that is,
2 limited by the jurisdiction granted to it by
3 Congress, and if Congress has not waived the
4 sovereign immunity of the government to suit in its
5 own courts, the suit can't proceed.
6 So returning to the final point, Mondev
7 errs in suggesting, as it does repeatedly in its
8 reply, and we heard this on Monday and Tuesday as
9 well, that the jury verdict against the Boston
10 Redevelopment Authority on LPA's claim of tortious
11 interference with contractual relations
12 conclusively established the merit of LPA's claim.
13 It does no such thing. The Massachusetts
14 Superior Court never entered judgment on that
15 verdict. Indeed, it granted the BRA's motion for
16 judgment, notwithstanding the verdict, on sovereign
17 immunity grounds. That verdict has no binding
18 effect under Massachusetts law, and it certainly
19 has no binding effect here.
20 Moreover, the BRA advanced compelling
21 arguments before the Supreme Judicial Court that

1 the evidence before the jury did not support the
2 tortious interference verdict. The SJC never had
3 an opportunity to address that claim, however,
4 because it found that the tortious interference
5 claim could not proceed on other grounds. This
6 record does not support Mondev's suggestion that
7 the BRA was "never exonerated" with respect to the
8 tortious interference claim.
9 I would like to conclude by summarizing
10 the principal points I have made this morning.
11 First, State practice today does not
12 support Mondev's assertion that sovereign immunity
13 is internationally wrongful.
14 Second, customary international law
15 authorities addressing this question do not support
16 Mondev's assertion.
17 Finally, neither international norms of
18 foreign sovereign immunity that are emerging today,
19 nor the State practice of sovereign immunity,
20 supports Mondev's assertion.
21 In the final analysis, Mondev's complaint

1 is not that the Massachusetts courts denied LPA
2 access. Plainly, LPA had access to those courts,
3 and it fully availed itself of that access.
4 Instead, Mondev's complaint boils down to one that
5 LPA just didn't have a meritorious claim that it
6 could pursue against the BRA under Massachusetts
7 law. That, however, does not come close to
8 establishing a violation of customary international
9 law.
10 For these reasons, and for those set forth
11 in the United States' pleadings, Mondev's claim of
12 denial of access to the Court should be rejected in
13 its entirety.
14 Unless the Tribunal has any further
15 questions on this point, I would ask the President
16 to call upon my colleague, Ms. Svat, who will
17 address Mondev's claim of expropriation under the
18 NAFTA.
19 Actually, if it is convenient for the
20 Tribunal, Mr. Clodfelter would like, at this point,
21 before Ms. Svat starts, to respond to some of the

1 questions that were left open during the
2 presentation yesterday.
3 MR. CLODFELTER: Just to tie up our
4 presentation on the alleged violations of Article
5 1105. Professor Crawford posed a question about
6 the providence of the term "fair and equitable
7 treatment." The short time we have had has not
8 permitted us to make an exhaustive study, but we
9 have been able to, I think, pick up some of the
10 threads of the history of the use of that term.
11 The term "just and equitable treatment"
12 appeared for the first time in the Havana Charter
13 for the International Trade Organization, which was
14 the unsuccessful predecessor effort before the GATT
15 was agreed to.
16 Subsequently, the term "equitable
17 treatment" began to be inserted in treaties of
18 friendship, commerce and navigation starting in
19 1948. This development was considered, at the
20 time, to be an effort to include in treaties the
21 test of customary international law for the minimum

1 standard of treatment, and I would refer you, for
2 that conclusion, to the 1953 study by Robert
3 Wilson, entitled, "The International Standard in
4 Treaties of the United States."
5 The next iteration of the phrase, after
6 these bilateral efforts, was in the OECD Draft
7 Convention in '67, where the obligation was
8 included in Article 1A, but as the commentary of
9 paragraph 4A makes clear, and let me quote that
10 commentary, which was not quoted, by the way, by
11 Mondev when they referred to the OECD Draft
12 Convention commentary, the standard required
13 conforms, in effect, to the "minimum standard,"
14 which forms a part of customary international law.
15 So, even the inclusion of the phrase in the OECD
16 Draft Convention, was intended to reflect the
17 customary international law minimum standard.
18 PROFESSOR CRAWFORD: That paragraph was?
19 MR. CLODFELTER: That's 4A of the
20 commentary.
21 Judge Schwebel asked about the possibility

1 of cases of the Iran-U.S. Claims Tribunal
2 addressing the provisions of the Treaty of Amity
3 between Iran and the United States, which happens
4 to be one of the FCNs that began to include this
5 term. The treaty was entered into in 1955, and in
6 Article 4(1), includes an obligation for fair and
7 equitable treatment.
8 No cases of the Tribunal have had occasion
9 to apply or interpret that particular provision.
10 There is one case, the case of Rankin v. Iran,
11 which relied upon the sister obligation of Article
12 4(2) for "constant protection and security." It
13 was held to be a relevant standard, along with a
14 customary international law standard, and both were
15 considered simultaneously to the traditional fact
16 pattern of threats of violence against the person
17 and property of foreigners in Iran at the time of
18 the revolution, not particularly pertinent to us
19 here.
20 Then just one last note that the question
21 was is it the position of the United States that

1 the reference to fair and equitable treatment in
2 our bilateral investment treaties and FCNs is
3 always intended to reflect customary international
4 law.
5 I was not prepared yesterday to give a
6 definitive answer, and I'm still not prepared to
7 give a definitive answer, but I would like to note
8 that in all of the transmittal letters of BITs
9 since 1992, the State Department has informed
10 Congress that the reference to fair and equitable
11 treatment reflects customary international law, as
12 did some of the transmittal letters before.
13 I can't explain why there is not a total
14 uniformity in the transmittals, but I simply pass
15 that on to follow up on your question, Judge
16 Schwebel.
17 JUDGE SCHWEBEL: Well, thank you so much,
18 Mr. Clodfelter. I find that all quite interesting.
19 I can accept the view that it is not only the
20 position of the United States today, but has been
21 the position in the past, at least at times, that

1 customary international law requires fair and
2 equitable treatment, just as it requires prompt,
3 adequate and effective compensation on the taking
4 of the property of a foreign national.
5 But what troubles me about the analysis
6 that the United States is advancing here and about
7 the Tripartite interpretation is that it seems to
8 take no account of the views of a larger number of
9 other States--in numerical terms, the majority of
10 other States, which repeatedly, in the 1960s and
11 '70s, in particular, put through resolutions in the
12 General Assembly of the United Nations which
13 repudiated the view that aliens are entitled to
14 fair and equitable compensation and prompt,
15 adequate and effective compensation. Rather,
16 taking the view that an alien only is entitled to
17 whatever the national law of the acting State lays
18 down and nothing more, that international law
19 simply has no role whatsoever.
20 One can view the Bilateral Investment
21 Treaties, which largely were negotiated and came

1 into force thereafter, as an attempt to vault, by
2 conventional means, the impasse that had been
3 reached between the developed and developing world
4 over what the content of customary international
5 law is.
6 In the light of that history, it seems to
7 me that was on somewhat unsteady ground in
8 asserting that provisions for prompt, adequate and
9 effective compensation or their equivalent, just
10 and equitable treatment, are provisions of
11 customary international law, unless perhaps one
12 founds that on the concurrence of those provisions
13 in almost 2,000 Bilateral Investment Treaties.
14 I think there is room for making the case
15 that, while the developing countries in the '70s
16 voted as they did, simply to repudiate the
17 application of international law to the protection
18 of alien property, they did that in a collective
19 forum dominated by block voting and partisan
20 politics.
21 But when they had to confront the

1 desirabilities and realities of attracting foreign
2 investment, they were prepared to sign treaties
3 that went a great deal farther, and that indeed
4 conflicted with the views for which they had voted
5 in adopting the Charter of Economic Rights and
6 Duties of States, the new International Economic
7 Order, the later resolutions on permanent
8 sovereignty over natural resources and so on.
9 One could construct, from this
10 multiplicity of almost 2,000 such treaties, which
11 fully embrace the developing world, and indeed the
12 former Communist world or the current Communist
13 world, I think a position that international law
14 has changed, in the view of States at large, and
15 now has come to include, as customary international
16 law, those provisions, but simply to say it without
17 explanation, I think leaves many questions
18 unanswered.
19 That is the disquiet I have about whether
20 the Tripartite position is cogent.
21 MR. CLODFELTER: If I might just kind of

1 briefly, first, let me just mention what is
2 relevant to this case. Of course, these are not
3 questions that you are going to be called upon to
4 decide for this case. In this case, there can be
5 no question about what the nature of the
6 international legal obligations are between the
7 three State parties and the undertakings they have
8 made with respect to the investors of the other
9 parties.
10 So the debates on whether or not customary
11 international law included a minimum standard that
12 went on in the '70s and part of the '80s does not
13 affect the obligations as between the three State
14 parties and the investors from each of those
15 States.
16 The position of the United States was,
17 throughout that debate, continues to be, I think as
18 is the position of both Mexico and Canada, that the
19 debate was beside the point. Customary
20 international law did have an international minimum
21 standard of treatment which was well established,

1 and of course the General Assembly resolutions are
2 not binding. As you say, they were political
3 efforts, and parties did subsequently enter into
4 agreements where they expressly undertook
5 obligations which we believe are part of customary
6 international law.
7 But the real test, of course, during that
8 time was even, quite apart from the debate of
9 whether or not 2,000 BITs can crystalize principles
10 of customary international law, is State practice.
11 What did they do when they were challenged by the
12 States for actions against their nationals. Though
13 I don't have a study to present to you, we have no
14 doubt that States, even States that voted for
15 resolutions condemning the minimum standard, felt
16 obliged to, in fact, recognize the rights of aliens
17 within their territory, pretty much in accordance
18 with what we maintain is the minimum standard of
19 treatment.
20 I will leave it at that. Thank you.
21 JUDGE SCHWEBEL: Well, if I may just add,

1 I see the force of all of that, and I would observe
2 that what is striking is the change in Mexico's
3 position. Mexico was an exemplar, the perhaps most
4 prominent exemplar maybe apart from the Soviet
5 Union in maintaining that a State could do as it
6 pleased, in respect of the property of foreign
7 nationals and only national law was determinative.
8 You are as familiar as the rest of us with
9 the famous statement of Secretary Hull, flowing
10 from the oil nationalizations in the '30s, that the
11 fact that or the position that Mexico espoused, and
12 that might have entitled it to treat its own
13 nationals in that way, could not affect the rights
14 of American investors in Mexico, and moreover
15 Mexico was the principal sponsor of the Charter of
16 Economic Rights and Duties, which was a flat
17 repudiation of international law in this sphere.
18 Now one can say that Mexico has reversed
19 position by adhering to the Tripartite Declaration
20 and recognizing as customary international law what
21 it had refused to recognize as customary

1 international law for decades. That I think is a
2 positive element of the Tripartite Declaration.
3 PRESIDENT STEPHEN: Ms. Svat?
4 MS. SVAT: Thank you.
5 Members of the Tribunal, today I will
6 address Mondev's expropriation claim under Article
7 1110, and I will show that it is time-barred in its
8 entirety.
9 No claim for violation of Article 1110 can
10 be sustained in this case. During the course of
11 this arbitration, Mondev's expropriation claim has
12 changed quite a bit. So I would like, first, to
13 just briefly trace the evolution of its claim from
14 the Notice of Arbitration to its presentation here
15 this week, in light of the requirements of Article
16 1110.
17 Then, I will address the claim that Mondev
18 now urges the Tribunal to accept. In this regard,
19 I will explain three fundamental errors in Mondev's
20 reasoning.
21 First, Mondev's investment could not

1 possibly have been protected by Article 1110 of the
2 NAFTA;
3 Second, Mondev, again, as it did with
4 Article 1105, creates out of whole cloth a new
5 element allegedly required for a showing of breach
6 of Article 1110;
7 Third, in doing so, Mondev ignores a
8 wealth of international authority that confirms
9 that there is no basis to Mondev's interpretation
10 of international law.
11 That is it, actually, just three.
12 Before I begin, however, I would like to
13 remind the Tribunal of one thing. The United
14 States unequivocally denies that any expropriation
15 occurred in this case. After I have concluded my
16 remarks, Mr. Legum will explain why, as a factual
17 matter, Mondev's allegations of an expro in the
18 1980s fail. But during the course of my remarks, I
19 will address Mondev's legal argument, assuming
20 their factual allegations to be true. I will test
21 those arguments against the elements necessary to

1 establish a breach of Article 1110 and also under
2 international law.
3 My remarks, based on Mondev's legal
4 arguments, therefore, should not be misconstrued as
5 acceptance of their argument or allegations for any
6 purpose, other than to show that the claim, as
7 pleaded, is time-barred. Our position is that
8 there simply was no expropriation here at any time.
9 So, to begin, I will now review Article
10 1110 and the evolution of Mondev's claim
11 thereunder. If you will direct your attention to
12 the screen, I will read the portion of paragraph 1
13 of Article 1110 relevant here.
14 It states, "No Party may directly or
15 indirectly nationalize or expropriate an
16 investment, except for a public purpose, on a
17 nondiscriminatory basis, in accordance with due
18 process of law in Article 1105(1) and on payment of
19 compensation in accordance with paragraphs 2
20 through 6."
21 In other words, an expropriation would

1 constitute a breach if it failed to conform to any
2 of these four conditions set forth at subparagraphs
3 (a) through (d).
4 Now, over the course of the arbitration,
5 Mondev's allegations have been a bit of a moving
6 target. Initially, Mondev alleged that the SJC, by
7 its 1998 decision in Lafayette Place Associates,
8 expropriated Mondev's investment and that the
9 expropriation violated all four grounds under (a)
10 through (d).
11 PRESIDENT STEPHEN: I am sorry. Would you
12 just repeat that--the first viewpoint was?
13 MS. SVAT: Their first view was that the
14 court, the SJC, by its decision actually
15 expropriation Mondev's investment. That was in the
16 Notice of Arbitration. That was quite a while ago.
17 In the Memorial Mondev alleged that it was
18 the course of conduct of the City and the BRA that
19 expropriation Mondev's rights, but still in
20 violation of all four of the conditions in
21 paragraph 1. At that point, Mondev had all but

1 admitted that its allegation of violation of
2 Article 1110 was time-barred because it had alleged
3 all of the elements that could possibly be relevant
4 to assert a breach were complete before 1994.
5 So, to avoid this result, Mondev has
6 recast its allegations yet again. It still alleges
7 a taking by the City and the BRA in the 1980s, but
8 it no longer argues that the expropriation failed
9 to conform to all of the conditions at (a) through
10 (d); instead, it focuses only on subparagraph (d),
11 the failure to compensate. The reason is plain.
12 Only subparagraph (d) could possibly provide Mondev
13 with a textual hook to allege a violation of breach
14 after 1994.
15 Thus, Mondev alleges, and I have some
16 paragraphs here from its Reply that I will put on
17 the screen, that "the taking of LPA's contract
18 rights by mid-1990," and during the hearing this
19 week they have now said by mid-1991, "by the City
20 and the BRA," that taking "needed to be accompanied
21 by payment of compensation," and it wasn't.

1 Of course, Mondev has never suggested that
2 either the City or the BRA or anyone else ever
3 acknowledged that a taking occurred or that
4 compensation was due. To the contrary, they denied
5 liability throughout 7 years of domestic
6 litigation, nor, I might add, did LPA ever allege a
7 taking by the City or the BRA under U.S. law.
8 So, according to Mondev, and this is the
9 heart of our disagreement, "Although there was no
10 immediate payment of compensation," the alleged
11 breach of Article 1110 did not occur at the time of
12 the alleged taking because, and I will quote again,
13 "means were initially available to Mondev to obtain
14 compensation." Thus, the breach, according to
15 Mondev, did not occur until 1998 or 1999 when the
16 Massachusetts and U.S. courts denied LPA relief.
17 Now, if this sounds familiar, that is
18 because yesterday I challenged a nearly identical
19 argument under Article 1105. Mondev rests its 1110
20 claim on a self-made rule that ties the timing of a
21 breach to the availability and exhaustion of

1 domestic means of obtaining relief.

2 Again, Mondev does not cite a single

3 authority in support of its theory, but it does set

4 forth, in detail, its purported rule. I would

5 like, again, to suggest we look at the screen. I

6 have broken down the elements of the rule that

7 Mondev states.

8 When a State expropriates indirectly,

9 there is a lack of compensation, there is available

10 an administrative or judicial procedure for

11 assessing whether such an expropriation took place

12 and, if so, for providing compensation, and such

13 procedures are invoked, but fail to compensate,

14 then it is with the failure to compensate that the

15 State breaches its obligation under international

16 law.

17 Mondev asserts this proposition as if it

18 were black-letter law, as if it were the case that

19 international law places on a claimant the burden

20 to initiate and pursue available and domestic

21 remedies, any available domestic remedies to

1 determine that an expropriation has taken place and
2 that compensation is due, even in the face of a
3 State's complete failure to acknowledge the taking
4 or the need to compensate, and, according to
5 Mondev, only when such domestic remedies failed
6 does international law consider the State's conduct
7 wrongful.
8 But the truth is that neither the language
9 of Article 1110, nor any principle of customary
10 international law, supports this purported rule.
11 Instead, both the NAFTA and the body of
12 international authorities cited before this
13 Tribunal confirm that no rule exists, and it is to
14 these sources of law that I will now turn.
15 I will begin with the ext of Article 1110.
16 After I summarize the elements required under
17 Article 1110 to show a violation of its provisions,
18 I will then demonstrate that nowhere in this text
19 can Mondev hope to find support for the self-made
20 rule. I am projecting paragraph (1) of Article
21 1110, again, just for background. As we saw

1 earlier, it states that the NAFTA parties may not
2 nationalize or expropriate, directly or indirectly,
3 except under four specific circumstances.
4 Now, keeping Article 1110 in mind, I would
5 like to take a brief detour. Before I address the
6 theory of breach that Mondev alleges, I would like
7 to recall a threshold question that Sir Arthur
8 posed at the beginning of his presentation on
9 expropriation.
10 He asked, "Did Mondev's investment come
11 within the scope of Article 1110?" I've put these
12 portions of the transcript on the screen.
13 "We submit the answer is no." Sir Arthur
14 went on to argue that, "Mondev had an investment in
15 the United States in the Lafayette Place Project."
16 He then suggested no room for doubt that Mondev's
17 investment is protected by Article 1110.
18 However, "so far as Mondev was concerned,
19 by mid-1991, Mondev's investment in the Lafayette
20 Project had been destroyed."
21 Thus, we submit, it could not possibly

1 have been protected by Article 1110 of NAFTA.
2 Indeed, Chapter Eleven, as Mr. Legum explained
3 yesterday when he referred the Tribunal to the
4 notes that accompany the Treaty at Page 393 of the
5 blue book.
6 "Chapter Eleven only covers," and it's on
7 the screen, "only covers investments existing on
8 the date of entry into force of the NAFTA or those
9 made thereafter."
10 Thus, it is difficult to understand how
11 Mondev can assert that its investment came within
12 the scope of Article 1110. Indeed, it is the
13 position of the United States that it did not.
14 Moreover, even if Mondev's investment were
15 expropriated, even if it was creeping
16 expropriation, that expropriation by the City and
17 the BRA ended long before 1994. Their alleged acts
18 and omissions did not have a continuing character.
19 If the Tribunal does not object, I would
20 like to return to the point of the continuing
21 character of those acts at the end of my comments.

1 JUDGE SCHWEBEL: Is it your position, Ms.
2 Svat, that there was no investment because of the
3 mortgage matter or is it based on some other
4 proposition?
5 MS. SVAT: My point is to point out that
6 based on Mondev's allegations the investment was
7 completely destroyed in 1991, and therefore it was
8 not an investment existing on the date of the entry
9 into force of the NAFTA. So it could not possibly
10 be protected by an obligation that wasn't in force
11 at the time the investment existed.
12 JUDGE SCHWEBEL: How do you interpret
13 "destroyed"?
14 MS. SVAT: Well, words were used
15 yesterday, such as a death by a thousand cuts, the
16 date of the death certificate. The allegation is
17 that the investment was taken, that it was gone,
18 that it was destroyed. I interpret that as being
19 that there was no longer an investment.
20 JUDGE SCHWEBEL: If I may say so, I find
21 that point quite unpersuasive. I mean, suppose

1 that an alien invests in a State, and there is an
2 undoubted investment at one time, and mobs,
3 uncontrolled by the State, destroy the investment.
4 Let's say it's a hotel. Do the rights of the alien
5 investor disappear because the mob has destroyed
6 the hotel? Surely the value of the investment is
7 something to which the alien investor still is
8 entitled.
9 MS. SVAT: My point is merely that the
10 obligations that the United States has, under the
11 NAFTA, the very protections of Article 1110 were
12 not in force on the date that the investment was
13 taken. Therefore, if the NAFTA were in force at
14 that time, then I would take your point, that, of
15 course, if there's a taking, you can't argue that
16 there's no investment, therefore, there's no
17 protection.
18 My point is simply that, on January 1st,
19 1994, what was Mondev's investment on the date that
20 the Treaty came into force? Mondev has conceded
21 that it was no longer in existence.

1 JUDGE SCHWEBEL: Well, that may be, but
2 its claim was in existence. Even if the enterprise
3 had been destroyed as a viable enterprise for
4 Mondev, the fact that it had made an investment, if
5 it is a fact, let's assume it to be a fact, is
6 there, and its claim for the value of that
7 investment subsists.
8 MS. SVAT: Well, first, I would like to
9 have the slide back on the screen of Note 39, which
10 is extremely clear, and it says that the Treaty
11 only covers investments that are existing. If the
12 Lafayette Place Project ceased to exist in 1991, as
13 Mondev argues and contends, then my point is that
14 it is not covered by Article 1110, which is exactly
15 what Mondev proposed yesterday or Tuesday.
16 Now, if the NAFTA had been in force at the
17 time of the expropriation, that would be a
18 different scenario altogether, and I think that is
19 the source of my and your sort of not meeting of
20 the minds here. I would like to take just a moment
21 to read this.

1 PROFESSOR CRAWFORD: Ms. Svat, if you look
2 at the definition of investor of a party, it says,
3 "Investor of a party is national, et cetera, that
4 seeks to make, is making or has made an
5 investment." So you might cover the scenario, and
6 Mr. Legum gave the same answer to me yesterday,
7 that, provided they have made an investment--
8 MS. SVAT: Yes, and in fact I actually do
9 cover that in my points, and I will try and do it
10 right now, and perhaps just repeat it when I get to
11 it. That is that if there were a continuing
12 breach, that breach, on January 1st, 1994, would
13 nevertheless have--if it were continuing, then
14 there would be a breach, but it would only give
15 rise to a 3-year window in which a claimant could
16 bring a claim. In any event, that would be the
17 result there. However, we definitely do not
18 concede the point that the breach continued in any
19 form.
20 I merely meant to take this detour to show
21 that the conclusion that Mondev drew definitively,

1 that its investment was within the scope of a
2 Treaty provision, we submit is not tenable if it
3 was gone before the Treaty provisions entered into
4 force. We are not taking issue with the notion of
5 protections in place when a taking occurs.
6 Yes, the NAFTA does protect investors that
7 had investments that may no longer exist, so long
8 as they had them beginning on January or
9 thereafter, according to the note.
10 JUDGE SCHWEBEL: Well, I now understand
11 your point. I'm not sure, still, that I find it a
12 persuasive point, but I understand the point, and I
13 see it has some force, but I think the counter case
14 would be that this chapter covers investment
15 existing on the date of entry, meaning that if an
16 investment has been made before, but the claim for
17 it subsists because it has not been dealt with,
18 that, too, could be regarded as an existing
19 investment.
20 MS. SVAT: I will address some of these
21 points a little later, but I would like to say that

1 Mondev has not alleged that its claim is the
2 investment. If its claim to money were its
3 investment, that is a different story, and Mondev
4 hasn't alleged it, and that is why I don't address
5 that scenario.
6 PROFESSOR CRAWFORD: I turn your attention
7 to paragraph 8, the definition of investment.
8 "Interests arising from the commitment of
9 capital or other resources."
10 MS. SVAT: Yes.
11 PROFESSOR CRAWFORD: You might, I suppose
12 argue, argue, well, the Claimant will say that they
13 made a commitment of capital and other resources in
14 the United States, admittedly before NAFTA entered
15 into force, and that as a result of events that
16 occurred before that date, they still had interests
17 which arose from the commitment of capital, and
18 that those interests fall literally within the
19 definition of investment.
20 Therefore, on that analysis, if anything
21 happened after the 1st of January 1994, which

1 resulted in the deprivation of those interests,
2 Article 1110 could potentially apply. Certainly,
3 Article 1105 could apply.
4 MS. SVAT: I'd like to say that, in
5 response, Article 1139 defines investment very
6 broadly, and this is not unusual. Mondev, however,
7 has defined its investment very narrowly. Indeed,
8 the litigation that ensued in the years following
9 was related to--was also specifically related to
10 that very investment that they are claiming under
11 1110 was taken. So my comments are limited to the
12 expro claim and to the investment that Mondev
13 alleges was taken.
14 PROFESSOR CRAWFORD: I suppose that
15 argument may be more relevant to the 1105 point,
16 that if you had it as--let's assume,
17 hypothetically, that a person who had made an
18 investment still had interests in the form of valid
19 claims arising from that investment in the
20 territory of the State at the time that NAFTA
21 entered into force and that those interests were

1 subsequently eliminated by action which, on the
2 face of it, was contrary to 1105, that it is
3 possible to conceive of situations in which that
4 would be covered.
5 I can see that in the context of a court
6 decision after 1st January 1994, which says you
7 didn't actually have an interest because your legal
8 interest didn't exist under the applicable law, the
9 position may be different.
10 MS. SVAT: I think the Claimant, we take
11 the allegations as we find them. They allege, with
12 respect to each claim, certain investments, and I
13 think we need not go beyond, in this particular
14 case, the very words that were used at this
15 hearing, and that is all I was merely trying to
16 point out.
17 MR. LEGUM: If I may just make one quick
18 point, if the Tribunal will take a look at
19 subparagraph (j) of Article 1139, it will see that
20 there is a carve-out for the definition of
21 investment. It says, "Investment does not mean

1 claims to money that arise from certain limited
2 categories," and then it goes on to say that it
3 also doesn't include any other claim to money that
4 does not involve the type of interests set out in
5 subparagraphs (a) through (h). One could draw a
6 negative inference from that and say that an
7 investment can be a claim that arises from one of
8 those other types of investments that is set forth
9 in Article 1139.
10 However, if that is what the investment is
11 that we are talking about here, that has dramatic
12 consequences for Mondev's expropriation claim. If
13 its investment within the NAFTA is only its claim
14 to money, well, clearly, that was never taken by
15 any act that preceded the entry into force of the
16 NAFTA. The only way that that claim could have
17 been taken, in any respect, would be by actions
18 that took place thereafter.
19 MS. SVAT: One last, final point of
20 clarification just to finish up my discussion with
21 Judge Schwebel, the notion that a claim exists

1 after the investment is taken, the point being that
2 prior to the NAFTA international law, of course,
3 existed, and there would be a claim under
4 international law that existed for an expropriation
5 of a foreign national's property in the United
6 States. That would be a claim, however, that
7 Canada would need to espouse on behalf of Mondev,
8 under customary international law principles, not
9 under a treaty entered into subsequently that gives
10 private rights to investors.
11 JUDGE SCHWEBEL: Well, couldn't Mondev
12 pursue the claim in its own name through the courts
13 of the United States, as, indeed, it did?
14 MS. SVAT: It did not pursue an
15 international claim. I am only discussing the
16 expropriation claim, not its pursuit of the claim
17 in the U.S. courts, which obviously happened after
18 the NAFTA. My comments are limited to explaining
19 why the expro claim is time-barred here.
20 JUDGE SCHWEBEL: Let's suppose that from
21 the outset of the litigation, counsel for Mondev

1 submitted the causes of action they submitted, but
2 also submitted that the actions of authorities in
3 Massachusetts were in violation of international
4 law, wouldn't a court hear those claims?
5 MS. SVAT: I apologize. I am not going to
6 be able to answer that question of whether or not a
7 domestic court would hear the international claim.
8 JUDGE SCHWEBEL: Well, I believe that it
9 would. There is certainly no barrier to a U.S.
10 domestic court ruling on questions of customary
11 international law, and that has been the case from
12 the foundation of the republic.
13 PROFESSOR CRAWFORD: Well, of course, the
14 pack at Havana may have been open to LPA, but they
15 didn't rely on it would probably be the short
16 answer to the question. I am not trying to answer
17 Judge Schwebel's question.
18 MS. SVAT: I didn't realize that he had
19 asked a question. I couldn't answer his first
20 question, and I am sure he's correct in his
21 response to it.

1 Now, if I could resume, I think the rest
2 of my comments will help elaborate on all of these
3 issues, if that is all right.
4 But, of course, Mondev's argument is that
5 the breach of Article 1110 did not occur until
6 1999, and thus it is saved. It is to this argument
7 that I will now turn. There are several basic
8 precepts that flow from the provisions of Article
9 1110(1), which by themselves refute Mondev's
10 suggestion that a special rule applies in this
11 case, and I will have to recall Slide No. 12 at
12 this point if we could have just the provisions.
13 Thank you.
14 First, the standard of treatment due does
15 not depend on whether an alleged expropriation is
16 direct or indirect. Article 1110 is categorical
17 and applies equally to both kinds of
18 expropriations, and no party may expropriate
19 directly or indirectly.
20 Second, no additional inquiry or showing
21 is required regarding the manner in which the

1 alleged expropriation is carried out. Either a
2 Party expropriates for a public purpose on a
3 nondiscriminatory basis, in accordance with due
4 process and on payment of compensation, or it
5 doesn't.
6 Here I would add that if this Tribunal
7 were to accept as true all of Mondev's allegations
8 concerning the City and the BRA, it would be quite
9 difficult and impossible, I would suggest, to avoid
10 the conclusion that the 1991 expropriation under
11 Mondev's allegations was not lawful on other
12 grounds as well. Sir Arthur alleged expropriatory
13 acts by the City and the BRA that he also described
14 as threatening, coercive, dilatory and
15 unreasonable, just to use a few adjectives. By
16 this reasoning the expropriation would have been
17 unlawful in 1991 even if it had been compensated.
18 But of course we know that it was also
19 uncompensated in 1991.
20 Finally, nowhere does Article 1110(1)
21 refer to or require the Claimant to use any

1 domestic adjudicatory procedures that may be
2 available to determine whether there has in fact
3 been an expropriation or whether any other type of
4 remedy is due. There is no room within the four
5 corners of Article 1110(1) for Mondev's theory.
6 Of course, where an Article 1110 claim is
7 based on subparagraph (d), an allegation of
8 expropriation not on payment of compensation,
9 paragraphs 2 through 6 sweep in additional required
10 elements of a claim. However, as we shall see,
11 paragraphs 2 through 6, like paragraph 1, evidence
12 a clear incompatibility between the text of Article
13 1110 and the theory that Mondev would like this
14 Tribunal to apply. The additional requirements
15 contained in paragraphs 2 through 6 work in two
16 complementary ways. They indicate the agreement of
17 the parties as to how to comply with the
18 compensation requirement, and they identify ways in
19 which a party's purported compliance may
20 nevertheless fall short of the treatment required.
21 Thus, as you can see from the slide, a Claimant

1 could rely on paragraph 2 to allege that although a
2 party offered compensation, it failed to provide
3 compensation that was equivalent to the fair market
4 value of the expropriated investment immediately
5 before the expropriation took place. And the same
6 is true for paragraphs 3, 4, and you also have 6
7 projected on the screen. And I won't go through
8 those now since we're running a little short on
9 time.
10 But each of the inquiries at paragraphs 2
11 through 6 address a situation of calculating the
12 exact amount, form or manner of payment due. Not
13 one questions whether the alleged expropriation
14 occurred or whether it was compensable. Indeed
15 they all presume recognition of a compensable
16 expropriation by the State. Moreover, none of them
17 set forth different rules for direct as opposed to
18 indirect expropriations, or rules that a Claimant
19 first seek domestic remedy.
20 There is just no paragraph of Article 1110
21 that even hints that an indirect expropriation

1 becomes unlawful only when a claimant fails to
2 secure a domestic remedy.
3 But adopting Mondev's novel theory would
4 require that we ignore not only 1110 of the NAFTA,
5 but international law as well. And under
6 international law, there are principles that
7 address the means by which a State may satisfy the
8 obligation to compensate for an expropriation.
9 There are even reasons for finding an unlawful
10 expropriation at a time later than the
11 expropriation itself. But no rule of international
12 law supports Mondev's novel theory that a State's
13 obligation not to expropriate without compensation
14 is only breached when the Claimant invokes but is
15 denied recovery by domestic procedures.
16 As the United States demonstrated at pages
17 27 through 30 of its Counter-Memorial, and 43
18 through 47 of its Rejoinder, international law
19 determines the legality of an expropriation at the
20 time of the expropriation unless a State at that
21 time either pays compensation or observes the

1 obligation to compensate, and this is what Ian
2 Brownlie meant when he--
3 PRESIDENT STEPHEN: Would you perhaps just
4 repeat those sets of paragraphs that you mentioned?
5 MS. SVAT: 27 through 30--those are pages
6 of the Counter-Memorial, and 43 through 47 of the
7 Rejoinder.
8 PRESIDENT STEPHEN: Thank you. I'm sorry.
9 I interrupted you. You were getting on to
10 Brownlie.
11 MS. SVAT: No, no, that's quite all right.
12 Yes, he made the same point when he
13 explained that an expropriation, quote: "is
14 unlawful unless there is provision for the payment
15 of effective compensation," unquote. And the Iran-U.S.
16 Claims Tribunal also agreed in Amoco
17 International Finance Corporation v. Iran. It
18 elaborated on what it means to make the requisite
19 provision for compensation so as not to run afoul
20 of its obligation to compensate. That Tribunal
21 stated, "Provisions for the determination and

1 payment of compensation must provide the owner of
2 the expropriated assets sufficient guarantee that
3 the compensation will be actually determined and
4 paid in conformity with the requisites of
5 international law."
6 And likewise Professors Sohn and Baxter
7 said something quite similar in their draft
8 convention on international responsibility. They
9 said "Vague assurances at the time of the taking of
10 property to the effect that compensation will be
11 paid in the future are insufficient if action is
12 not taken within a reasonable time thereafter to
13 grant that compensation. Thus, where a State's
14 offer of compensation is inadequate, the
15 expropriation will be deemed unaccompanied by
16 compensation and in breach of the governing
17 international obligation."
18 And I would also direct the Tribunal to
19 examine the case of the Seizure of Property and
20 Enterprises in Indonesia, which was a decision by
21 Lord McNair, and we cite to it in our briefs at

1 pages 252 to 253 of that opinion. Lord McNair set
2 out a similar standard for determining when a
3 taking is unlawful for failure to offer
4 compensation. And I'll read it from the slide
5 quickly.
6 "It thus appears that there is no
7 certainty as to the ultimate payment of
8 compensation. It is difficult to see how in these
9 circumstances"--meaning those of the Indonesian
10 Government seizure of Dutch property--"a Tribunal
11 could find that the nationalization had been
12 accompanied by effective measures which ensure and
13 make certain the prompt payment of adequate
14 compensation."
15 Now, this well-settled principle has two
16 corollaries. First and most logically, State
17 responsibility will not attach at the time of an
18 expropriation if it is accompanied by the required
19 recognition of the obligation to compensate. And
20 the rationale for this rule is obvious. A State
21 that promptly recognizes its obligation and

1 provides sufficient assurance that it will live up
2 to such an obligation should not be held to be in
3 violation of international law on the basis of
4 failure to pay at the time of a taking.
5 And second, a State's ultimate failure to
6 live up to the obligation it recognized at the
7 earlier time of the expropriation will give rise to
8 international scrutiny, and in such a case the
9 breach of the international obligation could arise
10 after the expropriation took place. And this makes
11 perfect sense as well. Any other rule would allow
12 a State to avoid responsibility all together by
13 simply promising, but never delivering compensation
14 in the amount required.
15 And indeed, Article 1110 contemplates as
16 much, and I'll just reflect back. We looked
17 earlier at paragraphs 2 through 6. A Claimant
18 could show, for example, that compensation was
19 eventually paid as promised, but that under
20 paragraph 4, for example, interest was not
21 calculated properly from the date of the

1 expropriation until the date of actual payment.
2 Thus the failure to compensate may be judged to
3 have occurred at a time subsequent to the taking.
4 However, the case--
5 PROFESSOR CRAWFORD: Of course, not all of
6 those failures would render the act on
7 expropriation. It may well be that they would
8 simply be a breach of the failure to pay a certain
9 amount of money. The expropriation itself could
10 still be, in effect, lawful. For example, if not
11 all the interest was paid, there would simply be no
12 obligation to pay that amount of interest. In any
13 event, that's really--
14 MS. SVAT: And under Article 1110 it would
15 simply a violation of Article 1110, paragraph D.
16 However, the case alleged by Mondev is
17 very different from the situation envisioned by
18 Article 1110, where failure to pay compensation may
19 be deemed to occur subsequent to the taking, namely
20 Mondev's allegations lack the factual prerequisite,
21 acknowledgement by the United States of an

1 obligation to compensate. Mondev's claim simply
2 does not include an allegation, because it cannot,
3 that either the City or the BRA, quote,
4 "guaranteed," unquote, that any compensation would
5 be paid to LPA. Mondev had never even suggested
6 that the City or the BRA acknowledge that a taking
7 occurred or that compensation would be forthcoming.
8 Therefore, this case, as pleaded by
9 Mondev, presents the classic case where
10 international authorities direct the Tribunal to
11 look at the circumstances surrounding the alleged
12 expropriation and not beyond.
13 Professors Sohn and Baxter's rule of thumb
14 is instructive in this regard, and I'll read it
15 from the screen. "While no hard and fast rule may
16 be laid down, the passage of several months after
17 the taking without the furnishing by the State of
18 any real indication that compensation would shortly
19 be forthcoming would raise serious doubt that the
20 State intended to make prompt compensation at all."
21 And here there is no room for doubt.

1 Mondev Concedes that neither the City nor the BRA
2 furnished any indication that compensation would be
3 forthcoming, either at the time of the alleged
4 expropriation or at any time thereafter.
5 As I pointed out earlier, the City and the
6 BRA in fact denied liability throughout the seven
7 years of litigation where the issue of a taking by
8 the City and the BRA was never even an issue.
9 Thus, because no element of the alleged
10 wrongful taking could have remained to be completed
11 under Mondev's allegation, there is no valid
12 justification to look beyond the date of the
13 purported expropriation in this case.
14 And I'm just about the discuss a few
15 cases, and I'm wondering whether the Tribunal would
16 prefer that I delay for--
17 PRESIDENT STEPHEN: Yes. Thank you for
18 raising it. I was thinking that you would be able
19 to conclude. But you still have a few minutes, do
20 you?
21 MS. SVAT: I will not be able to conclude

1 in 5 minutes.

2 PRESIDENT STEPHEN: In that case we'll

3 adjourn now for a quarter of an hour. Thank you.

4 MS. SVAT: Thank you.

5 [Recess.]

6 MS. SVAT: I was just about to discuss a

7 number of cases, and I'll preface by saying that in

8 not one of the many cases cited by Mondev or by the

9 United States did a Tribunal look beyond the date

10 of an expropriation in the face of a State's

11 complete failure to acknowledge a taking or its

12 obligation to compensate.

13 And here I will briefly examine a few of

14 those cases that involved indirect expropriations,

15 and I'll begin with the Biloune & Marine Drive

16 Complex v. Ghana Investment Center, which is at

17 U.S. App. Vol. 9, Tab 4. It was an investment

18 dispute submitted under the terms of an investment

19 agreement and decided by an ad hoc Tribunal in

20 1989. The Biloune Tribunal found that a series of

21 acts and omissions on the part of the Government of

1 Ghana culminated in the indirect expropriation of
2 the Claimant's rights and interests in the
3 development of a resort in Agra, Ghana. In
4 particular the Tribunal determined, at pages 107
5 through 210, that the expropriation took place on
6 the date of the last in a series of acts. The last
7 of these acts was Mr. Biloune's deportation. But
8 the Tribunal found that that deportation had
9 effectively prevented the investment enterprise
10 from further pursuing its approved project. Like
11 Mondev's allegations here, Ghana never acknowledged
12 the expropriation. In fact, Ghana had denied even
13 that the deportation was related to the investment.
14 Mr. Biloune never sought compensation through
15 municipal procedures as far as the case tells us.
16 Yet the Tribunal did not inquire whether any
17 remedies might be available under Ghana's law. It
18 simply found a breach of the international
19 obligation.
20 Likewise, in Phillips Petroleum Company v.
21 Iran at U.S. App. Vol. 10, Tab 30, the Iran-U.S.

1 Claims Tribunal found that the Claimant's
2 contractual rights were expropriated through a
3 series of acts attributable to the Government of
4 Iran. In Phillips the Claimants held rights to a
5 portion of oil produced under a government-granted
6 concession. Consistent with the principles that I
7 have been describing, the Tribunal found an
8 uncompensated taking occurred on a date by which it
9 had become clear to the Claimant, quote: "That
10 there was no reasonable prospect of return to an
11 arrangement," unquote, on the basis of the
12 Claimant's original contract. And that's at
13 paragraph 102. And the Tribunal further found that
14 as of that time, quote: "No compensatory payment
15 was made for the Claimant's share," unquote. And
16 that's paragraph 113.
17 At no point did the Tribunal examine
18 whether domestic avenues were available to the
19 Claimant to establish that an expropriation took
20 place or to seek a municipal remedy.
21 And finally I'll refer to the CME award

1 that Mondev cited yesterday. And as we heard
2 yesterday, CME alleged, among other things, an
3 expropriation of its investment in the Czech
4 Republic. It was a joint venture corporation set
5 up to operate a television broadcasting station.
6 And the Tribunal found a de factor expropriation of
7 the investment's exclusive use of a broadcasting
8 license by the relevant government authority.
9 You'll recall that that authority had by agreement
10 granted CME exclusive use of a license to broadcast
11 in 1993. And the authority later expropriated it
12 by coercing an amendment of that agreement in 1996
13 and by acts and omissions in 1999 that allowed the
14 investment to be completely destroyed.
15 Again, the Respondent never acknowledged
16 the indirect expropriation. Yet the Tribunal did
17 not put the onus on the Claimant to perfect its
18 claim of breach by seeking redress in local courts.
19 It found the unlawful taking in 1999. Indeed the
20 Tribunal, at paragraph 415 found, the Claimant was
21 not obligated to wait for the outcome of

1 proceedings pending before the Czech Supreme Court
2 before instigating treaty proceedings. The
3 Tribunal said the outcome of the civil court
4 proceedings is irrelevant to the decision on the
5 alleged breach of the treaty by the Media Council
6 acting in concert with the Respondent.
7 Yet Mondev continues to stand by its
8 theory that an indirect taking, unaccompanied by
9 recognition of the obligation to compensate, does
10 not violate Article 1110 until available domestic
11 procedures have been sought and have failed to
12 yield any remedy. With nothing to back it up,
13 Mondev simply surmises, at paragraph 155 of its
14 Reply, that because the moment at which an indirect
15 expropriation occurs will be uncertain, it is
16 inevitable that compensation always follows such
17 expropriation and presumably that no failure to
18 expropriate foreign indirect expropriation arises
19 at the time of the taking.
20 United States, however, finds the view of
21 Judge Brower more convincing. Judge Brower is

1 formerly and now sitting judge of the Iran Claims
2 Tribunal, of course, and also formerly counsel to
3 Mondev. In his separate opinion in the Sedco case
4 which is U.S. at Vol. 11 at Tab 36 before the Iran-U.S.
5 Claims Tribunal, Judge Brower endorsed a much
6 more reasonable view. He said, "By definition it
7 is difficult to envision a de facto or creeping
8 expropriation ever being lawful, for the absence of
9 a clear intention to expropriate almost certainly
10 implies that no contemporaneous provision for
11 compensation has been made. Indeed, research
12 reveals no international precedent finding such an
13 expropriation to have been lawful."
14 Mondev's argument that the failure of
15 judicial remedies in 1998 and 1999 triggered the
16 breach of Article 1110 simply cannot be reconciled
17 with any of the international law principles I have
18 just discussed. In fact, we can appreciate the
19 sharp distinction between a failure to provide
20 compensation for an expropriation and the failure
21 to secure a domestic remedy from municipal courts

1 for the same losses.
2 And I will project paragraph 144 of the
3 Special Rapporteur's Second Report on the then
4 Draft Articles on State Responsibility to
5 articulate the distinction I speak of, a
6 distinction that Mondev misses.
7 In a case where a nondiscriminatory but
8 uncompensated expropriation occurs, it is the
9 failure to compensate which constitutes the gist of
10 the breach, and this failure may be judged to have
11 occurred at a time subsequent to the taking.
12 Nonetheless, the failure is still analytically
13 distinct from the exhaustion of local judicial
14 remedies. And the breach in such a case would
15 occur at the time the failure to compensate
16 definitively occurred, whatever form that failure
17 took.
18 Of course here the current discussion is
19 about whether Mondev's Article 1110 claim, as
20 alleged, is time-barred. So we are dealing only
21 with Mondev's allegations of breach, not with a

1 case where an expropriation has occurred. And the
2 statement on the screen is also slightly off point
3 because of course Mondev has not alleged a
4 nondiscriminatory expropriation. But even assuming
5 that were the case, Mondev has not put forth a
6 single piece of evidence to refute the United
7 States' showing that the failure to compensate, as
8 alleged, occurred before NAFTA's entry into force.
9 Thus, the alleged failure here definitively
10 occurred before LPA sued the City and the BRA in
11 1992.
12 And just as an aside, I'd like to point
13 out that the PCIJ's decision in Phosphates in
14 Morocco, which are in the briefs, is also a good
15 case on this point. That is at U.S. App., Vol. 6,
16 Tab 44. It's towards the end of the decision, and
17 it's page 22 or 28, depending on whether you look
18 at the top or the bottom of the page. But the PCIJ
19 found very similar--or the same point, which is
20 that the expropriation was distinct from the
21 pursuit of local remedies thereafter. It was

1 dismissed on jurisdictional grounds, but
2 nevertheless it did examine the notion of a taking,
3 and later a pursuit of domestic remedies.
4 And I have just one final point that I
5 would like to discuss before I conclude my remarks,
6 and I alluded to it earlier, the notion of the
7 continuing wrongful act. Mondev here alleges the
8 wrongful acts of the City and the BRA continued
9 post NAFTA. I believe Sir Arthur likened the
10 situation to that of a forced disappearance in
11 human rights law, a disappeared investment he
12 called it.
13 Now, to begin, if this were the case I
14 would just note--and I believe I noted this
15 earlier--that NAFTA's three-year prescription
16 period would have lapsed on January 1st, 1997, just
17 as Professor Crawford's hypothetical yesterday of
18 the illegally frozen assets. The right to bring
19 such a claim will lapse long before Mondev's notice
20 of arbitration was filed.
21 But to be sure it is not the case that the

1 alleged wrongful acts continued in this case. The
2 ILC's Article 14 and the commentary on Article 14
3 provides some examples of continuing wrongful acts
4 such as the involuntary disappearance or unlawful
5 detention. And even point out that the situation
6 of a creeping expropriation may be a special case.
7 But the case that the ILC cites and on which Mondev
8 relies, the Papamichalopoulos case, if I've said
9 that correctly, is an apposite here. Indeed it
10 turns out that the case is very different from this
11 case, and I'll just briefly distinguish that case
12 on a few levels.
13 And first I'd like to just point out that
14 of course Article 1 of the Protocol to the
15 Convention is not the same as Article 1110, so we
16 can just presume that there are obvious differences
17 in that regard which I am not going to go into.
18 But the first difference I will address is
19 that although the taking in that case, which I
20 apologize, I will just refer to as "that case" so I
21 don't have to say it so many times.

1 [Laughter.]

2 MS. SVAT: Was a de factor expropriation.
3 It was not a creeping expropriation in the sense
4 that it took a very long time for the expropriation
5 to take place. The court found that the
6 expropriatory act was a legislative act of 1967.
7 They found it amounted to a de facto expropriation
8 because rather than taking title to land, the land
9 was rather occupied by in that case the Navy Fund.
10 But as of 1967 the de facto expropriation had taken
11 place.

12 Second, in that case there was no lack of
13 the factual prerequisite lacking here, and by that
14 I mean the acknowledgement by the State of an
15 obligation to compensate. In fact the European
16 Court found, at paragraph 39, that as early--and
17 I'm quoting here--"As early as 1968 the Athens
18 Court of First Instance allowed the applications
19 made for interim measures to restore the original
20 position of the owners and the land occupied." In
21 fact, from 1968 through the date that the case

1 eventually came before the European Court, Greece
2 had acknowledged the de facto taking and attempted
3 to remedy the situation. And in fact, much of the
4 court proceedings that ensued over the years
5 between 1968 and the date of the case, which I
6 believe is 1993, yes, 1993, were about how to
7 arrange for compensation for the original owners of
8 the land.
9 PRESIDENT STEPHEN: So Greece acknowledged
10 the fact that compensation was due?
11 MS. SVAT: The courts and other organs of
12 the government acknowledged that compensation was
13 due. The Navy Fund never relented. They continued
14 to occupy the property. And there were some
15 disputes between the Ministry of Defense and the
16 Ministry of Agriculture, but by all signs the
17 weight was surely on the side of the government
18 organs that were trying to remedy the situation,
19 and they were looking for land that they could use
20 to trade. So throughout the whole period there was
21 an acknowledgement.

1 And third, the obligations of the Protocol
2 that was alleged to be breached, were binding on
3 the date of the taking. Unlike here, where Mondev
4 admits that the NAFTA was not in force on the date
5 of the alleged expropriation, the Court in this
6 case, in Papamichalopoulos, made clear at paragraph
7 40 that the Convention and the Protocol entered
8 into force as to Greece in 1953 and 1954
9 respectively.
10 Now, there was a time period during the
11 middle of the facts of this case where Greece
12 disavowed its obligations, and then reinstituted
13 them. I believe it was 1970 to 1974 is the window.
14 But when the taking occurred and then when the
15 court heard the case, and then ultimately in 1985,
16 when Greece allowed the suit or allowed the court
17 to have jurisdiction over it, they were obligated
18 by the terms of the Convention. And in fact,
19 whether or not the court's jurisdiction was in any
20 way affected was never an issue that was raised by
21 the parties.

1 And also with regard to this notion of
2 obligations and when they're binding, I just wanted
3 to point out, and we added an additional case to
4 our supplemental authorities, and I'm not sure if
5 it's at Tab 6 any more, but it may be. And that
6 case is another European Court of Human Rights
7 case, the case of Malhous v. Czech Republic, which
8 was issued in 1991 by the grand chamber of the
9 court. And the court explained, "That the court
10 can examine applications"--at page 16, I'm going to
11 read a passage--"The Court can examine applications
12 only to the extent that they relate to events which
13 occurred after the Convention entered into force
14 with respect to the relevant contracting party. In
15 the present case the property of the applicant's
16 father was expropriated in June 1949, that is, long
17 before 18 March 1992, the date of entering into
18 force in the Convention with regard to the Czech
19 Republic. Therefore the Court is not competent
20 ratione temporis to examine the circumstances of
21 the expropriation or the continuing effects

1 produced by it up to the present date. In this
2 regard the Court refers to and confirms the
3 Commission's established case law according to
4 which deprivation of ownership or of another right
5 in rem is in principle an instantaneous act and
6 does not produce a continuing situation of
7 deprivation of a right."
8 So in the end Mondev's unsupported theory
9 of breach of Article 1110, 10 years after the
10 alleged pre-NAFTA expropriation took place, is
11 merely that, a theory. It is a creative theory.
12 Indeed, it's designed specifically to try and
13 salvage an otherwise stale claim, but certainly not
14 one this Tribunal can adopt in light of the
15 overwhelming evidence that the provisions of the
16 NAFTA and the applicable rules of international law
17 refuted.
18 And that is all I have to say on
19 expropriation today.
20 PRESIDENT STEPHEN: Well, thank you, Ms.
21 Svat.

1 MS. SVAT: Thank you.
2 PRESIDENT STEPHEN: Mr. Legum.
3 MR. LEGUM: Thank you. Mr. President,
4 Members of the Tribunal, as Ms. Svat has just
5 demonstrated, Mondev's claim of an expropriation of
6 contract rights in the 1980s is time barred in its
7 entirety. The Tribunal therefore should have no
8 occasion for examining the merits of Mondev's claim
9 of an expropriation in that decade.
10 This morning I will nonetheless
11 demonstrate that Mondev's claim of an expropriation
12 of contract rights is without merit in any event.
13 I will make four points. First, there is
14 no merit to Mondev's contention that there was any
15 expropriation here of the rights in the project as
16 a whole. And by that I mean the rights in the
17 mall, and under the Tripartite Agreement, in
18 addition to the rights under that agreement with
19 respect to the Hayward Parcel.
20 Second, the record does not support
21 Mondev's assertions that certain acts by the City

1 and the BRA amounted to a taking of LPA's
2 contractual right to buy the Hayward Parcel before
3 it effectively granted that right to Campeau in the
4 lease.
5 Third, the most telling evidence in the
6 record, the evidence of money changing hands,
7 conclusively refutes Mondev's claim that those acts
8 of the City and the BRA took away Mondev's
9 contractual rights.
10 Yes, please?
11 PRESIDENT STEPHEN: Money changing hands
12 between?
13 MR. LEGUM: Campeau and LPA in this case.
14 Fourth, to the extent that Mondev seeks to
15 rely on later events, that is, events after the
16 March 1988 lease with Campeau, those events cannot
17 establish a taking and instead go only to the more
18 mundane question of whether the City breached its
19 obligations under the Tripartite Agreement, a
20 question of Massachusetts Law that the SJC
21 conclusively resolved in its well-reasoned

1 decision.

2 Now, before I begin my presentation I

3 would like to note that the United States is

4 severely hampered in its defense of this claim by

5 the passage of time. All we have to work with at

6 this point in time is the record of proceedings

7 before the Massachusetts Courts. Those proceedings

8 were not tried on a theory of creeping

9 expropriation, however. There is no way for the

10 United States at this point even to approximate

11 what relevant evidence not reflected in that record

12 might have been available for the United States'

13 defense of this claim had that claim been asserted

14 within a matter of years rather than well over a

15 decade after the pertinent events.

16 I turn now to my first point, the

17 suggestion that Mondev makes that the City or the

18 BRA deprived LPA of its rights in the project as a

19 whole is baseless. The contours of the financial

20 and contractual relationship between LPA and

21 Campeau with respect to the project are critical to

1 this issue, and that is where I will begin.
2 The Tribunal will recall that in the fall
3 of 1987 Campeau and LPA reached an agreement in
4 principle for the outright sale of all of LPA's
5 interests in the project to Campeau. In March of
6 1988 LPA entered in a lease agreement with Campeau
7 that had a number of additional terms not usually
8 found in a lease, including what was styled as an
9 option to buy all of LPA's rights in the project.
10 Now, on paper the financial terms of the
11 two transactions look quite different, and we have
12 a slide on the screen here that shows what the
13 actual documentation, the transactional
14 documentation showed. The numbers are in millions
15 of dollars. The chart is based with respect to the
16 proposed sale in 1987 on the terms of the proposed
17 agreement with LPA, that Campeau had submitted to
18 the BRA as part of its application for approval of
19 the sale. The chart is based with respect to the
20 lease on the terms of the lease and its
21 accompanying promissory note. Based on this

1 information the transactions look very different.
2 If we could have the next slide. The real
3 deal, however, in both transactions had a number of
4 central components that curiously were never
5 reduced to paper. According to testimony by the
6 Chief Executive Officer of Mondev, the proposed
7 sale included an additional cash payment in the
8 amount of the line of credit outstanding on the
9 Manufacturer's Hanover Bank line of credit, which
10 at the time was about $9.5 million. According to
11 another LPA representative, in the least
12 transaction Campeau paid an additional $12 million
13 in cash. Neither of these figures is mentioned
14 anywhere on paper.
15 Now, based on this information the
16 transactions look strikingly similar. The most
17 substantial difference between the two is that the
18 lease agreement provided LPA with a potentially
19 greater payout over the long term, but also exposed
20 it to greater credit risk vis-a-vis Campeau.
21 Now, if I can just go down each of the

1 elements of this. In the proposed sale the
2 proposal was for a immediate payment of $15 million
3 in cash. In the lease there was in fact an
4 immediate payment of $12 million in cash or checks,
5 immediately available funds. Under the proposed
6 sale, as Mr. Ransen described it, there was an
7 additional $9.5 million that Campeau was going to
8 pay in cash to pay down the line of credit on the
9 loan. Under the lease there was a note granted in
10 the amount of $9.5 million, about the same amount,
11 with interest to run in the amount of the interest
12 on that same loan.
13 So essentially, in terms of the time value
14 of money, the would both have approximately the
15 same effect, although obviously there's greater
16 credit risk vis-a-vis Campeau with respect to a
17 promissory note than a cash payment.
18 Both agreements provided for the
19 assumption by Campeau of all outstanding debt. In
20 terms of the--yes please?
21 PRESIDENT STEPHEN: I don't understand

1 what is meant by "in debt to be paid down."

2 MR. LEGUM: As I understand it--and this

3 is based on the testimony in the record, that's all

4 we have on this point--the amount of the line of

5 credit was $9.5 million. That's the obligation of

6 LPA to Manufacturers Hanover Bank. And the

7 arrangement, as it was described, was that Campeau

8 would make a cash payment to Hanover--well, I don't

9 know whether it was to Hanover or to LPA.

10 Obviously the transaction never went through and

11 that detail--

12 PRESIDENT STEPHEN: Of that amount?

13 MR. LEGUM: Of that amount, yes.

14 In terms of additional consideration, the

15 proposed sale provided for no additional

16 consideration, but the lease provided for three

17 different items of additional consideration.

18 First, $300,000 a year in rent on the lease of the

19 project. A $3 million payment that was described

20 as a contingent payment or couched as a contingent

21 payment that would be due when the City and the BRA

1 approved the development project of Campeau.
2 I have "contingent" in quotation marks
3 there because in fact the contingency was when all
4 required approvals had been obtained, and the term
5 of the lease was through 1994. As of 1993, the
6 status of the project as a Chapter 121A project
7 would expire, and there would be no further need
8 for any approvals. So although it's couched as a
9 contingent loan, the contingency was sure if
10 Campeau had stayed in business to come due no later
11 than 1993. And then finally there was an
12 additional $2 million payment that would take place
13 when the transfer of the Hayward Parcel took place.
14 This comparison, we submit, conclusively
15 refutes Mondev's suggestion here that there is any
16 basis for finding an expropriation of its interests
17 in the project as a whole.
18 Now, there are, as I've acknowledged,
19 differences between the two transactions
20 principally in the amount of credit risk associated
21 with the lease as opposed to the proposed sale.

1 But we submit that kind of difference, which is a
2 difference in form and not in the total amount of
3 compensation due or contemplated by the
4 transaction, is not the kind of difference that can
5 reflect any kind of expropriation. In fact, I will
6 show now that there was no even arguable
7 expropriation here.
8 The Tribunal will recall the option and
9 delegation arrangement in the lease that I
10 described yesterday. LPA delegated to Campeau its
11 authority to negotiate with the City and the BRA
12 concerning the project and the Hayward Parcel. LPA
13 granted Campeau an option to buy all of its
14 interests in the project, including its rights
15 concerning the Hayward Parcel.
16 The option was, as I noted yesterday, not
17 contingent on Campeau or LPA, closing on the
18 Hayward Parcel before January 1, 1989, the drop-dead date,
19 or in fact at any time before 1994.
20 Under this arrangement, Campeau, not LPA, bore the
21 risk that the right to acquire the Hayward Parcel

1 at the Tripartite Agreement formula price would
2 expire in January of 1989. If Campeau closed
3 before that date, it would receive the benefit of
4 the Tripartite Agreement formula and LPA would get
5 paid its $5 million. If Campeau closed after that
6 date, it would not receive that benefit, but LPA
7 would get paid just the same.
8 We all, of course, recall what happened.
9 The rights under the Tripartite Agreement did
10 expire in January 1, 1989, but Campeau pressed on
11 with its plans. Why shouldn't it have, after all?
12 The cost of the land rights at issue here was only
13 on the order of 2 percent of the total cost of its
14 project. The BRA approved its plan in June 1989.
15 The only reason why LPA did not get paid at the end
16 of the day, as contemplated in the lease, was that
17 Campeau experienced financial difficulties and
18 became bankrupt. It is undisputed, of course, that
19 the United States had nothing to do with that.
20 The Tribunal will also recall that when
21 Campeau experienced its financial difficulties, LPA

1 declared it in default under the lease and resumed
2 control over the project.
3 If we could have the next slide please.
4 LPA was in no sense forced by governmental action
5 to abandon the project. As we can see from the
6 screen, LPA made a business decision that had
7 everything to do with Campeau's bankruptcy and a
8 bad real estate market in the early 1990s and
9 nothing to do with the City, the BRA or the United
10 States. And this is a question at trial of the
11 Chief Executive Office of Mondev. The question
12 reads: "Did LPA have the ability, the financial
13 ability to pay that mortgage if it wanted to?"
14 "Yes."
15 And then later on that officer of Mondev
16 explains, "In order to build Campeau's project they
17 had to demolish the mall. In order to demolish the
18 mall, they closed the stores. We had nothing to
19 take over. There was nothing there any more."
20 Well, obviously, Campeau's decision to
21 close the mall and to evict the tenants cannot be

1 attributed to the United States. There is, we
2 submit on this record, no basis for a finding of an
3 expropriation of the project as a whole. And
4 indeed, it is puzzling how this assertion fits in
5 with Mondev's attempt to make supposed
6 expropriations in the 1980s relevant to a NAFTA
7 claim. No claim concerning the loss of the project
8 as a whole was submitted to the Massachusetts
9 Courts. It is difficult to see how what Mondev
10 described as the NAFTA kiss of life could revise
11 this claim even under Mondev's view of temporal
12 considerations.
13 I turn now to my second point, that the
14 record does not support Mondev and does not show
15 any taking of LPA's right to acquire the Hayward
16 Parcel. Now, paragraph 149 of Mondev's Reply sets
17 forth in five paragraphs the acts that Mondev
18 contended in that pleading affected the supposed
19 expropriation. Sir Arthur repeated many of these
20 acts in his summary of Mondev's creeping
21 expropriation claim and added a few others.

1 I would like to address the acts alleged
2 in these paragraphs, and then turn to the
3 additional acts.
4 The first three paragraphs all address
5 acts in connection with the design review process.
6 Paragraph (a), as we can see on the screen,
7 addresses a supposed plan by the City to run a
8 street through the Hayward Parcel. Subparagraph
9 (b) deals with determinations of road closings in
10 connection with the design review process.
11 Subparagraph (c) deals with other supposed
12 obstacles created by the BRA in the design review
13 process. Thus, each of these subparagraphs
14 addresses the design review process in one way or
15 another.
16 Now, Mondev's position, as articulated in
17 paragraph 149 of its reply and reiterated on
18 Tuesday, is that these acts in the design review
19 process deprived LPA of its contract right under
20 Section 6.01 of the Tripartite Agreement to
21 purchase rights in the Hayward Parcel at a formula

1 price that the parties had agreed to years earlier
2 in that agreement. That position is irretrievably
3 inconsistent with the position LPA took before the
4 Supreme Judicial Court.
5 In its reply brief before that Court, LPA
6 represented to the SJC that, quote: "The agreement
7 did not require LPA or Campeau to complete the
8 design review process before acquiring the Hayward
9 Parcel, and therefore, any failure to complete the
10 design review was not the cause of their inability
11 to acquire the Hayward Parcel." As we've seen the
12 Supreme Judicial--am I going too fast?
13 PRESIDENT STEPHEN: No. You just lost me
14 in that last step.
15 MR. LEGUM: Okay. The fact that the
16 Supreme Judicial Court relied on this
17 representation or was it before that?
18 PRESIDENT STEPHEN: No, that one.
19 MR. LEGUM: That the Court relied on it?
20 PRESIDENT STEPHEN: Yes.
21 MR. LEGUM: The Tribunal will recall that

1 in the part of the decision that addresses whether
2 the record demonstrated a repudiation, it relied on
3 testimony by Mr. Ottieri that was to the same
4 effect as what you see on the screen. It said LPA
5 would have bought the parcel no matter what the
6 result of the design review process. That's the
7 part of the decision I'm referring to.
8 All right. Let's study this for a moment.
9 Mondev is telling this Tribunal that the City and
10 the BRA's acts prevented LPA from completing the
11 design review process and therefore deprived LPA of
12 its contract right to acquire the Hayward Parcel.
13 LPA told the Court that any failure to complete
14 design review process was not the cause of their
15 inability to acquire the Hayward Parcel. As
16 Professor Bin Cheng noted in his classic work on
17 general principles of law, quote--and I'm quoting
18 from pages 141 to 142: "It is a principle of good
19 faith that a person shall not be allowed to blow
20 hot and cold to affirm at one time and deny at
21 another. Such a principle has its basis in common

1 sense and common justice, and whether it is called
2 estoppel or by any other name, it is one which
3 courts of law have in modern times most usefully
4 adopted."
5 As Professor Cheng noted, international
6 Tribunals have repeatedly applied this principle,
7 and we submit, so should this international
8 Tribunal. Mondev should not be permitted to blow
9 hot and cold on the very same subject to both the
10 Massachusetts Courts and to the this Tribunal. Its
11 suggestion that the conduct of a design review
12 process deprived LPA of its right to acquire the
13 Hayward Parcel cannot be credited.
14 I turn now to the next act of governmental
15 authority, that according to Mondev's Reply,
16 deprived LPA of its right to acquire the Hayward
17 Parcel.
18 If we could have the next slide please.
19 This is described in subparagraph (d) of Paragraph
20 149, which refers to a supposed refusal by the City
21 and the BRA to approve the transfer of the

1 Lafayette Place project to Campeau. The reference
2 here is to Campeau's December 1987 application to
3 the BRA for approval of the proposed sale.
4 Contrary to Mondev's insinuation, the record shows
5 that neither the City nor the BRA ever denied that
6 application. Instead LPA withdraw the application
7 only 56 days after Campeau had submitted it. The
8 reason LPA withdrew the application was that
9 Campeau and LPA had decided to restructure the
10 transaction in a form that did not require
11 regulatory approval.
12 Now, this assertion by Mondev does not
13 come close to demonstrating an expropriation of any
14 contract right. As an initial matter, it is
15 impossible to see how action or inaction on that
16 application for such a fleeting period of time
17 could have impeded LPA from exercising its right to
18 purchase the Hayward Parcel before 1989. Indeed,
19 Mondev has not suggested that it did, and it is
20 similarly to see as a general proposition how
21 inaction for 56 days could constitute and

1 expropriation of property under international law.
2 Now, Mondev has made much of the jury
3 verdict on tortious interference with contract. It
4 suggests that that verdict somehow establishes that
5 the BRA's conduct was internationally wrongful.
6 Earlier today I demonstrated that verdict was never
7 entered as a judgment of any court and has no
8 effect under Massachusetts Law and certainly not
9 here. I would like to note in addition only that a
10 finding of tortious interference under municipal
11 law in no way can establish a violation of
12 customary international law by itself. Indeed, as
13 Professor Crawford will no doubt recall, the
14 International Law Commission conducted a
15 comparative survey on different countries' laws
16 concerning tortious interference with contract in
17 connection with the project on Draft Articles of
18 State Responsibility. That survey concluded that
19 tortious interference laws varied so much from one
20 country to another, that it could not even be said
21 that there existed a general principle common to

1 developed legal systems on the subject. Certainly
2 there is no basis for suggesting that a finding of
3 tortious interference under municipal law by itself
4 establishes internationally wrongful conduct.
5 Moreover, to the extent Mondev offers this
6 allegation in support of its theory that the BRA
7 wrongfully deprived LPA of its right to sell its
8 interests in the Lafayette Place project to
9 Campeau, the allegation establishes no deprivation
10 of any such contractual right. To the contrary,
11 any right to sell its interests granted to LPA
12 under the regulatory regime LPA agreed to was
13 subject to the approval of the BRA. Nothing in
14 that regime required that the BRA grant that
15 approval within the period of time demanded by the
16 applicant.
17 PRESIDENT STEPHEN: But essentially what
18 you say is surely that after the relevant number of
19 days it was withdrawn by LPA.
20 MR. LEGUM: That's correct, and that is an
21 additional argument that I mentioned earlier.

1 PRESIDENT STEPHEN: Yes.
2 MR. LEGUM: Inaction for such a fleeting
3 period of time cannot constitute an expropriation.
4 I would now like to turn to the final act
5 that Mondev alleges to evidence and exercise of
6 governmental authority, that deprived it of its
7 contract rights. Subparagraph (e) of paragraph 149
8 refers to an alleged, quote, "false claim by the
9 BRA that LPA owed certain taxes on the project."
10 Sir Arthur, on Tuesday, described this as quote:
11 "Absolutely a trumped-up claim," close quote. Sir
12 Arthur is correct that there is a trumped-up claim
13 here. He may have been misled, however, as to who
14 it is that is doing the trumping, for it is Mondev
15 that has invented this episode from whole cloth.
16 The only evidence Mondev has offered up on
17 this point is the uncorroborated testimony of its
18 Chief Executive Officer. That testimony admits
19 that LPA paid taxes due after the amount owed was
20 brought to its attention. Take a look at the
21 screen. I'm actually not going to read this in the

1 interest of time, but on its face, this interchange
2 between counsel and the witness establishes only
3 that LPA learned it owed taxes and paid them. What
4 Mondev relies on for this trumped-up claim claim is
5 an unsigned December 17, 1987 document that
6 purports on its face to be a memorandum from BRA
7 staff to Steve Coyle. Mr. Coyle, however,
8 testified that this memorandum, as was customary in
9 such transactions, was prepared by LPA's counsel,
10 David Rideout, as part of the package of documents
11 submitted to the BRA in connection with the
12 proposed sale to Campeau.
13 And if we can look at the next slide.
14 Question: "Mr. Coyle, did your staff draft memos
15 to you in December of 1987 recommending approval of
16 the transfer of Lafayette Place Associates' rights
17 in the mall and the Hayward Parcel to the Campeau
18 Corporation?"
19 THE WITNESS: "No. I believe Mr. Rideout
20 or his colleagues drafted it, presented it to staff
21 in the format used by the BRA to propose that."

1 Thus according to the sworn testimony,
2 this document in no way reflects the views of the
3 BRA. Indeed, so far as we have been able to tell,
4 this document was never offered for admission into
5 evidence at trial, likely because it was so
6 unreliable from an evidentiary point of view, that
7 it stood not chance of being admitted under normal
8 rules of evidence. And I would further note that--
9 PROFESSOR CRAWFORD: I'm sorry. Which?
10 MR. LEGUM: I'm sorry?
11 PROFESSOR CRAWFORD: Which document?
12 MR. LEGUM: I'm sorry. The December 1987
13 memorandum.
14 PROFESSOR CRAWFORD: I see. There was a
15 single memorandum.
16 MR. LEGUM: There was more than one, but
17 the one that Mondev relies on was the December 17,
18 1987 memorandum.
19 There was a question during the course of
20 Mondev's presentation as to whether there was
21 evidence in the record of taxes refunded to LPA as

1 a result of its supposed discovery of a false claim
2 of taxes due. We have not been able to find any
3 such evidence and submit that there is none.
4 Mondev's basing a charge of false and
5 trumped-up claims on so slender a reed as this, we
6 submit, is to say the least, irresponsible.
7 Moreover, what this has to do with the issues in
8 this case is far from apparent. Mondev does not
9 attempt to explain how the BRA's assertion that LPA
10 had not paid taxes could have affected an
11 expropriation of its right to purchase the Hayward
12 Parcel. The relationship between the two is far
13 from apparent. This false assertion of a false
14 claim does not establish the taking of a contract
15 right.
16 PRESIDENT STEPHEN: Well, I'm sorry. I
17 thought that what you were going to show us in
18 what's now on the screen related to this question
19 of the payment of taxes. In fact it doesn't relate
20 to that at all, does it? It relates to some
21 document which was prepared apparently by the

1 applicant and handed to BRA, and dealing with the
2 question of the approval of the transfer.
3 MR. LEGUM: I'm sorry. I may have skipped
4 a step in the analysis on this issue. The evidence
5 that Mondev relies on in support of its claim that
6 there was a false claim.
7 PRESIDENT STEPHEN: The trumped-up--
8 MR. LEGUM: Yes. The trumped-up claim
9 claim, is found--is referred to in Mondev's Factual
10 Appendix at paragraph 82. It refers to two
11 different pieces of evidence. One is the testimony
12 by its Chief Executive Officer that I flashed on
13 the screen earlier. And the second is a December
14 17, 1987 document that purports to be a memorandum
15 to Steve Coyle from the BRA staff. And that
16 document is found--
17 PROFESSOR CRAWFORD: What does that
18 document have to do with taxes?
19 PRESIDENT STEPHEN: Yes, exactly.
20 MR. LEGUM: It's a memorandum that
21 recommends the approval of the sale, and in the

1 course of doing so clicks through different issues
2 that would be relevant to that, including the fact
3 that according to that memorandum taxes, all taxes
4 due had been paid.
5 PRESIDENT STEPHEN: Ah-ha. Well, that
6 doesn't appear from beyond the screen.
7 MR. LEGUM: Exactly. And I apologize for
8 missing that step in the analysis.
9 PRESIDENT STEPHEN: Thank you.
10 MR. LEGUM: I've now reviewed each of the
11 allegations of expropriatory acts by the City and
12 the BRA set forth in Mondev's Reply, and shown that
13 they do not come close to showing a taking of
14 contractual rights.
15 I'd now like to address some of the
16 additional allegations piled on in the course of
17 Mondev's presentations at this hearing.
18 Now, one assertion that has received
19 particular prominence in Mondev's presentation is
20 its contention that LPA was, quote, "coerced into
21 signing the October 1987 Third Supplemental

1 Amendment to the Tripartite Agreement."

2 That is the one that added the drop-dead

3 date. The record shows no such thing. To the

4 contrary, the record shows that LPA's counsel,

5 counsel for LPA, prepared the initial draft of the

6 amendment. On the screen we have testimony by Mr.

7 Ottieri, who is an officer of LPA.

8 "Question: Who drafted the third

9 amendment to the Tripartite Agreement?

10 Answer: It was drafted by our attorneys

11 at Palmer and Dodge.

12 Question: And you signed it?

13 Answer: I did."

14 It is, we submit, not the usual course for

15 a party being forced to sign a document against its

16 will to ask its own counsel, at its own expense, to

17 draft up the document.

18 Moreover, the record shows that the City

19 and the BRA revised the document and sent it back

20 to LPA for its review in the event that it approved

21 its signature. LPA received the proposed amendment

1 on October 28, 1987. It signed it the very next
2 day, October 29. Hardly the conduct of a party
3 with reservations about to wisdom of the benefits
4 of the agreement, much less a party "coerced" into
5 signing it. And, of course, LPA, in October of
6 1987, was deep in its negotiations with Campeau for
7 the sale of its interests, and the clarity of the
8 amendment added as to the continuing existence of
9 the rights, and the City's and the BRA's
10 willingness to work in good faith no doubt amply
11 suited its purposes.
12 Now I'd like to take a second to compare
13 the allegations of coercion here to those in the
14 case that Sir Arthur mentioned in the course of his
15 presentation, the CME case. In the CME case, and I
16 am referring to paragraph 114 of the decision, the
17 coercion took the form of fines authorized by
18 Section 20, subparagraph 5 of the media law, plus
19 criminal charges against the statutory
20 representatives and executives of the company, plus
21 a threat of revocation of the company's license.

1 Now there is no evidence of anything
2 remotely approximating that here. There is no
3 evidence of any kind of direct, immediate threat
4 against LPA that could possibly give rise to a
5 claim of coercion, as that term is used in any
6 legally relevant sense.
7 I would now like to turn to another point
8 raised by Mondev repeatedly, supposed bad faith by
9 the BRA in imposing height restrictions on LPA's
10 buildings and mentioning a "no-build" scenario. We
11 now see on the screen excerpts from the April 22,
12 1987, letter from Mr. Coyle to LPA that Mondev
13 mentioned several times in its presentation. The
14 letter brings to LPA's attention a proposed interim
15 regulation applicable to all downtown projects in
16 the City of Boston, including Chapter 121A
17 projects.
18 The proposed interim regulation, as the
19 letter made clear, was a measure of general
20 application. Every developer in the downtown area
21 had to comply with it. While it did set general

1 height limitations, it also provided procedures for
2 applying for different forms of exemptions from
3 those limitations.
4 Now, as Mondev admitted in response to a
5 question from Professor Crawford, there was no
6 stabilization clause in the Tripartite Agreement.
7 There was no contractual obligation by the City or
8 the BRA to exempt LPA from the general laws and
9 regulations applicable to everyone else. There is
10 nothing that remotely smacks of bad faith in asking
11 a foreign-owned company to comply with municipal
12 laws that everyone else in its circumstances must
13 also respect.
14 I would now also like briefly to address
15 the communication concerning the "no-build"
16 scenario. If we could have the next slide, this is
17 a little bit busy. This is a series of excerpts
18 from the August 1987 letter, which concerns an
19 environmental impact study.
20 Now I suspect that by now most lawyers who
21 have practiced in the last decades of the 20th

1 century have become quite familiar with the concept
2 of environmental impact assessments. They are
3 required now for any project of any real
4 significance, including, I would note, at least in
5 the United States, International Trade Agreements.
6 The concept of an environmental impact
7 assessment may have been novel for LPA back in the
8 1980s, but the standard practice is to start with a
9 baseline, typically, the current state of affairs,
10 and then compare that baseline to different
11 alternative scenarios. The current state of
12 affairs, when one is considering an empty lot, is a
13 no-build scenario. Far from evidencing bad faith,
14 this letter merely reflects the BRA attempting to
15 help LPA understand what was apparently a new
16 concept for it--how to conduct an environmental
17 impact assessment. It smacks nothing of bad faith.
18 I would like, before moving from this
19 general area, to make two broader points.
20 First, from the City's and the BRA's
21 perspective, this type of interaction with LPA was

1 typical. LPA seemed unable or unwilling to
2 understand that societal expectations for City
3 planning had changed from the 1970s to the 1980s.
4 The environment, the character of neighborhoods,
5 quality of life issues were important, and the BRA
6 regulations and design review process reflected
7 this increased importance to community issues.
8 Those regulations apply to everyone.
9 LPA never made any serious effort to
10 comply with the process specified by the BRA in its
11 Design Review Process Manual, which LPA was
12 provided a copy of. At best, LPA only completed
13 Stage 1 of the clearly delineated four-stage design
14 review process specified in the BRA's design review
15 manual. From the BRA's perspective, LPA's refusal
16 to follow rules of general application was the
17 issue and not any invented obstacles created by the
18 BRA, especially for LPA.
19 The second general point I would like to
20 make is there are very much two sides to this whole
21 general story. LPA's case on this particular

1 issue, in particular, is based, in important part,
2 on uncorroborated testimony of conversations that
3 were denied by the other participant in those
4 conversations. Just because Mondev says something
5 is so, does not mean that it is so. It means that
6 is what their side of the story is.
7 Now, in the United States' pleadings,
8 because what happened in the 1980s, we have
9 submitted, and we have demonstrated, is not
10 relevant to a finding of breach under the NAFTA in
11 this case. We have not gone into this in great
12 detail. In the event the Tribunal finds it
13 necessary to do so, and we submit that it should
14 not, it should carefully examine all of the
15 evidence that is described in the United States'
16 Factual Appendix and Observations on Mondev's
17 Factual Appendix.
18 PROFESSOR CRAWFORD: On the question of
19 fact, the jury, I mean, I take your point that the
20 jury's verdict against BRA was never entered
21 because of the finding of immunity, but nonetheless

1 the jury did find facts after hearing witnesses.
2 MR. LEGUM: That is certainly correct, but
3 I would note two things.
4 First of all, the BRA had good arguments
5 that the jury was wrong. It never had those
6 arguments adjudicated on because there is no
7 occasion for the Supreme Judicial Court to get to
8 that.
9 Second, the tortious interference claim,
10 as we have demonstrated, only involved this 56-day
11 period. It didn't really involve the design review
12 process at all, which is what I have been talking
13 about for the past few minutes.
14 Traffic patterns. Boston--
15 PRESIDENT STEPHEN: What did you say?
16 MR. LEGUM: Traffic patterns. Traffic.
17 Boston's downtown is crammed into a 2-mile-square
18 area. Its traffic problems are
19 legendary. The enormous project known as the "big
20 dig," which involves constructing an 8- to 10-lane
21 highway underneath downtown Boston was in its

1 planning stages in the 1980s. As a result, the
2 City, in that time period, was exploring a wide
3 variety of different solutions to its traffic
4 problems, including how to direct traffic from the
5 new underground highway into City streets.
6 Against this background, no finding of bad
7 faith or expropriation could be made based on the
8 City's considering, and never even executing, a
9 proposal to route a street through the Hayward
10 Parcel. LPA had no contractual right that
11 prohibited eminent domain takings, much less a
12 consideration by the City or the BRA of whether
13 such a taking might be desirable. A city cannot be
14 prohibited from considering plans to better its
15 traffic patterns merely because they conflict with
16 a developer's plans.
17 Now I would like to turn now to my third
18 point, which is that the money trail in this case
19 shows a very different story from what Mondev
20 attempts to portray.
21 Early in my career as a lawyer, a senior

1 partner taught me an important lesson. In every
2 major transaction, no matter how complex, no matter
3 how many instruments, and exhibits and addenda, the
4 most important paper to be signed, the most
5 important paper to be exchanged in a transaction is
6 always colored green--green referring to the color
7 of currency, obviously. Let's take a look at what
8 the green paper in this record shows.
9 In March of 1998, as we know, LPA entered
10 into a lease agreement with Campeau that, among
11 other things, granted Campeau an option to acquire
12 LPA's rights as to the Hayward Parcel.
13 If we could have the next slide, please.
14 LPA told the SJC in its opening brief that
15 Campeau, in the lease, "agreed to pay LPA an
16 additional $5 million for the Hayward Parcel
17 transfer."
18 Now early this week, Mondev--
19 PROFESSOR CRAWFORD: Those are the two
20 contingent payments which, together, added up to $5
21 million.

1 MR. LEGUM: I believe that's what the
2 reference is to.
3 PROFESSOR CRAWFORD: Three and the two.
4 MR. LEGUM: Earlier this week, Mondev
5 tried to back away from what it told the Supreme
6 Judicial Court and invent another allocation for
7 their consideration LPA received for the rights
8 granted in the lease, suggesting that it received
9 no consideration in the lease with respect to the
10 Hayward Parcel. We submit that such post-hoc
11 reallocations cannot be credited, particularly when
12 one considers, as we have seen, that the lease
13 itself did not contain the full terms of the
14 bargain between Campeau and LPA.
15 This is I think particularly clear when
16 one consider how similar the financial terms of the
17 proposed sale and the lease were in many respects.
18 If, as Mondev submits in this case, the option
19 rights or the rights to acquire the Hayward Parcel
20 were worth something considerable, and it agreed to
21 sell all of those rights for a certain

1 consideration in the proposed sale, and it
2 effectively did the same thing in the lease, one
3 can only assume that in both circumstances, no
4 matter how one allocates the different components
5 of the transaction, the consideration for those
6 rights in either transaction was substantial.
7 This fact refutes Mondev's contention that
8 the alleged acts of the City and the BRA in 1986
9 and 1987 took away LPA's right to acquire the
10 Hayward Parcel for much the same reasons that I
11 stated earlier. If LPA no longer owned any rights
12 of value to the Hayward Parcel, how could it have
13 sold an option on those rights to Campeau for
14 millions of dollars in March of 1988? If those
15 rights had been effectively taken away from it, how
16 could it have sold the rights?
17 The exchange of money in this record shows
18 that, contrary to Mondev's contention today, in
19 March of 1988, LPA enjoyed its right to acquire the
20 Hayward Parcel and was paid handsomely for it.
21 There was no expropriation here.

1 Now, to this point, I've been addressing
2 events before the lease. I'd like to now briefly
3 address events after the lease.
4 Mondev itself admits that after the lease
5 was signed and Campeau proposed its Boston Crossing
6 Project, and I quote from Mondev's Factual Appendix
7 at paragraph 89, "The BRA expressed strong support
8 for the Boston Crossing Project and encouraged
9 Campeau to pursue its plans." Mondev identifies
10 only two acts of the City or the BRA in this time
11 period.
12 First, it points to Campeau's request for
13 an extension of the drop-dead date of January 1,
14 1989, for the closing. As the SJC found, however,
15 Campeau had no right, under the Tripartite
16 Agreement, to an extension of the drop-dead date
17 that the parties had specifically agreed to in
18 1987. A refusal to grant such a request cannot, in
19 any way, be seen as expropriatory.
20 Moreover, the Massachusetts Superior Court
21 entered summary judgment against LPA on the ground

1 that the City and the BRA's refusal to extend the
2 January 1, 1989, deadline was not a proximate cause
3 of the failure of Campeau to purchase the so-called
4 Hayward Parcel.
5 LPA never appealed this decision.
6 JUDGE SCHWEBEL: Say that again. I didn't
7 quite get that.
8 MR. LEGUM: This is referring to the grant
9 of summary judgment on the claim of breach of the
10 implied covenant of good faith and fair dealing,
11 which the trial court did in the first ruling on
12 summary judgment. That ruling was that the City
13 and the BRA's "refusal to extend the January 1,
14 1989, deadline was not a proximate cause of the
15 failure of Campeau to purchase the so-called
16 Hayward Parcel."
17 If the refusal to grant the extension was
18 not a proximate cause of Campeau's failure to
19 purchase the Hayward Parcel, as the trial court
20 found in its unchallenged decision, that same
21 refusal can hardly be seen as contributing to an

1 expropriation of the right to purchase that same
2 parcel.
3 The second event that Mondev refers to in
4 this period is Campeau's December 19, 1988,
5 desultory offer to close on the Hayward Parcel and
6 the fact that the closing never took place.
7 The issue presented by these facts is not
8 one of expropriation under international law.
9 Rather, the issue presented is whether, as the City
10 contended, Campeau let the rights expire in January
11 of 1989, or on whether, as LPA demonstrated or,
12 excuse me, contended in the Massachusetts courts,
13 the City refused to perform in response to that
14 letter by Campeau. Those questions, however, are
15 ones of Massachusetts law, which the Supreme
16 Judicial Court conclusively determined.
17 In sum, the record simply does not support
18 Mondev's claim that an expropriation took place
19 back in the 1980s.
20 Unless the Tribunal has any questions, I
21 will ask the President to call on Mr. Bettauer to

1 deliver the closing for this part of the United
2 States' case.
3 PRESIDENT STEPHEN: Thank you.
4 Mr. Bettauer, how long do you think you
5 will be?
6 MR. BETTAUER: Ten minutes.
7 PRESIDENT STEPHEN: Thank you.
8 MR. BETTAUER: Mr. President, members of
9 the Tribunal, I would like to conclude our
10 presentation of our case-in-chief, and to do so I
11 want to stand back and make just a few, final
12 observations. I will start with two.
13 First, it is clear that what Mondev really
14 wants here is another chance at recovery because it
15 thinks that the Supreme Judicial Court opinion was
16 wrong. However, as we have abundantly discussed
17 and demonstrated, this Tribunal is not an Appellate
18 Court. That is not its job. The legal standard
19 under NAFTA and customary international law is not
20 whether the decision was wrong, but whether it was
21 a manifest and outrageous miscarriage of the

1 judicial system; in other words, a denial of
2 justice.
3 We have shown that that clearly was not
4 the case here. NAFTA provides specific legal
5 protections. It does not guarantee investors
6 affirmative court decisions, regardless of the
7 merits of their claims. There is no basis on which
8 this Tribunal could find a denial of justice.
9 Second, we have demonstrated that most of
10 Mondev's claims here are time-barred. Mondev has
11 tried to come up with ways to shift the time of
12 breach for each of its claims and, thus, to insert
13 them into this proceeding. As I said at the outset
14 of our presentation, it has tried to conflate
15 events that occurred in the 1980s with events that
16 occurred after NAFTA's entry into force.
17 For their expropriation claim, they have
18 come up with a theory that would have the date of
19 breach shift to the date that the U.S. Supreme
20 Court denied a write of certiorari for the claims
21 covered by the petition for cert and to the date of

1 the Supreme Judicial Court decision for its
2 decision to deny rehearing for their other claims.
3 For their national treatment claims, while
4 not alleging bias on the part of U.S. courts and
5 not showing any treatment after 1993, they say four
6 earlier statements somehow support that claim.
7 On Monday, Sir Arthur complained stale
8 claims to a fairy tale, suggesting that Mondev
9 recognized that dead claims could not be revived
10 like Sleeping Beauty by a NAFTA "kiss of life."
11 But here, most of Mondev's claims are, in fact,
12 dead claims, and this is not a fairy tale. Those
13 claims not be brought back to life under the NAFTA.
14 Mondev's startling and novel theories
15 would, in fact, put into suspended animation all
16 breaches of international law and of NAFTA, pending
17 completion of recourse to available local entities.
18 But as we have shown, there is no basis for this
19 approach, one that would have wide ramifications
20 for international law and for NAFTA. NAFTA cannot
21 be correctly interpreted to reach back to events

1 that the parties never intended it to cover. In
2 any event, we have also shown that there is no
3 substantive foundation to any of Mondev's
4 allegations.
5 What happened here is that Mondev made an
6 investment that went sour, but this was not because
7 of any violation of NAFTA by the United States.
8 Had Campeau not gone bankrupt, which Mondev says
9 happened for reasons not in any way connected to
10 the case, it is unlikely that this would have been
11 the outcome, but Campeau did go bankrupt and the
12 investment went sour. This happened before NAFTA
13 entered into force, and the events related to that
14 could not have violated NAFTA.
15 Sir Arthur said on Monday, and I quote,
16 "Things went wrong for Mondev." That was his
17 quote. He tried to attribute it to us, but it
18 wasn't the cause of the United States. That was
19 not the result of any breach of NAFTA by the United
20 States or any of its political subdivisions.
21 So Mondev went to court to try to recover

1 its losses, and when it failed to do so, after 7
2 years of litigation, it came after the United
3 States under NAFTA, but we think the U.S. courts
4 were right, and we have shown you why. But, right
5 or wrong, they did not violate the established
6 customary international law norms of denial of
7 justice in reaching their decision.
8 Mondev would have this Tribunal turn NAFTA
9 into more than an ordinary insurance policy. They
10 would make it a strict liability policy for any
11 loss by any investor. Yes, things go wrong in
12 life, but NAFTA is no guarantee against that.
13 Professor Crawford noted the Azinian
14 Tribunal case on Monday. That case got it exactly
15 right. That Tribunal said, "A foreign investor,"
16 and I'm quoting, "entitled, in principle, to
17 protection under NAFTA, may enter into contractual
18 relations with a public authority and may suffer
19 breach by that authority and still may not be in a
20 position to state a claim under NAFTA. It is a
21 fact of life everywhere that individuals may be

1 disappointed in their dealings with public
2 authority and disappointed, yet again, when
3 national courts reject their complaints."
4 The Tribunal continued, and I continue the
5 quote, "What must be shown is that the court
6 decision itself constituted a violation of the
7 Treaty. Even if the Claimants were to convince
8 this arbitral tribunal that the," and there the
9 Mexican courts were at issue, "that the courts were
10 wrong, this would not, per se, be conclusive as to
11 a violation of NAFTA. More is required. The
12 Claimants must show either denial of justice or a
13 pretense of form to achieve an internationally
14 wrongful end." That is the close of the quote.
15 Azinian was right. NAFTA is not a strict
16 liability investment insurance scheme. None of the
17 NAFTA parties think it provides for this, and NAFTA
18 would not survive in the political systems of the
19 three NAFTA countries if Chapter Eleven Tribunals
20 turned it into this.
21 While NAFTA seeks to encourage investment

1 and to ensure that investments have the essential
2 protections accorded by its terms, sometimes
3 investors will succeed and profit and sometimes
4 they will not. NAFTA does not change that, and
5 Chapter Eleven Tribunals cannot change that.
6 NAFTA does not insure investors against
7 any loss. It provides protections against specific
8 breaches, none of which occurred here.
9 I ask this Tribunal to dismiss all of
10 Mondev's claims. With that, I close the U.S.
11 presentation of its case-in-chief.
12 PRESIDENT STEPHEN: Thank you very much,
13 Mr. Bettauer.
14 We will adjourn now until 10 o'clock
15 tomorrow morning.
16 MR. BETTAUER: Mr. President, may I make a
17 request?
18 PRESIDENT STEPHEN: Yes.
19 MR. BETTAUER: Since the Claimant's will
20 have a 3-hour portion reply in the morning and we
21 in the afternoon, perhaps we could start tomorrow

1 morning at 9:30 to give us two and a half hours in
2 between, since they now have overnight. Would that
3 be acceptable to the other side and to the members
4 of the Tribunal?
5 MR. WATTS: It does, of course, cut down
6 on the time available for us between now and what I
7 hope may still be 10 o'clock, and the parties did
8 agree, I understand, on a 10 o'clock start tomorrow
9 morning.
10 PRESIDENT STEPHEN: And from that do I
11 deduce that you would oppose the suggestion that
12 there be a start at 9:30?
13 MR. WATTS: Yes.
14 PRESIDENT STEPHEN: Mr. Bettauer, would it
15 be a solution that, rather than starting earlier,
16 which clearly cuts short the preparation time for
17 the Claimant, we simply continue rather later
18 tomorrow?
19 MR. BETTAUER: That would be perfectly
20 acceptable.
21 PRESIDENT STEPHEN: That would meet your--

1 MR. BETTAUER: Exactly.

2 PROFESSOR CRAWFORD: In other words, that

3 we would start at 3:30, rather than--

4 PRESIDENT STEPHEN: Yes.

5 Very well, we will adjourn now until 10:00

6 tomorrow.

7 [Whereupon, at 1:11 p.m., the hearing

8 recessed, to reconvene at 10:00 a.m., Friday, May

9 24, 2002.]