

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

MONDEV INTERNATIONAL LTD.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/99/2

**COUNTER-MEMORIAL ON
COMPETENCE AND LIABILITY OF
RESPONDENT UNITED STATES OF AMERICA**

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FACTUAL APPENDIX

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In accordance with Article 38 of the ICSID Arbitration (Additional Facility) Rules and the Tribunal's order of October 24, 2000, the United States respectfully submits this counter-memorial on the competence of the Tribunal and the question of whether any act of the United States has breached the obligations of Section A of Chapter Eleven of the North American Free Trade Agreement (the "NAFTA").

PRELIMINARY STATEMENT

Taking a different tack from that in its Notice of Arbitration, Claimant Mondev International Ltd. ("Mondev") focuses the bulk of its Memorial not on what happened in court but on what took place in Boston conference rooms and public offices in the late 1970s and the 1980s – years before the NAFTA went into effect and a decade before its claims here were submitted. Mondev's claims as reinvented are without merit.

First, Mondev's suggestion that the NAFTA could be breached by acts that took place before it was even written is without support in international law or the NAFTA's text. Nor, under the NAFTA's prescription provision, can Mondev pursue claims where it knew of the supposed breach and its claimed losses long before the submission of this case to arbitration. The bulk of Mondev's claims – whether under Article 1102, 1103, 1105 or 1110 – fail for these reasons alone.

Second, the remainder of the claims – those focusing on the Massachusetts courts – are without substance. There is no merit to Mondev's attempt to find a denial of the international minimum standard of justice in a unanimous decision of one of the oldest and most respected courts in North America, applying time-worn principles of contract law in a routine fashion. Having failed to persuade the United States' highest court that the decision's application of contract law presented errors of constitutional proportions, Mondev attempts, in effect, an appeal to this Tribunal. This Tribunal, however, is not an appeals court, and the Massachusetts decision amply accords with the fundamental standards of justice mandated by international law and applicable here. Moreover, Mondev's assertion that the court denied it national treatment is accompanied by neither argument nor credible evidence.

Third, Mondev's stale claims do not succeed in any event. Mondev strives mightily to transform an unremarkable claim for breach of contract, exhaustively litigated in municipal courts to an unremarkable conclusion, into one for expropriation and "impairment of contract rights" in violation of international law. It fails in that attempt. The contract rights supposedly expropriated or impaired existed under Massachusetts law, which, as the Massachusetts high court correctly found, recognized no breach of that

contract in the circumstances of the case. As with Mondev's denial of justice claims, the court's sound application of governing law to that contract disposes of these claims as well.

Finally, although the United States respectfully submits that it is not this Tribunal's task to attempt to reconstruct events from the 1970s and 1980s – and objects to Mondev's proffer of evidence for that purpose – the United States' Factual Appendix annexed hereto tells a very different story from that asserted in the Memorial. There was no expropriation here, "creeping" or otherwise, nor was there any other violation of international law.

STATEMENT OF FACTS¹

The factual story pertinent to the admissible claims in this case begins in 1992, when Lafayette Place Associates ("LPA"), a Massachusetts limited partnership indirectly controlled by Mondev, filed suit against the City of Boston (the "City") and the Boston Redevelopment Authority (the "BRA") in Massachusetts Superior Court. Trial in the case started in 1994 and, after fourteen days of argument and testimony, culminated in a jury verdict in favor of LPA. The City and LPA each then challenged, before the Massachusetts Supreme Judicial Court, aspects of that verdict and subsequent rulings by the trial judge.

¹ Mondev's Memorial is cited herein as "Mem." and its factual and legal appendices are cited respectively as "Mondev Factual App." and "Legal App." The Appendix of materials submitted to the Supreme Judicial Court of Massachusetts and reproduced in Mondev's submissions to this Tribunal is cited as "SJC App. [volume] at [page]." The materials Mondev reproduced and submitted to this Tribunal with the Statement of Stephen H. Oleskey are cited as "Oleskey Statement, Exh. [number]." The appendix of evidentiary materials accompanying this Counter-Memorial is cited as "US App. [volume] at Tab [letter]." The factual appendix accompanying this Counter-Memorial is cited as "US Factual App." The United States denies the facts stated in Mondev's Memorial except to the extent specifically admitted herein. *See* Arbitration (Additional Facility) Rules art. 38(3).

In this Statement of Facts, the United States sets forth the facts relevant to the task before this Tribunal: to determine whether, on or after the entry into force of the NAFTA on January 1, 1994, the United States breached any obligation that it owed to Mondev under Chapter Eleven. The facts relevant to that determination are those concerning LPA's lawsuit and the proceedings in the courts of Massachusetts.

As the United States will later demonstrate in its Statement of Law, acts or omissions of the United States that pre-date the NAFTA cannot constitute breaches of Chapter Eleven's obligations and therefore are only of incidental, if any, relevance to the Tribunal's task. The United States objects to Mondev's proffer of such stale facts as evidence of breaches of the NAFTA and respectfully submits that the Tribunal should consider only acts of the Massachusetts courts to determine questions of breach.

Subject to that objection, and in the alternative, the United States nonetheless briefly presents in the annexed Factual Appendix a counter-statement of the events of the 1970s and 1980s that Mondev improperly relies upon to allege breaches of the NAFTA by the United States. The annexed Factual Appendix demonstrates that Mondev's claims of wrongful conduct by the City and the BRA are ill-founded in any event.

A. LPA's Suit Against The City And The BRA

On March 30, 1992, LPA filed an amended complaint against the City and the BRA in Massachusetts Superior Court. The complaint concerned a 1978 real-estate development deal concluded among LPA, the City and the BRA. Those parties signed a Tripartite Agreement ("TPA" or "Agreement"), pursuant to which LPA agreed to develop a piece of property in a run-down area of downtown Boston known as Lafayette Place.

The development was to proceed under an urban renewal plan that provided city, state and federal assistance to approved developers to refurbish decaying urban areas.

Incident to the development of Lafayette Place, the Agreement granted to LPA a contingent option to purchase from the City an adjoining parcel of land, known as the Hayward Place parcel (the "Hayward Parcel"). The option would come into existence only in the event that the City determined not to continue operating a parking garage on those premises. The Agreement, however, did not fix either the price to be paid for the Hayward Parcel, its exact boundaries or the exact parameters of the rights to be conveyed in the land.

LPA's complaint alleged that, in late 1983, the City provided LPA with the notice that triggered the Hayward Parcel option. Nearly three years later, in July 1986, LPA gave notice to the City that it wanted to exercise the option. From that time forward, LPA, the City (acting through its Real Property Board), the BRA and other interested municipal agencies met frequently to discuss and attempt to agree on the parameters of the project LPA was considering for the Hayward Parcel (the "Hayward Place Project") and on how that project would connect, either by bridge over the Avenue de Lafayette or on ground level if that street were closed, to Lafayette Place.

The complaint further alleged that in 1987 LPA shifted course and decided to sell its interests in both Lafayette Place and the Hayward Parcel to the Massachusetts subsidiary of the Campeau Corporation ("Campeau"), another Canadian developer. That sale required approval by the BRA and the City. When, after two months, the BRA had not approved the sale, LPA leased to Campeau the interests it had proposed to sell.

Campeau then proceeded to negotiate with the BRA and the City to pursue its own development plan. Campeau's "Boston Crossing Project" was much larger than LPA's Hayward Place Project had been, and involved both Lafayette Place and Hayward Place. In 1987, LPA and the City had negotiated an amendment to the Tripartite Agreement that established a "drop-dead" date of January 1, 1989 for the transfer of the Hayward Parcel. Robert Campeau wrote to Mayor Flynn on December 19, 1988, asking that the sale be completed prior to January 1. No closing occurred in that 12-day period. Although LPA's rights with respect to the purchase of the Hayward Parcel expired on January 1, 1989, Campeau and the city agencies continued negotiating, and Campeau's plans were approved by the BRA in June 1989. Campeau, however, never began the construction of Boston Crossing, because it declared bankruptcy in October 1990.

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

LPA's claims were based on the following theories of Massachusetts law: (1) that the City and the BRA had breached the Tripartite Agreement; (2) that they had breached an implied covenant of good faith and fair dealing by failing to work in good faith toward a closing, by refusing to act upon the proposed Campeau deal in a timely manner and by failing to deal fairly with respect to Campeau's requested extension of the deadline on the

option; (3) that BRA Director Stephen Coyle, acting on the BRA's and the City's behalf, had intentionally interfered with LPA's contractual and/or advantageous relations with Campeau and others; (4) that the BRA and the City acted in violation of Massachusetts General Law, Chapter 93A, the Regulation of Business Practice and Consumer Protection Act, a statute that proscribes unfair and deceptive acts and practices in the conduct of trade and commerce; and (5) that they violated the Massachusetts Civil Rights Statute, Mass. G.L. c. 12, § 11I, by interfering with LPA's exercise and enjoyment of rights secured by the Constitution and the laws of the United States and by the Constitution and laws of the Commonwealth of Massachusetts. SJC App. 1 at A23-26.

B. Structure Of Civil Proceedings In Massachusetts

In Massachusetts, as in many jurisdictions within the United States, civil proceedings take place in several phases. The case begins with the filing of the complaint and answer, pleadings that summarize the parties' claims and defenses. A discovery phase follows, in which the parties exchange documentary evidence relevant to the issues in the case and submit their witnesses, and those of third parties, to exploratory oral examinations called depositions.

During or at the close of the discovery phase, either party may move for summary judgment. To be successful, the party must demonstrate that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law.

If the case survives summary judgment, it proceeds to trial (and a trial by jury if the plaintiff so requests). In a jury trial, the parties select the members of the venire in a preliminary phase of the trial. Each party then presents an opening statement to the jury,

summarizing its theory of the case and the evidence it intends to present. The parties then call witnesses and examine and cross-examine them in the presence of the judge and jury. Objections to evidence or procedures used at trial may be made, but are generally waived unless made contemporaneously and ruled upon by the judge.

At the close of the plaintiff's case in chief, the defendant may move for a directed verdict. The court may grant a directed verdict if the plaintiff has failed to adduce evidence from which a reasonable jury could rule in its favor. Generally speaking, a trial judge who considers the question at all close will not direct a verdict but will submit the case to a jury, because Massachusetts procedure allows the judge to revisit the same question after the jury returns a verdict. Addressing the question again at that time ensures that no new trial will be needed if an appellate court disagrees with the judge's decision. *See* Expert Opinion of Judge Rudolph Kass, US App. 1, ¶ 19 (hereinafter "Kass Opinion").

Closing arguments are presented after all the evidence is admitted. The judge then instructs the jury on the law, and the jury deliberates in private.

After the jury renders its verdict, the losing party may make certain post-trial motions. If the defendant had moved for a directed verdict, it may renew that request in the form of a motion for judgment notwithstanding the verdict. In ruling on such a motion, the court applies the same standard as if it were ruling on a motion for a directed verdict. If either party believes that the trial was infected with error, it can move for a new trial.

C. Pre-Trial Proceedings In The *LPA* Case

In 1992, LPA's case was initially assigned to Judge Hiller Zobel. In Boston, a new case is assigned to a particular "session" of the Suffolk County Superior Court. Judges on the Massachusetts Superior Court rotate from county to county, remaining several months in a particular county, and in the case of Suffolk, in a particular session, in a manner akin to riding a circuit. As a result, a complex case will often come before more than one judge in succession.

On June 22, 1993, the City and BRA filed their memorandum in support of a motion for summary judgment. SJC App. 3 at A429. Judge Zobel ruled on September 15, 1993. *Id.* at A489-90. The court granted the motion with respect to the c. 93A claim. The court also dismissed the claim based on the Massachusetts Civil Rights Act, which would have required a finding that the City and the BRA had acted through threat, intimidation or coercion. It also determined that the defendants' refusal to extend the January 1, 1989 deadline was not a proximate cause of Campeau's failure to purchase the Hayward Parcel. Judge Zobel did not give detailed reasons for his findings; he was not required to do so under the Massachusetts Rules of Civil Procedure. *See* Kass Opinion ¶ 75 & n.25.

After thus narrowing the issues between them, the parties conducted additional and extensive discovery. Each party deposed several witnesses. In the course of this discovery, the parties engaged in what is known as discovery motion practice: each party occasionally viewed itself as frustrated in its efforts to obtain access to witnesses and

documents and requested relief from the court. In some of those disputes, the motions judge and the trial judge ruled in LPA's favor; in others in favor of the City or the BRA.

For example, LPA sought a wide range of documents from the files of the City and the BRA to help it prove its claims of lack of good faith. The City and the BRA asked the court to limit that discovery to records showing official acts of the City and the BRA, but the special master charged with settling discovery disputes recommended that such discovery be permitted with some limitation on the time-frame during which documents could be requested. *Mondev's Notice of Arbitration*, Sept. 1, 1999 ("Notice of Arb."), Exh. 31. The trial court permitted the broad discovery requested to go forward. The City and the BRA appealed this order to a single judge of the Massachusetts Appeals Court; that judge denied their appeal, although in line with the special master's recommendation he ordered that the files be made available dating from 1985, rather than from 1978. *See Kass Opinion*, Exh. 2.

In another instance, LPA argued that it needed to depose Mayor Flynn, who had allegedly attended some meetings having to do with the Lafayette Place project, and who had been copied on much of the correspondence. LPA also asked that his deposition be videotaped for admission at trial, because he had been named ambassador to the Vatican and would shortly be leaving Massachusetts. *SJC App. 1* at A63-67. The City asked for a protective order preventing an oral deposition, noting that high-ranking government officials are usually exempt from deposition, but offering to make the Mayor's testimony available under alternative forms of discovery. *SJC App. 1* at A51-54. Judge Zobel ordered that the Mayor be made available for a one-hour interview with counsel for LPA, and he was. *SJC App. 5* at A882-883. Counsel for LPA later acknowledged that Mayor

Flynn had been most cooperative in the interview. SJC App. 5 at A886-910. LPA nonetheless renewed its request for a deposition of the Mayor, and the City offered instead to memorialize the interview in a written statement. After hearing argument, Judge Zobel ordered that the parties attempt to agree on a written stipulation, which could then be used at trial if deemed admissible by the trial judge. The parties drafted such a stipulation.

Also during the course of discovery, documents came to light that prompted the City and the BRA to renew their motion for summary judgment. The defendants filed their motion on January 19, 1994. In their memorandum supporting that motion, the City and the BRA set forth detailed information about LPA's negotiations with Campeau, much of which controverted the allegations in LPA's amended complaint. SJC App. 3 at A500-54. Judge Zobel denied the renewed summary judgment motion on all counts on February 22, 1994, without stating reasons.

D. The Trial In Massachusetts Superior Court

In October, 1994, when the case came on for trial in the session in Suffolk County to which it was assigned, Judge Robert Mulligan was the presiding judge of that session. As Mondev notes, Judge Mulligan's brother was Corporation Counsel for the City of Boston during some of the relevant time period. The record, however, shows that, far from "refusing" to recuse himself as Mondev suggests, Mem. ¶ 71, no party ever suggested that he do so. Although all parties were aware of the relationship, none expressed any objection.²

² In fact, counsel for the City, not LPA, raised the relationship when LPA's counsel referred at trial to documents that had been reviewed by Boston's corporation counsel. All counsel, and Judge Mulligan,

The trial itself lasted fourteen days. It, too, was characterized by the usual procedural wrangling that accompanies an adversary trial. For example, the BRA started out the trial with four motions in limine, asking that various evidence be excluded. SJC App. 13 at A2570-81. Two of those motions were denied immediately, without written reasons. SJC App. 13 at A2577, A2580. The third was effectively denied when Marco Ottieri was permitted to testify, while Judge Mulligan granted the fourth motion, after briefing, to permit evidence of other lawsuits in which LPA was involved to be introduced to the jury.³

After four days of testimony, LPA moved for a mistrial on grounds that the trial judge had admitted prejudicial evidence with respect to other litigations involving the Lafayette Place development, including the suit in which LPA claimed that it was Campeau's fault that the Hayward Parcel was never transferred. The judge admitted the testimony with respect to the Campeau litigation only after he had examined the evidence outside the jury's presence and satisfied himself of its relevance. In its motion, LPA conceded that its claims in the Campeau litigation and in the current litigation were inconsistent. SJC App. 3 at A582. The judge denied that motion.

E. The Motions For Directed Verdict

At the close of LPA's case, the BRA moved for a directed verdict on several grounds, including that it was immune from liability for intentional tort under the

settled to their satisfaction that the fact of counsel review carried no evidentiary significance. Trial Transcript Day 1, SJC App. 13 at A2614. Judge Mulligan's brother's name was redacted from a document submitted to the jury. Trial Transcript Day 12, SJC App. 27 at A4550-51.

³ See, e.g., SJC App. 8 at 1459; see also SJC App. 3 at A580-86 (objecting to judge's permitting testimony on foreclosure proceedings by LPA's bank and on LPA's lawsuit with the Swissôtel Corporation, which had purchased the hotel built as part of the Lafayette Place Project).

Massachusetts Tort Claims Act.⁴ The City also moved for a directed verdict, alleging that as a matter of law, the terms of the Tripartite Agreement did not create an enforceable contract.⁵ The BRA again requested a directed verdict at the close of all the evidence.⁶ *See* Mass. R. Civ. P. 50(1)(a)(b) (permitting motion for directed verdict at close of plaintiff's case and a renewed motion at the close of all evidence). Judge Mulligan denied those motions, without prejudice.

F. The Verdict

Judge Mulligan received proposed jury instructions from all parties, and then informed the parties of the instructions he proposed to issue.⁷ The instructions required to the jury to consider, among other things, whether the evidence established an enforceable contract, and if so whether LPA had performed its obligations under the contract.⁸ He also showed the parties the jury verdict form, to which neither side objected.⁹ That form required the jury first to determine whether there was a valid contract between the City and LPA. The jury was also to determine whether LPA performed its obligations under the contract. If the jury determined that LPA did not

⁴ SJC App. 4 at A599-606.

⁵ *Id.* at A704-09.

⁶ *Id.* at A649-57.

⁷ *See id.* at A607-48; *id.* at A658-97; *id.* at A698-701; SJC App. 27 at A4541-49.

⁸ SJC App. 27 at A4541, A4563, A4688.

⁹ The special verdict form required the jury to determine damages only. Initially, LPA had sought specific performance of the contract under the TPA as well as damages. SJC App. 1 at A23-26. During the trial, however, LPA dropped its claim for specific performance and focused on monetary damages. According to LPA's attorney, once the Lafayette Place mall had been foreclosed on, LPA was no longer interested in purchasing the Hayward parcel. *See* LPA's Petition for Rehearing to the SJC, June 10, 1998, at 5 n. 6, Notice of Arb., Ex. 16.

perform its obligations, it then would be required to determine whether that failure was the result of the City's or the BRA's actions.

The jury found that LPA had performed its obligations, and so did not consider that latter question. The jury next determined that the BRA was not acting as an agent for the City, but erroneously marked the box saying that the BRA had also breached the contract (because the BRA was not a party to the contract to sell the Hayward Parcel, it could have breached that contract only as agent for the City).¹⁰ The jury awarded \$9.6 million in damages against the City. The jury also found that the BRA had intentionally interfered with the contractual relations between LPA and Campeau, and awarded \$6.4 million on those grounds.

Immediately after the jury returned its verdict, the parties consulted with the judge on certain alleged inconsistencies in the form. Judge Mulligan declined LPA's request to clarify whether the jury had found an independent obligation between the BRA and LPA with respect to the contract, observing that if the BRA was not acting as the City's agent it could not be in breach. He noted that LPA had not objected to the jury verdict form.¹¹ Judge Mulligan also determined that the \$6.4 million in damages were "swallowed up" in the \$9.6 million award.¹²

G. Post-Trial Proceedings

The City and the BRA both moved for judgment notwithstanding the verdict on the grounds they had advanced in their motions for directed verdict. Mass. R. Civ. P.

¹⁰ SJC App. 4 at A710.

¹¹ SJC App. 29 at A4755-56.

¹² SJC App. 29 at A4751-55.

50(b).¹³ Judge Mulligan granted the BRA's motion on the ground that it was immune from liability for intentional tort, and issued a thorough decision explaining his reasoning.¹⁴ LPA argued that the judge should reenter judgment with statutory interest running from the alleged date of the breach, rather than the date on which it had filed suit. The judge refused, noting that LPA had not requested the jury to make such a determination with respect to date of the breach, and that he would not do so in their stead.¹⁵

H. The Appeal To The Supreme Judicial Court

The first level of appellate review in Massachusetts is provided by the Appeals Court, and that is an appeal of right. The second level of review, which is discretionary, is performed by the Supreme Judicial Court (or "SJC"), the highest court in the State. After the Superior Court had entered judgment, the City and LPA each cross-appealed, and LPA sought to bypass the Appeals Court by seeking direct review by the Supreme Judicial Court. The Supreme Judicial Court granted that request.

The City's appeal centered on whether a valid purchase and sale contract existed between the LPA and the City, and whether the trial court judge had committed reversible error by failing to grant either the City's motion for a directed verdict or its motion for judgment notwithstanding the verdict addressed to this point. Brief of Appellant City of Boston, Dec. 19, 1997, Oleskey Statement, Exh. 16. The second question raised by the City was whether the City was in breach of any such contract if indeed one existed. *Id.*

¹³ SJC App. 4 at A713-27; *id.* at A728-44.

¹⁴ *Id.* at A750-64.

¹⁵ *Id.* at A775-78.

The City also questioned whether the evidence supported damages against the City, and in particular the damages so awarded. *Id.* In the alternative, the City queried whether the confused nature of the jury verdict and the trial court's failure to examine its answers required that there be a new trial. *Id.*

On cross-appeal, LPA challenged the trial court's decision that the BRA was a public employer immune from liability for intentional tort under the Massachusetts Tort Claims Act. Brief of Plaintiff-Appellee and Cross Appellant LPA, Jan. 20, 1988, Oleskey Statement, Exh. 17. It challenged Judge Zobel's decision, on summary judgment, to dismiss LPA's claims under Massachusetts General Laws, Chapter 93A, the unfair and deceptive trade practices statute. *Id.* LPA also challenged Judge Mulligan's decision that the damages awarded in tort were subsumed in the damages for breach of contract. *Id.* Finally, LPA challenged Judge Mulligan's decision that interest should run from the date of the filing of the lawsuit, rather than from what it argued to be the date of the breach. *Id.* LPA also responded to the City's contentions.

The BRA filed a brief in response to LPA. The City of Boston and LPA also filed reply briefs. *See* Oleskey Statement, Exhs. 18, 19 and 21.

The Court heard oral argument on March 9, 1998. Not surprisingly, the SJC focused on the two central issues: whether the terms of the Tripartite Agreement had been sufficiently definite to result in a binding purchase and sale agreement, and whether the BRA had been properly found to be a public employer, and thus immune from liability for intentional tort, under the Massachusetts Tort Claims Act. At argument, the Court signaled its interest in whether fundamental terms in the contract were sufficiently definite to constitute an enforceable contract. Transcript of Oral Argument, Notice of

Arb., Exh. 14 at 2-4. In fact, the Court asked both the City and LPA whether Section 6.02 of the Tripartite Agreement indicated at most an “agreement to agree” that was not sufficiently definite to be an enforceable contract. *Id.* at 6. Oral argument dealt less with the status of the BRA with respect to tort liability, and not at all with Judge Zobel’s dismissal of the Mass. G.L. c. 93A claim.

I. The SJC Decision

The SJC issued its opinion on May 20, 1998. In it, the SJC first gave effect to the parties’ intent that the option to purchase the Hayward Place parcel found in Section 6.02 of the Tripartite Agreement be an enforceable contract. *Lafayette Place Associates v. Boston Redevelopment Authy.*, 427 Mass. 509, 517-19 (1998). The court so concluded only because of the mechanisms the Agreement contained to resolve the key undefined terms – the price and the exact size of the parcel to be conveyed – in the Agreement. *Id.* at 518-19. The SJC determined, however, that LPA had not availed itself of the mechanisms that would have fixed the undefined terms, which were completely within LPA’s power to set in motion. It therefore found, as a matter of law, that LPA’s own tender of performance under the contract was insufficient to charge the other party with a breach of contract. *See id.* at 519, 521-522. The SJC also upheld the trial judge’s decision that the BRA was a public employer and thus fell within the purview of the Massachusetts Tort Claim’s Act’s exception to liability, and further upheld Judge Zobel’s dismissal of the unfair and deceptive trade practices act claim.

LPA petitioned the SJC for a rehearing on several grounds, but the SJC denied the request. Notice of Arb., Exhs. 16 & 17. LPA then engaged Alan Dershowitz, a professor

at Harvard Law School, to assist in its preparation of a petition for *certiorari* to the United States Supreme Court. The Supreme Court has discretionary review over most cases, and does not ordinarily consider matters of state law unless they implicate federal concerns. In order to make a case for the Supreme Court to grant the *certiorari* petition, LPA styled the SJC decision as a sharp alteration of settled common law, which, it alleged, deprived LPA of rights in violation of the due process and takings clauses of the United States Constitution. LPA Petition for Writ of *Certiorari*, Nov. 25, 1998, Oleskey Statement, Exh. 27. In opposition, the City of Boston argued that LPA had never raised any questions of federal law before the SJC until it asserted a due-process claim in its petition for rehearing, and further that the SJC's decision had not constituted a sharp change in the common law of Massachusetts. Brief in Opposition, Jan. 25, 1999, Oleskey Statement, Exh. 28. The Supreme Court denied the petition for *certiorari* without comment or dissent.¹⁶

STATEMENT OF THE LAW

I. MONDEV'S CLAIMS OF BREACH BY THE CITY OF BOSTON AND THE BOSTON REDEVELOPMENT AUTHORITY ARE TIME-BARRED

With the exception of the acts of the Massachusetts judiciary, all of the acts and omissions that Mondev would have this Tribunal review pre-date the entry into force of the North American Free Trade Agreement in 1994. Of the 77 paragraphs Mondev devotes to summarizing the facts of the case in the Memorial, 54 involve alleged acts or

¹⁶ Mondev has conceded that LPA's Petition for Writ of *Certiorari* had virtually no chance of success. Mem. ¶ 119 ("There was, in fact, no federal recourse available to LPA even remotely likely to alter the

omissions by the City or the BRA in their dealings with LPA. *See* Mem. ¶¶ 13-90.

Those dealings concluded before LPA filed its lawsuit in 1992. Mondev's allegations of pre-1994 acts or omissions by the City and the BRA include the following:

- The City and the BRA supposedly deprived LPA of its contractual rights under the Tripartite Agreement and thereby caused LPA injury no later than mid-1990, Mem. ¶¶ 140-142;
- The City and the BRA allegedly “wrongfully used their governmental authority . . . in the manner in which they failed to perform their contractual obligations and in which they sought to obstruct LPA from realizing its contractual benefits,” Mem. ¶ 160;
- The City and the BRA were “motivated by an anti-Canadian animus” in their dealings with Mondev and LPA, Mem. ¶ 204;
- The City and the BRA, supposedly in a disproportionately prompt manner, approved LPA's application in 1984 to sell part of its interests in the Lafayette Place project to a Swiss company, Mem. ¶ 207.

These allegations of pre-1994 conduct provide the foundation for claims of breach under NAFTA Articles 1110, 1105(1), 1102 and 1103, respectively. Indeed, all of Mondev's claims of breach of the NAFTA – save only its denial of justice claims – implicitly acknowledge that the elements of each alleged breach were present long before the NAFTA's effective date.

As demonstrated below, however, the obligations imposed by Chapter Eleven are not retroactive and thus none of the City's or BRA's actions can constitute a breach of the NAFTA. Furthermore, even if the provisions of the NAFTA applied retrospectively, Chapter Eleven's prescription period would in any event bar all but those of Mondev's claims that allege breach by the Massachusetts judiciary.

results of the SJC decision [with respect to the Massachusetts Tort Claims Act] – *or in any other respect.*”) (emphasis added).

A. Because The NAFTA Does Not Apply Retroactively, Acts Or Omissions Before 1994 Cannot Breach A NAFTA Obligation

Mondev's claims that pre-1994 acts or omissions of the City and the BRA constitute a breach of the United States' obligations under Chapter Eleven can proceed only if the provisions of the NAFTA apply retroactively. They do not.

Absent a showing of contrary intent, the NAFTA only binds the Parties with respect to acts or facts that took place on or after that effective date. Under principles of international law governing the NAFTA's interpretation, *id.* art. 102(2), "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of Treaties, May 22, 1969, art. 28, 1155 U.N.T.S. 331.¹⁷ *See also* State Responsibility Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, International Law Commission, 52d Sess., art. 13, U.N. Doc. A/CN.4/L.600 (2000) ("An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").¹⁸

¹⁷ Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, Ex. L. 92d Cong., 1st Sess. at 1.

¹⁸ *See also Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, International Law Commission, 51st Sess., at 19-23, ¶¶ 37-44, U.N. Doc. A/CN.4/498 (1999) (describing this principle as "uncontroversial" and reviewing supporting authorities); *see also* Commentary to Article 18 [precursor to Article 13 cited in the text above] of State Responsibility Draft Articles Provisionally Adopted by the Commission on First Reading, International Law Commission (1996), at <www.law.cam.ac.uk/rcil/ILCSR/ft/Sr18.rtf> (noting support for principle in State practice and jurisprudence).

No provision of the NAFTA suggests an intent for retroactive application of the Parties' obligations. The text simply states that the "Agreement shall enter into force on January 1, 1994." NAFTA art. 2203. The text of the obligations set forth in Chapter Eleven – including the obligations Mondev claims the United States breached – is similarly consistent with international law's presumption that they are only prospective in nature.¹⁹ The NAFTA's stated objectives concerning investment likewise suggest a desire prospectively to "promote conditions of fair competition in the free trade area" established by the Agreement (NAFTA art. 102(1)(b) & art. 101) and to "increase substantially investment opportunities in the territories of the Parties" (*id.* art. 102(1)(c)).

In the only Chapter Eleven case to address the issue to date, the tribunal in *Feldman v. United Mexican States* found that the NAFTA's obligations do not apply retroactively. In a preliminary decision on jurisdiction, the tribunal held:

[g]iven that NAFTA came into force on January 1, 1994, no obligation adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect.

Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000) at 30, ¶ 62. Thus, as the *Feldman* tribunal correctly found, because no Party was bound by an obligation under the NAFTA prior to January 1, 1994, acts or omissions that took place prior to that date cannot constitute breaches of the NAFTA.

Furthermore, Chapter Eleven of the NAFTA only grants tribunals jurisdiction over claims for breaches of Section A of the Chapter and two sections of Chapter Fifteen;

¹⁹ See *Tradex Hellas S.A. (Greece) v. Republic of Albania*, Decision on Jurisdiction (Dec. 24, 1996), 14 ICSID REV. – FOREIGN INVESTMENT L. J. 161, 180, 191 (1999) (treaty provisions, like those in Chapter Eleven, that use verbs such as "shall" and "may" evidence the parties' intent only to be bound prospectively, even if alleged breaches concern investments that pre-existed the treaty's entry into force).

such tribunals have no authority to consider alleged breaches of any other international law obligations.²⁰ As the *Feldman* tribunal held, a Chapter Eleven tribunal “is not authorized to investigate alleged violations of either general international law or domestic . . . law.” *Feldman*, Interim Decision at 29-30, ¶ 61. Mondev’s claims that pre-1994 acts of the City and the BRA constitute a breach of the United States’ obligations under the NAFTA must, therefore, fail.

Mondev attempts to evade the consequences of the NAFTA’s prospective nature by asserting that the alleged breaches of the NAFTA were “completed” only in 1998 and 1999, when the Massachusetts and U.S. high courts denied LPA relief. Mem. ¶ 113. In this way, Mondev suggests, this Tribunal can consider the alleged pre-1994 acts and omissions of the City and the BRA. *Id.* ¶ 116. The sole authority offered by Mondev in support is the separate opinion of Judge Fitzmaurice in *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 97 (Dec. 2).

Mondev’s argument is without merit. Far from supporting Mondev’s contention, Judge Fitzmaurice’s opinion observes that an act that could not have constituted a breach of a treaty at the time it took place “cannot *ex post facto* become one.” *Id.* at 129.

Although the *Northern Cameroons* facts differ from those here, the International Court of

²⁰ See, e.g., *United Mexican States v. Metalclad Corp.*, Vancouver Docket No. L002904, ¶ 76 (Brit. Colum. S. Ct. May 2, 2001) (setting aside portion of arbitral award finding a breach of an obligation outside Chapter Eleven on ground that tribunal exceeded its authority in doing so); *Azinian et al. (U.S.) v. United Mexican States*, 14 ICSID REV. – FOREIGN INVESTMENT L.J. 538, 562 ¶ 82 (1999) (Award) (Nov. 1) (“claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A.”); see also *Phosphates in Morocco (Italy v. Fr.)*, 1938 P.C.I.J. (ser. A/B) No. 74 at 18 (June 14) (on questions of jurisdiction *ratione temporis*, “it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance.”).

Justice – like this Tribunal – was asked to consider a claim that an obligation was breached at a time that pre-dated the claimant’s ability to invoke the obligation. During most of the United Kingdom’s administration and alleged misadministration of the U.N. Trusteeship Agreement for the Territory of the Cameroons, the Republic of Cameroon was not a member of the United Nations and thus had no right to invoke an obligation under the Trust. *See id.* at 128-29. Similarly, here, all of the breaches of NAFTA that Mondev alleges (excepting its denial of justice claims) pre-date the United States’ obligations under Chapter Eleven and Mondev’s right to invoke them, neither of which arose until January 1, 1994. Thus, the views of Judge Fitzmaurice are apt here:

An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one. Similarly, such acts or events could not in themselves have constituted, or retroactively have become, violations of the Trust in relation to the Applicant State, since the Trust confers rights only on Members of the United Nations, and the Applicant State was not then one, nor even, over most of the relevant period, in existence as a State and separate international persona.

Id. at 129. Like Cameroon, Mondev had no right to claim a breach of the NAFTA prior to 1994. Yet, as the United States will demonstrate, Mondev is “undoubtedly making various [pre-NAFTA] acts and events a separate and independent ground of complaint” and asking this Tribunal to pronounce upon them as an “essential element of the claim taken as a whole.” *Id.* at 130. As Judge Fitzmaurice recognized, claims such as these cannot be admitted.

In the discussion of each of Mondev’s claims in Parts II, III and IV below, the United States will expose the error in Mondev’s premise that the SJC and U.S. Supreme

²¹ *See also Azinian v. United Mexican States*, 14 ICSID REV. – FOREIGN INVESTMENT L.J. at 562, ¶ 82 (“claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded

Court “completed” alleged pre-NAFTA breaches by the City and the BRA.²² As will be demonstrated, all of Mondev’s claims of breach by the City and the BRA under Articles 1102, 1103, 1110 and Article 1105 are barred because the NAFTA does not apply to those acts.

B. Even Assuming The NAFTA Applies To Alleged Acts Or Omissions Of The City And The BRA, Chapter Eleven’s Prescription Period Prohibits Mondev From Making Those Claims

Even if the Parties’ obligations under Chapter Eleven apply retroactively – which they do not – a claimant’s right to make a claim is further checked by the period of prescription contained in Section B of the Chapter. Article 1116 expressly disallows claims where more than three years have passed since the date the investor first learned (or should have first learned) both of the alleged breach and the alleged ensuing loss or damage. *See* NAFTA art. 1116(2).²³ Article 1116’s three-year period is triggered once each of the substantive elements of a breach and the resulting injury has arisen and the claimant has acquired at least constructive knowledge of both the breach and the loss.

In this case, Mondev submitted its notice of arbitration on September 1, 1999. It, therefore, has no right to make a claim for any alleged breach of Chapter Eleven if it

upon the violation of an obligation established in Section A.”).

²² In many instances, Mondev does not even identify a post-NAFTA act or omission that might supposedly have “completed” alleged pre-NAFTA breaches by the City or the BRA. *See, e.g.*, Mem. ¶¶ 140-141, 160, 161-163, 166, 204, 207-208. These instances contrast with Mondev’s earlier written and oral statements that its claims were based only on “actions of the Supreme Judicial Court of Massachusetts.” Mondev’s June 2, 2000 Submission at 15; ICSID Recording of April 20, 2000 Hearing (“... it’s these decisions which are at the heart of the proceeding”).

²³ The Article states:

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

knew or should have known, prior to September 1, 1996, of all the elements of the alleged breach and the resulting damage. The record establishes that Mondev knew of all of the City's and the BRA's supposed acts and omissions, and the alleged resulting loss to LPA, well before 1996. Indeed, it was precisely that supposed conduct and loss that prompted LPA's lawsuit against the City and the BRA in 1992. Mondev thus fully realized the extent of the injury allegedly inflicted upon LPA by these municipalities as early as January 1, 1989 (the date the Hayward Parcel option expired), but certainly no later than March 16, 1992 (the date LPA filed suit).

As demonstrated below in the discussion of each provision of the NAFTA alleged to have been breached, *all* of the City's and the BRA's supposed acts and omissions related to LPA and the Hayward parcel option – other than their defense at trial and on appeal – occurred prior to 1996. Mondev's claims of breach based on those acts are therefore barred by the prescription period.

II. MONDEV'S EXPROPRIATION CLAIM IS WITHOUT MERIT

As its primary claim, Mondev alleges that the City's and the BRA's treatment of LPA's contract rights amounted to “a clear instance of so-called ‘creeping expropriation’” under Article 1110. Mem. ¶ 139. Mondev acknowledges, however, that both the alleged expropriation and the purported loss of Mondev's investment took place no later than 1990 (Mem. ¶¶ 140-143). As demonstrated below, Mondev's claim that its contract rights were “taken” is time-barred and is without merit in any event.

NAFTA art. 1116(2); *see also id.* art. 1117(2) (barring stale claims by an investor on an enterprise's behalf).

A. The Expropriation Claim Is Time-Barred

Mondev’s expropriation claim is time-barred because the alleged “taking” and every other element required to state an expropriation claim was complete before the NAFTA went into effect.²⁴ Moreover, Mondev’s unfounded assertion that the SJC “completed” a nascent breach of Article 1110 by the City and the BRA does not save its claim.

1. By Mondev’s Own Account, Its Supposed Expropriation Claim Accrued No Later Than 1990

It is elemental that a breach of an international obligation occurs “when an act of th[e] State is not in conformity with what is required of it by that obligation.”²⁵ A comparison of the obligations of NAFTA Article 1110 and Mondev’s assertions establishes that any breach could only have taken place before the NAFTA went into effect – even assuming, as Mondev contends, that a “taking” occurred at all (a central point in dispute which the United States addresses in sub-part B below).

To breach the obligations of Article 1110, a State must, first, effect an expropriation and, second, fail to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 1110(1):

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance

²⁴ Because Mondev’s “creeping expropriation” claim acknowledges that the alleged loss of LPA’s contract rights took place before the NAFTA entered into force, *see* in particular Mondev’s allegations at Mem. ¶¶ 140-141, this case does not present, and the United States does not address, a situation where alleged expropriatory acts began prior to 1994 but did not deprive the property owner of fundamental rights of ownership until after 1994.

²⁵ State Responsibility Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, International Law Commission, 52d Sess., art. 12, U.N. Doc. A/CN.4/L.600 (2000).

with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.

If the act of expropriation does not conform to all of the specific conditions set forth in subparagraphs (a) through (d), it constitutes a breach of Article 1110. If, on the other hand, the expropriation is for a public purpose, does not discriminate or violate principles of due process or Article 1105(1), and is taken “on payment of compensation” “without delay,” *id.* art. 1110(3), there can be no breach of Article 1110. Thus, an expropriation unaccompanied by compensation, or at least by adequate provision for the prompt determination of such compensation, violates Article 1110.²⁶

Mondev here effectively alleges that each of the elements required for a breach of Article 1110 was present in this case no later than 1990. To begin, Mondev alleges that the supposed expropriation itself (deprivation of LPA’s contract rights) and purported damages concluded no later than “mid-1990.” Mem. ¶¶ 140-141. Mondev also alleges that no compensation was ever “paid or even offered” by the City or and the BRA (Mem. ¶ 145), as would be required by Article 1110(1)(d). Notably, Mondev does not suggest that the city officers responsible for the supposed expropriation ever acknowledged that a taking had occurred or that any compensation was due.²⁷

²⁶ See also, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 185 comment c (1965) (a taking is “unlawful on the ground of failure to pay just compensation only if it does not appear at the time of taking that just compensation will be provided.”); SOHN & BAXTER, HARVARD DRAFT CONVENTION, art. 10(2) (“[t]he taking . . . is wrongful if it is not accompanied by prompt payment of compensation”); Abs-Shawcross Draft Convention on Investments Abroad, *in* 9 J. PUB. L. 115-118 (1960), art. III (“Adequate provision shall have been made at or prior to the time of deprivation for the prompt determination and payment of such compensation, which shall . . . be paid without undue delay.”); Secretary of State Hull letter to Mexican Ambassador, *reprinted in* 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW at 662 (“[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.”).

²⁷ Mondev further argues that each of the other conditions listed at paragraphs (a) through (d) of Article 1110(1) was unmet at the time of the alleged expropriation. See generally Mem. ¶ 145. Mondev claims

Consequently, according to Mondev's own allegations, each of the required elements needed to assert a breach of Article 1110 were complete before the NAFTA went into effect. Because Mondev's allegations place the alleged unlawful expropriation at a time prior to the United States' obligations arising under the NAFTA, however, they cannot establish a breach of Article 1110.

Finally, even if Article 1110 did govern the alleged pre-1994 breaches by the City and the BRA (which it does not), Chapter Eleven's three-year prescription period would nonetheless defeat Mondev's claim. There can be no doubt that more than three years elapsed between the date when LPA and Mondev first knew of both the alleged breach of Article 1110 by the City and the BRA and LPA's losses (by 1990) and the date Mondev submitted its claim for damages to arbitration (on September 1, 1999).

2. The SJC Decision Did Not "Complete" Alleged Pre-NAFTA Wrongs So As To Bring Them Within This Tribunal's Jurisdiction

Mondev tries to salvage its Article 1110 claim with the erroneous argument that, even though the alleged expropriation took place before 1990 and no compensation was offered by the City or the BRA or paid at any time, it "bec[a]me an unremedied expropriation for purposes of NAFTA Article 1110" by virtue of the 1998 and 1999 decisions of the Massachusetts Supreme Judicial Court and the United States Supreme Court. Mem. ¶ 143. Mondev's assertion is without merit.

that the deprivation of LPA's contract rights was not for a public purpose and thus contrary to Article 1110(1)(a) (Mem. ¶ 145); was discriminatory contrary to Article 1110(1)(b), by virtue of "prejudice on the part of the City and the BRA" (Mem. ¶ 204); and was not in accordance with Article 1110(1)(c) because of the City's and the BRA's alleged use of "governmental authority in an arbitrary and abusive manner" (Mem. ¶ 160).

First, as explained above, the act of expropriation unaccompanied by compensation without delay, or adequate provision for payment of such compensation, without delay itself gives rise to a breach. No additional step need be taken by the property owner or the State to complete the breach.²⁸ That LPA sought a remedy in Massachusetts for, among other things, breach of contract and tortious interference with contract rights does not make up any part of the earlier alleged deprivation or satisfy any required element of a breach of Article 1110. “What is decisive is the time by which [c]laimants had irreversibly lost possession and control of the property.” *International Technical Products Corp. v. Iran*, 9 Iran-U.S. Cl. Trib. Rep. 206, 241 (1985). Here, LPA lost possession and control, without compensation, no later than 1990. *See* Mem. ¶ 113.²⁹ That fact is “decisive” for purposes of its Article 1110 claim.

Second, the Permanent Court of International Justice rejected a strikingly similar argument in its decision in *Phosphates in Morocco (Italy v. Fr.)*, 1938 P.C.I.J. (ser. A/B) No. 74, at 10 (June 14). In that case, as here, the date of the alleged deprivation of the investor’s rights fell outside the Court’s jurisdiction. *See id.* at 21. Nevertheless, Italy “sought to avert this consequence by arguing that . . . this violation only became definitive . . . subsequent to the crucial date,” when the investor sought and was refused redress by the French Ministry of Foreign Affairs. *Id.* The Court denied Italy’s claim on the ground that the subsequent refusal to redress the prior wrong “merely results in

²⁸ B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 34 (1977) (“The onus is certainly not upon the claimant state to do more than show that it has not received adequate compensation.”).

²⁹ *See also* Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 63 (“it is undisputed that the contractual performance (the transfer of the Hayward Parcel) did not take place by the specific ‘drop dead’ date the parties established. As a consequence, the only issue before the jury was whether there was liability for the obvious non-performance and whether that non-

allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.” *Id.* at 22. The Court therefore found that “an examination of the justice of this complaint could not be undertaken without extending the Court’s jurisdiction to a fact which, by reason of its date, is not subject thereto.” *Id.* at 23.

Finally, Mondev’s theory that the SJC’s failure to compensate LPA “completed” the alleged pre-NAFTA breach of Article 1110 confuses the concept of “breach” with that of “remedy.” A full examination of that portion of the United Kingdom’s comments on the Draft Articles on State Responsibility that Mondev quotes only in part well illustrates the distinction between these concepts. *See* Mem. at 49 n.53 (quoting only United Kingdom’s comments on Article 22, exhaustion of local remedies). In its comments on the draft article addressing the time of the breach, the United Kingdom carefully noted that in a case like this one “the wrong is committed *and completed* by the initial wrongful act attributable to the State (which may itself involve actions of more than one State organ),” in contrast to “the subsequent submission of the matter to other, higher authorities in the State [which] constitutes the exhaustion of local remedies.”³⁰

performance was in any way legally excused. In this case, there is therefore no room for any speculation as to the date of breach.”).

³⁰ Comments by the United Kingdom Government on the State Responsibility Draft Articles Provisionally Adopted by the Commission on First Reading (1996) ¶ 49 (comments on Article 18, requirement that the international obligation be in force for the State) (emphasis supplied), *available at* <www.law.cam.ac.uk/rcil/ILCSR/UK.rtf>; *see also* *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, International Law Commission, 51st Sess., at 64, ¶138, U.N. Doc. A/CN.4/498 (1999) (explaining that where local remedies are sought, and absent an additional internationally wrongful act by the local courts, “the local remedy is a failed cure, not part of the illness itself”); *see also* Comments by the United Kingdom Government ¶ 30 (disagreeing with the statement that “no international wrong arises until the moment that the local remedies have definitively failed to redress the wrong”) (general comment on the exhaustion of local remedies principle); *id.* ¶ 56 (in the case of “failure to provide compensation within a reasonable period of time after the expropriation of alien property,” the UK explains again that “[r]ecourse to procedures in the State in order to seek ‘correction’ of

B. No Expropriation Took Place Here In Any Event

Mondev's contention that the City and the BRA expropriated LPA's rights under the Tripartite Agreement is without merit in any event. As LPA has repeatedly recognized, the rights under that Agreement were defined by Massachusetts law.³¹ The Supreme Judicial Court of Massachusetts – the ultimate arbiter of Massachusetts law – considered LPA's contentions and found no breach of LPA's rights under the Tripartite Agreement. As demonstrated in Part II below and in the accompanying Expert Opinion of Judge Rudolf Kass, the SJC's decision fully accorded with settled principles of Massachusetts law and was amply consistent with international standards of justice. It is plain, under these circumstances, that Mondev has not and cannot establish an expropriation of LPA's rights under a contract that was not even breached.

As the tribunal in *Azinian v. United Mexican States* noted:

a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA*. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints.

...

... *What must be shown is that the court decision itself constitutes a violation of the treaty*. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.

the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies") (comments on Article 21, breach of an international obligation requiring the achievement of a specified result).

³¹ See Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 31-42 (all arguments supported by Massachusetts law); TPA § 15.01, SJC App. 6 at A979 (specifying governing law as that of Massachusetts).

14 FOREIGN INV. L.J. at 562, 568 ¶¶ 83 & 99 (emphasis in original). The distinction between a denial of justice and an expropriation – though each may give rise to international responsibility – is a traditional one. *See* B.H. Weston, “*Constructive Takings*” *Under International Law*, 16 VA. J. INT’L L. 103, 115, 117, 171 (1975).

Mondev has no claim here for expropriation. As demonstrated in the discussion that follows, its claim of denial of justice is also without merit.³²

III. MONDEV’S CLAIMS UNDER ARTICLE 1105(1) ARE MERITLESS

In its Memorial, Mondev alleges two broad categories of acts as violating Article 1105(1): acts by the City and the BRA, and acts by the Massachusetts courts. As demonstrated below, neither category establishes a breach of Article 1105(1)’s standard of treatment.

A. Mondev’s Claim That The City And The BRA Failed To Accord LPA “Treatment In Accordance With International Law” Must Fail

Mondev’s contention that the City and the BRA breached Article 1105(1) through their treatment of LPA in the 1980s is baseless. First, this claim is time-barred. Second, Mondev’s claim that the supposed breach of contract here violated international law lacks legal foundation in any event. Customary international law authorities addressing “full protection and security” similarly do not support Mondev’s claims, as those authorities are limited to cases where a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.

³² In its Notice of Arbitration, Mondev made the startling assertion that the SJC itself committed an expropriation by reversing the lower court judgment in LPA’s favor. *See* Notice of Arb. at 74. Mondev

Finally, the the City's and the BRA's treatment of LPA during the 1980s fully accorded with the requirements of customary international law in any event.

1. Mondev's Article 1105(1) Claim Based On Conduct Of The City And The BRA Is Time-Barred

Mondev's claim that the City and the BRA violated Article 1105(1) is outside the scope of Chapter Eleven. The acts and omissions of these entities of which Mondev complains took place in the 1980s. *See* Mem. ¶¶ 160-166. As demonstrated above in Part I, Article 1105(1) cannot have been breached by acts that took place before the provision was even written. Mondev's claim fails on its face to constitute a breach of Article 1105(1).

Moreover, even if the NAFTA did apply, Mondev and LPA were plainly aware by 1992 of the acts and omissions of the City and the BRA that they allege to have breached Article 1105(1), as all of those acts and omissions were placed into issue in LPA's 1992 lawsuit. The record establishes that Mondev and LPA were aware of their supposed loss no later than 1989, when LPA's contractual rights with respect to the Hayward Parcel expired. Mondev's claim that the City and the BRA breached Article 1105(1) thus would also be barred by the NAFTA's three-year prescription period, if the NAFTA's obligations were applied to this pre-NAFTA conduct. *See* NAFTA art. 1116(2).

2. Mondev's Article 1105(1) Claim Concerning The City And The BRA Has No Legal Foundation

As an initial matter, the United States agrees with Mondev that Article 1105(1)'s mandate of "treatment *in accordance with international law*" requires the NAFTA Parties

appears to have abandoned this argument. *See* Mem. ¶ 143. The United States reserves the right to present

to act in accordance with the international minimum standard under customary international law. NAFTA art. 1105(1) (emphasis added); *see* Mem. ¶¶ 146-150. As each of the three NAFTA Parties has now confirmed in formal, public submissions to various Chapter Eleven tribunals, “fair and equitable treatment” and “full protection and security” are provided as examples of the customary international law standards incorporated into Article 1105(1), not as obligations more expansive than the standards they illustrate.³³ As each of the three NAFTA Parties has stated, the plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to that law. The agreement among the NAFTA Parties on this point is authoritative. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331 (“There *shall* be taken into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”) (emphasis added).³⁴

argument and authority opposing such an argument in the event that Mondev reasserts it in its Reply.

³³ *See* Second Submission of Canada Pursuant to Article 1128, ¶ 26, *Methanex Corp. (Can.) v. United States* (April 30, 2001) (“Article 1105 incorporates the international minimum standard of treatment recognized by customary international law.”); *id.* ¶ 33 (“‘fair and equitable treatment’ is subsumed in the international minimum standard recognized by customary international law.”); *id.* ¶ 39 (“‘full protection and security’ is subsumed in the international minimum standard recognized by customary international law.”); Letter of Mexico Pursuant to Article 1128, ¶ 9, *Methanex Corp. (Can.) v. United States* (transmitted by facsimile May 15, 2001) (“Article 1105 establishes only an international minimum standard of customary international law in which ‘fair and equitable treatment’ is subsumed.”); *id.* ¶ 12 (“Article 1105 . . . clearly indicates that both ‘fair and equitable treatment’ and ‘full protection and security’ are included as examples of the customary minimum standard, subsumed therein, and in no way add to it.”).

³⁴ The three NAFTA Parties also agree that their submissions pursuant to Article 1128 may evidence an agreement as to interpretation within the meaning of Article 31(3)(b). *See* Second Submission of Canada Pursuant to Article 1128, ¶ 8, *Methanex Corp. (Can.) v. United States* (April 30, 2001); Letter of Mexico Pursuant to Article 1128, ¶ 1-4, *Methanex Corp. (Can.) v. United States* (May 15, 2001). The United States also notes the recent decision of the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corp.*, which held that a NAFTA Chapter Eleven tribunal had exceeded its authority in viewing Article 1105(1) as incorporating a transparency obligation not found in customary international law.

Mondev's suggestion that customary international law provides minimum standards of treatment relevant to the acts of the City and the BRA at issue here is without merit. *First*, Mondev's reliance on authorities addressing State responsibility for injuries to aliens that derive from contract disputes between States and aliens is misplaced. Mem. ¶¶ 156-159. Mere breaches of contract are not *per se* violations of international law, as even the authority Mondev cites recognizes.³⁵

Though some authorities suggest that in certain circumstances a breach of a State contract may be viewed as violating international law, *e.g.*, when a repudiation of a contract is discriminatory or motivated by non-commercial considerations,³⁶ those circumstances are not present here.

As an initial matter, there was no breach. Breach of contract, whether examined by a municipal or an international tribunal must necessarily be measured against the requirements of the law governing the contract.³⁷ Massachusetts law governed the

Vancouver Registry No. L002904, ¶¶ 70-72 (May 2, 2001) <available at <http://www.worldbank.org/icsid/cases/awards.htm> >.

³⁵ See C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 119 (1967); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(2)(a) comment h (1989) (“A state’s repudiation or failure to perform is not a violation of international law under this section if it is based on a bona fide dispute about the obligation or its performance, if it is motivated by commercial considerations and the state is prepared to pay damages or to submit to adjudication or arbitration and to abide by the judgment or award.”).

³⁶ Mem. ¶¶ 141-43, ¶¶ 165-68. *See also* RESTATEMENT (THIRD) § 712(2)(a); Stephen M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law*, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERT AGO 401, 406 (1987) (noting that if a State repudiates or violates its obligations under a contract with a foreign national, it is responsible for such a violation ‘only if it’ – the breach – ‘is discriminatory . . . or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons.’) (quoting with approval the RESTATEMENT (THIRD) § 712 (2)(a)).

³⁷ *See* F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT’L L. 572, 581 (1960) (“Contracts are governed by the law determined by the private international law of the forum.”). In rare circumstances contracting parties may advert to a “transnational law” as governing. *See* AMERASINGHE at 106-112 (noting problems with this approach, including the lack of an international law of contract as such).

contract.³⁸ The Supreme Judicial Court has expertly applied Massachusetts law to this contract and correctly determined that there has been no breach of contract. That decision, as demonstrated in sub-part B below, amply accords with international standards.

Moreover, as demonstrated in Part IV below, Mondev's allegations of discrimination are without basis. And the gravamen of LPA's and Mondev's complaints against the City and the BRA is that they were motivated by the desire to secure a higher price for the Hayward Parcel, not governmental concerns.³⁹ Mondev's claim of impairment of a State contract is without merit.

Furthermore, while the acts of provincial and local governments are ordinarily attributed to a State, Mondev offers no authority suggesting that customary international law imposes any international *obligation* with respect to alleged breaches of contract by a local government, such as those Mondev claims here. Nor does Mondev acknowledge the substantial authority to the contrary.⁴⁰

³⁸ TPA § 15.01, SJC App. 6 at A979 (specifying governing law as that of Massachusetts).

³⁹ See RESTATEMENT (THIRD) § 712(2)(a) at reporter's note 8 (state liability is not implicated if contract is breached for commercial reasons, "e.g. due to inability of the state to pay or otherwise perform, or because performance has become uneconomical; or because of controversy about the contractor's performance."); Schwebel, *supra*, at 408-09 ("the breach of [] a contract [with an alien] by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law"). Compare *id.* at 409-13 (describing unlawful uses of sovereign authority to abrogate contracts).

⁴⁰ See RESTATEMENT (SECOND) § 193(3) ("Breach by a political subdivision of a state, whether or not it is a federal state, of a contract to which the central government or an agency of that government is not a party, does not, as such, give rise to responsibility on the part of the state under international law."); *id.* reporter's note 2 (collecting authorities); see also RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGES DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS (Harvard Law School) art. 8(b), 23 AM. J. INT'L L. 131, 173 (Sp. Supp. 1929) [hereinafter HARVARD RESEARCH DRAFT] ("A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice."); *Cayuga Indians (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 173, 187-88 (1926) ("If the Treaty of 1795 is a contract of the State of New York, the United States would not be liable merely on the basis of a failure of New York to perform a covenant to pay money. This proposition is established by repeated decisions of international tribunals.") (citations omitted); see also RESTATEMENT

Second, Mondev’s discussion of Article 1105(1)’s guarantee of “full protection and security” rests on a faulty understanding of the provision. Mondev asserts, without support, that a failure on the part of the United States to afford “protection from the occurrence of wrongful conduct in the first place” violates the full protection and security requirement set forth in Article 1105. No claim can be predicated on Mondev’s incorrect reading of the provision.

As Mondev appears to acknowledge, Mem. ¶¶ 172-174, the “full protection and security” standard is that of the customary international law minimum standard of treatment. Cases in which the customary international law obligation of full protection and security was found to have been breached, however, are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.⁴¹ This case does not resemble any

(THIRD) § 712, reporter’s note 8 (“[T]here is authority that [responsibility of States for acts of local governments] does not extend to breach by local subdivisions of contracts with foreign contractors”). These authorities recognize that, if the federal government has a direct interest in a contract, as a participant or a beneficiary, or has specifically assumed liability for it, or has some other direct interest, the federal government may, depending on the circumstances, be held liable upon the contract of a state. *See Cayuga Indians*, 6 R.I.A.A. at 188. Mondev’s reliance on the *Jalapa Power* case is therefore unavailing, for in that case the Mexican federal government had approved a contract by which the State of Vera Cruz purchased rights belonging to the Jalapa Power Company, including a provision providing that 5 percent of the federal tax on petroleum be diverted to help pay for the property. *See Jalapa Railroad & Power Co.* (U.S. -Mex. Cl. Comm’n. 1941), in AMERICAN MEXICAN CLAIMS COMMISSION: REPORT TO THE SECRETARY OF STATE 538, 538-39 (1948).

⁴¹ *See, e.g., American Manufacturing & Trading, Inc. (U.S.) v. Zaire*, 36 I.L.M. 1531 (1997) (failure to prevent destruction and looting of property constituted violation of protection and security obligation); *Asian Agricultural Products Ltd. (U.K.) v. Sri Lanka*, 30 I.L.M. 577 (1991) (destruction of claimant’s property violated full protection and security obligation); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (failure to protect foreign nationals from being taken hostage violated most constant protection and security obligation); *Chapman (U.S. v. Mex.)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm’n 1930) (lack of protection found where claimant was shot and seriously wounded); *H.G. Venable (U.S. v. Mex.)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm’n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Gr. Brit.)*, 2 R.I.A.A. 729 (1925) (reasonable police protection would not have prevented mob from destroying claimant’s store); *see also, e.g.,* RESTATEMENT (SECOND) § 183 (which, significantly, is not included in the part of the RESTATEMENT dealing with economic injuries) comment *a* (“A state is not an insurer of an alien’s safety in its territory, but a state is

of those international decisions in the slightest – neither physical harm or invasion, nor criminal activity, is involved – and this Tribunal can, and should, summarily dismiss Mondey’s “full protection and security ” argument.

In its Memorial, Mondey offers no authority to suggest that the international law doctrine of full protection and security extends further than noted above. Neither of the two provisions of OPPENHEIM’S INTERNATIONAL LAW it cites advances its cause. The first addresses the international minimum standard writ large, not the duty to provide full protection and security. *See* Mem. ¶ 173 & n.84; OPPENHEIM’S INTERNATIONAL LAW § 405 (Sir Robert Jennings & Sir Arthur Watts, eds. 9th ed. 1992) (“The state in whose territory an alien resides must afford his person and property at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law”). The second provision cited has primarily to do with expropriation, not full protection and security. The only relevant portion of that provision actually contradicts Mondey’s assertion: a footnote to the section remarks upon the ICJ’s holding in the *ELSI* case that “a requirement to afford ‘constant protection and security’ to nationals of the other contracting party [is] incapable of being ‘construed as the giving

liable for failure, intentional or negligent, to maintain a police system adequate for the protection of aliens”); *id.* comment *c* (“The rule of this Section does not apply to injurious conduct of a private nature, such as ordinary negligence, breach of contract or patent infringement. It is concerned only with conduct that is of a criminal nature or that the police are normally concerned with preventing in the interest of preserving public order.”); Article 7(1) of the *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens, Revised Draft reprinted in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (1974) (“The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.”); *cf.* Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L. 501, 510 n.28 (1998) (“It does not appear . . . that any BIT party thus far has claimed that a host state’s failure to protect intellectual property rights violated” the full protection and security obligation.).

of a warranty that property shall never in any circumstances be occupied or disturbed’.” OPPENHEIMS, § 407 & n.3 (quoting *Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 65 (July 20)). Thus, Mondev’s authorities lend it no support.

Mondev also asserts, again without reference to authority, that the use of the word “full” evidences an intent of the NAFTA Parties to accord a greater emphasis to the standard than required under customary international law. The relevant authority is to the contrary.

In *ELSI*, the parties disputed the meaning of an article of a treaty of friendship, commerce and navigation which provided: “The nationals of each High Contracting Party shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.” 1989 I.C.J. at 63 (international quotation omitted). Noting that the “primary standard laid down by [that article of the treaty] is ‘the full protection and security required by international law,’” the ICJ chamber held: “in short the ‘protection and security’ must conform to the minimum international standard.” *Id.* at 66. Thus, in *ELSI*, the ICJ confirmed that, by obligating themselves to provide “full” protection and security, the State Parties had not intended to require a level of protection and security in excess of the international minimum standard. Mondev’s reliance on the standard of full protection and security is therefore misplaced.

3. Mondev’s Complaints About The City’s And The BRA’s Treatment of LPA Are Unfounded In Any Event

As demonstrated at length in the annexed Factual Appendix, Mondev’s complaints concerning the acts of the BRA and the City are without merit in any event.

The City and the BRA acted appropriately in fulfilling their mandate of promoting economic development on terms compatible with sometimes competing interests, such as reducing environmental impacts, ensuring the availability of affordable housing, minimizing negative effects on traffic circulation and preserving the city's character.⁴²

The rights to acquire the Hayward Parcel under the Tripartite Agreement expired not because of misconduct by the City or the BRA, but because LPA leased those rights to Campeau too late to allow sufficient time for Campeau to close within that timeframe.

The record belies LPA's and Mondev's assertion that the City and the BRA stymied either LPA's project or LPA's deal with Campeau. As BRA Director Coyle repeatedly emphasized, the BRA considered development on the Hayward Parcel to be important.⁴³ Contrary to Mondev's assertions, the BRA was not laggard in acting on its submissions for design review. The BRA's diligent attention to LPA's and Campeau's design proposals is borne out by the frequent, cordial and often productive meetings between first LPA and later Campeau with the BRA officials.⁴⁴ Those meetings both pre- and post-dated LPA's exercise of its option, which LPA delayed until nearly three years after it was first notified that the option was available to be exercised.⁴⁵

⁴² See U.S. Factual Appendix at 7-8 (describing goals of the Boston Redevelopment Authority and the City of Boston in implementing a comprehensive urban planning program for the city).

⁴³ Deposition of BRA Director Stephen Coyle, US App. III, Tab C at 166, 433-34 (hereinafter "Coyle Deposition"); see also Letter from Stephen Coyle to Robert Campeau, Dec. 30, 1988, SJC App. 10 at A1940-41 (affirming commitment to work on Boston Crossing Project).

⁴⁴ SJC App. 2 at A414, A416, A418, A420; SJC App. 5 at A811-12; SJC App. 7 at A111.

⁴⁵ See SJC App. 6 at A1063-64. That option had been contingent; LPA had no guarantee that the City would decide to demolish the parking garage, which event would trigger the option. Indeed, review of the Tripartite Agreement reveals the small role Section 6.02 played in relation to the overall Lafayette Place Project.

Nor did the BRA impose requirements on LPA that it did not impose on others. The BRA acted in accordance with the complex but transparent design review program it implemented in 1985 and revised in 1986.⁴⁶ All developers in the city, and not just LPA, were subject to these requirements. LPA knew of the requirements, but disputed whether it had to comply with them.⁴⁷ Of course, the possible exceptions under the design review program to zoning limitations were available to LPA as well as to other developers.⁴⁸

After working with the BRA for over a year, LPA changed course in September 1987, and decided to attempt to sell its rights in the Lafayette Place Mall and in the Hayward Parcel to the Campeau Corporation, another Canadian developer. The sale required BRA approval because the project operated under urban renewal statutes that conferred special benefits on developers.⁴⁹

LPA submitted a request to sell the project on December 13, 1987, and initially requested BRA approval in no later than within two weeks – an impractical goal given the questions surrounding the proposal and the BRA’s obligations to give public notice of all items that it would act on at its board meetings.⁵⁰ The BRA never refused to approve the sale; it was simply never given sufficient opportunity to act on it. LPA withdrew the request 56 days later, and within a little over a month had restructured its deal with

⁴⁶ US Factual App. at 7-12. The BRA held scores of public meetings and distributed thousands of brochures about new plans for development that would factor in “smart growth” ideas. *See also* Coyle Deposition at 33-37, 133-35.

⁴⁷ Coyle Deposition at 331-36.

⁴⁸ US Factual App. at 10-12 & n.38

⁴⁹ US Factual App. at 1-2, 15-16

⁵⁰ US Factual App. at 15-16

Campeau, styling the arrangement a “lease” and receiving nearly the same remuneration.⁵¹

After LPA signed the lease with Campeau, the BRA worked with Campeau on its much larger proposal for development – a massive project envisaging two 300-foot office towers rising above the Hayward Parcel and the site of the existing Lafayette Place Mall, which would be gutted and refurbished.⁵² Campeau made substantial changes to its proposal in the Fall of 1988. As the expiration date of the rights to acquire the Hayward Parcel approached, Campeau requested something it was not entitled to under the Tripartite Agreement: an extension of time.⁵³ When the City declined, Campeau made no real protest – because the benefit of the rights under the Tripartite Agreement to Campeau was modest in comparison to the overall economics of the proposed Boston Crossing Development.

The BRA approved the construction of Campeau’s development in June 1989.⁵⁴ The record thus reflects consistent and even expeditious conduct on the part of all interested parties. That the Downtown Crossing project was not built is attributable to Campeau’s bankruptcy, not to any acts of the City or the BRA.

B. LPA Received Justice In The Massachusetts Courts

Contrary to Mondev’s suggestion, the treatment LPA received in the Massachusetts courts was in full accord with standards of fairness and due process.

⁵¹ US Factual App. at 16-17.

⁵² US Factual App. at 17.

⁵³ See, e.g., Letter from L. McQuarrie to Stephen Coyle, Oct. 21, 1988, SJC App. 10 at A1939.

⁵⁴ Testimony of L. McQuarrie, SJC App. 20 at A3726.

Mondev's assertion that that treatment constitutes a denial of justice in violation of the international minimum standard cannot be sustained.

Challenging the actions of a nation's judicial system is no small matter. The acts of independent judiciaries are entitled to a presumption of regularity and are therefore accorded great deference. *See, e.g.*, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 522 at 526-27 (1943). Thus, an international tribunal will substitute its judgment for that of a municipal court only in the rarest of circumstances. "[I]t is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country, which nevertheless the law of nations universally allows in extreme cases." *Garrison's Case*, 3 MOORE'S INT'L ARB. 3129 (1995) (U.S.-Mex. Cl. Comm'n 1868).

With respect to judicial acts, the international minimum standard has been articulated in the context of tribunals deciding whether or not claimants have experienced a "denial of justice" in a State's judicial system. *See generally* ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 539-570 (1938). Customary international law recognizes two primary ways in which a court proceeding might fall short of international standards: a court's actions may constitute a "procedural" denial of justice, *i.e.*, a foreigner may be wrongly denied access to a tribunal or the tribunal may act in such an unfair or in such a dilatory fashion that no justice is forthcoming; or they may constitute a "substantive" denial of justice, *i.e.*, a court may render a decision that is so "manifestly unjust" as to violate the minimum standard of treatment required under international law. *See, e.g.*, LOUIS B. SOHN & R.R. BAXTER, HARVARD DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR

INJURIES TO ALIENS (1961), art. 6 (denial of access to a tribunal or administrative authority); *id.* art. 7 (denial of a fair hearing); *id.* art. 8 (adverse decisions or judgments).

The HARVARD RESEARCH DRAFT, a scholarly examination of State responsibility standards, states as follows:

denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.⁵⁵

Mondev alleges substantive and procedural denials of justice falling into three general categories: (a) that the SJC announced a new rule of contract interpretation, improperly applied that decision retroactively and failed to remand the case to the jury for retrial in light of the supposed “new” rule; (b) that the SJC’s affirmance of the lower court’s decision that the BRA was immune from liability under Massachusetts law for intentional tort and that LPA could not maintain a Chapter 93A claim against the BRA and the City effectively denied LPA access to and redress from a judicial tribunal; and (c) that miscellaneous procedural decisions taken by the trial court, when added to the preceding allegations, demonstrate grave defects in the judicial process.

These charges are unfounded. As demonstrated below and in the accompanying Expert Opinion of Rudolph Kass, a retired judge who served for 22 years on the Massachusetts Appeals Court, the conduct of the Massachusetts courts accorded with settled Massachusetts law.

⁵⁵ HARVARD RESEARCH DRAFT art. 9, 23 AM. J. INT’L L. at 173.

1. The SJC Decision Is Fully Consistent With International Law

To establish that the decision was manifestly unjust, Mondev would have to show that the conduct of the Massachusetts courts amounted “to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man” *Chattin*, 4 R.I.A.A. 282 (Mex.-U.S. Gen. Cl. Comm’n 1927). This it cannot do. Far from the startling departure from Massachusetts practice and international standards that Mondev asserts, the SJC decision here was an unremarkable application of established Massachusetts law to the facts of the *LPA* case.

First, the SJC did not establish a new rule of Massachusetts contract law in the *LPA* case. What Mondev fails to point out in its legal argument here – although it was of central importance before the SJC – is that the Tripartite Agreement contained open terms relating to issues of fundamental importance in the law of contract, including the precise size of the parcel to be conveyed and the price to be paid for it. The first issue before the SJC, therefore, was whether an enforceable contract existed. That issue was not new, for it had also been argued before the jury.⁵⁶

The SJC found that, in order for the agreement to be enforceable, those open terms had to be readily definable. *See* Kass Opinion ¶ 46 (noting that courts had found contracts to be unenforceable when far less basic terms were left open). Because the Tripartite Agreement specified mechanisms that LPA could have engaged to fill in those missing blanks, including an arbitration proceeding to determine the contours of the parcel to be conveyed and a three-member appraisal board panel to determine the market

values necessary to establish the sale price, the SJC gave effect to the intent of the parties and found that a valid contract existed.⁵⁷

Once it had established the existence of the contract, the SJC relied on the well-established principle that when a contract requires concurrent performance by the parties, “one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance.”⁵⁸ Contrary to Mondey’s assertion, Mem. ¶ 201(5), such a proposition is not new law. *See* Kass Opinion ¶¶ 54-56 (tracing history of rule in Massachusetts courts to 1859). Indeed, Professor Coquillette, Mondey’s proffered expert on Massachusetts law, agrees that the “ready, willing and able” standard is established Massachusetts law. *See* Opinion of Professor Daniel Coquillette ¶¶ 15-16 (hereinafter “Coquillette Opinion”).

Judge Kass and Professor Coquillette part company, however, over whether the SJC’s application of that principle to the facts of this case constituted a new rule imposing a heightened obligation on the offeror to show his or her readiness. *Compare* Kass Opinion ¶¶ 57-59 *with* Coquillette Opinion ¶¶ 19-20. Professor Coquillette errs, however, in ignoring the SJC’s finding of an enforceable contract based only on the mechanisms specified in the Tripartite Agreement. With due respect to Professor Coquillette, the correct view, that taken by the SJC and endorsed by Judge Kass, is that LPA’s failure to engage the mechanisms – the essential component to the very existence

⁵⁶ *See* Trial Transcript Day 12, SJC App. 27 at A4679-80.

⁵⁷ *Lafayette Place Associates v. Boston Redevelopment Authy.*, 427 Mass. 509, 517-19 (1988).

⁵⁸ *See Leigh v. Rule*, 331 Mass. 664, 668 (1954).

of an enforceable contract – conclusively established that it was not ready, willing and able to perform the contract. As Judge Kass aptly observes:

But for that resolution machinery, the Tripartite Agreement would not have been enforceable. The SJC was compelled to direct its attention to how that machinery had been used. The answer is undisputed. No one pressed the starter switch on any of the machinery to resolve open questions.

Kass Opinion ¶ 58.

As demonstrated in Judge Kass’s opinion, Professor Coquillette’s valiant effort to find fault with the decision falls flat. The primary cases on which Professor Coquillette relies do not undercut the SJC’s rationale – on the contrary, they support the SJC’s decision. *See* Kass Opinion ¶¶ 48-62.

For example, Judge Kass notes an essential element missing in Professor Coquillette’s analysis of *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 350-52, 354-55 (1969). In *Mayer*, the plaintiff had an option to acquire land, but the amount of land to be conveyed was subject to certain exclusions based on aviation safety considerations. The plaintiff exercised the option, but the parties disputed the exclusions’ proper effect on the boundaries of the land required to be conveyed. The plaintiff set a date and time for the parties to meet at the land registry office. Both sides appeared on the appointed date and reiterated their positions. The plaintiff proffered payment. But because the plaintiff did not commit to accept less than all of the land covered by the option, the SJC found the tender to fail to establish that the plaintiff was ready, willing and able to perform the contract according to its terms. *See* Kass Opinion ¶ 50.

Professor Coquillette limits the *Mayer* case to the proposition that the parties may agree that conditions such as the time and place of conveyance, within outside limits

established in the contract, may later be set by the parties to the contract. Coquillet Opinion ¶ 20. That, however, was a subsidiary, and, as Professor Coquillet remarks, “unsurprising proposition.” *Id.* The heart of the *Mayer* case is in part three of the court’s analysis, which establishes a high standard for what constitutes being ready, willing and able to perform a contract for the purchase of real estate. *Mayer*, 355 Mass. at 353-55. Compared to the substantial tender found insufficient in *Mayer*, the desultory letter LPA offered up fell far short of the SJC’s established standards. *See* Kass Opinion ¶¶ 50-53.

The SJC produced a scholarly decision firmly grounded in Massachusetts law, as Judge Kass deftly illustrates: “[t]he SJC’s analysis of whether LPA made an offer of performance that put the city in default constitutes conventional analysis of the facts of the case and application of the conventional *Leigh v. Rule* principle. There is no invention of a higher standard of tender, as LPA suggests.” Kass Opinion ¶ 58. The unanimous decision in *LPA*, written by a highly respected justice, now a professor of law at Harvard Law School, and concurred in by all six of his associate justices, is well-reasoned, coherent and amply supported.

Mondev’s suggestion that the decision is “manifestly unjust” or “an outrage or to an insufficiency of governmental action recognized by every unbiased man” cannot be sustained. *See Chattin*, 4 R.I.A.A. at 286-87. In fact, it provoked no complaint from anyone except the losing party, LPA; the case occasioned no contemporaneous remark in Massachusetts legal circles. “Indeed, the *Lafayette* opinion was so ordinary an application of familiar law that it attracted no comment whatever in law journals in

Massachusetts or elsewhere. It is astonishing that anyone would argue that the opinion is astonishing.” Kass Opinion ¶ 17.⁵⁹

Second, even if Mondev’s complaint that the SJC announced a new rule of law and retroactively applied it to the parties in the case were accurate, such an application would not violate customary international law. Common-law courts have for centuries developed principles of law through incremental decisions deciding the rights of the parties before them. LPA acknowledges as much in its petition for certiorari to the U.S. Supreme Court.⁶⁰ In some instances those decisions may be viewed as “retroactive,” yet courts rarely require that such decisions be given prospective effect only.⁶¹

Established State practice thus does not support Mondev’s suggestion that the development of the common law through judicial decisions in this manner violates international law. Indeed, to the contrary, international law recognizes that States have the authority to prescribe laws in different ways, including by the common-law method of adjudication, whereby, in uncodified areas of the law, the applicable rules evolve with

⁵⁹ Nor has the *LPA* decision proved to be controversial in its application in subsequent court decisions. As of May 25, 2001, fourteen Massachusetts courts had cited the case; of those, eleven followed the case, while three courts distinguished their cases from it in finding that the contracts before them did *not* contain sufficiently definite terms, or a means to ascertain those open elements, to constitute binding agreements. *See, e.g., Comets Community Youth Center, Inc. v. Town of Natick*, 2000 Mass. Super. LEXIS 546, at *4-6 (Mass. Super. Ct. 2000); *O’Hagan v. Taveras*, 2000 Mass. Super. LEXIS 302, at *9 -13 (Mass Super. Ct. 2000); *Newburyport Redevelopment Authy. v. Newburyport Inn Ltd. Partnership*, 1999 Mass. Super. LEXIS 66, at *23-27 (Mass. Super. Ct. 1999).

⁶⁰ *See* Petition for Writ of *Certiorari, Lafayette Place Associates v. City of Boston*, U.S. Supreme Court No. 98-863 (Nov. 25, 1998), Oleskey Statement, Exh. 27 at 9-10 (“This Court has placed limitations on the retroactive application of legislation, as well as limitations on the retroactive application of judge-made law in the criminal context. . . . This Court has not yet applied these same principles to retroactive changes in civil common law, and has at times suggested that citizens have no federally protected rights in State common law. . . . The essence of the common law is its evolution over changing circumstances and times.”).

⁶¹ *See, e.g., Erie v. Tompkins*, 304 U.S. 64 (1938) (U.S. Supreme Court determined that there is no federal common law of procedure, thereby overruling a nearly century-old body of law, but did not make change prospective only).

and as a result of decisions in successive cases.⁶² In addition, Mondev's suggestion that the SJC, under Massachusetts law, should have exceptionally decided not to apply the supposed "new rule" to the parties before it is particularly curious given that LPA itself never requested the SJC to depart from the general common-law rule.⁶³

Finally, Mondev suggests that the question of whether LPA was ready, willing and able to perform the contract should have been remanded to the jury and that such "usurpation of the jury's function by the appellate court was extremely damaging to the proper administration of justice in this case." Mem. ¶ 201(6). Neither the law of Massachusetts nor customary international law supports this assertion.

As Judge Kass explains, the SJC's decision of the issue without remanding it to the jury is fully consistent with Massachusetts practice. Kass Opinion ¶¶ 67-68.⁶⁴ The standard, appropriately applied by the SJC, is whether anywhere in the evidence, taken in the light most favorable to the plaintiff, without assessing the credibility of witnesses, there is a basis, as a matter of law, for the jury to have reached the verdict it did. Kass

⁶² See, e.g., *The Sunday Times Case*, Eur. Ct. H.R. 6538/74 at 245 ¶ 47 (1979) ("It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law [contempt of court] is not 'prescribed by law' on the sole ground that it was not enunciated in legislation: this would deprive a common-law state which is Party to the Convention of the protection of Article 10 (2) and strike at the very roots of that State's legal system.") (citation omitted); 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 219 at 729 (1945) ("Save for the general obligation to conform to the practices of civilization, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code.").

⁶³ See LPA's Petition for Rehearing (Letter to Chief Justice Herbert P. Wilkins), June 10, 1998, Oleskey Statement, Exh. 24; see also Kass Opinion ¶ 63 ("Occasionally, when a Massachusetts appellate court consciously has been a change of direction in law on which parties have likely relied, it will state that the change has only prospective effect. In the *Lafayette Place* opinion there was no announcement of a rule of law to have prospective effect for the excellent reason that no new rule of law had been declared.").

⁶⁴ See Kass Opinion ¶ 67 ("The dissent's incantation of the virtues of having questions of fact decided by juries is quite wide of the mark. Rather than trenching upon any long established line of demarcation between the role of judge and jury, we have simply applied the time tested and universally approved formula for discerning when a party with the burden of proof has failed in his obligation to introduce enough evidence to permit a jury to find in his favor.") (quoting *Bonin v. Chestnut Hill Towers Realty Corp.*, 392 Mass. 58, 71 (1984)).

Opinion ¶ 64. This is a determination entrusted to the judge, or to the reviewing court.⁶⁵

Thus, the SJC acted well within its authority in reviewing the record and concluding that it lacked any evidence that LPA had attempted to trigger the mechanisms essential to fix the terms of any tender of performance.⁶⁶

In addition, *Mondev* offers no support to establish that customary international law confers on it a right to a jury trial to determine a question of civil damages. Indeed, States are not even required to confer a right to a jury trial to determine questions of *criminal* liability.⁶⁷ This is not surprising, since, as noted above, States are permitted to order their judicial systems as they choose. “In fulfilling [the requirement to provide an adequate judicial protection for the rights of aliens] each State enjoys a plenary margin of liberty. The organization of its courts, the procedure to be followed, the kinds of remedies instituted, the laws themselves, are left to the State’s own discretion.” FREEMAN at 78-79 (1938).

In sum, *Mondev* has not shown that the SJC decision departed from established Massachusetts practice, let alone that it was a “denial of justice” in international law. The applicable standard of review is strict: “Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to

⁶⁵ See Kass Opinion ¶ 18 (“Whether on the basis of given facts, there has been a breach of contract is a question of law and, as such, is decided by judges.”).

⁶⁶ *Id.* (“*Mondev*’s assertion that the SJC exceeded its powers to review trial court judgments disregards the routine duty of an appellate court to analyze a record on appeal for purposes of determining whether – if the evidence is taken in the light most favorable to the plaintiff – the case could go to the jury.”).

⁶⁷ HARVARD RESEARCH DRAFT at 179 (“For example, the system of criminal law in force in many countries is different from that applied in American courts; e.g., the inquisitorial system prevails in many countries, and trial by jury, habeas corpus and certain safeguards which American laws provide for the benefit of the accused are unknown.”).

scrutinize its grounds of fact and law.” *Putnam* (U.S.-Mex. Cl. Comm’n 1923), in OPINIONS OF THE COMMISSIONERS 222, 225 (1927). Mondey fails to show any departure from Massachusetts law, let alone a departure so manifestly unjust as to violate international law.

2. Neither The Massachusetts Tort Claims Act Nor The SJC Decision On LPA’s Claims Under Massachusetts Statute 93A Effected A Denial Of Justice

Mondey concedes that the trial court’s and the SJC’s conclusion that the Boston Redevelopment Authority is a public entity immune from liability for intentional tort under the Massachusetts Tort Claims Act was correct. Mem. ¶ 183. Mondey argues, however, that such immunity effectively deprived LPA of access to the courts and thereby denied it justice. Mondey’s argument is without merit.

While customary international law requires that States provide certain protections to aliens, no international authority requires States to provide a cause of action for the tort of intentional interference with contractual relations. Moreover, even if customary international law were to require redress for such a wrong, it leaves the forms of the remedies to the State. “The organization of its courts, the procedure to be followed, *the kinds of remedies instituted, the laws themselves*, are left to the State’s own discretion.” FREEMAN at 78-79 (emphasis added).

Mondey has made no attempt to prove that customary international law mandates that sovereigns adopt laws subjecting themselves to liability for intentional tort under the circumstances at issue here.⁶⁸ Sovereign immunity in tort law is, of course, a

⁶⁸ See HYDE, §219 at 729 (“Save for the general obligation to conform to the practices of civilization, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code.”); HARVARD

longstanding tradition in many of the world's legal systems. *See* Gyula Eörsi, *Private and Governmental Liability for the Torts of Employees and Organs*, XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 4, at 83-85 (1976). Indeed, while sovereign immunity has been relaxed to some extent in most of the world's jurisdictions, the waivers are limited and subject to various exceptions. *See id.* at 120-31.⁶⁹ Consistent with this trend, the Massachusetts Tort Claims Act was enacted by the legislature in 1978 in response to judicial pressure to make uniform the patchwork of exceptions to sovereign immunity that had developed over the years. *Kass Opinion ¶¶ 70-72*. The Massachusetts act is consistent with modern laws governing sovereign immunity in a number of jurisdictions.⁷⁰

Moreover, it is not true that U.S. law left LPA without remedies. At most the act, to the extent that it entails immunity for intentional torts, denied LPA one of the particular remedies it chose to seek. Though the BRA was immune from suit in intentional tort under Massachusetts law, it is not immune from suit under the United States' federal civil rights act.⁷¹ Had it so desired, LPA could have asserted a claim

RESEARCH DRAFT at 179 (“The rule that those who resort to foreign countries are bound to submit to the local law as expounded by judicial tribunals is disregarded only under exceptional circumstances.”).

⁶⁹ *Foreign* sovereign immunity is of course a familiar and recognized doctrine in international law. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 332-35 (1998) (noting debate between principle of “restrictive” immunity and absolute immunity).

⁷⁰ The immunity for intentional tort found in the Massachusetts Tort Claims Act reflects that in the Federal Tort Claims Act, 28 U.S.C. § 2680(h). Similar immunities exist in the laws of many other states. *See, e.g.*, CAL. GOV. CODE § 815.3 (2001); TEX. CIV. PRAC. & REM. CODE § 101.057 (1999); ALASKA STAT. § 09.50.250 (1999).

⁷¹ *See, e.g., Raso v. Lago*, 958 F. Supp. 686 (D. Mass. 1987), *aff'd*, 135 F.3d 11 (1st Cir. 1998) (adjudicating claim against BRA under federal civil rights act for, among other things, depriving plaintiffs, without due process, of an alleged property right to an absolute housing preference); *Lewis v. Boston Redevelopment Authority*, 1996 WL 208473 (D. Mass. 1996); *Hurney v. Boston Redevelopment Authority*, 1996 WL 208475 (D. Mass. 1996). *See generally Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) (recognizing that local governmental entities are subject to suit under federal civil rights act).

against the BRA under that act. The federal civil rights act provides relief for harm caused by extreme conduct by government officials and those acting in concert with them.⁷²

The federal constitutional standards of due process of law enforced by the act (requiring just compensation for state takings of property⁷³ and prohibiting discrimination on the basis of national origin,⁷⁴ among other things) are similar in many respects to those of the international minimum standard. LPA therefore would have had difficulty meeting those standards, for much the same reason that Mondev's claim here falls short.

Nonetheless, the doors of the Massachusetts courts were open to LPA with respect to claims against the BRA under the federal civil rights act. Mondev offers no authority to suggest that customary international law requires States to afford remedies to aliens broader than those recognized under the international minimum standard.⁷⁵

⁷² See, e.g., *Moran v. Bench*, 353 F.2d 193, 194 (1st Cir. 1965) (“[I]f defendants employed their official powers for the purpose of injuring the plaintiff, rather than to serve the proper ends of their governmental duties, plaintiff might well have a claim under the civil rights statutes.”).

⁷³ See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-34 (1983). LPA could have pursued a federal civil rights claim in either Massachusetts state court or in federal court. In order to pursue a federal-court claim that it had been denied procedural due process in the taking of its property, LPA would have had to pursue post-deprivation remedies in Massachusetts state court before bringing an action under 42 U.S.C. § 1983. See *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). See *Roy v. City of Augusta*, 712 F.2d 1517, 1523-24 & nn. 6 & 7 (1st Cir. 1983) (permitting case challenging alleged unfair deprivation of property right to go forward and noting unavailability of state law remedy because of state's grant of immunity to defendants); but see *Martinez v. California*, 444 U.S. 277, 286-88 (1980) (holding that state had rational basis for, and therefore did not violate due process by, immunizing state parole officers from liability for decisions on parole release notwithstanding subsequent acts by those released).

⁷⁴ See, e.g., *Manego v. Cape Cod Five Cents Savings Bank*, 692 F.2d 174 (1st Cir. 1982) (recognizing that racial discrimination claim is valid under § 1983 but dismissing claim for lack of evidence).

⁷⁵ LPA did, of course, bring a claim under the Massachusetts Civil Rights Act, which requires that claimants show action motivated by threat, intimidation, or coercion. LPA could show no such action by the BRA or the City, and only conclusorily alleged that the facts recited in its complaint constituted such treatment. See LPA's Response to BRA's and City's Motion for Summary Judgment, USG App. III at Tab D. Not surprisingly, Judge Zobel dismissed that claim on summary judgment, and LPA did not appeal. The federal civil rights act does not require such proof.

Mondev's attempt to cast as a denial of justice the dismissal of LPA's claim under Chapter 93A, the unfair and deceptive claims act, is similarly unavailing. Again, Mondev fails to offer argument or authority suggesting that it had a right under customary international law to bring a claim under this particular statute against a municipal government.⁷⁶

That LPA did not prevail in its Chapter 93A argument does not in itself transform the court's decision into a denial of justice. Chapter 93A proscribes "unfair or deceptive practices in the conduct of any trade or commerce." The act was initially designed to protect individual consumers from fraud and deceptive trade practices of commercial entities, providing for up to treble damages and attorneys fees in order to make such suits economically viable. It was later amended to add causes of action for unfair methods of competition and unfair or deceptive acts in commerce. Though, as Mondev alleges, the SJC noted that the *kind* of allegation LPA made is one that might have been made under Chapter 93A in a case between private entities, it concluded that the BRA and the City were not engaged in trade or commerce. Rather, the Court held that "[t]here simply cannot be any doubt that the parties' dealings took place in the context of the pursuit of the urban renewal and redevelopment goals of c. 121A and c. 121B." *Id.* at 428. Massachusetts' limitation of the relief provided under this act to commercial entities was unremarkable and did not violate customary international law.⁷⁷

⁷⁶ See, e.g., FREEMAN at 497-530 (discussing the substantive protections States must offer aliens).

⁷⁷ See Kass Opinion ¶ 75; see also *Linthicum v. Archambault*, 379 Mass. 381, 383 (1979) (relief afforded by Chapter 93A is "in addition to, and not an alternative to, traditional tort and contract remedies"); *York v. Sullivan*, 369 Mass. 157, 164 (1975) (Chapter 93A "created new rights and remedies for consumers; it was not designed to limit their preexisting rights and remedies, or to create obstacles to their pursuit.")

Mondev had full and fair access to justice in the Massachusetts and United States courts. Any claim to the contrary is unfounded.

3. Mondev's Claim of Procedural Irregularities Has No Support in International Law

In a halfhearted attempt to bolster its claim, Mondev asserts that two evidentiary rulings by the trial judge effected a denial of justice, that he erred in not issuing a written opinion in partially granting the City's and the BRA's motion for summary judgment and that he should not have ordered that the damages in tort be encompassed by the damages in contract. Its assertions are without merit.

First, contrary to Mondev's allegation, the trial judge did not act improperly in refusing to compel Ed Roche, the Chairman of the Real Property Board of the City of Boston, to testify. LPA had wanted Roche to testify only to authenticate a memorandum he had supposedly written to Mayor Flynn so that the memorandum could be admitted into evidence.⁷⁸ When Mr. Roche did not respond to the subpoena, Judge Mulligan permitted the document to be made part of the record.⁷⁹ In fact, LPA argued from Roche's memorandum document at closing argument and at the Supreme Judicial Court.⁸⁰ Moreover, it is false to say Judge Mulligan refused to compel Roche to come to court; to the contrary, he indicated that Roche could "drive over or he can come over in a

⁷⁸ SJC App. 19 at A3531; SJC App. 23 at A4044-46.

⁷⁹ SJC App. 25 at A4344-49; SJC App. 12 at A2503.

⁸⁰ SJC App. 27 at A4646; Notice of Arb., Exh. 14 at 14

police car.”⁸¹ Judge Mulligan’s allowance of the memorandum mooted the request, and LPA did not pursue the issue once it had received a favorable ruling.⁸²

Moreover, LPA cannot now raise Judge Mulligan’s alleged failure to act when LPA itself never requested that he do so. In systems employing the adversarial approach to adjudication, attorneys for the parties bear the burden of the asking the court to take action.⁸³ If a court makes a ruling to which the attorney objects, the attorney must object to the ruling contemporaneously or lose its right to request review of the ruling. *See* Mass R. Civ. P. 46 & 51 (b); Kass Opinion ¶ 68.⁸⁴

Mondev also casts Judge Mulligan’s failure to have compelled former Mayor Flynn to testify or to admit his stipulation as a procedural deficiency. Again, however, the record reveals that Judge Mulligan was ready to treat Mayor Flynn like any other potential witness.⁸⁵ Judge Mulligan had indicated that he would take the matter up the last morning of argument if Flynn failed to appear in response to a subpoena that had been left at his last known address (Mayor Flynn had become U.S. ambassador to the

⁸¹ SJC App. 19 at A3532.

⁸² SJC App. 25 at A4344-49.

⁸³ *See, e.g.,* Stephen Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 7 (1978) (noting that such a system requires the judge to play “a fundamentally passive role” and “assumes that competing litigants are capable of protecting their respective interests by presenting their cases to the trier of fact in an effective way.”).

⁸⁴ A similar principle may be found in international law. *See, e.g.,* C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 176 (1990) (international law makes clear that “the individual must raise at the local level arguments which he raises at an international level”); *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192, 207 (Nov. 18) (rejecting argument that arbitrator had not been selected in accordance with treaty terms, noting “[n]o question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such”). The procedural rules governing this arbitration provide similarly. *See* Arbitration (Additional Facility) Rules art. 34 (“A party which knows or ought to have known” of a basis for objection “and which fails to state promptly its objections thereto, shall be deemed to have waived the right to object.”).

⁸⁵ SJC App. 25 at 33-37 (denying motion to quash the subpoena and noting that Mayor Flynn’s rank of ambassador did not entitle him to be treated differently from another witness in a similar position).

Vatican, but was reputedly in Boston during at least part of the trial).⁸⁶ LPA, however, did not ask Judge Mulligan either to admit the stipulation or to compel Mayor Flynn to appear, and Mayor Flynn's stipulation was accordingly not admitted at trial.⁸⁷ LPA cannot be permitted now to raise an issue it abandoned.

Incidentally, the stipulation was of limited value. It indicated only that Mayor Flynn had recommended to the BRA board that Coyle be hired as BRA director (contrary to Mondey's assertion, the Mayor did not have the authority to hire the BRA Director) and that Flynn relied on Coyle's judgment with respect to development matters.⁸⁸ Further, given that the Real Property Board, not Mayor Flynn, acted for the City of Boston with respect to property issues, Flynn's opinion of his relationship with Coyle was of most limited use.

The judge's handling of these matters did not injure LPA; LPA's arguments before the jury on the basis of allowed testimony convinced the jury to return a favorable verdict. Indeed, LPA did not raise either of these points as error in its appeal to the SJC. *See* Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17.

⁸⁶ SJC App. 4 at A702; SJC App. 25 at A4340-42.

⁸⁷ *See* SJC App. 25 at A4339-43 (October 18 transcript noting that Flynn matter would be taken up the following morning), and SJC App. 27 at A4549-52 (October 19 transcript in which LPA's counsel asked only that the subpoena to Flynn be made part of the record).

⁸⁸ SJC App. 3 at A483-85.

Furthermore, these kinds of evidentiary issues, even if erroneous, do not constitute denials of justice under international law.⁸⁹ They certainly do not support a charge of grave defects in the judicial process.

Second, LPA's claim that Judge Zobel denied it justice by not issuing a written decision in rejecting its Chapter 93A claim is not only meritless but also overlooks one salient fact. In Massachusetts, judges are not obligated to issue written rulings in cases before a jury. *See* Kass Opinion ¶ 75 & n.25. Moreover, LPA appealed that decision to the SJC and therefore had ample opportunity to argue the issue. *See* Oleskey Statement, Exh. 17 at 59-61.

Third, LPA complains that the trial court judge erroneously determined that the damages for the tort claim were encompassed by the damages for the contract claim, and then refused to hear LPA's counsel argue against that decision. This is a red herring. LPA appealed that decision to the SJC. *Id.* at 58-59. LPA does not dispute that it had a full and fair opportunity to argue that issue to the SJC; its supposed inability to argue the point before the trial court judge can establish neither a denial of justice nor any injury to LPA's rights. Moreover, the ruling on this aspect of the verdict was secondary to the primary decision that the BRA was immune from liability under the Massachusetts Tort

⁸⁹*See* RESTATEMENT (SECOND) § 182 comment *a* (1965) (“Mere error in a decision, if not manifestly unjust, does not constitute a denial of procedural justice.”); Charles de Visscher, *Le déni de justice en droit international*, 52 R.C.A.D.I. 367, 381-82 (1935) (“One is thus led to recognize that even in the best-organized States there remains a place, in sum rather large, for inevitable divergences in opinion and for the risk of error that must be considered as inherent in human reason. *Errare humanum est*: error, which presumes good faith, excludes responsibility.”) (“On est ainsi amené à reconnaître que même dans les Etats les mieux organisés il reste une place, en somme fort large, pour des divergences d’appréciation inévitables comme pour des risques d’erreur qu’il faut considérer comme inhérents à la raison humaine. *Errare humanum est* : l’erreur, qui suppose la bonne foi, exclut la responsabilité.”) (translation by counsel); *Salem (U.S. v. Egypt)*, 2 R.I.A.A. 1163, 1202 (1932) (noting possibility that Egyptian courts erred in applying Egyptian law, but concluding that “[s]uch errors in judgment cannot be regarded as a denial or a warping of justice in the sense of international law.”).

Claims Act. Thus, even if the Massachusetts courts had permitted the tort verdict to stand on its own, LPA still could not have recovered from the BRA under Massachusetts law, nor did it have any right to do so under international law, as demonstrated in Part III(B)(2) above. Finally, LPA ignores that entering judgment on both verdicts would effectively have permitted double recovery. Theoretically, LPA could have *either* purchased the Hayward Parcel itself *or* have sold the option to purchase the rights to Campeau: it could not have done both.

* * * * *

The Massachusetts courts' decisions were not denials of justice under international law. They were not remarkable under established Massachusetts law. Mondeve simply does not want to accept that LPA lost its case in the Massachusetts courts. "Citizens abroad are too apt to complain that justice has been denied them whenever they are beaten in a litigation, forgetting that, as a rule, they would complain just the same if they were beaten in a litigation in the courts of their own country." Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 526 (1910). This is just the case here.

IV. MONDEV'S CLAIMS OF DISCRIMINATION ON THE BASIS OF NATIONALITY ARE UNFOUNDED IN BOTH LAW AND FACT

As demonstrated below, there is no basis for Mondeve's claim that any Massachusetts entity or official accorded LPA, based on its Canadian ownership, treatment less favorable than treatment accorded in like circumstances to enterprises owned by U.S. or third-country investors.

A. Mondev Fails To Establish A Breach Of Article 1102

Neither the law nor the facts support Mondev’s allegation that “[t]he United States, contrary to Article 1102, discriminated against Mondev as a Canadian investor.” Mem. ¶¶ 202-04. First, much of Mondev’s Article 1102 claim is time-barred. Second, Mondev does not attempt to plead or prove the requisite elements of a claim under the national treatment standard set forth in Article 1102 – that LPA received less favorable treatment than U.S. investments in like circumstances. Finally, the record in this case does not support Mondev’s allegations of anti-Canadian bias against Mondev or LPA in any event.

1. Conduct Of The City And The BRA Prior To January 1, 1989 Cannot Form The Basis Of Mondev’s Article 1102 Claim

Much of Mondev’s national treatment claim centers on its assertion that, “had Mondev been a wholly Massachusetts, or other United States investor,” it would have received better treatment from the City and the BRA during the 1980s. Mem. ¶ 204. Mondev does not deny that it was aware of the supposed acts and omissions on which this assertion is based at the time they took place in the 1980s.⁹⁰ Mondev similarly was aware of its supposed loss no later than 1990.⁹¹ For the reasons detailed in Part I above, however, no breach of Article 1102 can be stated based on acts and omissions before the provision was even written, and any such claim of breach is barred in any event by

⁹⁰ See Mem. ¶ 204 (“the City and the BRA were throughout motivated by an anti-Canadian animus” which “colored their treatment of Mondev and LPA”); *id.* ¶ 204(a) & Mondev Factual App. ¶ 75 (“BRA Director Coyle to LPA [in 1987]: ‘I don’t want you to take all that profit and run back to Canada with it.’”).

⁹¹ See Mem. ¶ 140 (“in mid-1990 the whole Lafayette Place Project failed, and Mondev, as the owner of LPA, suffered substantial financial injury”).

Chapter Eleven's three-year limitations period. Mondev's national-treatment claim cannot be considered to the extent it relies on stale facts to allege breach.

2. Mondev Does Not Attempt To Plead Or Prove The Elements Of An Article 1102 Claim

Mondev fails to mention – let alone plead or prove – the fundamental elements of a claim under Article 1102. As it relates to the facts of this case, Article 1102(2) requires a NAFTA Party to accord to investments of investors of another Party treatment no less favorable than the treatment accorded in like circumstances to investments of its own investors.⁹² To begin, the Article 1102 standard is a *relative* standard, because the treatment a Party affords its own nationals provides the sole basis of comparison for the treatment it owes to investments of investors of another Party. It is also a *limited* standard: it does not afford NAFTA investments protection in all instances. The national treatment standard is subject to a number of exceptions (*see, e.g.*, NAFTA arts. 1108, 2103, Annex II (Reservations for Future Measures)) and it applies only in cases of “like circumstances.”⁹³

Thus, to establish a violation of Article 1102, more is required than merely showing that a claimant's investment received treatment that it contends is adverse. Nor

⁹² Article 1102(2) provides:

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

NAFTA Article 1102(1) also requires that *investors* be accorded national treatment with respect to their investments.

⁹³ *See, e.g.*, Don Wallace, Jr. & David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions*, 31 Cornell Int'l L.J. 615, 619-20 (1998) (describing the national treatment standard as a limited protection because it only applies in cases of “like circumstances”).

is a showing of bias or intent to discriminate by itself sufficient to establish a breach of Article 1102. *See* NAFTA art. 1102. Rather, a claimant must show that its investment, when compared to U.S. investments *in like circumstances*, received treatment that was *less favorable*.

Mondev, however, offers neither argument nor evidence to establish the elements of an Article 1102 claim. Indeed, Mondev does not even attempt to identify a U.S. investor or investment against which the Tribunal could make the requisite comparison.

Instead, Mondev points to four unrelated statements allegedly made by agents or officials of either the City or the BRA about Mondev and LPA over a period of more than eleven years – each to a different audience. *See* Mem. ¶ 204(a)-(d). As demonstrated below, none of the statements establish bias, let alone that the treatment accorded LPA resulted in less favorable treatment when compared to U.S. counterparts in like circumstances. Mondev has thus failed even to begin to carry its burden of proving a violation of NAFTA Article 1102 and, as a result, its claim must be rejected.

3. The Record Does Not Support Mondev’s Claim That The Massachusetts Courts Were Biased

As noted, a breach of Article 1102 cannot be established by an allegation of bias unaccompanied by a demonstration of less favorable treatment of the claimant than a U.S. investor or investment. Nonetheless, the sparse facts Mondev pleads do not support its claim of bias in any event. At no point does Mondev even allege that the Massachusetts courts rendered any decision against LPA on the basis of alleged anti-Canadian bias. It does not do so because there is no evidence that the Massachusetts courts were biased against LPA. Indeed, in another case concerning the Lafayette Place Project, the

Massachusetts Superior Court, Appeals Court and Supreme Judicial Court all ruled in LPA's favor.⁹⁴

The four alleged statements that Mondey offers in support of its Article 1102 claim were made by City and BRA officials. Whether examined individually or together, however, not one establishes bias. The first dates from December 1987 and, as noted above, is time-barred. *See* Mem. ¶ 204(a). The evidentiary value of the supposed statement is highly dubious in any event.⁹⁵

According to Mondey, the second statement was made by the City's attorney during closing argument after LPA's jury trial, supposedly for the prejudicial purpose of highlighting LPA's foreign ownership: "Remember, we're dealing [with] Canadians here." *Id.* ¶ 204(b). A close review of the relevant portion of the closing argument, however, readily reveals no such sinister intent. Counsel's reference to LPA's Canadian ownership was meant merely to demonstrate the complications and open questions involved in closing the Hayward Parcel deal:

Well, you read the 6.02 and you see what's in here and what has to be done. And you say to yourself, gee, buying downtown Boston land under this option agreement, if it's, in fact, enforceable and valid, that's even more complicated. And it's got all sorts of obligations as to what has to be done to figure out what to do.

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

⁹⁴ *See Blount Brothers Corp. v. Lafayette Place Associates*, 399 Mass. 632 (1987) (affirming the Appeals Court's decision to affirm the entry of summary judgment by the lower court judge in favor of LPA).

⁹⁵ Mondey's chairman claimed at trial, in uncorroborated testimony, that BRA Director Coyle told him, "I don't want you to take all that profit and run back to Canada with it," supposedly referring to LPA's proposed sale to Campeau. Coyle, on the other hand, testified that he made no such statement. *See* Coyle Deposition at 431. Moreover, because the statement was elicited at trial by counsel for LPA, it can in no way constitute evidence of post-NAFTA bias on the part of the City, the BRA or the trial court.

the deed. And, you know, what date is it going to be? Is it two o'clock in the afternoon or ten o'clock in the morning? Do you just bring a plain check? Do you bring a certified check? *Does it have to be a certified check drawn on an American bank? Remember, we're dealing [with] Canadians here.*

Closing Argument by Mr. Fabiano, Trial Transcript Day 12, SJC App. 27 at A4583-84 (emphasis supplied).

Read in context, this reference to the Canadian nationality of LPA's owners was plainly intended to explain the additional complication and unanswered issue of whether a check drawn on an American bank was required or whether or one drawn on a Canadian bank would suffice. This single sentence in the City's closing argument (which altogether comprised 33 pages of transcript) after fourteen days of trial, simply cannot be construed as either evidence of anti-Canadian animus on the part of the City or an attempt by counsel to arouse such animus on the part of the jury. Nor can it be deemed to indicate hostility on the part of the court itself. In fact, when the reference to Canada is considered in light of the jury's verdict *in favor* of LPA, it proves absolutely nothing.⁹⁶

The third statement Mondev cites was also made by the City's counsel, but this time at oral argument before the SJC. According to Mondev, "the City made reference to LPA's foreign ownership by arguing that LPA should not recover because 'you walked away, you went back to Canada with money in your pocket.'" Mondev Factual App. ¶ 137; *see also* Mem. ¶ 204(c).

⁹⁶ That counsel for LPA did not even object to the statement shows that LPA had no concern at the time about any so-called anti-Canadian bias on the part of either the court or the jury. Moreover, LPA's failure to object at the trial level also prevented LPA from claiming such error on appeal. *See* Mass. R. Civ. P. 46 and 51(b) (cited in Kass Opinion ¶ 68 and attached thereto at Exh. 40).

Again, taken in context, counsel for the City's one reference to LPA's foreign ownership is best described, not as an attempt to instill anti-Canadian animus, but rather as a means of explaining why there was no breach of contract by the City. In fact, counsel for the City was responding to a question from an SJC justice regarding the significance of LPA's leasing its rights under the Tripartite Agreement to Campeau:

. . . it goes with the issue of whether or not there could have been a breach. When you cut through all of the arguments here, the main contention that is made by Lafayette Place Associates is that the proof of the breach is in the pudding. There was no conveyance. And our argument is, of course there was no conveyance. "You never asked for a conveyance. Beginning in March of 1988, a full ten months before the City was obligated to convey property, to the extent that it had any obligation, *you [LPA] walked away, you went back to Canada with money in your pocket and you said Campeau, it is up to you.*" The record is clear that they never asked for a conveyance. The record is clear that they abandoned the contract, and a party that abandons a contract cannot turn around and then sue for breach of that contract.

Oleskey Statement, Exh. 22 at 8 (argument of counsel for the City) (emphasis supplied).

The point the City was trying to make before the SJC was that LPA abandoned the contract after it leased its rights to Campeau by "stepping aside, taking the \$17,000,000 from Campeau and saying to the City and the BRA and Campeau what happened with 6.02 is now your call, your negotiation, your contract" *Id.* at 6. Not only is this statement in context bereft of any anti-Canadian sentiment, but Mondev offers no evidence to attribute any such sentiment to the SJC or to suggest that it was concerned at the time that the SJC would rely – or that it in fact relied – in any way on this isolated statement at oral argument.⁹⁷

⁹⁷ Moreover, Campeau – whose plan for the Hayward Place parcel the BRA ultimately approved – was itself a Canadian-owned enterprise.

Finally, the only other fact that Mondev cites for purposes of its Article 1102 claim is a public statement made, again, by counsel for the City of Boston, in response to the U.S. Supreme Court's denial of LPA's petition for *certiorari*. Apparently, the City expressed that it was "glad taxpayers won't have to pay about \$20 million to a Canadian developer that's already made a lot of money." Mem. ¶ 204(d); *see also* Mondev Factual App. ¶ 141. This statement, however, was made *after* the SJC issued its opinion. There can be no doubt, therefore, that it could not have had any effect on that decision and is wholly irrelevant to Mondev's claim. In any event, standing alone, it does not evidence anti-Canadian animus, but rather vindication, on the part of the City of Boston. *See* Greg Gatlin, *One Less Legal Woe for Hub Parcel*, BOSTON HERALD Mar. 3, 1999, at 29, reproduced at Mem. Exh. 18 ("We thought all along that the city had not done anything in breach of its agreement.").

This statement, like all of the others Mondev cites, provides no support for Mondev's allegation that the United States discriminated against LPA. Mondev's Article 1102 claim is thus entirely unfounded.

B. The Tribunal Lacks Jurisdiction Over Mondev's Most-Favored-Nation Treatment Claim, Which Is Unsupported In Any Event

In its Memorial, Mondev submits a new argument based on Article 1103 of the NAFTA. Although Mondev's Article 1103 claim consists only of two paragraphs of argument (Mem. ¶¶ 207-208), it nevertheless is one of which Mondev did not provide notice to the United States prior to the submission of its Memorial. Indeed, this is the first time Mondev identifies either Article 1103 or the supposed treatment of Swissôtel as the basis for a claim against the United States in this case. Because Mondev has not

complied with the procedural prerequisites necessary to engage the consent of the United States under the NAFTA, the Article 1103 claim is not within the scope of the agreement to arbitrate. The claim must in any event be rejected, however, because it is time-barred and it is entirely unfounded.

1. Mondev's Article 1103 Claim Is Not Within The Scope Of The Disputing Parties' Consent To Arbitration

By first giving the United States notice of its Article 1103 claim in its Memorial on February 1, 2001, Mondev failed to meet the requirements of Articles 1119 and 1122. As a result, Mondev's Article 1103 claim is not within the scope of the disputing parties' consent to arbitration and, therefore, there is no basis for Mondev to present it as an ancillary claim under Article 48 of the Arbitration (Additional Facility) Rules.

To begin, the settlement of investment disputes between a NAFTA Party and an investor of another Party is governed by Section B of Chapter Eleven. Pursuant to Article 1119 of Section B, a disputing Party is entitled to receive, and an investor "shall deliver," written, advance notice of its intent to submit a claim to arbitration "which notice shall specify: . . . (b) the provisions of this Agreement alleged to have been breached; [and] (c) the issues and the factual basis for the claim" NAFTA art. 1119. Mondev's notice of intent specified that it sought to submit under Article 1116 – on its own behalf – claims that the United States had breached three such provisions: Article 1102, Article 1105 and Article 1110. *See* Notice of Intent at 1 (May 6, 1999).

Accordingly, after waiting the requisite 90 days, Mondev delivered its notice of arbitration, again, submitting to arbitration under Article 1116 claims that the United States is liable to Mondev for loss and damage caused by breaches of Articles 1102, 1105

and 1110. *See* Notice of Arb. at 69-70, ¶ 121 (Sept. 1, 1999). Consequently, by operation of Article 1122, the United States consented to Mondev's submission to arbitration, on its own behalf, of only these three claims and no others. *See* NAFTA art. 1122(1) ("Each Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement.*") (emphasis supplied).

Article 48 of the Arbitration (Additional Facility) Rules, however, permits incidental or additional claims *only if* they are "within the scope of the arbitration agreement of the parties." As a result, in this case, the scope of the United States' and Mondev's agreement to arbitrate is limited to settlement of Mondev's Article 1116 claims for breach of the NAFTA provisions on national treatment (art. 1102), minimum standard of treatment (art. 1105) and expropriation and compensation (art. 1110). This Tribunal therefore has no authority to allow Mondev to present in its Memorial a new claim under Article 1103.

2. The Only Facts Alleged In Support of Mondev's Article 1103 Claim Occurred Before 1990

That Mondev's Article 1103 claim is based on allegations of pre-NAFTA treatment dating as far back as 1984 proves equally fatal. Indeed, the entirety of Mondev's Article 1103 claim is founded on a single and very general comparison of the treatment the City and the BRA allegedly accorded LPA in its transaction with Swissôtel in 1984 by (Mem. ¶ 207), and the treatment the same municipal entities accorded LPA prior to its option expiring in 1989 (Mem. ¶ 208 (alleging that "the City and the BRA chose to engage in inordinate and unjustified delays" when dealing with LPA under the Tripartite Agreement)). Mondev offers no other facts in support of its Article 1103 claim.

For the reasons stated in Part I above, Mondev's Article 1103 claim is time-barred.

3. In Any Event, Mondev's Article 1103 Allegation Is Entirely Without Merit

Even assuming this Tribunal is competent to hear Mondev's Article 1103 claim, the single piece of evidence Mondev puts forth to support its claim fails to meet the "in like circumstances" requirement of Article 1103. NAFTA art. 1103 ("[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party"). Mondev suggests that the Tribunal should consider that the City and the BRA "promptly granted" LPA approval to sell Swissôtel certain rights in the Lafayette Place Project, while they allegedly delayed "in their dealings with Mondev" with respect to the other unidentified aspects of the project. Mem. ¶ 208.

Mondev, however, fails to explain to the Tribunal how this allegation establishes a breach of Article 1103. Mondev sheds no light on how favorable treatment of an application *by LPA* to sell a part of the hotel portion the Lafayette Place project could establish a denial of most-favored-nation treatment *to LPA* in unidentified other dealings. Mondev does not clarify how the treatment accorded LPA – or even *which* treatment accorded LPA – was less favorable than the treatment accorded LPA in its transaction with Swissôtel. Nor does Mondev even attempt to define the "like circumstances" required for the analysis.

It is not the burden of the United States to hypothesize as to the "like circumstances" that would be appropriate for comparison purposes. That the Hayward

Parcel option expired, however, without resulting in the transfer of ownership from the City to LPA cannot establish that Swissôtel received more favorable treatment from the City and the BRA. Mondey’s cursory Article 1103 claim – like its Article 1102 claim – is therefore unfounded.

V. MONDEV HAS FAILED TO CARRY ITS BURDEN OF ESTABLISHING ITS OWNERSHIP OF THE RIGHTS AT ISSUE

In its Memorial, Mondey does not dispute that its claims based on breach of the Tripartite Agreement must fail unless LPA is the legal owner of the rights under that Agreement at issue.⁹⁸ Mondey also concedes that the Bank’s foreclosure of the Mortgage in 1991 “extinguished” any and all rights of LPA granted to the Bank as security in the Mortgage.⁹⁹ Instead, Mondey offers several baseless contentions in an attempt to avoid the legal consequences of the plain text of the Mortgage.

As demonstrated in the accompanying Expert Opinion of Karl B. Holtzschue, however, Mondey’s contentions are without merit. *First*, Mondey’s suggestion that the Mortgage does not establish “the *revealed intention* of the parties to create security in the collateral” finds no support in the instrument’s text.¹⁰⁰ The Mortgage states in pertinent part as follows:

. . . TO SECURE THE PAYMENT of an indebtedness in the sum of . . . \$50,000,000 . . . AND ALSO TO SECURE the performance of . . . this mortgage, [LPA] hereby mortgages and GRANTS to [the Bank] . . .
. . .
. . .
. . . all rights and benefits, if any, of whatsoever nature now or hereinafter derived or to be derived by the mortgagor under or by virtue of

⁹⁸ See Mem. at 30-31 ¶¶ 95-96.

⁹⁹ See Expert Opinion of Robert E. Scott, Jan. 29, 2001, at 10 ¶ 10.

¹⁰⁰ *Id.* at 5 ¶ 5(a) (emphasis in original).

the following instruments . . . , including, without limitation, . . . all rights to exercise options . . . : . . . the Tripartite Agreement . . . , excluding any rights of the mortgagor thereunder to develop parcels adjacent to the premises¹⁰¹

As Professor Holtzschue observes, it is difficult to imagine how an intent to create security in this collateral could more clearly be revealed.¹⁰²

Second, Mondeev contends that the right to purchase the Haywood Parcel and to sue for breach of the Tripartite Agreement constitute “rights of [LPA under the Tripartite Agreement] to develop parcels adjacent to the premises” that were therefore excluded from the security granted by the Mortgage.¹⁰³ Curiously, Mondeev does not look to the Tripartite Agreement to determine the content of “rights . . . *thereunder* to develop parcels.” It looks elsewhere for the simple reason that, as Professor Holtzschue explains, the Tripartite Agreement clearly indicates which rights may be considered “rights . . . to develop.” Those rights – relating to the Tripartite Agreement’s program for developing the Lafayette Place project area – are not the rights relating to the purchase of the Hayward Parcel and the right to sue for breach of the Agreement that are at issue here.¹⁰⁴

Instead, Mondeev erroneously asserts – relying on a provision of the law governing the sale of goods that has no application to mortgages – that the terms of this exclusion in the Mortgage can be divined from isolated statements made in the years *after* the Mortgage was executed and recorded. As Professor Holtzschue observes, the notion that such *post hoc* statements “could indicate that the Bank did not have a mortgage on

¹⁰¹ Expert Opinion of Karl B. Holtzschue, May 31, 2001, US App. III at Tab A, Exh. 2 at 2-3 (hereinafter “Holtzschue Opinion”).

¹⁰² See Holtzschue Opinion at 8-10 ¶ 4(b).

¹⁰³ See Expert Opinion of Robert E. Scott, Jan. 29, 2001, at 6-9 ¶¶ 7-8.

¹⁰⁴ See Holtzschue Opinion at 11-13 ¶ 4(c)-(d).

property clearly described in the Mortgage would be a shocking notion to lenders. They consider a mortgage to be written in stone, and alterable only by a written document signed by the lender in proper form and recorded.”¹⁰⁵ Because the Tripartite Agreement classifies rights to develop differently from rights to purchase or to sue for breach, the phrase “rights . . . thereunder to develop parcels” did not exclude from the Mortgage the rights that Mondeve purports to assert in this arbitration.¹⁰⁶

Finally, Mondeve disingenuously suggests that this arbitration is the first time any party has asserted that the Bank’s foreclosure extinguished LPA rights under the Tripartite Agreement.¹⁰⁷ Mondeve’s position, however, is not supported by the record. To the contrary, the record shows that LPA knew from the very beginning that its claim to own the rights it asserted was questionable.¹⁰⁸ The City and the BRA expressly denied during the course of that litigation that LPA owned those rights.¹⁰⁹ The fact that the Massachusetts courts ultimately found LPA’s claims to be without merit on other grounds in no way supports Mondeve here.

In sum, under the plain terms of the Mortgage, LPA’s rights to seek to purchase the Hayward Parcel and to claim damages for a breach under the Tripartite Agreement

¹⁰⁵ *Id.* at 15 ¶ 4(d).

¹⁰⁶ *See id.* at 5-8 ¶¶ 4(d)-5.

¹⁰⁷ *See Mem.* at 30 ¶ 95 (suggesting that “the United States takes the position that it now has discovered that throughout nearly seven years of litigation between LPA and the City and the BRA, unbeknownst to the Bank and its successors, the City, or the BRA, LPA in fact was an ‘imposter’ seeking to recover compensation on the basis of claims that in fact already had been transferred to the Bank.”) (footnote omitted).

¹⁰⁸ *See SJC App. 1* at A22 ¶ 45 (LPA’s Amended Complaint, Mar. 30, 1992) (alleging that the Bank “foreclosed Campeau’s and LPA’s interests in the Lafayette Place retail mall. LPA’s interests in the Hayward Parcel, however, were not within the security which LPA had given to the [Bank], and were not foreclosed.”).

were extinguished by the Bank's foreclosure sale. Its claims here based on those rights are inadmissible.

VI. THE TRIBUNAL LACKS JURISDICTION OVER MONDEV'S NEW ARTICLE 1117 CLAIM

For much the same reasons as those expressed above with respect to Mondev's Article 1103 claim, the claim under Article 1117 that Mondev advances for the first time in its Memorial is also outside the scope of the United States' consent to arbitrate in Chapter Eleven. *See supra* at 68-69. Mondev made no reference to a claim under Article 1117 in the notice of intent to submit a claim to arbitration required by Article 1119. The United States' consent to arbitrate, however, encompassed only those claims as to which the NAFTA's procedures had been followed, including Article 1119. *See* NAFTA art. 1122(1) ("Each Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement.*") (emphasis supplied). Because the Article 1117 claim is not "within the scope of the arbitration agreement of the parties," it cannot be admitted as an incidental or additional claim. Arbitration (Additional Facility) Rules art. 48.

In addition, Mondev in any event has not complied with the NAFTA's formal requirements to seize the Tribunal with jurisdiction over an Article 1117 claim. *See* NAFTA art. 1121(2)(a) ("only if" enterprise consents in writing to arbitration may Article 1117 claim be submitted); *id.* art. 1125(c) (Article 1117 claim may proceed "only on

¹⁰⁹ *See* SJC App. 3 at A429 ("LPA claims that as it was the developer of Lafayette Place it has the right to purchase the Hayward Parcel despite the fact that its interests in Lafayette Place were foreclosed upon in 1991 and it no longer has any interests of any sort in the project.").

condition” that enterprise agrees in writing to appointment of members of tribunal).
Mondev’s Article 1117 claim fails for this reason as well.¹¹⁰

VII. OBSERVATIONS ON MONDEV’S PRINCIPLES OF COMPENSATION

In its Order of September 25, 2000, the Tribunal ordered that “the issue of quantum of damages, should it arise for determination, [be] disposed of separately and subsequently.” September 25 Order at 5. For the reasons expressed in the preceding Parts of this Counter-Memorial, the United States respectfully submits that Mondev’s claims are ill-founded and there is no occasion to consider the question of damages at all.

In addition, although Mondev in its Memorial purports to offer “observations on principles of compensation” (in the form of two very general citations), Mondev to date has provided no inkling of even the nature of the supposed damages that justify its demand of \$50 million. *See* Mem. ¶¶ 209-210. The United States can hardly join issue on “principles of compensation” without at least some idea as to the general heads of

¹¹⁰ Mondev’s suggestion that “in international law . . . questions of form are less important than they are in many systems of municipal law” is both wrong and misses the point. Mem. ¶ 110. While international law provides the rule of decision here, *see* NAFTA arts. 102(2) & 1131(1), the law governing this arbitration is municipal. *See* Additional Facility Rules art. 3 comment (Additional Facility awards “are not insulated from national law and . . . their recognition and enforcement will be governed by the law of the forum”). National laws do not necessarily view notice requirements that are a precondition to consent to arbitration as matters of form that can be ignored in determining arbitrability. *See, e.g., Raceway Park, Inc. v. Local 47, Service Employees Int’l Union*, 167 F.3d 953, 955-56 (6th Cir. 1999) (affirming lower court’s finding that dispute was not arbitrable for failure to comply with notice of intent procedure, although questioning whether that issue should have been resolved by arbitrator rather than court). Nor, contrary to Mondev’s suggestion, is compliance with preconditions to a State’s consent to jurisdiction ignored by tribunals governed by international law. *See, e.g., Legality of the Use of Force (Yugo. v. Belg.)*, 1999 I.C.J. ¶ 44 (June 2 Order on Provisional Measures) (declining to consider supplemental application introduced late in provisional measures procedure absent respondent’s consent); *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, 1995 I.C.J. 6, 23 ¶ 43 (“the Court is unable to entertain a case so long as the relevant basis of jurisdiction has not been supplemented by the necessary act of seisin: from this point of view, the question of whether the Court was validly seised appears to be a question of jurisdiction.”).

damages claimed. The United States therefore respectfully submits that it is in no position to address “principles of compensation” at this stage in any event.

As stated in the United States’ preliminary objections, the Tribunal is competent to award “monetary damages” or “restitution of property” pursuant to Article 1135(1) only for loss or damage incurred *by Mondev* – and not by LPA – “by reason of, or arising out of, that breach.” NAFTA art. 1116(1). Mondev claims that it can establish such damages to support its claim under Article 1116 – the only one properly before this Tribunal. Mem. ¶ 91; *see supra* Part VI. The United States expressly reserves its right, should it become necessary, to submit argument on the issue of whether Mondev has met its burden of establishing the loss or damage required by Article 1116(1).

VIII. OBSERVATIONS ON OTHER POINTS IN MONDEV’S STATEMENT OF LAW

Mondev devotes a substantial portion of its statement of the law to a number of points that the United States does not dispute for purposes of these proceedings. For the convenience of the Tribunal, the United States briefly reviews those points below.

Final Judicial Act. The United States is satisfied with Mondev’s showing that, under United States law, review of the SJC’s determination of the BRA’s status under the Massachusetts Tort Claims Act was not available in the United States Supreme Court. The United States therefore does not dispute, for purposes of these proceedings, that the court decisions challenged by Mondev were final manifestations of justice within the U.S. system, as required for State responsibility potentially to attach under customary

international law.¹¹¹ While it disagrees with Mondev's characterization of this substantive requirement of the rules of State responsibility as an aspect of the procedural rule of exhaustion of local remedies¹¹² and with Mondev's other arguments to this point based on international law, the United States respectfully submits that the issue is not presented for decision in this case, given the disputing parties' agreement that the SJC's decision was a final judicial act on the point in question.

International Law Governs. The United States agrees with Mondev that the NAFTA is to be interpreted in accordance with international law and that the NAFTA and international law provide "the rules of law . . . applicable to the substance of th[is] dispute." Arbitration (Additional Facility) Rules art. 55(1); *see* NAFTA arts. 102(2) & 1131(1); Mem. ¶¶ 124-125.

Attribution Of Local Governmental Acts. The United States does not contest for purposes of these proceedings the attribution to it of the acts of the local governmental entities at issue here, including the City, the BRA and the Massachusetts courts. *Cf.* Mem. ¶¶ 126-131. The general attribution of such acts, of course, does not address the

¹¹¹ *See* EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 198 (1915) ("It is a fundamental principle that [with respect to acts of the judiciary] . . . only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state."); LEAGUE OF NATIONS PUBLICATIONS, *BASES OF DISCUSSION*, Vol. III *Responsibility of States* pp. 41-51 (1920) ("It is not disputed that the courts are able to involve the State in responsibility, but the judicial decision with which it is confronted must be final and without appeal."); *Christo G. Pirocaco v. Republic of Turkey* (1923), *reprinted in* FRED K. NEILSEN, *AMERICAN -TURKISH CLAIMS SETTLEMENT UNDER THE AGREEMENT OF DECEMBER 24, 1923* at 587, 599 (1937) ("As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort.").

¹¹² "The rules relating to denial of justice, with which the local remedies rule is often confused, spring from different roots." David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389, 411 (1964). The reason for this conflation is simple: if a claimant has exhausted local remedies, the claimant will generally have obtained a decision of a court of last resort, unless such recourse is obviously futile or manifestly ineffective. Thus, unless the requirement that local remedies be exhausted has been waived, an international tribunal charged with considering a claim for denial of justice will necessarily have determined that the decision at issue is that of a court of last resort.

question of whether in a given situation the NAFTA or particular customary international law authorities do or do not suggest an international obligation with respect to such local governmental acts. *Cf. supra* note 40 and accompanying text.

CONCLUSION AND SUBMISSIONS

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against Mondev, dismissing Mondev's claims in their entirety and with prejudice; and (b) pursuant to Article 59 of the Arbitration (Additional Facility) Rules, ordering that Mondev bear the costs of this arbitration, including the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the United States in connection with the proceeding.

Respectfully submitted,

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