

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

**REJOINDER ON
COMPETENCE AND LIABILITY OF
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Barton Legum

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

David A. Pawlak

Laura A. Svat

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

October 1, 2001

CONTENTS

PRELIMINARY STATEMENT	2
I. EXCEPT FOR MONDEV’S DENIAL OF JUSTICE CLAIM, ALL OF MONDEV’S CLAIMS ARE TIME-BARRED	5
A. It Is Common Ground That Pre-NAFTA Acts Of The City And The BRA Cannot Constitute Violations Of NAFTA Obligations	5
B. Alleged Unsatisfied Pre-NAFTA Breaches Of Customary International Law Did Not In 1994 Become Violations Of Article 1105(1).....	7
1. Article 1105(1) Addresses Obligations Owed By State Parties, Not The Remedies Due Upon Their Breach.....	8
2. The Obligation Of A State To Make Reparations Under The Customary International Law Of State Responsibility Is Owed To States, Not Private Persons	10
3. Mondev’s “Continuing Violation” Theory Would Render Ineffective The Three-Year Time Limitation Of Articles 1116(2) And 1117(2).....	12
II. MONDEV’S CLAIMS OF DENIAL OF JUSTICE UNDER ARTICLE 1105(1) ARE WITHOUT MERIT	14
A. The Free Trade Commission Has Rejected The <i>Pope & Talbot</i> View Of Article 1105(1)	14
B. Mondev Was Not Denied Access To The Massachusetts Courts	16
1. International Law Does Not Require A State To Subject Itself To Suit In Its Own Courts As If It Were A Private Person.....	17
2. State Practice Does Not Support Any Rule Of International Law Barring Sovereign Immunity	20
3. The Law Of Foreign Sovereign Immunity Refutes The Contention That States Must Subject Themselves To Suit In Their Own Courts	23
4. The BRA Was Not Immune From Constitutional Torts Approximating The International Minimum Standard	26
C. The SJC’s Decision Amply Accords With The International Minimum Standard ..	29
1. Only Outrageous Judicial Decisions Can Constitute A Denial Of Justice.....	30
2. The SJC’s Application Of A Long-Standing Rule Of Contract Law Was Just And Proper	32

3. The SJC’s Finding Of Insufficient Evidence For Any Jury To Find In LPA’s Favor Is Sound Under Massachusetts And International Law.....	35
III. MONDEV’S EXPROPRIATION CLAIM FAILS TO ESTABLISH A BREACH OF NAFTA ARTICLE 1110	41
A. The Claim Of Expropriation Under Article 1110 Is Time-Barred.....	41
B. Mondev’s Claim Of Expropriation In The 1980s Is Meritless In Any Event.....	48
IV. MONDEV FAILS TO ESTABLISH A VIOLATION OF ARTICLE 1102	52
V. MONDEV FAILS TO REFUTE THAT LPA’S OWNERSHIP OF THE RIGHTS AT ISSUE WAS EXTINGUISHED IN 1991	55
VI. ARTICLE 1116 PROVIDES NO BASIS FOR MONDEV TO SUBMIT A CLAIM FOR INJURIES ALLEGEDLY SUFFERED BY ITS INVESTMENT.....	60
VII. THE TRIBUNAL LACKS JURISDICTION OVER MONDEV’S ARTICLE 1117 CLAIM.....	61
CONCLUSION AND SUBMISSIONS	63

**RESPONSE TO MONDEV’S OBSERVATIONS ON THE
UNITED STATES’ FACTUAL APPENDIX**

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

**REJOINDER ON
COMPETENCE AND LIABILITY OF
RESPONDENT UNITED STATES OF AMERICA**

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 rejoinder 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").¹

¹ The materials submitted to this Tribunal with Mondev's Memorial and the United States' Counter-Memorial are cited herein in the style set forth in footnote 1 to the Counter-Memorial. In addition, Mondev's Reply is cited herein as "Reply" and its Observations on the United States' Statement of Facts is cited herein as "Mondev Factual Obs." The appendix of evidentiary materials accompanying this Rejoinder is cited as "US App. [volume] at Tab [letter/number]." The Rejoinder's Response to Mondev's Observations on the United States' Factual Appendix will be cited as "US Factual Resp." The United States denies the facts stated in Mondev's Reply except to the extent specifically admitted herein. *See* Arbitration (Additional Facility) Rules art. 38(3).

PRELIMINARY STATEMENT

The United States began its Counter-Memorial with the observation that the case presented in Mondev's Memorial was significantly different from that of its Notice of Arbitration. In response to the showing made in the United States' Counter-Memorial, Mondev's Reply yet again attempts to reinvent its claims. The Reply, notably, abandons Mondev's claim of a violation of the NAFTA's most-favored-nation provision. It further casts aside Mondev's varied and unfounded charges of denial of justice by the Massachusetts Superior Court.

In place of these and other assertions, the Reply offers a novel theory that, by agreeing to accord specified standards of treatment to investments of investors of other Parties, the NAFTA Parties also necessarily agreed to pay reparations for supposed *past* wrongs. The Reply places new emphasis on Mondev's assertion that, despite seven years of litigation, LPA was denied access to the Massachusetts courts. And, in an effort to found an international claim under the NAFTA on the unremarkable and dated events at issue here, the Reply offers a flood of rhetoric and, in many instances, distorts the record and authority cited beyond what either can fairly support.

Mondev's claims as recast in the Reply are without merit. *First*, Mondev's strained attempt to characterize events of the late 1980s as a violation of a 1994 treaty fails. The treatment of investments required by Article 1105(1) does not include an obligation to remedy all supposed past wrongs. Mondev's inventive theory that that Article includes a "continuing obligation to make reparations" finds no support in the text of the treaty or in established principles of international law.

Second, Mondev's assertion that LPA was denied recourse to the Massachusetts courts in violation of international law is unfounded. As even the authorities cited by Mondev recognize, there is no general requirement that States subject themselves to suit in their own courts. Neither international law nor State practice supports Mondev's assertion that the established municipal-law principle of sovereign immunity applied in LPA's case is internationally unlawful.

Third, Mondev's attempt to find a denial of justice in a respected nine-member appellate court's unanimous decision, authored by a preeminent jurist and scholar, lacks credibility. Mondev's suggestion that the SJC announced a "new rule" in LPA's case is unsupported. Indeed, the supposed "new rule" is stated in the same words Mondev recites in a decision issued in 1991 – a year *before* LPA brought its suit. There is similarly no basis for Mondev's contention that the SJC erred in concluding that the evidence could not support an assertion that the City had repudiated the contract – an assertion that LPA never made in the Massachusetts courts. Far from a denial of justice, the record reflects that the SJC carefully reviewed LPA's positions and found them wanting, in a considered and well-reasoned decision.

Fourth, Mondev's allegation of a 1980s "expropriation" that violated NAFTA Article 1110 is unfounded. As an initial matter, the claim is plainly time-barred. Mondev's assertion to the contrary is based on the theory that, in cases where the State denies that any expropriation takes place, any breach occurs not immediately but only after the claimant has invoked local procedures to determine that a taking has occurred and to award just compensation. Mondev's theory is contrary to the text of Article 1110 and to the overwhelming weight of international authority.

Fifth, Mondev's assertion of an expropriation is in any event without merit. Contrary to Mondev's distorted account, the record of events in the 1980s before this Tribunal conclusively shows that LPA's contractual rights were never taken by the State. Instead, Mondev's claims of "expropriation" hinge on the same issues of Massachusetts law that the SJC ultimately and fairly resolved in its reasoned decision. There was no expropriation, and no breach of Article 1110, here.

Sixth, the Reply effectively concedes that Mondev's national treatment claim is without merit. Mondev does not suggest that, after the NAFTA's entry into force, LPA received "treatment" from any governmental organ other than the courts. It acknowledges that the courts acted without any bias. Moreover, it does not attempt to identify any U.S. investment in "like circumstances" that received more favorable treatment. Mondev has no Article 1102 claim.

Finally, the United States respectfully submits that, far from being "frivolous" as Mondev asserts, its objections to competence dispose of the claims they address. The United States' temporal objection requires the dismissal of the bulk of Mondev's claims. As demonstrated further below, it is Mondev – not the United States – that misunderstands the facts and the law with respect to the ownership of the contract-based claims. And, as clearly stated in the Counter-Memorial, the United States did not abandon its objection to Mondev's ability to assert an Article 1116(1) claim, but, rather, reserved its objection. Mondev's characterization of that objection as "frivolous" rings hollow, given that Mondev has not offered a shred of evidence to support its own, conclusory allegation that it suffered a direct injury distinct from that of LPA.

As demonstrated in the Counter-Memorial and below, Mondev's claims are without merit. They should be dismissed in their entirety.

I. EXCEPT FOR MONDEV'S DENIAL OF JUSTICE CLAIM, ALL OF MONDEV'S CLAIMS ARE TIME-BARRED

A. It Is Common Ground That Pre-NAFTA Acts Of The City And The BRA Cannot Constitute Violations Of NAFTA Obligations

As the written phase of this proceeding concludes, it is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA's entry into force. The disputing parties agree both that the provisions of the NAFTA do not apply retroactively and that tribunals may not consider alleged breaches of obligations other than those named in Chapter Eleven.² The disputing parties also agree that the NAFTA's provisions, notably the three-year time limitation of Articles 1116(2) and 1117(2), establish the NAFTA Parties' intent to exclude stale claims.³

It follows, therefore, that the only measures even arguably capable of giving rise to liability under Chapter Eleven in this case are the acts or omissions of the various courts that heard LPA's case. Mondev concedes this much as well. The City's and the BRA's dealings with LPA – save for their defense against LPA's lawsuit – concluded years before LPA initiated litigation in 1992. Thus, none of the alleged acts or omissions

² See Counter-Mem. at 20-21; Reply ¶ 46 (asserting that all claims here “rely on obligations which existed under NAFTA *on or after 1 January 1994*, and acts or omissions occurring *after that date*, giving rise to breaches of those obligations *after that date*”) (emphasis in original); see also Reply ¶ 193 (“A breach of NAFTA Article 1105(1) can occur only after NAFTA entered into force on 1 January 1994.”).

³ See Reply ¶¶ 38, 204 n.267.

of the City or the BRA can constitute a breach of the NAFTA.⁴ Nor does Mondev allege that the City or the BRA breached the NAFTA after January 1, 1994. All that remains to be considered by the Tribunal for purposes of establishing liability, therefore, are the acts or omissions of the courts during the pendency of LPA's case.

Notwithstanding the disputing parties' agreement as to these general parameters on consideration of Mondev's claims, Mondev's Reply, like its Memorial, is replete with assertions based on stale acts or omissions of the City and the BRA. For example,

- Mondev bases its Article 1102 claim entirely on statements allegedly made by the City and the BRA,⁵ yet fails to explain how any one of them could have constituted "treatment" of, or injury to, LPA within the admissible time frame for purposes of Article 1102.
- The supposed expropriation of the Hayward Parcel option, and the City's and BRA's refusal to offer compensation therefor, pre-dates the NAFTA's entry into force by at least four years, but continues to form the basis of Mondev's Article 1110 claim.⁶
- Portions of Mondev's Article 1105(1) claim are based entirely on pre-NAFTA acts or omissions of the Boston municipal entities.⁷

While each of these instances will be addressed in the discussion of Mondev's individual claims that follows in Sections II, III and IV *infra*, the United States addresses as a

⁴ See Reply ¶ 166 ("the acts of the BRA and the City . . . [were] not violations of NAFTA obligations that were not yet in effect"). Indeed, international tribunals applying Article 28 of the Vienna Convention of the Law of Treaties have repeatedly found the non-retroactivity principle to bar consideration of claims originating before a treaty's entry into force, even though reference to earlier events as background was permitted. See, e.g., *Carranza v. Argentina*, Case 10.7087, Inter-Am. C.H.R., 4 BHRC 459, Report 30/97 (1997); *Consuelo v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309 & 10.311, Inter-Am. C.H.R., OEA/ser./L./V/II.83, doc. 14 at 41 (1993).

⁵ See Reply ¶ 224 ("prejudice on the part of the City and the BRA colored their treatment of Mondev and LPA, to their disadvantage").

⁶ See Reply ¶ 153.

⁷ See, e.g., Reply ¶¶ 166-197 ("The Acts Of The City And The BRA Were Inconsistent With The Standard Of Treatment Required Of The United States Under Customary International Law").

threshold matter the fundamental error that underlies Mondev's insistence that these claims are not stale.

B. Alleged Unsatisfied Pre-NAFTA Breaches Of Customary International Law Did Not In 1994 Become Violations Of Article 1105(1)

In an attempt to finesse the difficulty that the vast majority of the acts of which it complains took place years before the NAFTA went into effect (*see* Counter-Mem. at 18-19), Mondev introduces a new and novel theory in its Reply: that the alleged pre-NAFTA acts and omissions of the City and the BRA constituted violations of international law that remained unremedied by the United States and, upon the NAFTA's entry into force, "[t]he continuing failure to satisfy [the] continuing obligation to Mondev [to make full reparation] . . . constitutes a (continuing) violation of NAFTA Article 1105." Reply ¶ 200. In other words, Mondev posits that any supposed unsatisfied violation of international law (no matter how many years, decades or centuries in the past) became, in 1994, and remains, unless and until reparation is paid, a "continuing violation" of Article 1105(1).

Even assuming that the United States owed any obligation under customary international law to LPA, a U.S. company, Mondev's "continuing violation" theory cannot be reconciled with the plain text of the treaty or long-standing principles of international law. *First*, Article 1105(1)'s standard of "treatment of investments of investors of another Party in accordance with international law" on its face references *primary* international law obligations in the form of standards of treatment. The text of the NAFTA does not suggest any intent to encompass *secondary* obligations such as the requirement to make reparation. *Second*, Mondev's argument is based on the false

premise that the United States could owe an obligation of reparation under customary international law *to Mondev* in any event. Any breach of an obligation to make reparation to another State could hardly constitute “treatment” of Mondev within the meaning of Article 1105(1). *Finally*, Mondev’s argument, if adopted, would read NAFTA’s three-year prescription period out of the treaty. According to Mondev, an investor would be permitted to bring claims based on a supposed breach of the obligation to make reparation not within three years of the *original* breach, but for as long as the respondent State refused to accede to the investor’s demands. Fundamental principles of treaty interpretation (and common sense) preclude such a construction.

1. Article 1105(1) Addresses Obligations Owed By State Parties, Not The Remedies Due Upon Their Breach

Mondev’s contention that any unsatisfied obligation to make reparation for alleged pre-NAFTA violations of international law continues after January 1, 1994 and gives rise to a violation of NAFTA Article 1105 is without merit in any event. Its theory confuses the substantive obligations of customary international law with the remedy provided. Article 1105(1), by its plain terms, addresses primary substantive rules of conduct and not secondary rules such as the obligation to make reparation.

The distinction between primary and secondary rules is well established. Primary rules impose substantive obligations and standards of behavior upon States. Secondary rules establish procedural standards to determine the legal consequences that follow from a breach of the primary rules. The obligation to make reparation for a breach of international law, as articulated in the International Law Commission’s codification of the

Draft Articles on State Responsibility (and in Article 31, in particular), is such a secondary rule of international law. As the Commission itself explained:

In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed ‘primary’, as opposed to the other rules – precisely those covering the field of responsibility – which may be termed ‘secondary’, inasmuch as they are concerned with determining the consequences of failure to fulfill obligations established by the primary rules.⁸

Article 1105(1) clearly does not encompass secondary rules of international law.

That Article requires that Parties accord investors of another Party *treatment* in accordance with international law, thus signaling an intent to incorporate substantive, primary international law rules of behavior in the form of standards of treatment. Neither Article 1105(1) nor any other provision of Section A of Chapter Eleven purports to address the *consequences* of a breach of such a primary obligation. That subject is addressed comprehensively in Section B of Chapter Eleven (with respect to investor-State arbitration) and in Chapter Twenty (with respect to State-to-State dispute resolution).

Those Chapters, in turn, evidence an intent to create within the NAFTA a limited remedial scheme applicable to investment disputes that adopts some, but not all, of the secondary rules of reparation upon which *Mondev* relies. The NAFTA does not, for

⁸ Robert Ago, Special Rapporteur, *Second Report on State Responsibility* at 179, U.N. Doc. A/CN.4/233, in *Yearbook of the International Law Commission 1970*, Vol. II; *see also Report of the International Law Commission to the General Assembly on the Work of its Twenty-Second Session* 306, ¶ 66(c), U.N. Doc. A/8010/REV.1, *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1970*, Vol. II (“[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper[.]”).

example, include the general principle of *restitutio in integrum*.⁹ It is unreasonable to conclude, therefore, that the NAFTA Parties intended that the full panoply of customary international law secondary procedures and remedies, which go beyond the limited remedies of the NAFTA, would be encompassed among those primary obligations that are in fact within the scope of Article 1105(1).

In short, even if the United States did owe a secondary obligation to make reparation under international law in this case (which it did not), it would remain a secondary obligation under international law after the NAFTA entered into force. It would not be transformed into a primary substantive obligation merely because the NAFTA became effective. The plain text of the treaty provides no support for a contrary conclusion. Therefore, Mondev's novel "continuing violation" theory must fail.

2. The Obligation Of A State To Make Reparations Under The Customary International Law Of State Responsibility Is Owed To States, Not Private Persons

Additionally, Mondev misinterprets customary international law relating to the obligation to make reparation. If the United States owed any obligation to make reparation for the alleged acts and omissions of the City and the BRA (which it did not), that obligation would be owed to Canada, not Mondev. It is fundamental that the

⁹ Compare Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, arts. 31, 35, International Law Commission, U.N. Doc. A/CN.4/L/602/Rev.1 (2001) with NAFTA art. 1134 (limiting tribunal's authority even to make recommendations in provisional measures orders); *id.* art. 1135 (limiting tribunal's authority to award of monetary damages for breach); *id.* arts. 2018 & 2019 (providing for trade sanctions in event of non-compliance with final panel report in State-to-State disputes).

obligation to make reparation does not flow to private persons under international law, but only to States.¹⁰

Although Article 31 of the Second Reading of the ILC's Draft Articles on State Responsibility (as cited by Mondev on page 88 of its Reply) does not explicitly state that the obligation to make reparation is owed solely to States,¹¹ this is clearly the import of the drafters' language. In Article 42 (the predecessor to current Article 31) of the First Reading of the Draft Articles, the text expressly provided that States are the parties to which reparations are owed:

The injured *State* is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.¹²

The text of Article 42 was revised in the Second Reading only to emphasize the obligation of the State that committed the wrongful act and to reduce possible confusion regarding situations in which multiple States are injured. The drafters certainly did not

¹⁰ See, e.g., *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 24 (Apr. 6) (Judgment) ("by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law") (internal quotation omitted); *Panevezys-Salutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. 4, 16 (ser. A/B) No. 76 (Feb. 28) (Judgment), in 4 World Ct. Rep. 341, 357 (1943) (same); F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

¹¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 31.

¹² *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Commission on First Reading*, art. 42(1), International Law Commission (1996), available at <http://www.law.cam.ac.uk/rcil/ILCSR/Arts.htm> (emphasis added).

intend to change the basic precept that only injured *States*, and not individuals, are owed reparations.¹³

As a private party, Mondev would thus not be owed reparation by the United States under customary international law. Any failure to meet an obligation owed only to another State can hardly qualify as “treatment” of “investments of investors of another Party.” NAFTA art. 1105(1). Mondev’s claim that Article 1105(1) encompasses a “continuing obligation of reparation” fails as a matter of fundamental principles of international law.

3. Mondev’s “Continuing Violation” Theory Would Render Ineffective The Three-Year Time Limitation Of Articles 1116(2) And 1117(2)

Finally, Mondev’s novel theory cannot be squared with the text of NAFTA Articles 1116(2) and 1117(2). According to Mondev, any breach of an international obligation that remains unremedied gives rise to an actionable obligation under Article 1105(1), because:

[T]he obligation to make full reparation is a continuing one. It continues from the day it arose until the day (which has not yet come) when it is satisfied.

Reply ¶ 200.

¹³ See James Crawford, Special Rapporteur, *Third Report on State Responsibility* § 25-26, International Law Commission, 52d Sess., U.N. Doc. A/CN.4/507 (2000). Moreover, many States expressed approval of the concept that reparations are only owed to States, not individuals. See, e.g., *Draft Articles on State Responsibility: Comments of the United States of America*, at III.1 (Oct. 22, 1997), available at <http://www.law.cam.ac.uk/rcil/ILCSR/USA.rtf> (“Draft article 42(1) appears to state correctly that a wrongdoing State is under an obligation to provide ‘full reparation’ to an injured *State*, in addition to ceasing unlawful conduct.”) (emphasis added); *Draft Articles on State Responsibility: Comments and Observations of the Government of the Federal Republic of Germany*, at VIII (Dec. 18, 1997), available at <http://www.law.cam.ac.uk/rcil/ILCSR/Germany.rtf> (expressing “agreement with the basic rule, contained in Article 42(1), that the injured *State* is entitled to full reparation in the form mentioned.”) (emphasis added).

Mondev's theory would have the effect of stripping the three-year prescription period of Articles 1116(2) and 1117(2) of any effect, since there would never be any occasion in which those Articles could operate to bar a claim. Under Mondev's theory, even if an investor was fully aware of a supposed breach and resulting damages in January 1994 and did nothing for over three years, the investor could always still pursue the breach in the guise of a violation of the supposed continuing "obligation to make full reparation." Thus, under Mondev's theory, notwithstanding the three-year limitation, the NAFTA Parties' exposure to claims would continue forever – "from the day [of the breach] until the day (which has not yet come) when it is satisfied." Reply ¶ 200.

Established principles of treaty interpretation, however, compel the rejection of this intellectual sleight-of-hand. It is well established that treaty provisions must be given a construction that renders them effective.¹⁴ Because Mondev's new theory renders the three-year prescription period ineffective, it cannot be reconciled with that principle.

In conclusion, this Tribunal is not, as Mondev suggests, "competent to assess what consequences may flow from facts and events that pre-date NAFTA." Reply ¶ 40.

Certainly, the Tribunal *may* consider *facts* that pre-date the NAFTA – a point that Mondev rehearses at great length in its Reply.¹⁵ Indeed, the entire record before the SJC

¹⁴ See *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) (Judgment) (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.") (collecting authorities); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) (Judgment) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

¹⁵ See Reply ¶ 39 (citing SECOND REPORT ON STATE RESPONSIBILITY, ¶ 121 n.234, for the proposition that pre-obligation conduct "might be relevant *as facts*"). Although the proposition is not remarkable (*see id.* ¶ 43 n. 87), the United States notes that this particular comment from the report addresses composite acts (*e.g.*, genocide), which are not relevant here. *See id.* ¶ 121 n.234. As the report makes clear, "a state can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct." *Id.* ¶ 43. Here, such obligations are limited to those in Section A of Chapter Eleven. *See*

(which, the United States submits, is *all* the Tribunal may consider in the instant case) depicts events that pre-date the NAFTA. As Mondev aptly notes: “Tribunals are well able to identify and reject claims which, on their individual facts, are stale or otherwise to be regarded as over and done with and now a matter of history.” Reply ¶ 204 n.267. Just so with respect to Mondev’s claims of wrongful acts in the 1980s.

II. MONDEV’S CLAIMS OF DENIAL OF JUSTICE UNDER ARTICLE 1105(1) ARE WITHOUT MERIT

A. The Free Trade Commission Has Rejected The *Pope & Talbot* View Of Article 1105(1)

As a general matter, Mondev is correct in recognizing that “[b]oth parties agree that the standard of treatment set forth in Article 1105(1) . . . requires States to provide treatment in accordance with principles of customary international law.” Reply ¶ 48. In its Reply, however, Mondev directs this Tribunal’s attention to the decision this spring in *Pope & Talbot v. Canada*, which suggested that NAFTA Article 1105(1) incorporates not only the customary international law minimum standard of treatment of aliens, but also certain undefined, subjective “fairness elements.” Reply ¶ 49. Mondev asserts that although it “need not rely on this view of the Article 1105 obligations of the United States, in view of the *Pope & Talbot* case Mondev’s claims under that Article . . . are even more compelling.” Reply ¶ 50.

Mondev was right not to rely on *Pope & Talbot*’s approach to Article 1105(1). As the Tribunal is aware, on July 31, 2001, the Free Trade Commission, established under NAFTA Article 2001, issued a binding interpretation of NAFTA Article 1105(1). The

Feldman, Interim Decision at 29-30, ¶ 61; *Azinian*, 14 ICSID REV. – FOREIGN INV. L. J. at 562, ¶ 82 (cited in Counter-Mem. at 22 & n. 20).

Free Trade Commission's binding interpretation of NAFTA Article 1105(1) rejected the *Pope & Talbot* tribunal's reading of that Article when it confirmed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." FTC Interpretation of July 31, 2001 ¶ B(1). Contrary to *Pope & Talbot's* approach, "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." *Id.* ¶ B(2). Similarly, contrary to the approach of the *S.D. Myers* and *Metalclad* tribunals also cited by Mondev in the Reply (¶¶ 54-57), "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." *Id.* ¶ B(3).

The Free Trade Commission's interpretation is binding on this and other NAFTA Chapter Eleven tribunals. *See* NAFTA art. 1131(2). Thus, the erroneous interpretations of Article 1105(1) of the *Pope & Talbot*, *S.D. Myers* and *Metalclad* tribunals, far from making Mondev's claims "even more compelling," are not helpful to Mondev's case.¹⁶

Finally, the United States agrees with Mondev that the customary international law standards incorporated into Article 1105(1) may evolve with time. The evolution of such standards, however, may only be established by the familiar showing of State

¹⁶ Mondev's reliance on *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Nov. 13, 2000) also is misplaced. *See* Reply ¶¶ 58, 185. The award in that case characterized certain facts – facts that established a classic expropriation under customary international law – as a "lack of transparency," using the *Metalclad* tribunal's phraseology. The *Maffezini* decision, based on a peculiar Spain-Argentina BIT, is of little assistance here, particularly given that the Supreme Court of British Columbia rejected "transparency" as a rule of law incorporated into Article 1105(1). *See* Reply ¶ 57; *see also* FTC Interpretation ¶ B. Mondev's reliance on passing *dicta* in the *Loewen* tribunal's interim decision on jurisdiction on "full protection and security" – an issue not briefed by the parties at the jurisdictional phase – is misplaced as well.

practice and *opinio juris*. The burden of establishing the existence and content of a rule of customary international law, of course, rests on the party asserting the existence of the rule.¹⁷ Awards of Chapter Eleven tribunals that all three NAFTA Parties have expressly disavowed cannot, as a matter of law, provide the required showing.

B. Mondev Was Not Denied Access To The Massachusetts Courts

There is no merit to Mondev's contention that, notwithstanding seven years of litigation in Massachusetts, LPA was denied access to the courts of the United States. Reply ¶¶ 61-100. Mondev bases its contention solely on the fact that the Massachusetts courts dismissed on legal grounds of two of the six claims asserted in LPA's amended complaint: one on the ground that the BRA was immune from this particular type of claim, and the other on the ground that the Massachusetts statute relied upon did not encompass the conduct at issue. Mondev's argument is without merit for a number of reasons.

First, contrary to Mondev's contention, there is no general customary international law requirement that a State permit individuals to bring suit against it as if it were a private party. *Second*, Mondev has not demonstrated, and cannot demonstrate, State practice supporting Mondev's assertion of an international bar to sovereign immunity against the types of actions at issue in this case. *Third*, Mondev's reliance on

¹⁷ See *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Aug. 27) (Judgment) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) (Judgment)) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 330 § 214 (6th ed. 1999) (burden on party “who relies on a custom to establish its existence and exact content”) (“c’est à [la partie] qui s’appuie sur une coutume d’en établir l’existence et la portée exacte”) (translation by counsel); BROWNLIE at 11 (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”).

international principles of foreign sovereign immunity is irrelevant and supports a contrary conclusion in any event. *Finally*, at bottom, Mondev's complaint is not that LPA was denied access to court to raise its grievances, but that the law applicable in suits against the BRA was not as favorable to LPA as Mondev would have liked it to be. That, however, provides no basis for an international claim. State practice, as reflected in decisions of courts in private transnational disputes, confirms the absence of any breach of an international obligation here.

1. International Law Does Not Require A State To Subject Itself To Suit In Its Own Courts As If It Were A Private Person

International law does not support Mondev's assertion that "[a]ny immunity from judicial scrutiny . . . limits and *pro tanto* renders ineffective the possibility of recourse to domestic courts in pursuit of claims [and] thereby lays [the State] open at the international level to a claim for denial of justice." Reply ¶ 91. To the contrary, international law – as articulated by the very commentators Mondev cites – confirms that the familiar municipal-law doctrine of sovereign immunity does not effect a denial of justice.

Although Mondev quotes liberally from Alwyn Freeman's treatise in support of its claim that LPA was denied access to the Massachusetts courts, it omits the passage following the one it quotes in its Reply (at ¶ 64):

[T]here are other cases in which *it cannot be said that any international obligation has been violated* by the failure to give a remedy. This is true, for example, *when complaints are directed against the highest authorities of the State*; for as most states do not furnish adequate remedies in such

cases it seems difficult to deduce from any ‘general principles of law’ an international duty to provide means of redress.¹⁸

The Harvard Research Draft, which Mondev also invokes (Reply ¶ 63), similarly recognizes that “[a]gainst the highest organs of the state who speak for the state, [local] remedies are rarely available.”¹⁹ The Harvard Research Draft nowhere suggests that sovereign immunity by itself violates any international norm. Instead, it identifies the obligation of access to courts as one “to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.”²⁰ Charles de Visscher concurs that “one cannot consider a denial of justice the absence of judicial or administrative recourse against the measures taken by the higher authorities of the State, the legislature or the government, as long as this absence results from the general legislation of the State and not from a measure of discrimination against aliens.”²¹

Each of those authorities also recognizes the separate proposition that, when a State is immune from suit in its own courts, there is no requirement to exhaust local

¹⁸ ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 228 (1970) (emphasis added).

¹⁹ RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS (Harvard Law School), comment to art. 7, in 23 AM. J. INT’L L. 133, 157-58 (Sp. Supp. 1929) (“1929 HARVARD RESEARCH DRAFT”).

²⁰ *Id.* art. 5, 23 AM J. INT’L L. at 147; *see also id.* comment to art. 5 (“if nationals may sue wrongdoing officers or even the state in its own courts, aliens should have the same privilege”) (emphasis added).

²¹ Charles de Visscher, *Le déni de justice en droit international*, 52 R.C.A.D.I. 367, 395 (1935) (translation by counsel) (“on ne saurait assimiler à un déni de justice l’absence de recours judiciaire ou administratif contre les mesures prises par les autorités supérieures de l’Etat, la législature ou le gouvernement, en tant que cette absence résulte de la législation générale de l’Etat et non d’une mesure de discrimination contre les étrangers.”); *see also id.* at 396 (“in the present state of the constitutional organization of countries, even the best organized, [the absence of remedies against sovereign action] cannot, as a general rule, be viewed as a breach of the obligation of judicial protection equivalent to a denial of justice.”) (translation by counsel; footnotes omitted) (“dans l’état actuel de l’organisation constitutionnelle des pays, même les mieux organisés, elle ne peut, en règle générale, être envisagée comme un manquement au devoir de protection judiciaire équivalent à un déni de justice.”).

remedies before a claim may be brought for internationally wrongful acts.²² It is this procedural proposition, moreover, that Clyde Eagleton addressed in the passage incompletely quoted by Mondev (Reply ¶ 64) as supporting its contention that sovereign immunity necessarily constitutes a denial of justice.²³ This aspect of the local remedies rule, however, in no way supports Mondev's assertion that delictual acts of a State that are not in themselves internationally wrongful become so merely because the State is immune from suit for such acts in its own courts.

The European Court on Human Rights provides further support for the proposition that international law does not forbid immunity. Although Article 6 § 1 of the European Convention on Human Rights provides without qualification that “[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by [a] . . . tribunal,” the Court has held that “the right of access to courts is not

²² See FREEMAN at 228-29 (“All of which simply signifies that a direct international action can be initiated on the score of the original misconduct, resort to local remedies being here impossible.”); 1929 HARVARD RESEARCH DRAFT, comment to art. 7, 23 AM. J. INT’L L. at 157 (“If the action by the official or authority is unreviewable by any other official or authority of the state, there are no local remedies the exhaustion of which is a condition precedent to state responsibility”); Charles de Visscher, *Le déni de justice en droit international*, 52 R.C.A.D.I. 367, 395-96 (1935) (“The absence of recourse against such measures obviously does not exclude international responsibility for the damages that result from these measures themselves [*i.e.*, those for which the State is immune from suit in its municipal courts]”) (translation by counsel) (“L’absence de recours contre ces mesures n’exclut évidemment pas la responsabilité internationale du chef des dommages qui résultent de ces mesures elles-mêmes”); see also *Forêts du Rhodope Central (Fond) (Greece v. Bulg.)*, 3 R.I.A.A. 1389, 1405, 1420 (Ad Hoc Tribunal Mar. 29, 1933) (no exhaustion of local remedies generally required where “the wrongful act consists of measures taken by the Government or by a member of the Government, in the exercise of his official functions. It is rare that there exist local remedies against the acts of the most authorized organs of the State.”) (translation by counsel) (“la règle de l’épuisement des recours locaux ne s’applique pas, en général, lorsque le fait incriminé consiste en des mesures prises par le Gouvernement ou par un membre du Gouvernement, dans l’exercice de ses fonctions officielles. Il est rare qu’il existe des remèdes locaux contre les actes des organes les plus autorisés de l’Etat.”).

²³ Clyde Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT’L L. 538, 557 (1928) (“When a state has failed to provide a remedy to meet a certain situation, as, for instance, an arbitrary act by the head of the state, which results in injury to an alien, diplomatic interposition may take place *at once*.”) (emphasis added).

absolute, but may be subject to limitations,” including the imposition of sovereign immunity.²⁴

Given the above, Mondev’s argument that the United States has failed to comply with the “obligation to afford [LPA] a right of recourse to the local courts to seek redress for purported wrongs done” is without merit. Reply ¶ 61. LPA received precisely the same access to the Massachusetts courts that was available to U.S. nationals: no U.S. national may sue the BRA for an intentional tort in Massachusetts, and no U.S. national can assert a claim for a breach of Chapter 93A against governmental entities. As demonstrated in sub-part C below, LPA was provided access to a highly sophisticated legal system that amply met the standards of justice required under international law. International law requires no more than that, and Mondev, notably, offers no authority to suggest that more was required. *See* Reply ¶¶ 61-93. Given the absence of support, Mondev has not – and cannot – make out a claim for denial of justice.

2. State Practice Does Not Support Any Rule Of International Law Barring Sovereign Immunity

Mondev fails to meet its burden of proving that the form of municipal sovereign immunity at issue in this case breaches the requirements of Article 1105(1). Rather, relying on inapposite authority, Mondev presents an aspirational view of the law governing State immunity. *See* Reply ¶¶ 77-8 & n.102. But “trends” or “developments”

²⁴ *Ashingdane v. United Kingdom* ¶¶ 57-59, Eur. Ct. H.R., 7 E.H.R.R. 528 (1985), WL 311178; *see also id.* (rejecting the applicant’s Article 6 § 1 claim, holding that the imposition of immunity did not “transgress the principle of proportionality,” and was in pursuit of a “legitimate aim” of avoiding the “mischief . . . of [governmental officials] being unfairly harassed by litigation”); *id.* ¶ 57 (“[I]t is no part of the Court’s function to substitute for assessment of the national authorities” but rather, under international law, limitations on access to courts “may vary in time and in place according to the needs and resources of the community and of individuals.”).

alone are insufficient to establish a rule of customary international law.²⁵

Notably, Mondev's assertion that "the degree to which States generally now subject themselves to the jurisdiction of their own courts is immeasurably greater than it was half a century ago" fails to prove its point. Reply ¶ 77 & n.102. The statutory schemes Mondev cites in support of this proposition do not establish that State practice requires sovereign liability under the circumstances present here.²⁶

Mondev's reliance on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), is also misplaced. Consistent with general State practice, the United States Supreme Court in *Larson* agreed with the district court's dismissal of the plaintiff corporation's complaint as an impermissible suit against the sovereign. *Larson*, 337 U.S. at 688. Far from adopting the "view that 'the principle of sovereign immunity is an archaic hangover not consonant with modern morality . . . that therefore should be limited wherever possible'" as Mondev suggests,²⁷ the *Larson* court held that "in the absence of

²⁵ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("general and consistent practice of states followed by them from a sense of legal obligation" required to establish rule of customary international law); see also *id.* comment b ("Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights. . . . Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law[.]").

²⁶ The immunity for intentional tort found in the Massachusetts Tort Claims Act at issue here is consistent with that provided by the Federal Tort Claims Act, 28 U.S.C. § 2680(h). In addition, contrary to Mondev's suggestion, the Tucker Act, 28 U.S.C. § 1491, does not allow for suits against the United States that sound in tort. See, e.g., *Clark v. United States*, 461 F.2d 781, 783 (Ct. Cl. 1972) (noting that the Court of Federal Claims, a creation of the Tucker Act, "does not have jurisdiction of tort claims"). Nor does the Administrative Procedure Act, 5 U.S.C. § 701, *et. seq.*, grant courts jurisdiction over tort claims not already conferred by statute. See e.g., *First Nat'l Bank of Scotia v. United States*, 530 F. Supp. 162, 167 n.4 (D.D.C. 1982) (the Act was not designed to confer jurisdiction not already provided by statute); *Redman v. F.A.A.*, 759 F. Supp. 1384, 1387 (D. Minn. 1991) (same).

²⁷ Reply ¶ 78. The full quotation from *Larson* also contradicts Mondev's assertion (Reply ¶ 78) that the U.S. Supreme Court lent its support to the "view" stated in the text: "*It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible.*" See *Larson*, 337 U.S. at 703 (emphasis added).

consent, [the court] has no jurisdiction” over a suit against the government. *Larson*, 337 U.S. at 688.

Mondev thus fails to rebut the observation of the United States’ Counter-Memorial that, despite trends that have resulted in a relaxation of the scope of sovereign immunity, State practice has not eliminated immunity altogether. *See* Counter-Mem. at 53. A recent comparative study of governmental liability law, surveying the law of England, Scotland, Canada, Australia, New Zealand, the United States, Ireland, Belgium, France, Italy, Germany and the European Community, confirms that “[t]he disappearance or weakening of sovereign immunity does not mean that all immunities for particular state bodies have disappeared”.²⁸

[I]n no legal system today is [government] liability the same as that of private individuals or corporations. The reasons for this are partly historical, linked to the reasons for sovereign immunity But other reasons continue to be valid. The government exists for the benefit of the community, not just private advantage. The acts of government determine important aspects of public and private well-being. . . . Its special responsibilities need to be reflected in the scope of its liability. Its activities, being intended for the welfare of society, must not be unduly restricted or encumbered.²⁹

Indeed, like the Massachusetts Tort Claims Act, the law in many jurisdictions throughout the world would restrict a State’s liability under the circumstances present here.³⁰ The

²⁸ JOHN BELL & ANTHONY BRADLEY, *GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY* 5 (U.K. National Committee of Comparative Law, 1991).

²⁹ *Id.* at 2.

³⁰ *See, e.g., London Borough of Hillingdon v. Secretary of State for the Environment* at 21, ¶ 6, Queen’s Bench Division (Crown Office List), CO/1604/98, O/1745/98 (July 30, 1999) (“except to the extent expressly or impliedly provided in the [United Kingdom] Planning Acts, . . . the Crown enjoys immunity at common law in relation to the development of land . . . in accordance with the normal common law principle of Crown immunity”); 1 CIVIL CODE OF THE PHILIPPINES ANN., art. 2180, at 1128, 1444-45 (13th ed. 1994) (the state is liable for damages arising from fault or negligent acts only when performed by its “special agents,” *i.e.*, those acting behalf of the government who receive a definite and fixed order or commission foreign to the exercise of the regular duties of office, “but not when the damage has been

record thus does not support the rule Mondev urges this Tribunal to recognize as a matter of first impression.³¹

3. The Law Of Foreign Sovereign Immunity Refutes The Contention That States Must Subject Themselves To Suit In Their Own Courts

Equally unconvincingly, Mondev looks to the international principles governing the jurisdiction of courts over *foreign* States – a body of law not at issue in this dispute – to support its view that municipal sovereign immunity is internationally illegal.³² Reply ¶¶ 81-84. The norms do not specify when a State *must* expose other States to such suits.

Mondev relies exclusively, and erroneously, on an article by Professor Hersch Lauterpacht to assert “a greatly restricted measure of [foreign sovereign] immunity” has

caused by the official to whom the task done properly pertains”); *see also id. citing Republic v. Palacio*, L-20322 (May 29, 1968) (Supreme Court of the Philippines applying Article 2180); *see also* J. CEZAR S. SANGCO, PHILIPPINE LAW ON TORT AND DAMAGES 199-201 (1978) (also addressing Article 2180); *Government Proceedings Act § 7 in STATUTES OF THE REPUBLIC OF SINGAPORE*, ch. 121 (1985 ed.) (no tort proceedings lie against the government “on account of anything done or omitted to be done or refused to be done by the Government or any public officer in the exercise of the public duties of the Government”); M.P. JAIN, ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE 566 (2d ed. 1989) (citing Malaysian Government Proceedings Ordinance § 7 (1956) for the same proposition); FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 500 (2d ed. 1993) (citing *Minister for Environmental Planning v. San Sebastian Pty Ltd.*, (1983) 2 N.S.W.L.R. 268, where Australian court found planning authority may not be sued in negligence in respect of plans for the redevelopment of inner Sydney because such standards reflect policy judgments and are non-justiciable); *Brown v. British Columbia (Minister of Transportation and Highways)*, 1 S.C.R. 420 (Can. 1994) (no liability arising from the imposition of a duty of care with respect to highway maintenance where reduced maintenance service was a policy decision based on consideration of financial resources).

³¹ Mondev’s vague claim that “Canada . . . has opened itself to a broad range of tort liability” and unsupported statement that “Mexico similarly is subject to suit for various types of activities . . .” do not suffice to satisfy Mondev’s burden to establish the existence of a rule of customary international law. Mondev’s reliance on Professor Hersch Lauterpacht’s article on *foreign* sovereign immunity provides no support for Mondev’s position either. As demonstrated below, Professor Lauterpacht contends only that *absolute foreign* sovereign immunity “has already been jettisoned by the majority of states.” Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 226 (1951). *See infra* at II.B.3.

³² Mondev has seized, apparently, upon a footnote in the Counter Memorial which reads, “[f]oreign sovereign immunity is of course a familiar and recognized doctrine in international law.” Counter-Mem. at 53 n.69 (emphasis in original).

been adopted “over the last half of the twentieth century.” Reply ¶ 83.³³ In sharp contrast to what Mondev suggests, however, Professor Lauterpacht’s article does not contend that the absence of immunity is customary international law.³⁴ Rather, Professor Lauterpacht merely acknowledges that the doctrine of *absolute* foreign sovereign immunity “has already been jettisoned by the majority of states.” Lauterpacht at 226. But so too has the Massachusetts legislature jettisoned *absolute* state immunity in its own courts. *See* First Opinion of Judge Kass ¶¶ 71-72, US App. I (“Kass Opinion”); *see also* Counter-Mem. at 53. Thus, the principal proposition advanced by Professor Lauterpacht is one with which the Massachusetts Tort Claims Act is in full accord: “[T]he doctrine of *absolute* immunity . . . has been abandoned.” Lauterpacht at 226 (emphasis added).

In addition, Mondev fundamentally misconstrues the nature of international norms concerning foreign sovereign immunity. Those norms specify the conditions under which a State *may*, if it deems it advisable, expose other States to suits in the State’s courts. Principles of foreign sovereign immunity, of course, shed little light on the question before this Tribunal – whether a State must subject itself to suit in its own courts with respect to the conduct at issue here. Mondev’s reliance on authorities addressing foreign sovereign immunity is misplaced in any event. In fact, a number of States continue to

³³ Mondev apparently found Professor Lauterpacht’s article on *foreign* sovereign immunity material to the issue of a sovereign’s immunity in its own courts based on Professor Lauterpacht’s passing suggestion that certain considerations prevent “too wide a gap between the law governing immunities of the home state and the law . . . relating to the immunities of foreign states.” Lauterpacht at 221.

³⁴ In fact, Lauterpacht acknowledges that the norm under international law is to grant jurisdictional immunity to other states. *See* Lauterpacht at 228 (“The view that there is at present no rule of international law which obliges states to grant jurisdictional immunity to other states is, admittedly, unorthodox and . . . startling.”). Moreover, in “discuss[ing] the question of jurisdictional immunities of foreign states . . . and the legal possibility and desirability of the abolition . . . of the principle of *absolute* immunity,” Lauterpacht acknowledges that such abolition would be “subject to specified exceptions and safeguards.” Lauterpacht at 250.

provide for absolute or near-absolute foreign sovereign immunity.³⁵ Thus, Mondev is hardly justified in its leap in logic, asserting that “a claim to immunity . . . amounts, in fact, to a denial of justice.” Reply ¶ 92. To the contrary, State practice in the area of foreign sovereign immunity establishes that international law permits States to afford absolute sovereign immunity from suit in their courts.

Also in its discussion of *foreign* sovereign immunity, Mondev erroneously contends that the BRA’s claim to immunity should have been denied because “[i]t is well established in international law that taking steps in legal proceedings relating to the merits of the case constitutes a waiver of immunity.” Reply ¶ 89(c). As an initial matter, Mondev’s reliance on State practice regarding waiver of *foreign* sovereign immunity from jurisdiction is not relevant to the imposition of municipal immunity at issue here. Regardless, again, State practice does not support Mondev’s view, but rather reflects that municipal courts routinely accept claims to immunity by foreign States long after legal

³⁵ See, e.g., U.N. GAOR, 37th Sess., 6th Comm., U.N. Doc. A/C.6/37/SR.39-51 (1982) (including the comments of the following States (followed by the Summary Report numbers and page numbers for their arguments) that opposed the restrictive theory of sovereign immunity: USSR (SR.39 at 9-10), Jamaica (SR.40 at 8-9), German Democratic Republic (SR.40 at 16-17), People’s Republic of China (SR.44 at 11), Chile (SR.44 at 17- 18), Byelorussian SSR (SR.45 at 6), Venezuela (SR.45 at 10-11), Czechoslovakia (SR.46 at 3-4), Mongolia (SR.46 at 16), Poland (SR.46 at 17), Ukrainian SSR (SR.46 at 26), Syria (SR.47 at 8), Tunisia (SR.47 at 21), Bulgaria (SR.48 at 14), Indonesia (SR.48 at 16-17), Bahamas (SR.48 at 18), Argentina (SR.49 at 8), Sierra Leone (SR.49 at 12), Libya (SR.49 at 16), Ethiopia (SR.50 at 5), Iraq (SR.50 at 13-14), Zaire (SR.51 at 5-6), Hungary (SR.51 at 9-10), Kenya (SR.51 at 12), Trinidad and Tobago (SR.51 at 15), and Mexico (SR.47 at 15-16); Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE L. 22, 26-27 (1987) (discussing 1979 response by twenty-seven States to a United Nations International Law Commission questionnaire regarding State jurisdictional immunity and reporting that fourteen grant to foreign States complete immunity, and that three others did not by then have legislation or judicial practice regarding the question); *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1494 (11th Cir. 1986) (“China asserts that restrictive sovereign immunity has not become a rule of international law, although in recent years some nations have begun to follow it, but these are, China says, only a small number of nations and by and large do not include developing countries, which find restrictive sovereign immunity not in their interest.”) (quoting U.S. statement of interest).

proceedings are initiated, and even following the entry of a default judgment.³⁶ Thus, contrary to Mondey's assertion, State practice relating to *foreign* sovereign immunity – if relevant at all here – provides no basis for Mondey's contention that the BRA's assertion of immunity under the Massachusetts Tort Claims Act was untimely.

4. The BRA Was Not Immune From Constitutional Torts Approximating The International Minimum Standard

Mondey's assertion that "the U.S. federal Civil Rights Act simply could not have provided LPA an effective alternative remedy in this case" misses the point. *See* Reply ¶¶ 97-98. Indeed, the United States has acknowledged that LPA would have had difficulty succeeding on such a claim. *See* Counter-Mem. at 54. Yet, oddly, Mondey has resorted to the rejoinder expert opinion of Kenneth W. Starr ("Starr Report") to confirm the United States' observation. *See* Starr Report ¶ 11, submitted Aug. 1, 2001.

The important point is, however, that Mondey errs in asserting that the BRA and its officials were absolutely immune from suit for allegedly wrongful acts. *See* Counter-Mem. at 53-54. The state and federal civil rights acts expose the BRA and its officials to suit for conduct that deprives persons of property without due process of law, as required by the United States and Massachusetts constitutions.³⁷

³⁶ *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 332 (S.D.N.Y. 1987) (vacating default judgment and allowing U.S.S.R to raise defense of sovereign immunity despite its "willful default"); *Jackson v. P.R.C.*, 794 F.2d at 1494-96 (upholding district court's decision to set aside default judgment when China raised meritorious defenses based on lack of subject matter jurisdiction due to issues of sovereign immunity); *United States of America v. Friedland*, 1999 A.C.W.S.J. LEXIS 26723, at **30 (Ontario Ct. of App., Dec. 23, 1999) (reversing finding by Ontario motions court that United States had waived immunity to counterclaim by submitting to jurisdiction).

³⁷ LPA, for example, brought a claim against the BRA under the Massachusetts civil rights act. LPA did not appeal the decision by the Massachusetts trial court dismissing that claim as factually insufficient to support a finding that the BRA or the city so threatened, intimidated or coerced LPA as to deprive it of its civil rights. *See* Counter-Mem. at n.75. In addition, to the extent that LPA's complaint was that the BRA refused to act on LPA's application in a timely fashion, LPA could have brought an action in the nature of

Mondev is correct that the standard for demonstrating a constitutional tort is more difficult to meet than that for demonstrating an interference with contractual relations under common law. *See* Reply ¶¶ 95-96. But this observation presents a question not of access to courts, but rather of the form of the remedy available in those courts. As Mondev concedes, however, a mere difference in the form of the remedy or the substantive law cannot form the basis of an international claim. *See id.* ¶ 71 (“[f]or the most part the provisions of a State’s municipal law and the particular causes of action available in that law are determined by that State . . .”).

Indeed, State practice in the private international law context confirms that States consider the legal systems of other States to be internationally adequate even where a claim provided under the law of one State is absent from or substantially limited in the other State. For example, State municipal courts routinely dismiss proceedings in favor of a more convenient foreign forum, finding such a forum to be adequate even where the cause of action pleaded in the forum State does not exist in the foreign court or is materially different there.³⁸ Similarly, State practice as reflected in municipal court

mandamus against the BRA and its officials requesting that the court order the BRA to act. *See Reid v. Acting Commissioner of Department of Community Affairs*, 362 Mass. 136, 137-38, 144 (1972) (considering petitioners’ request for a writ of mandamus to force BRA through the Department of Community Affairs and its commissioner to hold hearings on redevelopment project as an adjudicatory proceeding). If LPA found the result of the BRA’s decision on the application was unsatisfactory, LPA could have sought recourse under a statutorily-provided mechanism which applies specifically to the BRA. *See* Mass. St. 1960, c.652, ¶ 13 (“any person who is aggrieved by such vote [by the BRA], or any [BRA] officer or board, may file a petition in the supreme judicial or superior court sitting in Suffolk County for a writ of certiorari against the authority . . .”); *see also Boston Edison Co. v. Boston Redevelopment Authority*, 374 Mass. 37, 43-46 (Mass. 1977) (overruling trial court’s dismissal of action and holding that trial court had jurisdiction to hear petitioner’s complaint and correct errors of law committed by BRA against a person “who alleges a substantial injury as a direct result of the BRA’s action”). Instead, LPA opted to withdraw its application a mere fifty-six days after submitting it to the BRA, only to claim several years later that the BRA intentionally interfered with its contractual relations with Campeau.

³⁸ *DiRienzo v. Chodos*, 232 F.3d 49, 57 (2d Cir. 2000) (“The mere fact that the foreign and home fora have different laws does not ordinarily make the foreign forum inadequate.”); *see also La Societe du Gaz de Paris v. Les Armateurs Francais*, 23 Ll. L. Rep. 209, 210, 925 WL 23137 (1925) (affirming decision of

decisions, municipal codes and international agreements regarding the enforcement of judgments also demonstrates that a foreign State's legal system is considered to be internationally adequate even if the judgment is based on a cause of action that is non-existent or materially different from that in the recognizing State's system.³⁹

Mondev's contention that the United States violated international law by providing different standards for private and for constitutional torts therefore misses the mark. *See* Reply ¶¶ 73, 95. As demonstrated above, international law permits such differences. Mondev similarly misses the point in contending that "where a State's laws do make it wrongful to engage in a particular course of action . . . then the State has an obligation in international law to afford a foreign national the right to seek redress for that wrong through legal proceedings." *Id.* ¶ 73. The United States agrees that a State has

Scottish lower court granting motion for dismissal on forum non conveniens grounds despite possible unfavorable law in France).

³⁹ *See Compania Mexicana Rediodifusora Franteriza v. Spann*, 41 F. Supp. 907, 909 (N.D. Tex. 1941) (enforcing a foreign judgment granting attorney's fees where no law provided such in the enforcing jurisdiction: "That we do not have in Texas a statute which authorizes the imposition of costs which may include the defender's expenditure for an attorney will not sustain the claim that it is against the public policy of Texas for such a judgment to be entered[.]"); *Neporany v. Kir*, 5 A.D. 2d 438, 173 N.Y.S. 2d 146 (N.Y. App. Div. 1958) (enforcing Canadian judgment where similar U.S. law had been abolished: "under principles of comity we will recognize and enforce private rights acquired under valid foreign judgments provided they are jurisdictionally well founded and not contrary to our public policy"); *Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages of June 4, 1992*, Entscheidungen des Bundesgerichtshofes (Zivilsachen) BGHZ 118, 312 (1993) (Case reference IX ZR 149/91 Civil Division) *relevant excerpts reprinted in* 32 I.L.M. 1320, 1333 (1993) (Gerhard Wegen & James Sherer, trans.) ("The fact that the German judge, if he had had to make a decision on the trial, would, by the application of binding German law, have come to a different conclusion to that reached by the foreign court, does not mean that a foreign judgment is incompatible with substantial *ordre public*."); *WFM Motors Pty. Ltd. v. Malcolm Maydwell*, 1995 HKLRD 1047 (Hong Kong appeals court allowing for registration of New South Wales judgment); *see also* German Code of Civ. Proc. § 328 *paraphrased in Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments*, 32 I.L.M. 1320, 1322 (providing enforcement mechanism for foreign judgments); Mexican Commercial Code, art. 1347-A 1996 WL 919809 (Cod. Com) (same); CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (European Communities 1990), consolidated and updated text of BRUSSELS CONVENTION OF 1968, tit. III, § 2, *reprinted in* 29 I.L.M. 1413, 1425-28 (1990) (same); CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (European Communities-European Free Trade

such an obligation, but the obligation is that of providing redress equal to that provided under the State's laws to its own nationals. *See supra* notes 20-21 and accompanying text. Mondev does not dispute that LPA's access to the courts was identical to that of U.S. nationals in this respect.

The United States also agrees with Mondev that the remedies provided under a State's laws must conform to the international minimum standard. *See Reply* ¶ 71. In its Counter-Memorial (at 54), the United States noted that the federal constitutional standards of due process were similar in many respects to those of the international minimum standard, and observed that Mondev had offered no authority to suggest that international law required States to provide remedies to aliens broader than those recognized under the international minimum standard. Mondev's Reply does not dispute that absence of any such authority.

C. The SJC's Decision Amply Accords With The International Minimum Standard

In the Counter-Memorial, the United States demonstrated that Mondev's various allegations of procedural and substantive deficiencies in actions of the Massachusetts trial court and SJC were without merit. *See Counter-Mem.* at 56-60, 63-67. In its Reply, Mondev abandons all of its contentions concerning actions of the trial court and narrows its complaint concerning the SJC to two aspects of its decision: (1) the SJC's application of what Mondev contends is a "new rule" to the LPA case, and (2) the SJC's finding that LPA failed to prove repudiation on the part of the City, a finding that, Mondev asserts,

Association), *done at Lugano*, Sept. 16, 1988, tit. III, § 2, *reprinted in* 28 I.L.M. 620, 630-33 (1989) (same).

violated Massachusetts procedural rules. Reply ¶¶ 108-132. As demonstrated below, neither contention has factual merit or establishes a violation of international law.

1. Only Outrageous Judicial Decisions Can Constitute A Denial Of Justice

In its Reply, Mondev recognizes that “flagrant procedural deficiencies” or “gross defects in the substance of the judgment itself” are required to establish a claim of denial of justice. Reply ¶ 102 (quoting Freeman). The disputing parties thus concur that procedural or substantive denials of justice may be found only in extreme circumstances.⁴⁰ On the basis of four cited cases, Mondev identifies the types of “flagrant deficiencies” and “gross defects” that it contends are required to establish a denial of justice claim:

- where “the defects in the decision . . . cause the *inference of bad faith* on the part of the judges”; Reply ¶ 103 (quoting the *Martini* case) (emphasis added).
- where “the decision of the court was *lacking in good faith*”; Reply ¶ 104 (quoting the *Rahini* case) (emphasis added).
- when a tribunal, which is “always most reluctant to interfere,” determines the evidence is “*so far from . . . proving*” the case that the decision must be characterized as “*so unfair* as to amount to a denial of justice”; Reply ¶ 105 (quoting the *Bronner* case).
- when the conduct complained of to the municipal court indisputably constituted an “arbitrary and confiscatory breach” (Reply ¶ 106 (quoting the *Jalapa* case)) and the municipal court had *withheld decision for several years* beyond the time permitted under law. *Jalapa* at 543.

The SJC’s reasoned, commonplace application of contract law bears no resemblance to these cases. Mondev has made no showing of the requisite extreme

⁴⁰ See Counter-Mem. at 43 (“[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.”).

circumstances such as unwarranted delay or bad faith.⁴¹ International law sets a high threshold in this respect, recognizing a considerable margin of appreciation on the part of national courts. Thus, it is clear that mere error alone on the part of the national court is not enough; what is required is “manifest injustice” or “gross unfairness,”⁴² “flagrant and inexcusable violation,”⁴³ or “palpable violation” in which “bad faith not judicial error seems to be the heart of the matter.”⁴⁴ Nor can mere error be transformed into a substantive denial of justice just because that error had grave consequences for the

⁴¹See also, e.g., EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 339-40 (Kraus Reprint Co. 1970) (1915) (describing as denials of justice “irregularities in the course of judicial proceedings” that are “sufficiently gross so as to become a denial of justice” as well as “grossly unfair or notoriously unjust” decisions); CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 114 (1928) (citing “manifest injustice” as the international standard of responsibility of the domestic judicial system); A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 CAN. Y.B. INT’L LAW 73, 93 (1976) (“The alien sustains a heavy burden of proving that there was undoubted mistake of substantive or procedural law leading to an adverse decision operating to his prejudice.”); 1929 HARVARD RESEARCH DRAFT, art. 9 & comment to art. 9, in 23 AM. J. INT’L L. at 186 (“It may be said that before an international claim ought to be considered well-founded it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion.”); LOUIS B. SOHN & R.R. BAXTER, *CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS*, comment to art. 8(a), at 98 (Harvard Law School, Draft No. 12, 1961) (“1961 HARVARD DRAFT CONVENTION”) (“The alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.”).

⁴²J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 1929 BRIT. Y.B. INT’L L. 181, 188 (“manifestly or notoriously unjust” decisions).

⁴³Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 267, 281 (1978).

⁴⁴2 DANIEL P. O’CONNELL, *INTERNATIONAL LAW* 948 (2d ed. 1970); see also, e.g., *Garrison’s Case (U.S. v. Mex.)* (1871), 3 MOORE, INT’L ARBITRATION 3129, 3129 (1898) (an “extreme” case where court “act[ing] with great irregularity” refused Garrison’s appeal “by intrigues or unlawful transactions”); *Rihani*, Am.-Mex. Cl. Comm’n (1942), 1948 Am. Mex. Cl. Rep. 254, 257-58 (finding decision of the Supreme Court of Justice of Mexico “such a gross and wrongful error as to constitute a denial of justice”); *The Texas Company*, Am.-Mex. Cl. Comm’n (1942), 1948 Am. Mex. Cl. Rep. 142, 144 (rejecting claim for failure to show error by Supreme Court of Justice of Mexico “resulting in a manifest injustice”); *Chattin (U.S.) v. Mexico* (1927), 4 R.I.A.A. 282, 286-87 (requiring that injustice committed by judiciary rise to the level of “an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man”).

claimant. “[J]udicial error, *whatever the result of the decision*, does not give rise to international responsibility on the part of the State.”⁴⁵

As Judge Tanaka of the International Court of Justice explained in the *Barcelona Traction, Light & Power Co. (Belg. v. Spain)* case:

It is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

1970 I.C.J. 3, 160 (Feb. 3) (separate opinion of Judge Tanaka).⁴⁶ No basis for such a “grave charge” is apparent in this case.

2. The SJC’s Application Of A Long-Standing Rule Of Contract Law Was Just And Proper

Mondev’s assertion that “upon appeal the SJC pronounced a new rule of law stating that ‘a buyer must manifest that he is ready, able and willing to perform *by setting a time and place for passing papers* or making some other *concrete* offer of performance”” is fanciful. Reply ¶ 112 (emphasis in original; quoting SJC Decision at 520). The principal terms used in the SJC’s supposed “new rule” are also found in that court’s 1957 decision in *LeBlanc v. Molloy*, where the court found that one party to a contract had placed the other in breach by “designat[ing] the place for performance of the

⁴⁵ REVISED DRAFT ON INTERNATIONAL RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS, art. 3(3), *reprinted in* GARCÍA-AMADOR, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 129, 130 (emphasis added).

⁴⁶ See also Eduardo Jiménez de Aréchaga, *International Responsibility of States for Acts of the Judiciary*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 171, 185 (Friedman et al., eds., 1972) (noting consensus between the disputing States in *Barcelona Traction* that only “gross and patent error in the application of municipal law or in finding the facts upon the basis of which the law to be applied gives rise to responsibility if palpable injustice results therefrom.”).

agreement” and the “*passing of the papers*” necessary to complete the transaction.⁴⁷ In fact, in a 1991 decision, the Appeals Court of Massachusetts – citing the same cases as those relied upon by the SJC in *Lafayette Place Associates* – stated the supposed “new rule” in *the same words* that the SJC later used in its 1998 decision:

To place the seller in default, the buyer was required, before the deadline for performance, to manifest that he was ready, able and willing to perform by setting a time and place for passing papers or making some other concrete offer of performance.⁴⁸

This is hardly a coincidence. The 1991 Appeals Court decision and that of the SJC in LPA’s case describe the rule in exactly the same way, because the same rule, established by the series of decisions from the 1950s and 1960s cited by both courts, had been in place in Massachusetts law for decades.

As demonstrated in the Counter-Memorial, the SJC’s application of this long-standing rule to the contract at issue before it, which was enforceable only because it set forth a series of formulae and mechanisms for fixing unspecified terms, was unremarkable. *See* Counter-Mem. at 45-46. As Judge Kass observes, “[Mondev’s] theory that the SJC propounded a new rule in the *Lafayette Place* case would have as a consequence that any application of an accepted principle to a particularized set of facts constitutes a new rule. That is not the way common law jurisprudence works.”⁴⁹ Indeed,

⁴⁷ *LeBlanc v. Molloy*, 335 Mass. 636, 638 (1957) (attached at Tab 5 to the Expert Opinion of Professor Daniel R. Coquillette, dated Feb. 1, 2001) (“The defendants argue that the plaintiffs had no right to *designate the place* for the performance of the agreement and that the defendants’ failure to appear there did not constitute a repudiation of the contract. We do not agree. It is fair to infer from the evidence that the defendants were notified a day or two before June 30, 1955, that the *passing of the papers* would be at Mr. Baker’s office on July 1, 1955.”) (emphasis added).

⁴⁸ *Simpson v. Vasiliou*, 29 Mass. App. Ct. 699, 703 n.3, 564 N.E.2d 607, 610 n.3 (1991).

⁴⁹ Kass Rejoinder Opinion at 3.

the essence of the judicial task in any system is the application of the law to the facts of the case. The SJC's doing so in this case violated no principle of international law.

Nor can an international violation be found in the fact that the SJC's decision in LPA's case now forms part of the common law of Massachusetts. As noted in the Counter-Memorial (at 49), common-law courts such as the SJC develop principles of law through incremental decisions determining the rights of the parties before them. That the interpretation of the law adopted in such decisions applies to the parties before such courts does not give rise to State responsibility for a violation of international law. To the contrary, State practice does not support Mondev's position that the "retroactive" application of law constitutes a violation of international law.⁵⁰ Thus, even if the SJC decision had announced a new rule of law (and it did not) and applied it in the case before it, such an application would not violate international law.⁵¹

⁵⁰ *Cf., e.g., National & Provincial Building Society v. United Kingdom*, 7 Eur. Ct. H.R. (1997), WL 1104645, in which the applicants argued that the United Kingdom had "thwart[ed] their access to a court" by enacting retroactive legislation that barred the applicants from seeking judicial review of their claim for restitution under certain tax provisions. *Id.* at ¶ 100. The court, while recognizing that the retroactive legislation had stripped the applicants of any judicial remedies, *see id.* at ¶ 106, nevertheless held that "Article 6 § 1 cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party." *Id.* at ¶ 112.

⁵¹ Mondev's observation that the SJC could have, in the event that it had considered itself to be announcing a new rule, determined not to apply it to the parties before it is therefore beside the point as a matter of international law. *See* Reply ¶ 114. The United States notes, however, that in any event LPA never suggested in the proceedings before the SJC that the SJC should not apply the supposed new rule to the parties before it. *See* LPA Letter Petition for Rehearing, June 10, 1998, Oleskey Statement, Exh. 24. Indeed, LPA's failure to assert either that the SJC had announced a new rule or that the SJC's holding should not be applied retroactively was the principal ground asserted for denial of LPA's petition for certiorari in the U.S. Supreme Court. *See* Respondent's Brief in Opposition at 8-14, Oleskey Statement, Exh. 28. Mondev may not assert in an international forum grounds for complaint never properly presented in the courts of the United States. *See infra* at note 58 and accompanying text.

3. The SJC's Finding Of Insufficient Evidence For Any Jury To Find In LPA's Favor Is Sound Under Massachusetts And International Law

There is no merit to Mondey's contention that the SJC erred in failing to remand and provide LPA another opportunity to prove its case as to whether the City had repudiated the contract to sell the Hayward Parcel. Reply ¶¶ 115-132. As Judge Kass makes clear, it is "the *duty* of the court when the plaintiff has not met its burden of proof to enter judgment for the defendant."⁵² Indeed, in Massachusetts as in many other jurisdictions, "it is the responsibility of the courts to determine whether there is sufficient evidence to take the case to the jury. So far from being a usurpation, it is a *judicial duty* provided for by court rule (Mass. R. Civ. P. 50) and a practice 'time tested and universally approved.'"⁵³

Mondev does not dispute that it was proper for the SJC to review the record to determine whether a reasonable jury could conclude from the evidence that LPA was excused from setting in motion the appraisal and arbitration mechanisms that were essential to the existence of an enforceable contract to sell the Hayward Parcel. *See, e.g.*, Reply ¶ 121. Nor does Mondey contend that the SJC did not give due consideration to LPA's arguments; indeed, the SJC's decision on its face establishes that the court carefully considered LPA's contentions. *See* SJC Decision at 522-23. Mondey's real complaint is that it does not like the result that the SJC reached, asserting that the SJC's finding of no repudiation demonstrated "an inexplicable and callous disregard for the evidence in the record." Reply ¶ 128. The "evidence in the record" Mondey cites

⁵² Kass Rejoinder Opinion at 10 (emphasis added).

consists of a number of alleged statements and actions by the City or the BRA between 1985 and early 1988. Reply ¶ 124(a)-(h). Mondey's contention is without merit for several reasons.

First, LPA never suggested to the SJC that these facts established a repudiation of the City's contract to sell the Hayward Parcel. As Judge Kass notes, "LPA did not press for a jury instruction on repudiation. That issue was not part of the case as LPA framed it at the state level, either at trial or on appeal."⁵⁴ To the contrary, LPA's position before the SJC was that "the date of the breach was January 1, 1989. . . , the last possible date by which the City's performance could occur."⁵⁵ LPA never asserted, as Mondey does now, that a repudiation took place at an earlier date. Rather, LPA represented to the SJC that, in March of 1988 and in exchange for millions of dollars, LPA sold Campeau LPA's contractual right to buy the Hayward Parcel and the City and the BRA "publicly applauded [Campeau]'s ambitious development plans" for the parcel and the project.⁵⁶ LPA further represented that "Campeau actively pursued the acquisition of the Hayward Parcel once it assumed control of the development."⁵⁷

LPA's position in the Massachusetts courts cannot be squared with Mondey's position before this Tribunal that there was "overwhelming" evidence of an earlier repudiation – evidence so clear that "[i]t is nothing short of inconceivable" that the SJC

⁵³ Kass Rejoinder Opinion at 5 (emphasis added) (quoting *Bonin v. Chestnut Hill Towers Realty Corp.*, 392 Mass. 58, 71 (1984) (Kass Opinion, Exh. 38)); *see also* Kass Opinion ¶¶ 64-68.

⁵⁴ Kass Rejoinder Opinion at 6.

⁵⁵ Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 62 (internal quotation omitted).

⁵⁶ *Id.* at 25; *see also* US Factual Resp. at 10.

⁵⁷ Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 38-39.

could reach the “incredible conclusion” that no repudiation had been established. Reply ¶¶ 124, 127, 130. LPA could hardly in good faith have sold an option on its rights to the Hayward Parcel for millions of dollars if, in fact, the City had repudiated those rights in such clear terms that “[i]t is nothing short of inconceivable” that anyone would think otherwise. Nor can Mondeu’s newly reinvented case be reconciled with LPA’s representation to the SJC that Campeau knowingly paid millions of dollars for such rights and “actively pursued” a closing on a contract if, as Mondeu now suggests, that contract had already been unequivocally repudiated. In short, had LPA been so inclined, it would have asserted in the Massachusetts courts that the City had repudiated the contract of sale by early 1988. It did not do so.

A denial of justice cannot be predicated on the basis of a position that an alien litigant could have taken, but did not, in the course of municipal judicial proceedings. To the contrary, there has long been “a translation into international law of the rule common to municipal systems that a litigant cannot have a second try if, because of ill-preparation, he fails in his action.”⁵⁸ That principle applies particularly when a litigant seeks a second round to use a strategy abandoned in the first one. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held earlier this year, “a party should not be permitted to refrain from making an objection to a matter which was

⁵⁸ 2 O’CONNELL at 1059; *see also* Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. at 282 (“[A] State cannot base the charges made before an international tribunal or organ on objections or grounds which were not previously raised before the municipal courts.”); *H.G. Venable (U.S. v. Mex.)*, 4 R.I.A.A. 219, 226 (Mex.-U.S. Gen. Cl. Comm’n 1927) (opinion of president of tribunal) (State cannot be held liable when, through “either lack of knowledge or of application on the part of his lawyer,” claimant failed to comply with procedural requirements of local law); *id.* at 252 (opinion of Mexican arbitrator) (where claimant representatives “had always available the means of taking action against such attachment; and if they did not take such action in the manner prescribed by Mexican laws, their fault, ignorance, or negligence can not be laid on the authorities or on the Government of Mexico.”).

apparent during the course of the trial and to raise it only in the event of an adverse finding against that party.” *Prosecutor v. Delalic*, IT-96-21-A (ICTY 20 Feb. 2001) ¶ 640. Mondev’s claims cannot be entertained to the extent they are based on positions LPA never advanced in the Massachusetts courts.

Second, the SJC’s rulings based on the argument LPA *did* make in the Massachusetts courts were eminently reasonable and just. Responding to the *City’s* argument that LPA had repudiated the contract, LPA advised the SJC that only a “definite and unequivocal manifestation of intention [not to render performance]” on the part of the contracting party could establish a repudiation.⁵⁹ In support of the jury’s finding of a breach, LPA pointed to three actions by the City: the City’s failure to obtain an appraisal for a small portion of the Hayward Parcel; the City’s preparation of a transportation plan that for a time considered a street through the parcel; and the fact that the City never transferred the parcel to LPA.⁶⁰ The SJC considered each of these, along with LPA’s other assertions concerning the City’s and the BRA’s conduct, and found that, whether “taken alone or together,” these facts did not demonstrate that the City “would not perform under the contract.” SJC Decision at 522. The SJC quite rightly observed that LPA sought “to attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving” – because matters such as the details of the conveyance and the appraisal values could be fixed through the mechanisms established in the Tripartite Agreement. *Id.* at 523.

⁵⁹ Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 37 (quoting *Hammond v. T.J. Little & Co., Inc.*, 82 F.3d 1166, 1178 (1st Cir. 1996)).

⁶⁰ *Id.* at 36.

LPA also cited before the SJC, as Mondev does before this Tribunal, an internal memorandum and minutes of City officers to the effect that LPA would realize a “windfall” from the sale and that certain of such officers desired to obtain fair market value for the Hayward Parcel.⁶¹ It did so, however, only as evidence of the City’s alleged bad faith and motivation to breach the contract, not as evidence of repudiation.⁶² No doubt, LPA refrained from arguing that such statements establish a repudiation because those statements plainly fell short of the standard of a “definite and unequivocal manifestation of intention” not to render performance that LPA asserted in its own defense,⁶³ and because internal statements such as these cannot amount to repudiation in any event.⁶⁴ The SJC thoughtfully considered LPA’s arguments as to bad faith, and found them wanting for a variety of reasons that Mondev does not challenge here. *See* SJC Decision at 524-27. Based on the arguments LPA presented, the SJC’s decision that no reasonable jury could find a repudiation based on the acts LPA alleged to be breaches was amply reasonable and correct.

Finally, even if it were appropriate to measure the SJC’s decision against not the arguments LPA made to it but rather those Mondev makes to this Tribunal (and, for the reasons noted above, it is not appropriate to do so), the SJC’s decision fully accords with

⁶¹ *Id.* at 37; Reply ¶ 124(b).

⁶² *See* Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 37 & n.42.

⁶³ *Id.* at 37.

⁶⁴ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981), Kass Rejoinder Opinion, Exh. 7 (“A repudiation is (a) a statement by the obligor *to the obligee* indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach”) (emphasis added); *id.* § 250 illustration 4 (“A tells C, a third person having no right under the contract, and not B, that he will not perform. C informs B of this conversation, although not requested by A to do so. A’s statement is not a repudiation.”); *see also Burlington Landmark Assocs., LLC v. RHI Holdings, Inc.*, 27 F.Supp. 2d 95, 99 (D. Mass. 1998) (same).

international standards of justice. None of the statements identified by Mondev communicated to LPA the “definite and unequivocal manifestation of intention” not to perform required for a repudiation. *See* Reply ¶ 124(a)-(c), (e)-(f). Nor did any of the acts identified by Mondev “render[] the [City] unable or apparently unable to perform” as required for an act to constitute a repudiation.⁶⁵

In the end, LPA’s failure to invoke the arbitration and appraisal machinery of the Tripartite Agreement left the SJC with precisely what Mondev offers this Tribunal: sheer, unsupported speculation as to whether, had LPA obtained the appraisals and an arbitral award resolving all the “appropriate details” of the purchase and sale of the parcel, the City would have “simply refused to perform under Section 6.02 of the Tripartite Agreement.” Reply ¶ 122. As the SJC concluded, the record does not provide an answer to that question. The SJC properly found that LPA did not present evidence from which a jury could conclude that the City repudiated the contract.⁶⁶

For these reasons, and for those set forth in the Counter-Memorial, it is apparent that the SJC decision amply met or exceeded international standards of justice. Mondev’s

⁶⁵ RESTATEMENT (2D) CONTRACTS § 250(b); *see* Reply ¶ 124(d), (g)-(h) (principally citing conduct of design review process). Moreover, as the SJC found, the evidence of record does not support Mondev’s suggestion that “any delay in the design review process prior to 1988 was attributable to bad faith on the part of the city or the BRA rather than a lack of preparedness or persistence on LPA’s part,” and the record contains “overwhelming evidence that the review process progressed appropriately as soon as Campeau initiated the process in the spring of 1988.” SJC Decision at 524 & n.18.

⁶⁶ Mondev’s additional assertion that the SJC violated international law by supposedly requiring “a heightened standard of performance . . . of private parties in contractual dealings with Government entities” is similarly without support. Reply ¶ 130. As an initial matter, the SJC made it clear that “governments are [not] absolved from performing contractual obligations.” SJC Decision at 523. Mondev’s suggestion that such a rule would violate international law is erroneous in any event. *See, e.g., Radio Corp. of America v. China*, 3 R.I.A.A. 1623, 1627 (Ad Hoc Arbitration under Traffic Agreement 1935) (“It is a correct rule, known and recognized in common law as well as in international law, that any restriction of a contracting Government’s rights must be effected in a clear and distinct manner. ‘Contracts affecting the public interest are to be construed liberally in favour of the public.’ The Plaintiff, dealing with a Government as its co-contracting party, will have borne this point in mind, in negotiating the terms of the agreement.”).

attempt to find “gross defects in the substance of the judgment itself” must therefore be rejected. Reply ¶ 102.

III. MONDEV’S EXPROPRIATION CLAIM FAILS TO ESTABLISH A BREACH OF NAFTA ARTICLE 1110

Mondev fails in its renewed attempt to characterize events in the 1980s as within the ambit of a treaty that went into effect in 1994. As demonstrated below, the arguments offered by Mondev in the Reply fail to overcome the United States’ showing that the expropriation claim is time-barred. Moreover, Mondev’s claim that its contract rights were expropriated in the 1980s is unfounded in any event.

A. The Claim Of Expropriation Under Article 1110 Is Time-Barred

It is now common ground between the disputing parties that, under Chapter Eleven, an uncompensated expropriation – if established in law and in fact – constitutes a breach of Article 1110: nothing more is needed to establish a breach if a claimant has met its burden of proving both an “expropriation” and a failure of “payment of compensation [without delay] in accordance with paragraphs 2 through 6.”⁶⁷ It is also undisputed that the acts alleged to constitute a taking by the City and the BRA, and the failure of the City and the BRA to pay or “even offer[.]” compensation, both pre-dated 1994.⁶⁸ Mem. ¶ 145.

⁶⁷ NAFTA art. 1110(1) & (3); *see also* Counter-Mem. at 27; Reply ¶ 163.

⁶⁸ *See* Mem. ¶¶ 140-141, 145; Reply ¶ 153. The United States observes that, in its Memorial, Mondev claimed that the other conditions required to comply with Article 1110, *e.g.*, Article 1110(1)(b) (“on a non-discriminatory basis”), were also unmet at the time of alleged expropriation by the City and the BRA. *See* Mem. ¶ 145, ¶ 204. Notably, however, Mondev does not repeat in its Reply its earlier allegation that the taking breached Article 1110 because it was discriminatory. Such an allegation surely would not square with its theory the SJC “completed” the breach of Article 1110. Namely, Mondev concedes that there was, in fact, no bias or treatment less favorable on the part of the Massachusetts courts (*see* Section IV *infra*)

In addition, it is common ground between the parties that, if a State provides adequate procedures for determining *the amount of the compensation due* upon an *admitted* expropriation, the breach of the obligation to compensate may occur subsequent in time to the expropriation.⁶⁹ Indeed, the notion is by no means controversial and, likely, explains why both Mondev and the United States sometimes cite the same legal authorities.⁷⁰ Yet that is the extent of the parties' agreement.

Mondev proceeds to make the remarkable assertion – without citing a single authority in support – that a breach of Article 1110 for failure to compensate is not complete in the case of indirect expropriation until the conclusion of all available “administrative or judicial procedure[s] for assessing *whether such an expropriation took place* and, if so, for providing compensation.” Reply ¶ 157 (emphasis added). As the discussion that follows demonstrates, Mondev’s unsupported argument has no merit.

First, Mondev’s analysis is inconsistent with the text of Article 1110(1)(d), which allows expropriation only “on payment of compensation in accordance with paragraphs 2 through 6.” Paragraphs 2 through 6, in turn, do not distinguish between direct and indirect takings. Rather, for all expropriations, these paragraphs require that compensation must, among other things, be made “without delay.” NAFTA art. 1110(3).

and, thus, it follows that the SJC could not possibly have “completed” the alleged breach of Article 1110 on the grounds of discrimination.

⁶⁹ See Counter-Mem. at 27 & n.26; Reply ¶ 155; see also Reply ¶ 156 (“[T]he critical question is whether the State has provided a means or a procedure for determining and awarding the required compensation.”); *id.* ¶ 159 (“When a foreign national invokes procedures to obtain compensation for a taking of its property, the State’s obligation not to expropriate without compensation is only breached upon the failure of those procedures to yield appropriate compensation.”).

⁷⁰ See, e.g., *Second Report on State Responsibility of Mr. Crawford, Rapporteur*, ¶ 144 (“[F]ailure to compensate . . . may be judged to have occurred at a time subsequent to the taking.”); see also Counter-Mem. at 30 (citing Crawford’s *Second Report on State Responsibility* and the Comments of the United Kingdom on the Draft Articles on State Responsibility); Reply ¶¶ 160-161 (citing same).

Nowhere does Article 1110 require a claimant to invoke domestic procedures to assess whether *an expropriation took place*. Thus Mondev’s argument, if adopted, would transform the State’s Article 1110 obligation not to expropriate without compensation into a demand that the claimant pursue domestic remedies to establish an expropriation in cases where a taking is denied by the State. Such an interpretation would write into Article 1110 a requirement that simply does not exist.⁷¹

Second, customary international law supports the United States’ interpretation of Article 1110 and refutes that of Mondev. As the United States demonstrated in its Counter-Memorial, where a State does not at the time of the expropriation either compensate, or make adequate provision for the prompt determination of compensation, the breach occurs at the time of the taking. *See* Counter-Mem. at 27 & n.26. Indeed, State practice and the opinions of commentators establish that unless a State “observes”⁷² at the time of the expropriation its obligation to refrain from uncompensated taking – for example, by fixing,⁷³ guaranteeing⁷⁴ or offering⁷⁵ compensation – a violation of

⁷¹ *See* Counter-Mem. 29 & n.28 (citing Wortley for the proposition that the claimant is obligated “to do more than show that it has not received adequate compensation”).

⁷² *See* Secretary of State Hull letter to Mexican Ambassador, Apr. 3, 1940, *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.”).

⁷³ *Anglo-American Oil Co. Case (U.K. v. Iran), I.C.J. Pleadings*, Memorial Submitted by the Government of the United Kingdom 64-125, 106 (Oct. 10, 1951) (“deferred payment may be interpreted as satisfying the requirement of payment in accordance with the rules of international law if . . . the total amount to be paid is fixed promptly”); RESTATEMENT (THIRD) FOREIGN RELATIONS § 712, comment d (recognizing that compensation may be “delayed pending administrative, legislative, or judicial processes for fixing compensation”).

⁷⁴ *See, e.g.*, Government of the Netherlands Note to Government of Mexico, Oct. 27, 1938, *cited in* Memorial of the United Kingdom, *Anglo-American Oil Co. Case (U.K. v. Iran), I.C.J. Pleadings* at 102 (“if the authority takes immediate possession of such goods a just and prompt indemnity shall be immediately and effectively guaranteed”).

⁷⁵ DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 489 (1975) (“The United States Government is deeply disturbed by the absence of any indication that the Government of Libya intends to

international law arises.⁷⁶ Even authorities that Mondev cites with approval also agree that at least an *offer* of compensation is required at the time of the taking for the breach to be deemed to occur subsequent to the time of the taking.⁷⁷ As Professor Kollelijn notes, “[i]t is surely not too much to ask of governments that by their acts they should leave no doubts about the payment of the compensation which is incumbent upon them and which will make the appropriation lawful.”⁷⁸

It follows that a breach may be recognized subsequent to the time of the taking only when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation.⁷⁹ In this way, a State may not avoid its obligation by establishing a procedure for the determination and payment of compensation that fails to measure up to international standards governing the

provide prompt, adequate and effective compensation for the foreign investments affected by this decree, as required by international law.”); *id.* at 490 (“In the view of the Government of the United States, the expropriation of 51 percent of the interests of these American companies operating in Libya . . . without the offer of adequate compensation would be . . . invalid under international law.”).

⁷⁶ See *e.g.*, CHARLES C. HYDE, 1 INTERNATIONAL LAW 718-19 (1945) (adopting the view that international law would allow “the fiscal equivalent of prompt payment, if duly arranged for at the outset”); BROWNLIE at 540 (“Expropriation of particular items of property is unlawful unless there is provision for the payment of effective compensation.”); *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 12 (breach of an obligation occurs when an act is “not in conformity with what is required of it”).

⁷⁷ See A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 314-15 (1962) (“if a State takes measures which affect the contractual rights of aliens without offering to compensate them for their losses, it is responsible internationally for its unlawful nonpayment of compensation”).

⁷⁸ R.D. Kollelijn, ‘Nationalisation’ Without Compensation and the Transfer of Property, 6 NETH. INT’L L.REV. 140, 145 (1959).

⁷⁹ See Comments of the United Kingdom on the Draft Articles on State Responsibility ¶ 59 (“the breach does not arise until local procedures have definitively failed to deliver *proper compensation*,” *e.g.*, “have so failed within the time limits implied by the requirement of promptness”) (emphasis added); see also *Amoco Int’l Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 231 (1987) (“provisions for the determination and payment of compensation must provide the owner of the expropriated assets sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law”).

timing and amount of compensation to be paid, such as “compensation in accordance with paragraphs 2 through 6” of Article 1110:

Vague assurances at the time of the taking of property to the effect that compensation will be paid in the future are insufficient if action is not taken within a reasonable time thereafter to grant that compensation. While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all.⁸⁰

Finally, international tribunals – including those Mondev cites to support its expropriation claim – reject Mondev’s view of Article 1110. Tribunals have repeatedly found that claims for uncompensated expropriation arise upon the failure of a State to compensate or provide for compensation at the time of the expropriation.⁸¹ In the case of the *Seizure of Property and Enterprises in Indonesia*, for example, Lord McNair stated

⁸⁰ 1961 HARVARD DRAFT CONVENTION at 111, Explanatory Note to art. 10; *see also id.* at 103, art. 10(2) (“the taking is wrongful if it is not accompanied by prompt payment of compensation”).

⁸¹ *See also SEDCO, Inc. v. National Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180, 204 n.39 (1986) (describing a “taking itself” as wrongful “if . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking”) (separate opinion of Judge Brower); *Liberian Eastern Timber Corp. (LETCO) v. Liberia*, (Award, March 31, 1986), in 2 ICSID REP. 343, 366 (1994) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be “accompanied by payment (or at least the offer of payment) of appropriate compensation”); *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre*, 95 I.L.R. 184, 210 (Ad Hoc Arbitration) (Award on Jurisdiction and Liability of Oct. 27, 1989) (finding breach took place on date of constructive expropriation of corporate assets and shareholder’s interest in corporation where government denied that any expropriation took place and even though claimant did not seek compensation through municipal procedures); *Nationalization of Czechoslovak Enterprise (Austrian Assets) Case* (Austria, Admin. Ct. Oct. 1, 1959), 28 I.L.R. 14, 14 (1963) (“it was clear that the nationalization of the company was confiscatory because . . . German shareholders had been expressly excluded” from the promise to compensate).

Mondev’s own cases similarly support the United States’ interpretation of international law governing expropriation. *See, e.g., Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 113-17, 113 (1989) (finding uncompensated expropriation at the time of the taking where “[n]o compensatory payment was made” or offered and without examining whether domestic avenues were available for assessing whether an expropriation took place); *SPP (Middle East) Ltd. v. Egypt*, (Award, May 20, 1992), in 3 ICSID Rep. 189, 228 (finding that Egypt had expropriated the claimant’s rights under a contract and that, because Egypt’s only offer of compensation was inadequate, the expropriation was unaccompanied by fair compensation in breach of the governing obligation; tribunal did not put the onus on the claimant to pursue any local remedies).

that the nationalization of Dutch property by the Indonesian Government violated international law because the taking, among other things, was not “accompanied either by the contemporaneous payment of adequate compensation or by effective measures [to] ensure and make certain its prompt payment.” 6 Neth. Int’l L.R. 218, 249 (1959). The tribunal in that case found an unlawful expropriation by Indonesia of Dutch interests, without suggesting that the burden was on Dutch property owners to pursue redress through local procedures before a breach could occur.

By contrast, in those cases where tribunals found breaches to arise subsequent to the time of the expropriation, the State did provide for compensation at the time of the expropriation (*e.g.*, by establishing a process for fixing compensation), but later failed to promptly determine or pay adequate compensation. Judge Brower explained these decisions as follows in his concurring opinion in *SEDCO, Inc. v. NIOC*:

If, for example, contemporaneously with the taking the expropriating State provides a means for the determination of compensation which on its face appears calculated to result in the required compensation, but which ultimately does not, . . . it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has not been satisfied.⁸²

⁸² 10 Iran-U.S. Cl. Trib. Rep. at 204 n.39; *see also Goldenberg (Germ. v. Rom.)*, 2 R.I.A.A. 901, 909 (1928) (“[T]he requisition carried out by the German military authorities did not *initially* constitute an ‘act contrary to the law of nations’. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.”) (translation by counsel; emphasis in original) (“[L]a réquisition opérée par l’*autorité militaire allemande* ne constituait pas *initialement* un ‘acte contraire au droit des gens’. Pour qu’il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n’a pas été le cas, l’indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.”); *Papamichalopoulos v. Greece*, 16 Eur. Ct. H.R. 440 (ser. A) (1993) (finding violation of Protocol, where Greece recognized both the illegality of earlier indirect taking and obligation to compensate, but procedures set up to compensate were ultimately “unsatisfactory and protracted”). Again, *Mondev’s* own sources do not contradict this view. *See Amoco Int’l Finance Corp.*, 15 Iran-U.S. Cl. Trib. Rep. at 230-31 (no breach where, at the time of the taking, Iran had observed its obligation to compensate by making adequate provision for the payment of compensation).

In the end, Mondev's distinction between direct and indirect expropriations misses the point. *See* Reply ¶ 155. Rather, what is critical to the timing of the breach for lack of compensation (under both international law and Article 1110) is whether the State recognizes the taking and observes its obligation to fix compensation. Where the State does not recognize the expropriation – direct or indirect – the authorities cited conclusively demonstrate that the breach occurs for lack of compensation on the date of the taking:

By definition, it is difficult to envision a *de facto* or “creeping” expropriation ever being lawful, for the absence of a declared intention to expropriate almost certainly implies that no contemporaneous provision for compensation has been made. Indeed, research reveals no international precedent finding such an expropriation to have been lawful.

SEDCO, Inc. v. NIOC, 10 Iran-U.S. Cl. Trib. Rep. at 205-06 n.42 (separate opinion of Judge Brower).

In conclusion, Mondev has not provided any support for its theory that, in instances when a State refuses to acknowledge an expropriation, a breach of Article 1110 for lack of compensation is completed *only after* local administrative and judicial procedures fail to determine that *an expropriation took place* and that compensation is due. Rather, what is required is that the State, in recognition of an alleged taking, observe its obligation, and establish a procedure, to fix compensation. By no means can LPA's Massachusetts court litigation constitute such a procedure for purposes of this case.⁸³ Moreover, it is undisputed that, long before LPA's 1992 lawsuit, neither the City nor the

⁸³ Moreover, even if Mondev's theory on timing were correct, Mondev's argument fails, because LPA's complaint in Massachusetts court did not include a takings claim. The specific statutory mechanism that Massachusetts has established for remedying the indirect taking of property is an action in state court seeking compensation for inverse condemnation pursuant to Mass. Gen. L. ch. 79. *See, e.g.*, Annotated Laws of Massachusetts, ch. 79, § 10 (2001).

BRA ever “paid or even offered” compensation to LPA. Thus, even assuming an expropriation took place (which it did not), both the expropriation and the failure to compensate, or make adequate provision for the prompt determination of such compensation, occurred prior to NAFTA’s entry into force. Mondev can state no breach of Article 1110 here.

B. Mondev’s Claim Of Expropriation In The 1980s Is Meritless In Any Event

In any case, there was no expropriation here. While Mondev is quite right that international law – and not Massachusetts law – governs the question of whether the United States expropriated Mondev’s investment, Mondev misses the United States’ point. Putting aside the question whether governmental acts in some circumstances can effect a taking of interests arising from contractual rights without a breach of contract, Mondev’s expropriation claim here hinges on whether there was a breach of the Tripartite Agreement under Massachusetts law. Thus, as observed in the Counter-Memorial (at 31) and explained in more detail below, the amply-supported finding of the SJC – the ultimate arbiter of Massachusetts law – that no breach took place disposes of Mondev’s expropriation claim.

None of the three categories of acts alleged in the Reply support Mondev’s contention that “the City and the BRA . . . exercised their governmental authority to deprive LPA of its contract right under Section 6.02 of the Tripartite Agreement to purchase rights in the Hayward Parcel at the formula price the parties had agreed to years earlier in that agreement.”⁸⁴ The first category consists of supposed lapses in the City’s

⁸⁴ Reply ¶ 149.

and the BRA's conduct of the design review process aimed at developing the Hayward Parcel in 1986 and 1987.⁸⁵ The second is comprised of the BRA's assertion in December 1988 that LPA owed taxes with respect to the project.⁸⁶ And the third is Mondev's claim that the BRA delayed action on Campeau's request for approval of a transfer of LPA's interests in the project in December 1987 and January 1988.⁸⁷ These allegations are patently insufficient to establish the deprivation of LPA's rights to purchase the Hayward Parcel that is the crux of Mondev's Article 1110 claim.

First, Mondev's reliance on supposed lapses in the design review process as a "taking" of LPA's right to purchase the Hayward Parcel simply cannot be credited. LPA repeatedly represented to the Massachusetts courts that the design review process in no way impeded its ability or desire to exercise that right.⁸⁸ The SJC, notably, relied on LPA's representations to this effect in its decision.⁸⁹ Mondev may find it convenient to represent the facts in one fashion to one tribunal, and then to represent the same facts

⁸⁵ *See id.* ¶ 149(a)-(c) (citing Mondev Factual App. ¶¶ 35-45, 47-72, 96; Mondev Factual Obs. ¶¶ 10-11).

⁸⁶ *Id.* ¶ 149(e) (citing Mondev Factual App. ¶¶ 82-83).

⁸⁷ *Id.* ¶ 149(d) (citing Mondev Factual App. ¶¶ 75-87).

⁸⁸ *See* Reply Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Feb. 27, 1998, Oleskey Statement, Exh. 21, at 9 ("[T]he Agreement did not require LPA or Campeau to complete the design review process before acquiring the Hayward Parcel and, therefore, . . . any failure to complete the design review was not the cause of their inability to acquire the Hayward Parcel."); Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 34-35 ("LPA's purchase of the Hayward Parcel was not contingent upon BRA's approval of LPA's development plans for the parcel. . . . any uncertainties over the development approvals had no bearing upon the validity or enforceability of Section 6.02.").

⁸⁹ *See Lafayette Place Assocs.*, 427 Mass. at 523 (noting and relying on LPA testimony that "LPA was committed to purchasing the Hayward Parcel regardless of its ultimate configuration and of restrictions placed upon the parcel by the city, because it would 'build whatever we could build there profitably'") (quoting testimony of Marco Ottieri). As the SJC also found, the parties' execution of the Third Supplemental Agreement expressly reaffirmed the existence of LPA's rights under the Tripartite Agreement and, as a result, "the slate was wiped clean" for purposes of assessing the parties' relative good faith. *Id.* at 524 n.18.

differently to another tribunal.⁹⁰ International law, however, does not sanction such tactics.⁹¹ Given such contradictory postures before different juridical bodies, Mondev's contention before this Tribunal that the BRA's design review process "expropriated" its right to purchase the Hayward Parcel in violation of Article 1110 lacks credibility.⁹²

Second, Mondev does not attempt to explain how the BRA's assertion that LPA had not paid certain taxes could have effected an expropriation of its right to purchase the Hayward Parcel. The relation between the two is far from apparent.

Third, Mondev's attempt to find an "expropriation" in the BRA's failure to act within 56 days on Campeau's December 1987 application to acquire LPA's rights under the Tripartite Agreement is baseless. As an initial matter, it is impossible to see how action or inaction on that application could have impeded LPA from exercising its right to purchase the Hayward Parcel before 1989. It is similarly difficult to see how inaction for such a fleeting period of time could constitute an expropriation of property under international law.⁹³ Moreover, to the extent Mondev offers this allegation in support of

⁹⁰ Mondev had also, before another Massachusetts court, blamed Campeau for failing to use "commercially reasonable efforts to seek approval as transferee of the Premises from the [BRA] pursuant to Mass. G.L. c. 121A." SJC App. 8 at A1459, A1461; *see also* U.S. Factual App. at 20.

⁹¹ *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-49 (1987); *S.S. "Lisman" (U.S. v. Gr. Brit.)*, 3 R.I.A.A. 1769, 1790 (Special Agreement May 19, 1927) (Award Oct. 5, 1937) (finding claimant could not recover on grounds that British detention of vessel was unlawful, because claimant had affirmed the lawfulness of such detention before the British Prize Court and only complained there of undue delay).

⁹² In addition, the SJC reviewed the record with respect to these allegations and concluded that "LPA failed to show that any delay in the design review process prior to 1988 was attributable to bad faith on the part of the city or the BRA rather than a lack of preparedness or persistence on LPA's part." *Lafayette Place Assocs.*, 427 Mass. at 524 n.18; *see also id.* at 524 (noting "overwhelming evidence that the review process progressed appropriately as soon as Campeau initiated the process in the spring of 1988"). The Reply does not suggest that this finding by the SJC was in any respect a denial of justice. Its claims of bad acts by the BRA and the City with respect to the design review process, as the SJC properly concluded, are without factual merit in any event.

⁹³ Unlike, for example, the Algiers Accords, Article 1110 addresses only *expropriation* of an investment: it does not prohibit *interference* with or *impairment* of an investment that does not rise to the level of an

its new assertion that “the BRA . . . wrongfully deprived LPA of its *right to sell its interests in the Lafayette Place Project to Campeau*,”⁹⁴ the allegation establishes no deprivation of any such contractual right. To the contrary, any “right to sell its interests” granted to LPA under the regulatory regime LPA agreed to was expressly subject to the approval of the BRA. Nothing in that regime required the BRA to grant that approval within the period of time demanded by the applicant.

Fourth, Mondev’s claim that these acts, individually or together, deprived LPA of its right to purchase the Hayward Parcel is belied by the fact that in March of 1988 LPA sold an option on that very same right to Campeau for millions of dollars.⁹⁵ Mondev’s contention that the alleged acts of the City and the BRA in 1986 and 1987 took away this right simply cannot be reconciled with the fact that LPA itself purported to own and to grant that same right to Campeau a few months later – and was paid handsomely for it. LPA’s actions at that time conclusively refute Mondev’s assertion.

Finally, Mondev’s claims with respect to the Hayward Parcel in the end do not hinge on any excess of governmental authority in Boston in 1986 or 1987. Instead, they hinge on whether, as the City contended, Campeau let the rights expire in January of 1989, or on whether, as LPA contended in the Massachusetts courts, the City refused to perform in response to Campeau’s letter in late December 1988. Those questions,

expropriation. *Compare* NAFTA art. 1110(1) with DECLARATION OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS (CLAIMS SETTLEMENT DECLARATION), Jan. 19, 1981, U.S.-Iran, art. II(1), 20 I.L.M. 230, 231 (1981) (granting jurisdiction over claims that “arise out of . . . expropriations *or other measures affecting property rights* . . .”) (emphasis added).

⁹⁴ Reply ¶ 147 (emphasis added).

⁹⁵ *See* U.S. Factual App. at 16-17 & n.59; *see also* Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 25 (asserting that Campeau in the lease “agreed to pay LPA an additional \$5 million for the Hayward Place transfer”); US Factual Resp. at 10.

however, are ones of Massachusetts law that the SJC definitively resolved in its well-reasoned and well-supported decision.

It is for these reasons that the United States argued in its Counter-Memorial that Mondev has failed to establish an expropriation of LPA's rights under a contract that was not breached. Counter-Mem. at 31. Having failed to show either a denial of justice by the courts, "or a pretence of form to achieve an internationally unlawful end," Mondev must face the "fact of life" that the court properly rejected LPA's complaints. *Azinian v. United Mexican States*, 14 ICSID – FOREIGN INV. L.J. at 562, 568 ¶¶ 83 & 99. Mondev's claim under Article 1110 of the NAFTA is to no avail.

IV. MONDEV FAILS TO ESTABLISH A VIOLATION OF ARTICLE 1102

Mondev's Reply states a number of concessions that are fatal to its Article 1102 claim. The Reply does not dispute that only "treatment" post-dating the NAFTA's effective date could possibly breach Article 1102. *See* Reply ¶¶ 220-221(a). Nor does the Reply demonstrate that LPA received any "treatment" subsequent to that effective date other than that accorded by the U.S. courts. Furthermore, Mondev concedes that it "did not, and does not, attribute bias to the courts of Massachusetts," Reply ¶ 227, and also acknowledges that it has no evidence to suggest that the courts treated LPA less favorably than U.S. investments in "like circumstances." Reply ¶¶ 223-224. Mondev's Article 1102 claim does not survive these concessions.

First, Mondev's concession that the courts were unbiased, on the record before this Tribunal, is dispositive. Mondev identifies no measure taken with respect to LPA after January 1, 1994 by any governmental organ other than the courts. No Article 1102

claim can be stated absent a measure. *See* NAFTA art. 1101(1) (limiting scope of investment chapter to “measures relating to . . . investments” with respect to provisions at issue). Nor does Mondev identify any way in which a court measure accorded LPA treatment less favorable than that accorded to a U.S. investment. *See* Reply ¶ 223. Indeed, although Mondev concedes that it is unable to identify any U.S. investment in like circumstances that received less favorable treatment than LPA, the circumstances to which Mondev does refer have nothing to do with the courts.⁹⁶ The record before the Tribunal reflects a complete absence of proof with respect to Mondev’s Article 1102 claim.

Second, for the reasons just explained, Mondev’s attempt to attribute bias to the City and the BRA is misplaced as a matter of law. Only the courts’ adopted measures with respect to LPA during the period following the NAFTA’s entry into force are legally relevant; evidence of bias on the part of other governmental organs would be legally irrelevant even if it could be established.

Third, Mondev’s contentions as to anti-Canadian bias on the part of the City and the BRA are baseless in any event. As a preliminary matter, Mondev fails to respond to the United States’ Counter-Memorial, which showed that the supposed statements Mondev offers as “evidence” of bias were anything but that:

- Mondev does not deny that Mr. Ransen’s account at trial of an oral remark by Mr. Coyle in the late 1980s was a self-serving, uncorroborated statement that Mr. Coyle denied under oath. *See* Counter-Mem. at 64 & n.95; Reply ¶ 225(a).

⁹⁶ *See* Reply ¶ 223 (“In the present case, the ‘circumstances’ were unique: there was no project like the Lafayette Place Project, operating in a badly blighted area of the City, and governed by an arrangement such as that reflected in the Tripartite Agreement with its provision for an option on the Hayward Parcel. Comparisons with other development projects would carry little significance . . .”).

- Mondev does not deny the relevance to the issues before the jury of the City’s counsel’s reference to uncertainty as to whether any payment for the Hayward Parcel would be drawn on an American or a Canadian bank. *See* Counter-Mem. at 64-65; Reply ¶ 225(b). Instead, it rests its irresponsible charge of anti-Canadian bias on an unsupported suggestion that Mondev likely would have financed the transaction through U.S. banks. Mondev offers not a shred of evidence, however, that counsel for the City knew or could have known Mondev’s unstated intentions as to a payment it never attempted to make.
- Mondev’s continued reliance on two other, isolated references to the fact that Mondev is based in Canada merely serves to highlight the weakness of its claim of bias. Reply ¶ 225(c)-(d). Simply put, if these four statements and unidentified “other” statements taken from over twenty years of dealings and litigation are the best Mondev has to offer in the way of evidence of bias, Mondev offers very little indeed.⁹⁷

Finally, the United States notes the lack of support for Mondev’s assertions that “pre-NAFTA examples . . . serve to illustrate this continuing state of mind . . . [and] that [i]t is not possible to draw a sharp cut-off line between . . . the conduct of the City and the BRA and . . . the various court proceedings.” Reply ¶ 221(a)-(b). Mondev offers, and can offer, no evidence that the persons in charge of the City and the BRA subsequent to 1994 were the same as those in charge in the 1980s who dealt with Campeau and LPA.⁹⁸ As demonstrated above, there was no improper “state of mind” at any time, but there is

⁹⁷ Contrary to Mondev’s suggestion, bias on the part of municipal officers may not lightly be inferred. *See, e.g., Lac Lanoux (Fr. v. Spain)*, 12 R.I.A.A. 281, 305 (Nov. 16, 1957) (“there is a well-established general principle of law according to which bad faith may not be presumed.”) (translation by counsel) (“car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.”); FREEMAN at 74 (explaining that the “responsibility of a state cannot ordinarily be called into question” and that there is “a general presumption that the laws and their administration are satisfactory in the light of international requirements”) (emphasis in original); NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC428 § 279(2) (noting that “[t]he presumption of the regularity of governmental acts is a[] direct consequence of the sovereignty of the State”) (translation by counsel; emphasis in original) (“*La présomption de régularité des actes étatiques est une autre conséquence directe de la souveraineté de l’État.*”).

⁹⁸ Both Mayor Flynn and Director Coyle stepped down from their posts before 1994. Moreover, the only comments alleged to show anti-Canadian bias on the part of the City were made by counsel for the City after Flynn and Coyle stepped down, and they were made by different counsel: the City was represented by Mr. Gerald Fabiano during the 1994 jury trial (*see* SJC App. 27 at A4568) and by Mr. Rory FitzPatrick during the 1998 appeal (*see* Oleskey Statement, Exh. 22).

certainly no evidence that would support Mondeu's assertion of a continuum in "state of mind" between these periods.⁹⁹ And in any event, Mondeu's assertion of anti-Canadian bias is particularly difficult to credit given that the BRA *approved* the plans for the Hayward Parcel of Campeau – a Canadian company.

For all these reasons, and for those stated in the Counter-Memorial, Mondeu's Article 1102 claim is baseless.

V. MONDEV FAILS TO REFUTE THAT LPA'S OWNERSHIP OF THE RIGHTS AT ISSUE WAS EXTINGUISHED IN 1991

Mondeu's Reply does not deny that the Bank's foreclosure on the Mortgage in 1991 divested LPA of "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 the [Tripartite Agreement] . . . , including, without limitation, . . . all rights to exercise options (including, without limitation, options to purchase and lease) . . . , excluding any rights of the mortgagor thereunder to develop parcels adjacent to the premises[.]"¹⁰⁰ The Reply's sole contention in response is that the right to purchase the Hayward Parcel was included within the exclusion in the Mortgage of "rights . . . to develop parcels adjacent to the premises." Mondeu now contends that "the meaning of the phrase 'to develop' the Hayward Parcel encompasses *all* of LPA's rights in and to the Hayward Parcel."¹⁰¹

Mondeu's contention is flatly contradicted by the plain terms of the Mortgage and by positions LPA took before the Massachusetts courts. Moreover, as demonstrated in

⁹⁹ Mondeu's "state of mind" analysis has no relationship to the text of Article 1102 in any event.

¹⁰⁰ Holtzschue Opinion, May 31, 2001, US App. III at Tab A, Exh. 2 at 3-4; *see* Counter-Mem. at 71 & n.99; Reply ¶¶ 27-36.

¹⁰¹ Reply ¶ 33(i) n.39 (emphasis added).

the accompanying Rejoinder Expert Opinion of Karl B. Holtzschue, Mondev's contention cannot be sustained under applicable New York law.

First, Mondev's reading strains the text of the Mortgage beyond recognition: it would make little sense, as a textual matter, for the Mortgage specifically to include in the collateral the "options to purchase," and yet in the same breath exclude the very same option just specified. Moreover, paragraph 23 of the Mortgage required the prior consent of the Bank to any decision by LPA to exercise options to purchase under the Tripartite Agreement – a provision that would serve no purpose if, as Mondev contends, the exclusion encompassed "*all* rights in and to the Hayward Parcel." Mondev's new interpretation cannot be squared with the language of the Mortgage.

Second, Mondev's new interpretation cannot be reconciled with the positions LPA took in the Massachusetts courts. While Mondev asserts for purposes of its argument here that the "rights to purchase and to develop were inexorably interconnected,"¹⁰² that is not what LPA told the Massachusetts courts. To the contrary, the central premise of LPA's argument that its delays in submitting appropriate development plans did not impede the City's ability to perform the contract to sell the property was that the development of the parcel was distinct from its right to purchase it.¹⁰³ Although Mondev asserts before this Tribunal that "it is very clear that *there is no 'right to develop' provided*" in the Tripartite Agreement,¹⁰⁴ LPA advised the SJC that it did indeed own

¹⁰² Reply ¶ 33(i).

¹⁰³ See Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Jan. 20, 1998, Oleskey Statement, Exh. 17, at 34-35 (asserting that the Tripartite Agreement "does not condition LPA's acquisition of Hayward Parcel upon the completion of the design review process or on receipt of any other government approvals" and that "LPA and Campeau were willing to purchase the Hayward Parcel regardless of whether the BRA or City approved their development plans").

¹⁰⁴ Reply ¶ 31 (emphasis in original).

such rights, representing that in its lease with Campeau LPA “delegate[d] its *rights to develop* Phase II to Campeau.”¹⁰⁵ While Mondeev continues to find it convenient to present conflicting stories to different tribunals, such a tactic cannot meet its burden of demonstrating the Tribunal’s competence over the contract-based claim.¹⁰⁶

Finally, Mondeev does not contend that the phrase “rights to develop” ordinarily means “right to purchase.” Instead, the crux of its argument is that application of the phrase’s ordinary meaning leads to a “commercially irrational” result.¹⁰⁷ As the accompanying Rejoinder Expert Opinion of Karl B. Holtzschue conclusively demonstrates, however, Mondeev’s contention is without merit for several reasons.

As a preliminary matter, Professor Holtzschue notes, Mondeev and its expert go to considerable lengths to argue that the governing law allows the Tribunal to ignore the plain language of the instrument and refer instead to various statements made years after the Mortgage was executed.¹⁰⁸ Professor Holtzschue observes that the only authority that addresses the question of the governing law in this context, in a carefully reasoned decision, squarely holds that the law governing is that for interests in real estate, not in

¹⁰⁵ Reply Brief of Plaintiff-Appellee and Cross-Appellant LPA to SJC, Feb. 27, 1998, Oleskey Statement, Exh. 21, at 9 (emphasis added). The lease, notably – and contrary to Mondeev’s new view that rights to purchase and to develop are “inexorably interconnected” – expressly distinguished between the option to purchase the Hayward Parcel and the delegation of LPA’s rights to develop the project. See SJC App. 8 at A1408, A1412. Indeed, Mondeev’s assertion in its Observations on the United States’ Factual Appendix that the purchase price for the Hayward Parcel could be determined completely independently of the development for the parcel is also inconsistent with its contention that rights to purchase and develop are “inextricably interconnected.” See Mondeev Factual Obs. ¶¶ 12-13.

¹⁰⁶ See note 92 *supra*; see, e.g., *Tradex Hellas S.A. v. Albania*, 14 ICSID REV. - FOREIGN INV. L.J. 197, 219 (Final Award Apr. 29, 1999) (“it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim. . . . A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”) (internal quotation omitted).

¹⁰⁷ Reply ¶ 27; see *id.* ¶ 33.

¹⁰⁸ Holtzschue Rejoinder Opinion at 9-15; see Reply ¶¶ 29, 33(iv); Reply Expert Opinion of Robert E. Scott, dated July 28, 2001 (the “Scott Reply”), at 3-6.

intangible personal property.¹⁰⁹ Professor Holtzschue further notes that the New York law concerning real property interests does not permit consideration of the after-the-fact statements that Mondev relies upon in arguing that “rights to develop” means “rights to purchase.”¹¹⁰ The ordinary meaning of the terms used in the instrument controls, he observes, and that meaning establishes that LPA no longer owns the contractual rights at issue.¹¹¹

Professor Holtzschue then demonstrates that, even accepting *arguendo* Mondev’s contention that the law governing is that for security interests in intangible personal property, Mondev and its expert have failed to establish a “course of performance” that supports the proposition that “rights to develop” means “right to purchase.” As Professor Holtzschue notes, under that governing law “course of performance” may be considered only “[w]here the contract for sale involves *repeated* occasions for *performance* by either party *with knowledge* of the nature of the performance and opportunity for objection to it by the other[.]”¹¹² Professor Holtzschue establishes that – on their face – none of the statements offered by Mondev meets the requirements for a “course or performance”:

- September 1989 Internal Bank Memorandum. This internal memorandum was prepared in response to reports of Campeau’s weakening financial condition, not on the occasion of performance of any obligation under the Mortgage. Nor is there any evidence of knowledge of the memorandum on the part of LPA. It meets none of the criteria for a “course of performance.” And it discusses the option LPA granted to Campeau, not LPA’s rights to acquire the Hayward Parcel.

¹⁰⁹ Holtzschue Rejoinder Opinion at 3-4. Professor Holtzschue methodically analyzes the authorities relied upon by Mr. Scott, and demonstrates that the other authorities either support the United States’ position or are inapposite. *See id.* at 4-9.

¹¹⁰ *See id.* at 8.

¹¹¹ *See id.* at 9.

¹¹² *Id.* at 10 (emphasis in original; quoting N.Y. U.C.C. Law § 2-208(1)).

- Internal Bank Memorandum Concerning Meeting With Campeau. This memorandum similarly was not prepared on the occasion of any performance of an obligation under the Mortgage (to which Campeau was not even a party). There is similarly no evidence that the memorandum was ever transmitted to LPA. And the nature of the memorandum is such that the inference Mondey seeks to draw from its silence is without factual basis in any event.
- October 1990 Statement By LPA That It Had Rights To The Hayward Parcel. Again, this statement was made in an unscheduled visit to the Bank by Mondey's chairman, not on the occasion of a performance of any obligation under the Mortgage. Moreover, the statement was accurate at the time – judgment on the Bank's foreclosure action had not yet been entered in October 1990, and LPA still did have legal title to any rights under the Tripartite Agreement. Even if the Bank officer had been silent in response to the statement (which itself is not established by the evidence tendered), the inference Mondey seeks to draw from any silence would be unsupported.
- April 1993 Letter From Trial Counsel For LPA To City, BRA And Bank. Obviously, this letter, written over two years after the Bank foreclosed on the Mortgage and ended its business relationship with LPA, was not made on any occasion of performance. Moreover, the letter came over a year into litigations between LPA and each of the City, the BRA and the Bank, and just a few months before the Bank filed an amended complaint charging LPA with conveyances intended to defraud its creditors. Such a letter, reflecting posturing by litigation counsel at a time when it was patently futile, demanded no response.

In the final analysis, as Professor Holtzschue notes, Mondey's elaborate "course of performance" argument is supported by nothing, as are Mondey's inventive attempts to recreate a "commercially reasonable" explanation for the phrase "rights to develop" in the 1987 Mortgage that accords with its claims here.¹¹³ As Professor Holtzschue concludes, the best evidence of the parties' intent – indeed, the only reliable evidence offered here – is that of the language used in the Mortgage. That language makes clear that the Bank's foreclosure in 1991 on "all rights and benefits, if any, of whatsoever nature now or

¹¹³ See Reply ¶ 33(i)-(ii).

hereinafter derived or to be derived” under the Tripartite Agreement encompassed the right to purchase the Hayward Parcel at issue here.

VI. ARTICLE 1116 PROVIDES NO BASIS FOR MONDEV TO SUBMIT A CLAIM FOR INJURIES ALLEGEDLY SUFFERED BY ITS INVESTMENT

Mondev erroneously asserts in its Reply that the United States has “apparently . . . abandoned” its objection under Article 1116 of the NAFTA. Reply ¶ 13. Mondev further suggests that the objection is “frivolous.” *Id.* Mondev is mistaken on both counts.

It is well established in international law that no claim on behalf of a shareholder is cognizable for injury to a corporation.¹¹⁴ It is equally well established that *direct* injury to a shareholder *is* cognizable.¹¹⁵ Article 1116 was drafted with these principles in mind.¹¹⁶

In its Notice of Arbitration, Mondev did not allege any injury that could be viewed as independent from the injuries allegedly suffered by LPA. *See* Notice of Arb. ¶

¹¹⁴ *See Barcelona Traction*, 1970 I.C.J. 3, 34-37, ¶¶ 41-46 (“[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”).

¹¹⁵ *Id.* at 43, ¶ 74 (“Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”).

¹¹⁶ *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 145 (“Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of *direct injury* to an investor, and allegations of *indirect injury* to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.”) (emphasis added). Mondev errs in suggesting that the United States’ arguments before a chamber of the International Court of Justice in the *ELSI* case are inconsistent with the United States’ position here. *See* Reply at ¶ 14. In *ELSI*, the United States argued that the shareholders in that case suffered *direct* injuries to their rights. *See* Argument of Professor Gardner, Counsel for the United States, reprinted in I.C.J. Pleadings, *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Vol. III, at 92, 108. Furthermore, the Protocol to the FCN treaty at issue in the *ELSI* case – unlike Article 1116, which provides for *direct* injuries only – provided a remedy for “interests held directly or *indirectly*.” Protocol to TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE ITALIAN REPUBLIC, entered into force July 26, 1949, 9 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 282 ¶ 1 (1965) (emphasis added).

121. It is for this reason that the United States objected on Article 1116 grounds. In its Memorial, Mondev alleged for the first time that it did suffer direct injuries. *See* Mem. ¶ 97. Mondev provided no details, however, as to the nature of these or any of the other supposed injuries it suffered, asserting that such details would be forthcoming if Mondev were permitted to proceed to the damages phase. *See* Reply ¶ 15.

As the United States noted in its Counter-Memorial, Mondev's refusal to provide even the barest of details as to its supposed injuries left the United States in no position to test Mondev's assertion that it suffered an unspecified "direct injury." Counter-Mem. at 75-76. It is for this reason that the United States "expressly reserve[d] 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)." *Id.* at 76.

For these reasons, the United States continues to adhere to the position stated in its Counter-Memorial.

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

Mondev, in asserting its delinquent Article 1117 claim, ignored the NAFTA's explicit procedural requirements. As a result, Mondev failed to obtain the United States' consent to arbitrate under Article 1117 of the NAFTA. Mondev's Article 1117 claim must therefore be dismissed.

The Vienna Convention on the Law of Treaties, despite Mondev's contentions, supports the United States' position. Article 31(3) of the Vienna Convention provides in relevant part that "(a) [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties

regarding its interpretation” shall be taken into account when interpreting the ordinary meaning of a treaty in context. The other NAFTA parties have taken the position that Article 1121 “imposes *mandatory* pre-requisites on investors intending to submit a claim to arbitration.” Second Submission of Canada Pursuant to NAFTA Article 1128, *Mondev International, Ltd. v. United States*, ¶ 10; *see also id.*, ¶¶ 11-14; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (Award, June 2, 2000) § 6 (discussing Mexico’s position that formal defects in a waiver constitute a breach of Article 1121). Under the unanimous reading of the treaty by its Parties, Mondev must comply with the procedural requirements set out in NAFTA Article 1121 in order to obtain the United States’ unilateral consent to arbitrate.

Mondev’s excuses with regard to Article 1119 and the “formalities” under Article 1117 do not warrant an exception. Mondev’s Notice of Intent plainly did not accord with Article 1119’s requirements. Mondev admits as much. *See Reply* ¶ 18. Article 1119, as relevant to this case, required Mondev not only to provide LPA’s address “where a claim is made under Article 1117, but also to specify “the provisions of this Agreement alleged to have been breached and *any other relevant provisions*[.]” NAFTA Articles 1119(a), (b) (emphasis added). Article 1117 is clearly such an “other relevant provision.” Mondev made no reference to a claim under Article 1117 in its Notice of Intent. Thus, as the NAFTA parties agree that these terms should be applied and be applied strictly, Mondev’s Article 1117 claim was not within the scope of the United States’ consent to arbitrate.

CONCLUSION AND SUBMISSIONS

For the foregoing reasons and those stated in the Counter-Memorial, 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,

Mark A. Clodfelter
*Assistant Legal Adviser for International
Claims and Investment Disputes*
Barton Legum
*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*
David A. Pawlak
Laura A. Svat
*Attorney-Advisers, Office of International
Claims and Investment Disputes*
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

October 1, 2001