IN THE ARBITRATION UNDER

THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

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

Tuesday, May 21, 2002

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

The hearing in the above-entitled matter was reconvened at 9:30 a.m. before:

SIR NINIAN STEPHEN, President

PROFESSOR JAMES R. CRAWFORD

JUDGE STEPHEN M. SCHWEBEL

ELOISE M. OBADIA, Secretary of the Tribunal

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Washington, D.C. 20520

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Presentation by Claimant/Investor

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Mr. Watts xx

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

2 PRESIDENT STEPHEN: Ms. Abby Cohen Smutny

3 is ready.

4 MS. SMUTNY: Good morning. I thought

5 maybe I would start with a few miscellaneous

6 points.

7 Professor Crawford, you had asked for jump

8 sites to the Barcelona Traction. Let me just

9 direct you to certain paragraphs that relate to the

10 points that I was making yesterday.

11 Of the decision, paragraphs 85 through 92

12 and paragraphs 48 through 49, in those paragraphs

13 the points are contained.

14 Okay. Well, what I am going to address

15 this morning is the breaches under 1105, the

16 remainder of 1105 claims. Hopefully we can do that

17 by the coffee, and then Sir Arthur Watts will

18 address Article 1110, and that should take up to

19 lunch. So hopefully, if time permits, we will make

20 good time.

21 Okay. The first point under 1105,

1 Mondev's submission that the failure to provide a
2 remedy for the BRA's wrongful conduct constituting
3 a breach of 1105. The point in Mondev's submission
4 is simply this: When a foreign investor has a
5 claim that it has suffered losses by virtue of
6 state conduct taken in violation of the state's own
7 laws, the requirement to treat investments in
8 accordance with international law, including fair
9 and equitable treatment and full protection and
10 security, includes the requirement that the state
11 provide a means for addressing the claim. That is
12 indeed the essence in particular of the obligation
13 of providing full protection and security.
14 Full protection and security does not only
15 mean that a state accepts an obligation to provide
16 physical protection to the persons and property
17 against acts of violence. It also means providing
18 the means to seek relief against state conduct that
19 is both directed at a foreign national's investment
20 and that is in violation of the state's own laws.
21 A foreign investor must be able to rely upon there

1 being an effective mechanism in place to address
2 instances where a state acts in derogation of its
3 own laws or disregards legal obligations undertaken
4 in respect of a foreign investment that causes harm
5 to a foreign investment.
6 JUDGE SCHWEBEL: I see the force of what
7 you are saying, but is it consistent with the
8 majority view in the International Court of Justice
9 in the ELSI case?
10 MS. SMUTNY: That is to say that, yes, I
11 think it is in the sense that what we're talking
12 about here are the special protections that foreign
13 investors are provided by virtue of the treaties
14 protecting foreign investment, and that when a
15 state violates its own laws and harms an
16 investment, it must provide a remedy for the
17 investment. It must at least provide a remedy for
18 the investment.
19 Again, it's not--this claim under 1105 is
20 not directed at the underlying wrongs of the BRA
21 and the City as such, but that the state must

1 provide a mechanism to address it, and that the
2 absolute failure to provide any remedy to address
3 it is a violation of full protection and security,
4 that providing the means is part of the treatment
5 that is required for full protection and security,
6 for fair and equitable treatment.
7 PROFESSOR CRAWFORD: So your response on
8 the ELSI point is that there was a remedy under
9 Italian law, even if it was not effective in the
10 particular case, at least the remedy existed?
11 MS. SMUTNY: Yes, the argument--right. To
12 compare this to the ELSI case, the complaint
13 relates to the adequacy of the remedy. In this
14 case, there's no remedy at all.
15 PROFESSOR CRAWFORD: Does your position
16 mean that any domestic immunity--obviously we're
17 not concerned with foreign immunities--any domestic
18 immunity granted by the law of a state which
19 prevents the granting of a remedy in respect of an
20 injury to an investment or an investor is contrary
21 to 1105?

1 MS. SMUTNY: Not any immunity. An
2 immunity that relates--well, if the state itself
3 violates its laws--
4 PROFESSOR CRAWFORD: Yes, obviously--
5 MS. SMUTNY: Yes.
6 PROFESSOR CRAWFORD: Let's limit ourselves
7 to immunities extended to state officials.
8 MS. SMUTNY: Right.
9 PROFESSOR CRAWFORD: There are maybe
10 situations in which there are immunities extended
11 to persons whose conduct is not attributable to the
12 state, but we can ignore that.
13 MS. SMUTNY: Yes.
14 PROFESSOR CRAWFORD: My question is: Is a
15 domestic immunity of a state official per se
16 inconsistent with 1105 if it prevents a remedy for
17 an investment?
18 MS. SMUTNY: Yes. If it immunizes claims
19 that the official violated its own--the state's own
20 laws when the claim is that the violation of laws
21 is directed at a foreign investment and causes harm

1 to a foreign investment, the protections provided
2 under the investment protection treaties require
3 that in circumstances like that there must be a
4 remedy.
5 PROFESSOR CRAWFORD: My understanding is
6 that the President can't be sued personally. I
7 suppose that immunity wouldn't apply because it
8 would either be action of the United States for
9 which the United States can be sued or it would be
10 action not attributable to the United States.
11 MS. SMUTNY: Well, the point is not so
12 much--well, the point is that if the President
13 personally harmed a foreign investment by violating
14 the United States, for example, own laws, and there
15 was no remedy for that, that would be a violation
16 of the treaty in the sense that the investor has
17 suffered no protections, no full--did not receive
18 full protection and security in that circumstance.
19 Now, a state can do this, and maybe we
20 should talk about that. This position--let me move
21 on to the point. I mean, there may be reasons for

1 a state to conclude that it wishes in certain
2 circumstances to immunize itself from a suit by
3 private litigants. A state may conclude that it
4 serves the greater public purposes to immunize the
5 state from private claims. And the benefits of
6 such policies are obvious. They may be to free the
7 state, to take actions in the interest of society
8 without the fear of judicial action that may come
9 to those that are harmed. The benefits to the
10 society may be deemed to offset the harm to a given
11 individual, and this is a trade-off that states are
12 free to make, and this can be reflected in domestic
13 laws. And the trade-off poses no problems for the
14 state's own nationals who are presumed to benefit
15 from the government's more broad efforts, who are
16 presumed to be in a--and they're presumed to be in
17 a position to effect change if they're not
18 benefiting.
19 But the foreign national and its
20 investment are in a different position. The state
21 may choose to allow itself to violate its own laws

1 and yet to enjoy immunity against claims. But if
2 it does so, it runs the risk that it will open
3 itself to international liability when the state's
4 wrongful conduct is directed towards a foreign
5 national and its property. A state that concludes
6 a treaty for the promotion and protection of
7 investments takes--opens itself--well, it promises
8 to accord full protection and security to such
9 foreign investment in order to promote and
10 encourage investment and not to act in derogation
11 of its own laws towards such investment. But if it
12 does, if it does act in derogation of its own laws
13 towards the investment, it must provide a means of
14 claim when losses are sustained as a consequence.
15 It's providing the remedy that is part of providing
16 the treatment.
17 PROFESSOR CRAWFORD: It's partly a
18 question of analysis. Of course, the immunity
19 granted the BRA was not complete. It only related
20 to certain causes of action, in effect, intentional
21 torts. That's right, isn't it?

1 MS. SMUTNY: Well, yes, you could sue the
2 BRA for breaches of contract if you had a contract
3 with the BRA. Part of the reason why that wasn't
4 effective here is that the court concluded that the
5 BRA was not a party to this specific contract to
6 sell the property.
7 PROFESSOR CRAWFORD: Yes, I understand
8 that. In the normal situation, if there's a clear
9 immunity in respect to a particular cause of
10 action, you won't get to the question of the breach
11 of the law. I mean, we have here a jury finding
12 which was then set aside, so it was somewhat
13 unusual that the jury finding was, in effect, made,
14 notwithstanding the immunity, and the immunity was
15 later applied.
16 MS. SMUTNY: Right, and in a sense--and
17 perhaps your question underlies the point, you
18 know, here we have the luxury of having already a
19 sort of preliminary review of the merits of the
20 claim. And in this case, we know that the claim
21 was meritorious. One must ask the question what

1 if--is it consistent with the state's obligation to
2 provide some sort of preliminary screen to asses at
3 least prima facie whether the claim has merit. And
4 I would submit that that would be acceptable. But
5 when there's clearly a claim at least that has
6 prima facie merit, there must be a remedy for it.
7 Failing to provide a remedy for that situation is
8 the problem. There might be a mechanism set up to
9 evaluate against frivolous claims, but, nevertheless, there
10 needs to be a mechanism when such a
11 claim is made.
12 PROFESSOR CRAWFORD: But in the context of
13 Massachusetts law, isn't it the case or isn't it
14 arguable that the BRA could not commit that tort,
15 that is, that its immunity was not simply a
16 procedural bar, a rule that the tortious liability
17 of the BRA went so far and no further, in which
18 case there wasn't a breach of Massachusetts law at
19 all?
20 MS. SMUTNY: No, that's not how the
21 immunity worked. The finding was that the BRA

1 breached the law. The BRA's wrongful conduct
2 stands. The point is simply that there is no
3 remedy, there's no right to present a cause of
4 action as a consequence, but there is--it's not as
5 if it was un--the wrong was undone by the finding
6 of the court.
7 Well, to move on, what I was going to
8 point out is that the Respondent submits that where
9 there is a claim that a state has acted in
10 violation of its own laws to cause harm to a
11 foreign national, all that international law
12 requires is that a foreign national receive the
13 same rights of recourse as are made available to a
14 national in a similar circumstance.
15 Mondev submits that this is not so. While
16 a state may deny justice or fail to protect its own
17 nationals, hopefully with the greater good in mind,
18 it may not do so vis-a-vis foreign investment
19 consistent with the standards of treatment embodied
20 in 1105. 1105 reflects the principle familiar
21 certainly to this Tribunal that is embedded in

1 international law and long accepted by the United
2 States that foreign nationals at times may be
3 afforded better protection than afforded to
4 nationals under municipal law. And just to save
5 time, I will not quote to you the passage from the
6 Hopkins v. Mexico case that you'll find discussed
7 in the pleadings, and in particular that S.D. Myers
8 Tribunal cited. That's in Legal Appendix 3, S.D.
9 Myers v. Canada, referring to the Hopkins v. Mexico
10 case.
11 Nationals of a state are not necessarily
12 entitled to fair and equitable treatment, and their
13 investments are not entitled necessarily to full
14 protection and security. This Tribunal--just to
15 clarify this point, which I think is already clear,
16 this Tribunal need not conclude that the underlying
17 actions of the City and the BRA that form the basis
18 of LPA's complaint gave rise to anything more than
19 a claim that the City and the BRA acted in
20 violation of Massachusetts law, particularly the
21 BRA, in order to conclude that the further

1 application of Massachusetts law to shield the City
2 and the BRA--and I'll talk about the City in a
3 moment--from a claim in respect of the violations
4 is inconsistent with the standard of treatment.
5 Let me talk--yes, go ahead.
6 PROFESSOR CRAWFORD: This argument would
7 only, as it were prevail, if we were also satisfied
8 that the overturning of the breach of contract
9 claim was contrary to 1105?
10 MS. SMUTNY: No, no, not at all.
11 PROFESSOR CRAWFORD: Well, how could there
12 be an inducement to breach contract where it wasn't
13 a breach?
14 MS. SMUTNY: Okay. Two contracts again.
15 Again, the breach of contract claim that was
16 against the City related to the breach of the right
17 to purchase the Hayward Parcel. The tortious
18 interference was interference with LPA's right to
19 sell all its interests in the whole project to
20 Campeau.
21 PROFESSOR CRAWFORD: And that course of

1 action wasn't asserted against the City?

2 MS. SMUTNY: Well--and I'm going to come

3 back to that 93A claim because there was a question

4 yesterday that I want to address again. But at the

5 end of the day, there was not a finding that the

6 City had any wrongful conduct in respect of that.

7 So that's maybe the short answer to the question.

8 But I think it's important to go through

9 the circumstances of this case just very quickly

10 insofar as it relates to this point.

11 The jury, which included citizens

12 essentially of the greater Boston area, found as a

13 matter of fact that the BRA had abused its rights

14 as a municipal agency and had engaged in tortious

15 conduct, wrongfully interfering with LPA's contract

16 to sell its interests in the Lafayette Place

17 Project to Campeau. The jury assessed the level of

18 damage arising from that tortious conduct at $6.4

19 million.

20 On post-judgment motions, which I'm just

21 pointing out here where they're found in the

1 record, the trial court then ruled as a matter of
2 law that the evidence presented in trial was more
3 than sufficient to uphold the jury's findings on
4 that point, stating that LPA had shown that the BRA
5 had unlawfully attempted to exact a higher price
6 for the Hayward Parcel than would have been
7 obtained using the formula in the Tripartite
8 Agreement; and, further, that LPA had presented
9 strong evidence that the BRA was improperly
10 attempting to strong-arm it during the review
11 process.
12 And to refer back to your question, the
13 BRA as a function of the Massachusetts law was
14 never exonerated from its unlawful conduct towards
15 LPA. Instead, the BRA escapes liability only
16 because of the Massachusetts Supreme Judicial Court
17 ruling in 1998 that the law did not afford LPA any
18 recourse to redress that violation of law, holding
19 that the Massachusetts Tort Claims Act granted BRA
20 immunity from legal proceedings in respect of that
21 tort.

1 Now, let's go to the next. Let me briefly
2 address the 93A and the significance of being
3 denied 93A. It's not relating to treble damages.
4 The point is that LPA also claimed that the actions
5 of the City and the BRA violated Chapter 93A,
6 causing damage to LPA by, quote--and this is what
7 93A is addressed at--"unfair and deceptive acts or
8 practices in the conduct of trade or commerce."
9 This is significant because the remedy that 93A
10 provided against wrongful conduct is not limited to
11 breach of contract. And so this might have been
12 the way to get at the City's--even if it's not, you
13 know, giving rise to a breach of contract under
14 Massachusetts law, this was a way to address the
15 BRA and the City's wrongful conduct in respect of
16 depriving or acting in an unfair and deceptive
17 manner towards LPA as it sought to enjoy those
18 contract rights. So not limited by the
19 technicalities of contract law, this was a way to
20 get at the BRA and the City's clearly--a lot of
21 evidence for it--egregious conduct towards LPA.

1 That's the significance of the denial of 93A.
2 The court dismissed those statutory claims
3 in a pre-trial order, however. Let's go to the
4 next. On appeal, the SJC observed--now, this is as
5 respect of the 93A claim--that, "The gravamen of
6 LPA's claim against the City and the BRA is that it
7 was cheated out of the benefit that would have
8 accrued to it if the agreement regarding Hayward
9 Parcel had been performed." That is, not because
10 it was a breach of contract but that it was harmed
11 due to unfair or deceptive acts in the conduct of
12 trade, and the court observed that this is indeed
13 the kind of claim that's often made under 93A.
14 Now, as we just noted before, the trial
15 court had concluded that the evidence--the trial
16 court had concluded that the evidence had
17 demonstrated that the BRA had unlawfully attempted
18 to exact that higher price for the Hayward Parcel
19 and that--than would have been obtained otherwise
20 and that there was strong evidence that the BRA was
21 improperly attempting to strong-arm.

1 Let's cue to the next. But the SJC
2 concluded that that does not mean, however, that
3 the City was engaged in trade or commerce when it
4 entered into the arrangement, nor when it took the
5 actions of which LPA now complains.
6 The SJC, therefore, held that the lower
7 court was correct to dismiss the statutory claims
8 against the City because their involvement in these
9 transactions was wholly in pursuit of legislatively
10 prescribed mandates and that there simply cannot be
11 any doubt that the parties' dealings took place in
12 the context of the pursuit of urban renewal and
13 development goals.
14 In other words, the SJC concluded that
15 although the City and the BRA may have caused LPA
16 damage by unfair and deceptive acts or practices,
17 the SJC also held that those unfair and deceptive
18 acts that might have been taken were not in, quote,
19 the conduct of trade or commerce, and, therefore,
20 it concluded that 93A did not provide a remedy.
21 And the court emphasized this point by explaining

1 that in Massachusetts, it's perfectly possible for
2 a government entity to engage in dishonest or
3 unscrupulous behavior as it pursues its
4 legislatively mandated ends.
5 The SJC thus decided--
6 PROFESSOR CRAWFORD: That's not only true
7 in Massachusetts, actually.
8 MS. SMUTNY: Particularly vis-a-vis one's
9 own nationals, exactly. The SJC thus decided that
10 LPA had no recourse for the wrongs complained of
11 because Massachusetts law granted the BRA immunity
12 from intentional torts, and 93A did not provide a
13 remedy against government entities such as the City
14 and the BRA acting dishonestly and unscrupulously.
15 The result is that even though the BRA's
16 conduct in particular had been found to be a
17 violation of law and even though Mondev admittedly
18 suffered sizable losses, it was left with no
19 recourse to present the claim--
20 PROFESSOR CRAWFORD: But the BRA's conduct
21 wasn't in violation of Chapter--

1 MS. SMUTNY: Of 93A.
2 PROFESSOR CRAWFORD: 93A--
3 MS. SMUTNY: No, and I'll talk about 93A
4 in a moment, because the point there is how broad
5 the grant of immunity is, and maybe when we speak a
6 little bit more about proportionality--
7 PROFESSOR CRAWFORD: 93A is not immunity.
8 It's simply inapplicability. I mean, surely it's
9 not a breach of 1105 not to make a general trade
10 and commerce law applicable to acts of government.
11 I mean, otherwise, 1105 is going to completely
12 reconfigure the national legislation of all of the
13 states in ways that surely aren't contemplated.
14 MS. SMUTNY: Well--
15 PROFESSOR CRAWFORD: I mean, I understand
16 your own immunity when you're dealing with an
17 immunity in respect of rules that do apply to an
18 entity, but that seems to be different.
19 MS. SMUTNY: Yes. The principal point
20 here is the failure to provide a remedy for BRA
21 conduct which is wrongful as a matter of

1 Massachusetts law. The points regarding 93A and
2 the manner in which immunity was granted, the
3 conclusions regarding 93A, really relate more to
4 the manner--and I'll talk about that in a moment
5 because the manner in which--the manner in which
6 LPA, in addition, was denied a remedy aggravated
7 the problem. The fundamental point is really the
8 very, very simple one, and that is to say, is it
9 consistent with 1105 to allow a state to violate
10 its own laws, admittedly so, and not to provide a
11 remedy for it when it's directed--when it's
12 directed with bad faith at a foreign investment.
13 Now, let me just speak a little bit about
14 the other circumstances relevant to Mondev's
15 position, which we submit is relevant, that is to
16 say, the manner--but let me just emphasize this is
17 not necessary in our submission for the point. I
18 think the point is made, just as stated before, but
19 there was a fair amount of discussion in the
20 written pleadings, and I think it's worth
21 clarifying what that relates to, that the immunity

1 was granted to the BRA first only after a complete
2 and unsuccessful defense on the merits.
3 This is an important point, at least for
4 the Tribunal to appreciate, that the immunity was
5 granted very broadly, notwithstanding the clearly
6 commercial context of the transaction at issue, and
7 that also no available remedies were there for BRA.
8 These are all secondary to the principal
9 point, and I'll just point very briefly--I'm sorry.
10 JUDGE SCHWEBEL: Would you refresh my
11 recollection, please, on the point you were just
12 making? Was there a plea of immunity made by the
13 BRA or on its behalf before the merits on that
14 point were engaged?
15 MS. SMUTNY: No, and let me--I was about
16 to walk through that very precisely. The short
17 answer is no. The BRA raised the defense of
18 immunity in the trial only after it had
19 participated in the case on the merits, a
20 circumstance, I might observe, typically construed
21 as a waiver. That is, it was only after LPA had

1 finished presenting its evidence at trial that the
2 BRA first claimed it was immune from tort claims,
3 although it didn't articulate a reason. And only
4 after the jury's verdict had been rendered did the
5 BRA first claim that it enjoyed immunity under the
6 Massachusetts Tort Claims Act, and it was,
7 therefore, only after the jury's verdict that the
8 trial court upheld the claim of immunity.
9 On appeal, the SJC held that the judge did
10 not abuse its discretion to allow the claim of
11 immunity in that time. So it was in 1998
12 ultimately, six years following the filing of the
13 complaint against the City and the BRA, that the
14 immunity was ultimately upheld.
15 The United States--as we observed in the
16 written pleadings, taking steps in a legal
17 proceeding relating to the merits of the case most
18 typically constitutes a waiver. The United States
19 pointed in the written pleadings to examples of
20 defenses of immunity following the entry of default
21 judgment. Of course, that does not speak to the

1 point because the entry of default judgment by
2 definition is made when the state has not made an
3 appearance, let alone where a state has defended on
4 the merits. So it's not so much the timing, not
5 the lateness, but the actions taken prior to the
6 request for the waiver.
7 The second--
8 PROFESSOR CRAWFORD: Of course, you might
9 want to distinguish between an immunity ratione
10 personae, which a person can waive, where I would
11 agree with you, and an immunity which is a public
12 order or public interest immunity, which it--
13 MS. SMUTNY: Yes, there are reasons to--
14 PROFESSOR CRAWFORD: --may be that the
15 entity cannot waive.
16 MS. SMUTNY: That's right. There are
17 distinctions between, for example, foreign
18 sovereign immunity, which can be waived, and the
19 point about subject matter immunity; but,
20 nevertheless, the prejudice to LPA and the fact
21 that the BRA waits to see the evidence against it

1 first, this can't be ignored. And I just want to
2 emphasize that these points are ancillary to the
3 principal point that was made earlier. This is
4 just further aggravating circumstances which, on
5 balance, paints a total picture, but the principal
6 point of 1105 is made earlier.
7 The Massachusetts court rulings also that
8 the City was not engaged in commerce in its dealing
9 with LPA and, therefore, could not be subject to
10 any claim under the statutory prohibition against
11 unfair and deceptive acts or practices, that
12 ruling, together with the BRA's entitlement to
13 immunity under the Tort Claims Act simply because
14 it was a public employer, it's fair to observe that
15 these are very broad rulings of what it means not
16 to be engaged in commerce, and I would submit it's
17 out of step with the weight of modern international
18 legal practice regarding what it means for a state
19 to be engaged in commerce.
20 The City and the BRA were both parties to
21 the Tripartite Agreement. The BRA under the terms

1 of the Tripartite Agreement had undertaken an
2 express contractual obligation to work with the LPA
3 in good faith through the design review process
4 towards a closing, and the City in particular had a
5 direct financial stake in the Lafayette Place
6 Project as the owner of the Hayward Parcel.
7 None of the authorities cited by the
8 Respondent in the written pleadings to support the
9 proposition that in some circumstances it's
10 reasonable for a government to be granted immunity
11 from tort claims, none of those authorities
12 contemplate a situation where the government agency
13 is a direct commercial partner in the particular
14 project at issue. Again, just an aggravating
15 element here.
16 In urging the more general point that
17 international law does not preclude the application
18 of state immunity to prevent certain categories of
19 private claims, the United States cites to the case
20 Ashingdane v. United Kingdom, decided in 1985 by
21 the European Court of Human Rights. In that case,

1 the court held that a statutory limitation to the
2 right of a private party in the circumstances of
3 that case to pursue a claim against the state did
4 not violate Article 6(1) of the European Convention
5 on Human Rights.
6 As this Tribunal undoubtedly knows, that
7 Article provides that in the determination of one's
8 human--civil rights, excuse me, an obligation,
9 everyone is entitled to a fair hearing.
10 In the circumstances of the Ashingdane
11 case, the European Court concluded that the
12 statutory limitation at issue did not transgress
13 the principle of proportionality and was for that
14 reason consistent with Article 6(1).
15 Now, even apart from the question, as I
16 think might be clear from earlier, even apart from
17 the question of whether such authority speaks to
18 the question of the treatment required by
19 international law in regard to foreign nationals in
20 their property. As the European Convention on
21 Human Rights is directed to the treatment states

1 must accord even to its own nationals, the
2 significance of the European Court's ruling is that
3 the convention requires a fact-based assessment of
4 whether the limitation of access to the courts in
5 the circumstance is consistent with the principle
6 of proportionality.
7 In the Ashingdane court, the court--I'm
8 sorry. In the Ashingdane case, the court noted
9 that the court's task in assessing the
10 permissibility of the limitation imposed was not to
11 review the reasonableness of the statute per se
12 but, rather, to consider the circumstances and
13 manner in which the section was actually applied to
14 the Claimant. In that case, the court concluded
15 that the limitation was consistent with the
16 principle of proportionality because it was not a
17 complete bar to claims, and the Claimant was left
18 with viable other means of recourse.
19 The BRA's immunity and LPA's position,
20 however, is otherwise. The Tribunal may take note--and this
21 was in the bundle of authorities provided

1 yesterday evening. The Tribunal may take note of
2 an even more recent case decided this past year
3 under the very same Article 6(1) of the European
4 Convention of Human Rights, Matthews v. United
5 Kingdom, in which the court concluded that in the
6 facts of that case, the application of state
7 immunity to deny a private litigant the right of
8 action against the state did violate the principle
9 of proportionality and was in breach of Article
10 6(1).
11 In the Matthews case, the court emphasized
12 the fact that the grant of immunity was a blanket,
13 indiscriminate, overly broad grant of immunity like
14 that of the BRA's in this case, simply because the
15 BRA was a public employer. And it was largely on
16 that basis that the court held that the immunity or
17 the grant of immunity violated the principle of
18 proportionality.
19 Again, I would submit that the principle
20 of proportionality does not directly apply to this
21 circumstance.

1 But the conclusion to be drawn here is
2 that, to the extent the Tribunal considers the
3 jurisprudence of Article 6(1) of the European
4 Convention to be analogous to those contained in
5 Article 1105, the Tribunal should assess whether in
6 this case the grant of immunity to the City,
7 particularly the BRA, would survive a principle of
8 proportionality analysis.
9 PROFESSOR CRAWFORD: Are these sorts of
10 statutory immunities of public authorities with
11 regulatory mandates common in the United States? I
12 mean, my impression is that they are, but I may be
13 wrong.
14 MS. SMUTNY: Well, I would say that the
15 Massachusetts statute is not unique, although it is
16 on the strict side. But there are others, and we
17 have not done a complete--neither party has, but
18 I'm sure that it's correct to say that the
19 Massachusetts statute is not unique.
20 JUDGE SCHWEBEL: Could you define what you
21 describe as the principle of proportionality?

1 MS. SMUTNY: I think that simply reflects
2 the notion that states are permitted, in organizing
3 their own domestic laws, to consider the balancing
4 of interests between the state's needs at times to
5 deny certain rights to private parties, and that
6 needs to be balanced against the harm in cause to
7 the individual. And it's just another way of
8 obviously--we might call it a balancing test in
9 U.S. law. We're constantly referring to balancing
10 tests. It's the same concept.
11 When one is assessing the reasonableness--and this
12 is why I question whether it's analogous
13 to this situation. The European Convention on
14 Human Rights also relates to the treatment that the
15 states must accord to their own nationals. Of
16 course, when we're assessing--and certainly in
17 Massachusetts the legislature can assess and one
18 would hope has assessed whether or not the
19 Massachusetts Tort Claims Act is consistent in
20 their view with a balancing approach as the BRA and
21 other agencies may harm the citizens of the

1 Commonwealth.
2 PRESIDENT STEPHEN: But your point is that
3 the balancing act doesn't work in relation to
4 investors who are protected by NAFTA?
5 MS. SMUTNY: Absolutely. That's right.
6 Foreign nationals in this circumstance are entitled
7 to a higher level of protection perhaps than--I say
8 "perhaps" because U.S. law and certainly in other
9 states, the domestic laws vary. Some domestic laws
10 protect quite a bit. The point is, though, that it
11 is inconsistent with 1105 to allow a state to
12 tortiously interfere with a foreign investor's
13 investment and not provide any remedy for it.
14 Finally, I would say, as Mondev has
15 observed in its written submissions, its position
16 was further aggravated by the fact that, following
17 the grant of immunity, and notwithstanding the
18 express finding of the BRA's wrongful conduct, LPA
19 was left with no other effective remedy. The
20 United States in its Counter-Memorial disputed that
21 observation, suggesting that LPA might have

1 presented a claim against the BRA, for example,
2 under the United States Federal Civil Rights Act;
3 in other words, that LPA was protected sufficiently
4 by that law, and it was to demonstrate clearly that
5 the U.S. Federal Civil Rights Act was not aimed at
6 that type of wrongful conduct and that it did not
7 provide the needed protection. It was for that
8 reason that Mondev submitted an opinion of Judge
9 Ken Starr on the point.
10 The United States in its Rejoinder noted
11 that it agreed after reviewing that opinion, or
12 maybe that it agreed all along, that the U.S.
13 Federal Civil Rights Act most likely would not have
14 provided redress for the BRA's wrongful conduct.
15 The United States then added, however, that both
16 the U.S. Federal and Massachusetts State
17 Constitutions provided protections from takings of
18 property and that LPA was free to present that type
19 of claim, that is, those laws provided sufficient
20 protections to Mondev.
21 In that regard, the United States asserted

1 that, to the extent that LPA sought to challenge
2 actions taken by the BRA, it could have done so,
3 and it elaborates in its Rejoinder how this might
4 have worked. It cites to Chapter 652 of the
5 Massachusetts Act, Section 13, et cetera. But here
6 the United States is mistaken. It just so happens,
7 as a matter of fact, that the City and the BRA
8 argued repeatedly, that same statute now being
9 cited by the United States, that the BRA and the
10 City argued that those statutes, in fact,
11 constituted LPA's sole possible remedy under
12 Massachusetts law against the BRA.
13 The court repeatedly rejected that very
14 argument. The BRA made those arguments to the
15 motions judge, and I would refer you to SJC
16 Appendix Volume IV at A429. The motions judge
17 rejected it at SJC Volume III A489. The City and
18 the BRA renewed the same argument in their motions
19 for a directed verdict at the close of the
20 plaintiff's case, and in their motions--for
21 directed verdict at the close of all the evidence,

1 and in their motions for judgment NOV. The trial
2 judge rejected the argument in its decision and
3 order on the BRA's judgment NOV motion. Let's just
4 show the slide. And it was in that context--in
5 rejecting that argument, it was in that context
6 that the court said whereas here, Chapter 121A
7 petitioner has strong evidence that the reviewing
8 board is improperly attempting to strong-arm it
9 during the review process, there is little utility
10 in limiting the remedy to one intended to correct
11 errors of law in the board's decision. A grievance
12 rooted in the motives of the reviewing board is
13 beyond the reach of a certiorari remedy provided in
14 that section.
15 The point here, the United States'
16 argument on these points is reminiscent of the
17 argument advanced by Italy in the ELSI case to the
18 effect that the aggrieved U.S. nationals in that
19 case had exhausted--this is the analogous point,
20 that they had exhausted domestic remedies because
21 there allegedly remained, among other things--

1 PROFESSOR CRAWFORD: Had not exhausted.
2 Had not exhausted.
3 MS. SMUTNY: I'm sorry. Quite right. I
4 missed the important "not."
5 PROFESSOR CRAWFORD: You identified it by
6 reference to Italy. Italy argued they had not--
7 MS. SMUTNY: Quite right. In any event,
8 the point is that this is the type of argument
9 raised in that case about what does it mean to
10 exhaust local remedies. It's analogous to the
11 question of, you know, are there other remedies
12 available.
13 PROFESSOR CRAWFORD: But, of course, NAFTA
14 doesn't require that local remedies be exhausted.
15 All it requires is that before you go to the NAFTA
16 remedy, you waive any remaining local remedy.
17 MS. SMUTNY: Right.
18 PROFESSOR CRAWFORD: So you could have
19 gone on your case, leaving aside any question of
20 retrospectivity, you could have gone straight off
21 to NAFTA; if these events occurred now, you could

1 go straight off to NAFTA.

2 MS. SMUTNY: That's right.

3 PROFESSOR CRAWFORD: What happens when you

4 do resort to the local courts, even though under

5 NAFTA you don't have to?

6 MS. SMUTNY: Okay, but this--yes?

7 PROFESSOR CRAWFORD: Can the courts--can a

8 NAFTA Tribunal say, well, in effect, you had a

9 choice. Having gone to the local courts, we're not

10 going to say that anything is in breach of 1105 if

11 conducting yourself as a prudent litigant you could

12 have got redress in the local courts and you

13 failed. So 1105, without, as it were, reinserting

14 the local remedies, 1105 helps you to explain what

15 is reasonable in the context of a local remedy.

16 MS. SMUTNY: This relates to the point

17 that the complaint here, the wrongful conduct is

18 not just simply the BRA's wrongful interference.

19 It's the lack in the end of a remedy. And it's not

20 a question in this case of the court assessing the

21 merits of the claim and deciding that the claims

1 were not meritorious and then for the Claimant to
2 say, well, that was somehow wrongful, I wasn't
3 treated properly in the conduct of the judicial
4 administration and so on.
5 The point here is that at the end of the
6 day the court says to the Claimant, You were wrong
7 to come to the court on this point, you have no
8 remedy here, it's the failure to provide the
9 remedy, that's the nature of the harm. The
10 reference to the exhaustion of remedies point is
11 simply analogous to the notion of were there other
12 remedies. In other words, if Massachusetts fails
13 to offer a remedy for the tortious conduct, the
14 United States' argument was, well, you know, there
15 were other ways to get at it, so how bad could this
16 be? And the answer is no, there were no other ways
17 to go at it. And, therefore, it's relevant to
18 point out--and principally, the point of referring
19 to the ELSI case is to note a few things, including
20 the burden of proof on this point.
21 If the United States' position is that

1 there were other ways to get at this wrongful
2 conduct and so the failure to provide you a remedy
3 for it was just not that bad, it's worth noting,
4 first, that they have failed to point to any other
5 remedy that would have worked. They start off by
6 pointing to remedies, or at least we understood
7 them suggesting that there might be other remedies.
8 We demonstrate those remedies would have worked.
9 They say, well, gee, we agree, maybe you
10 misunderstood our point. And then they point to
11 some more remedies, and then we show, look, those
12 remedies were raised in the courts, they were
13 rejected, that doesn't--that doesn't work either.
14 The notion of the rule of reason regarding
15 exhaustion of remedies that Judge Schwebel
16 discusses in his dissent in ELSI is relevant to
17 that point. And just to save time, I won't go into
18 it. I think this Tribunal is very familiar with
19 the points there.
20 Ultimately, the United States asserts that
21 none of this is what matters. The United States

1 takes the view that international law, if I'm
2 understanding their position correctly, does not
3 require that protections be set in place to
4 safeguard foreign investments against conduct that
5 is in a sense de minimis wrongful, such as
6 presumably tortious interference with contracts or
7 government action that's unfair or dishonest or
8 unscrupulous.
9 The United States submits that
10 international law does not require a state to
11 provide a remedy for such conduct, even if such
12 conduct is undeniably wrongful as a matter of a
13 state's own laws. The United States suggests that
14 international law is only concerned with providing
15 protections against conduct sufficiently grave to
16 give rise at the local level to what it refers to
17 in the United States context to be a constitutional
18 tort, those actions, for example, against which
19 protections are afforded in the U.S. Constitution.
20 In this case, if LPA could not have made
21 out a claim under the Takings Clause of the Fifth

1 Amendment to the U.S. Constitution, then it has
2 nothing to complain about here. But here the
3 United States is mistaken, and this is to repeat
4 the initial point.
5 If a state makes certain conduct unlawful,
6 to ensure treatment in accordance with Article
7 1105, there must be a remedy available to a foreign
8 investor if the state itself engages in such
9 unlawful conduct in a manner directed specifically
10 to a foreign investment that causes significant
11 harm.
12 So, to the extent that the U.S. Federal
13 and Massachusetts state laws permit the state to
14 violate its own laws in its treatment of a foreign
15 investment in such a way as to cause losses to the
16 foreign investor and then immunizes itself from any
17 claim in that regard, then the U.S. Federal and
18 Massachusetts state laws do fall short of what
19 Article 1105 requires for foreign investors. It is
20 simply not correct that, as a matter of
21 international law, according full protection and

1 security to foreign investments means nothing other
2 than what one would find in U.S. law regarding the
3 takings of property; and that, moreover, the
4 content of the international law standard might, in
5 fact, be defined by reference to the decisions of
6 U.S. courts on the taking of property.
7 In short, to the extent that the United
8 States offers no protection against municipal
9 agencies that engage in dishonest and unscrupulous
10 behavior as they pursue their legislative mandated
11 ends to the detriment of foreign investors with
12 whom they have contracted or with whom they are
13 dealing, the United States fails to accord
14 treatment in accordance with international law.
15 Now, I was going to turn to the contract
16 claims. If you'll forgive me, I'm going to grab a
17 water.
18 Okay. Now--
19 JUDGE SCHWEBEL: Ms. Smutny, just to
20 finish this point off there, am I right in
21 concluding that you don't maintain that the mere

1 fact that an act of a state is in violation of its
2 own law is necessarily a violation or can indeed
3 be--well, I guess necessarily is a violation of a
4 treaty obligation of this kind? You're not saying
5 that? Rather, what you're saying is that the
6 failure of that state to accord a remedy to a
7 foreign national for violation of its own law is a
8 violation of 1105? Is that your point?
9 MS. SMUTNY: That's correct, when
10 particularly--and in this case, the narrow point--when that
11 wrongful conduct is directed against a
12 foreign national, the state's own conduct directed
13 against the foreign national--I'm sorry, the
14 foreign investment.
15 JUDGE SCHWEBEL: And does it matter
16 whether it's purposefully directed against the
17 foreign national because of his alienage, or
18 whether it just--that's an incidental point? I
19 mean, they're against the particular person but not
20 because of his alienage, but just because of the
21 circumstances otherwise?

1 MS. SMUTNY: What makes it wrongful is not
2 exactly--it doesn't matter what makes it wrongful.
3 The point is: Is it wrongful?
4 JUDGE SCHWEBEL: Right.
5 MS. SMUTNY: So if it's wrongful because
6 it's discriminatory--of course, in the context of
7 the investment protection treaty, that would only
8 be an aggravating factor, particularly in respect
9 of a treaty, because--and in this case, an 1102
10 problem. But we're not talking about 1102. It
11 might be wrongful for other reasons.
12 Okay. The dismissal of the contract
13 claims. I will now address the decision of the
14 SJC, the Supreme Judicial Court of Massachusetts,
15 in respect of LPA's contract claim against the City
16 and Mondev's submission that that decision both
17 substantively and procedurally was taken in a
18 manner inconsistent with the standard of treatment
19 contained in 1105.
20 The parties do not dispute that 1105
21 obligates the state's parties to NAFTA to accord

1 investors treatment--I'm sorry, investors and
2 investments of another party, treatment that
3 includes the obligation to ensure that the courts,
4 in hearing a covered investor's claim for redress,
5 treated justly and without any serious inadequacies
6 in the administration of justice.
7 Indeed, there is substantial precedent to
8 support the conclusion that a state may be held
9 internationally responsible for the content,
10 procedural operation, and/or substantive effect of
11 a judgment rendered by its courts.
12 In assessing the content of judicial
13 decisions and their effect on the property rights
14 of aliens, international Tribunals have looked to
15 the objective nature of the judgment in light of
16 both the underlying facts and the law to determine
17 whether the treatment accorded was wrongful, and
18 this is reflected in the Martini case which is
19 cited the pleadings.
20 But the principle may be illustrated
21 further as follows: Claimant's Legal Appendix 76,

1 the Rihani case, the American-Mexican Claims
2 Commission ruled that a decision of the Supreme
3 Court of Justice of Mexico that overturned a lower
4 court's ruling on the enforceability of certain
5 government-issued bonds was erroneous and, as such,
6 gave rise to international responsibility. The
7 Commission based its decision in that case on the
8 fact that the Mexican court's ruling was so clearly
9 inconsistent with the evidence in the record before
10 it that the ruling amounted to a denial of justice.
11 In the Bronner case, which is Legal
12 Appendix 77, that concerned a decision of a Mexican
13 court that upheld the confiscation of Mexican
14 custom authorities of imported--by Mexican customs
15 authorities of imported goods on the grounds that
16 the American importer's invoices were not in proper
17 form and that the defects appeared in them to prove
18 an intent to fraud. There again, the defect in the
19 court's ruling was that it was not reasonably
20 supportable by the evidentiary record before it.
21 In the Jalapa Railroad and Power Company

1 case, Legal Appendix 78, after concluding that a
2 legislative decree that effectively nullified the
3 Claimant's contract with the Mexican State of
4 Veracruz and concluding that that constituted a
5 confiscatory breach of contract, the Commission
6 held that a subsequent decision of the Supreme
7 Court of Justice of Mexico that upheld the decree
8 separately constituted a denial of justice.
9 After reviewing the circumstances
10 underlying the contractual relations between the
11 Claimant and the Government of Veracruz and the
12 means by which the government had nullified the
13 contract, the Tribunal found that the Government of
14 Veracruz stepped out of the role of the contracting
15 party, sought to escape vital obligations under its
16 contract by exercising its superior government
17 authority, and as to the decision of the Mexican
18 court that followed that action, the Commission
19 found that it, too, was inconsistent with the
20 standard of treatment required under international
21 law because the court ruled against the Claimant

1 after disregarding evidence in the Claimant's
2 favor, reversing prior established case law, and
3 otherwise disregarding applicable procedural rules.
4 The--go ahead.
5 PROFESSOR CRAWFORD: I'm just trying to
6 get a word in.
7 MS. SMUTNY: Sorry.
8 PROFESSOR CRAWFORD: That's all right. I
9 think I have to go back about four cases. But
10 since I was stumbling along in your wake, anyway,
11 that's not--I think this is the Rihani case.
12 MS. SMUTNY: Yes.
13 PROFESSOR CRAWFORD: There's no doubt at
14 all that a state can be responsible for decisions
15 of the courts.
16 MS. SMUTNY: Right.
17 PROFESSOR CRAWFORD: That's undoubtedly,
18 if they fall below the relevant standard. That
19 case at least, and from the sound of it, the others
20 cases you've been citing, some of which I'm not
21 familiar with, was really critical of the Supreme

1 Court for ignoring clear and indisputable evidence
2 in the record, and it said that in the circumstance
3 the only inference was that it had done that in a
4 willful disregard of the claim presented, and that
5 could clearly fall below the minimum standard.
6 But what happened here was a decision of a
7 court really on a point of law. It wasn't a
8 question of fact.
9 MS. SMUTNY: Well, I think--
10 PROFESSOR CRAWFORD: The court said in a
11 situation where you've got a state government
12 contract and you're trying to get the government to
13 do something, you've got to do absolutely
14 everything in your power. Now, that may or may not
15 be a desirable proposition of law, but it's
16 formulated as a general proposition of
17 Massachusetts law.
18 Are there any cases in which international
19 claims Tribunals have said that a proposition of
20 law laid down in the common law mode is, as it
21 were, so unreasonable as to fall below the minimum

1 standard, irrespective of assessment on questions
2 of fact?
3 MS. SMUTNY: Let me just back up to the
4 premise of your question, which is that all the SJC
5 did was restate the law, if you will--well, make a
6 finding that as a matter of law what was found
7 below was insufficient to find a breach, and in a
8 moment, I'll walk through--and I think that's very
9 important--the ruling, because the real problem
10 comes when the SJC fails--the question became
11 whether or not there was something left for remand.
12 And it was within that context that the SJC
13 purported to review all the evidence in the record.
14 It concluded there was nothing to remand.
15 In that context--and I'll get to that in a
16 moment, but the essential point bearing in mind is
17 that there is no reasonable way applying the
18 standard of review that was applicable that any
19 court looking at this evidence could have concluded
20 that there was not a reasonable basis for a
21 reasonable jury to find that in the circumstances

1 of this case, LPA would have been excused from
2 doing--from invoking the mechanisms, which we'll
3 talk about in a minute. That's really the point.
4 And that's why these references to these earlier
5 cases of patently failing, whether it's because of
6 going over it too quickly or whatever the reasons,
7 maybe--I don't want to suggest--this is why we
8 started off by reviewing--noting the objective
9 character. One doesn't maybe have to examine too
10 much why is it that this happened. There may be
11 many reasons why it happened. Maybe the court was
12 too busy with a busy docket. Who knows?
13 The point is that there is no way
14 reasonably to justify, to come to the conclusion
15 that what the SJC did is in any way consistent with
16 the standard of review they were supposed to apply
17 and the enormous evidence in this case, which I
18 think--you know, this claim of ours in 1105 is very
19 fact-based so I'm going to--
20 PROFESSOR CRAWFORD: So you deny my
21 characterization in the question, of course.

1 MS. SMUTNY: Yes.
2 PROFESSOR CRAWFORD: I'm not expressing
3 any concluded views at all. But you deny the idea
4 that what the Supreme Court did was to impose, as
5 it were, a new rule of law or a rule of law in
6 respect of government contracts. What you're
7 saying is they made a factual determination which
8 was contrary to the evidence.
9 MS. SMUTNY: Oh, no, I--
10 PROFESSOR CRAWFORD: In the same way that
11 the Mexican Supreme Court did here.
12 MS. SMUTNY: Well, no, they did apply a
13 new rule, and I'll walk through that. But that
14 ultimately is not enough for an 1105 breach. I
15 guess I agree with you on that point.
16 Courts, especially in common law
17 jurisdictions, apply new rules. We have judicially
18 developed law. That's not an 1105 breach. It's
19 what they do with it.
20 But, you know, in the context--and let me
21 go through it. And I'm jumping ahead a little bit,

1 but since you ask, you know, when a court
2 determines that the law is really X where a lower
3 court thought it was Y, you know, usually there's
4 an assessment about whether or not it's reasonable,
5 particularly in a contractual relationship, to
6 assess whether it's reasonable to apply it
7 retroactively or not. That's one point.
8 But then we go on to the point that in
9 this context--and, again, I'm jumping ahead--the
10 court in its own analysis left the question open:
11 Would LPA, nevertheless, be excused? That then
12 becomes the question. Would LPA be excused? And
13 in that context, they need to review all the
14 evidence in the case in the light most favorable to
15 LPA to assess was there a reasonable for a
16 reasonable jury looking at all the evidence in this
17 case to find that there was an excuse.
18 They do some kind of review. I don't know
19 how to describe it exactly, but they come very
20 quickly to the conclusion--and I'll get to this--no, there's
21 nothing, end of case.

1 Let me jump ahead because we've covered a
2 little bit of ground, and you're clearly following
3 along with me about what the nature of this debate
4 is, the relevant circumstances in this case.
5 LPA had claimed that the City and the BRA,
6 the two other co-contracting parties to the
7 Tripartite Agreement, had breached their
8 contractual obligations arising under that
9 agreement, and in particular with reference to
10 Section 6.02 of the Tripartite Agreement. Section
11 6.02 is that provision I think we're all
12 remembering that provided LPA the option to
13 purchase the Hayward Parcel development rights.
14 There is no disputing the fact that
15 although LPA exercised the option, the City and LPA
16 never closed the sale, so the question was whether
17 in the circumstances of the case, as LPA had
18 claimed, there was, due to breaches of the City--whether the
19 City had breached the contract.
20 At trial the jury had been persuaded by
21 the evidence in the case that the City and the BRA

1 had both breached the contract, and the trial
2 judge, who had heard all of the evidence and
3 observed all of the witnesses, entered judgment on
4 the jury's verdict as to the City, despite the
5 City's efforts to overturn the verdict on post-trial
6 motions.
7 The trial judge struck the jury's verdict
8 on the contract against the BRA as being
9 meaningless.
10 Now, the City appealed, asserting, among
11 other things, that the jury verdict was a
12 tremendous windfall, it would result in LPA being
13 awarded a bonanza of millions of dollars of
14 taxpayer money, whereas LPA had already walked away
15 with money in its pocket back to Canada. The basis
16 of the City's appeal was that it argued that the
17 contract to sell the Hayward Parcel was not
18 enforceable because terms such as price were not
19 sufficiently defined. On that issue, the SJC
20 disagreed and held that the contract was
21 enforceable.

1 The City also argued, however, that if
2 there was an enforceable contract, the City did not
3 breach it. The City based its argument on the
4 assertion that the evidence in the record
5 regarding, for example, whether appraisals were
6 completed or whether the City's real property board
7 wanted to avoid the formula, that that evidence,
8 they argued, was not sufficient to support a jury
9 verdict that the City breached the contract.
10 In defense of the judgment, LPA argued
11 that the totality of the evidence was sufficient to
12 support a jury verdict that the City breached.
13 So the question presented by the parties
14 on appeal to the SJC was one of the sufficiency of
15 the evidence that the City breached its contractual
16 obligation. This is a limited question. And it
17 was to that limited question, therefore, that LPA
18 directed its submissions on appeal.
19 However--and now here starts to be the
20 point--without notice to the parties and without
21 providing an opportunity to LPA to be heard on the

1 issue, the SJC in its opinion recast the issue,
2 notwithstanding that the dispute between the
3 parties was as to the sufficiency of the evidence
4 to support the jury's conclusions as to the City's
5 performance, the SJC concluded that the relevant
6 issue was the sufficiency of LPA's performance.
7 The City had not raised the sufficiency of LPA's
8 performance as a ground for appeal, and, therefore,
9 LPA had not addressed that issue.
10 Nevertheless, in its opinion the SJC
11 pronounced that the question then becomes whether
12 LPA can, as a matter of law, maintain a claim
13 against the City for breach of that contract. And
14 the court began its analysis by reference to the
15 case that articulated the established rule. In
16 Massachusetts, this is this Leigh v. Rule quote:
17 "When the performance under the contract is
18 concurrent, one party cannot put the other in
19 default unless he is ready, able, and willing to
20 perform and has manifested this by some offer of
21 performance." And note the second sentence, "But

1 the law does not require a party to tender
2 performance if the other party has shown he cannot
3 or will not perform."
4 PROFESSOR CRAWFORD: That's the
5 Massachusetts law, and that is followed in England
6 as well.
7 MS. SMUTNY: Yes. The court thus sought
8 to assess whether LPA had put the City in default
9 by being ready, able, and willing and manifesting
10 that by some offer of performance. That question
11 had been presented to the jury as follows--this is
12 the instructions the trial court gave to the jury.
13 The jury was asked to consider: Did LPA
14 perform its obligations? Did LPA do what it was
15 supposed to do? Did it do what it was supposed to
16 do pursuant to the terms and conditions of the
17 contract? One cannot seek to enforce a contract
18 unless one lives up to and meets its obligations.
19 Based on the totality of the evidence presented to
20 it, the jury concluded, having listened to all of
21 these witnesses and seeing all of the evidence, the

1 jury concluded that, yes, LPA had performed its
2 obligations under the contract.
3 JUDGE SCHWEBEL: Ms. Smutny, like
4 Professor Crawford, I'm traveling in your wake, and
5 I may not always be able to put my question just as
6 you've enunciated the provocation for it. I've
7 been mulling it over a bit, but the point I wish to
8 ask you is this: You criticized the Supreme
9 Judicial Court of Massachusetts for having issued a
10 judgment turning on a point that the parties didn't
11 argue because it wasn't a point of appeal. It
12 wasn't a point appealed from by the City or BRA,
13 and so, therefore, you say naturally the
14 plaintiffs--the appellant did not argue the point.
15 Now, I can accept, indeed warmly endorse
16 the proposition that no court and no arbitral
17 Tribunal should base its judgment on a point which
18 the parties have not argued. But does it follow
19 that a court so basing its judgment equates with a
20 denial of justice? That I think is another
21 question, and you seem to be conflating the two.

1 MS. SMUTNY: Well, this all leads to the
2 reasonableness of the SJC's failure to remand on
3 the question that the parties never had the
4 opportunity to address that was so much dependent
5 upon an appreciation of what the totality of the
6 evidentiary record showed. Everything that I'm
7 pointing to, all these little steps in the way, are
8 all leading to the threshold point. When the SJC
9 crosses the threshold, which they hadn't crossed
10 yet, of violating--where after we walk through how
11 they got there and then they fail to remain on the
12 question of excuse, when it is clear that the
13 parties, and LPA in particular, never got a chance
14 to speak to the SJC on it--I mean, just think as a
15 practical matter what the nature of the SJC's
16 review is. You've seen the voluminous record
17 below. And as you know, parties have page
18 limitations in the context of such limited appeals
19 where the question before the house was: Was the
20 evidence sufficient to support a jury finding that
21 LPA had performed?

1 And the point is, when the SJC ultimately--and
2 they are fully entitled to, but when the SJC
3 ultimately gets to the conclusion that, okay,
4 here's what the law is, this is what it should have
5 been, the real crux of this case really is did--was
6 LPA excused from invoking, as it turns out, these
7 arbitration and appraisal mechanisms? And I'll
8 point you to those in a moment, what those
9 mechanisms really were about.
10 But when they make that point and they do
11 a very cursory little review of a few nuggets of
12 evidence, and fail to remand, when you take all
13 these steps together, that demonstrate how
14 egregious that last conclusion was.
15 PRESIDENT STEPHEN: When you refer to the
16 failure to remand, as you put it, that means to
17 send the matter back to a jury?
18 MS. SMUTNY: Yes, send the matter to a
19 trier of fact, where LPA would have the opportunity
20 to speak to how the evidence meets the legal test.
21 I don't want to--I'm sorry if I was bogged down a

1 little bit in the national expression. The point
2 really is that the SJC's role as the appellate
3 court was simply--is not as a trier of fact. And
4 certainly LPA did not have any opportunity in that
5 posture to make arguments, particularly because it
6 was not on notice, that the SJC was even curious
7 about this point, it didn't have an opportunity to
8 demonstrate to any Court, certainly not a trier of
9 the facts, how the abundant evidence in this case
10 points to the fact that LPA was excused and
11 particularly, and we'll walk through it, the jury
12 was expressly instructed not to answer that
13 question, as the special question laid it all out.
14 PROFESSOR CRAWFORD: Yes.
15 MS. SMUTNY: So we would never know. I
16 mean if the jury had answered that question, maybe
17 there wouldn't have been a point here.
18 PROFESSOR CRAWFORD: There is a sort of
19 nagging problem underlying what Judge Schwebel
20 asked you, which is this. Okay, NAFTA is a very
21 important procedure and so on, but there's a

1 question of its reach into municipal procedures,
2 and obviously, different courts are going to have
3 different practices in whether they remand or
4 whether they decide cases, which they think are
5 clearly themselves and different courts are going
6 to have different practices in how extensively they
7 give reasons for what they've done.
8 If you're going to treat 1105 as giving
9 you a sort of mandate to review those issues, in
10 effect, a NAFTA Tribunal becomes a court of appeal,
11 and that's a bit of a worry, isn't it?
12 MS. SMUTNY: Yes, but it is really, at the
13 end of the day, particularly for this claim, a
14 question of degree, no question about it.
15 International law only speaks to those situations
16 where in the conduct of the decision making or in
17 the end result or other circumstances such as
18 failing to abide by procedural rules, blatant
19 failures to disregard evidence and so on that if
20 the result of the administration of justice is so
21 bad, there's no question that on this claim there

1 is a question of degree, and that's where this
2 Tribunal is going to have to decide, if what I walk
3 you through is sufficiently egregious. We would
4 submit that it is, particularly in light of what
5 this evidentiary record shows and the end result
6 here. And, again, and the nature of the facts, and
7 the Court is fully aware that because it knows what
8 it's doing, it knows it's retesting the question.
9 Well, on this next slide the SJC states in
10 his opinion--now, again, bearing in mind that the
11 parties are not arguing about the content of the
12 law--the SJC though, this is part and parcel of
13 this is how it's taking steps to make adjustments
14 to the parties' understanding as to what the
15 context of the law is. The SJC ruled that the rule
16 referred to above really means that a buyer must
17 manifest that he's ready, willing and able to
18 perform by setting a time and place for passing
19 papers or some other concrete offer of performance.
20 Again, on the point of notice and the
21 reasonableness of its later decisions, clearly the

1 City had never argued that the jury instruction was
2 an adequate expression of the standard. LPA never
3 had the opportunity to confront the question of
4 whether the evidence in the record was sufficient
5 to meet the so-called concrete offer.
6 PRESIDENT STEPHEN: What was there for the
7 jury that you say should have passed on this to
8 look at other than the one letter a fortnight
9 before of the final date. That would have been the
10 only matter, wouldn't it?
11 MS. SMUTNY: No. Let me refer you--I'm
12 going to jump--they want to make several laundry
13 lists of evidence that was available for them to
14 look at. Let me just make one last point before I
15 go into that just so that we have the complete
16 framework in mind for that evidence.
17 Anyway, the SJC says that this is what it
18 means. Then the SJC rules--and go to the next
19 slide--that in the circumstances of this case, this
20 is what we were obviously familiar with, where the
21 complex contract leaves the certain key terms to be

1 decided by formula and procedures, and where both
2 parties share the responsibility for activating
3 those procedures, the plaintiff cannot be ready,
4 willing and able to tender or put the defendant in
5 default unless the plaintiff attempts to use the
6 contractually specified mechanisms to overcome. So
7 the question really, as a matter of fact--jumping
8 ahead a little and then we'll go over it again--is
9 that the Court is ruling here that LPA's
10 performance, they needed to at least invoke the
11 arbitration and appraisal mechanisms in this case
12 in order to demonstrate that they were ready,
13 willing and able, unless they were excused from
14 doing so.
15 And now how does one assess whether
16 they're excused from invoking that mechanism?
17 We talked--before I point to that, we
18 spoke about the significance of applying the
19 retroactive application of new rules, but since we
20 talked about that, I'm just going to skip right to
21 the review of that evidence. Just give me one

1 moment. Let me find--well, before I do that, I
2 want to emphasize the appellate standard of review
3 here. Having reversed the jury's finding that LPA
4 had demonstrated that it was ready, able and
5 willing to perform, together with the Trial Court's
6 judgment predicated upon that finding, the SJC was
7 left to consider whether an alternative basis for
8 judgment against the City was possible, and if so,
9 whether there was sufficient evidence from any
10 source in the record to support a jury verdict on
11 such an alternative basis. If there was, it was
12 the appellate court's obligation to remand, the
13 send back to the trier of fact any remaining issues
14 to the court below, to give LPA an opportunity to
15 present its case to a proper trier of fact. And
16 this is because even under the SJC's ruling, the
17 law does not require a party to tender performance
18 if the other party has shown he cannot or will not
19 perform.
20 We should be going toward--the next slide
21 please. The jury had found that LPA had performed

1 and had been instructed expressly not to address
2 the question of whether LPA was excused from
3 performance in the circumstance, and so the jury
4 was expressly barred from addressing the very issue
5 now deemed so critical. And so it was the SJC's
6 role to find in its own standard of review, it was
7 to assess whether there was any evidence anywhere
8 in the record viewed in the light most favorable to
9 LPA from which a jury reasonably could conclude
10 that LPA's performance was excused. So the SJC
11 concluded, however, that LPA could not have been
12 excused from invoking the appraisal and arbitration
13 mechanisms to demonstrate that it was ready, able
14 and willing, because the SJC had just ruled that it
15 was--well, the question. I'm sorry I'm jumping
16 ahead, but the point ultimately is the question had
17 become was LPA excused from invoking appraisal and
18 arbitration mechanisms in the contract?
19 PROFESSOR CRAWFORD: [Off mike]
20 MS. SMUTNY: That's right.
21 PROFESSOR CRAWFORD: So in fact the

1 question addressed in questions 2 and 3, is a
2 slightly different one from the one on which the
3 Supreme Judicial Court decided. The Supreme
4 Judicial Court decided that one party can't hold
5 another in breach of the contract if the reason for
6 non-performance relates to a procedure that has not
7 been exhausted in effect or is not being used.
8 MS. SMUTNY: Yes.
9 PROFESSOR CRAWFORD: It's a fine
10 distinction perhaps.
11 MS. SMUTNY: Yes. Well, let's just pass
12 out, because I think it's important to appreciate--I've
13 excerpted, just to make it a little bit easier
14 to follow, this is just sections of the Tripartite
15 Agreement. These are the appraisal and arbitration
16 mechanisms that the Court basically held LPA was
17 required in this case to demonstrate a breach to
18 invoke. They're contained--distribute what we have
19 here. They're contained essentially in Sections
20 1301 and 10(d) of the Tripartite Agreement. But
21 these appraisal mechanisms in 1301, it says that

1 the Tripartite Agreement permitted the parties to
2 invoke appraisal procedures. The appraisal
3 procedures that one refers to was that if there was
4 a disagreement as to the purchase price of the
5 Hayward Parcel by recourse to appraisers, the
6 parties could accomplish--well, they could
7 arbitrate what the price is. So in that way they
8 could accomplish no more than to reduce essentially
9 the formula in the Tripartite Agreement to a
10 particular number.
11 And the other mechanism, the so-called
12 arbitration mechanism provided that if the parties
13 were unable to agree on appropriate details of the
14 purchase and sale contemplated, the details could
15 be resolved by arbitration, but at most such
16 details would have included issues such as the
17 purchase price.
18 In any event, it's highly questionable
19 whether the precise boundaries of the parcel, which
20 as you recall depended upon the City's regulatory
21 decision making, it's highly questionable whether

1 issues like that could have been resolved by our
2 recourse to arbitration, and in any event, most
3 importantly, neither of these provisions could have
4 been utilized to resolve a situation in which the
5 City simply refused to perform under Section 6.02,
6 and in any event, LPA never had the opportunity to
7 confront the issue of the limitations of these
8 mechanisms in the circumstances of the case. These
9 mechanisms and their limitations are important
10 because the SJC bases its whole decision on the
11 value, the utility of these mechanisms. They are
12 holding LPA to an obligation in the circumstances
13 of this case to have invoked them. So it's--
14 PRESIDENT STEPHEN: The mechanisms you
15 refer to were the very features that the Court
16 regarded as satisfying the requirements of a
17 binding contract.
18 MS. SMUTNY: Well, that's right, but once
19 there's a binding contract, one must still ask
20 whether LPA was excused in the circumstances from
21 failing at the end of the day, because the Court

1 held that they failed to perform as they needed to
2 perform. So the rule was, what will they excuse?
3 These are really separate points.
4 One is the question: do you have an
5 enforceable contract? Okay, you have one because
6 there are mechanisms in place. But then this
7 completely separate question is: is LPA in the
8 circumstance excused from doing more than it did?
9 JUDGE SCHWEBEL: Could you tell us the
10 precise clauses to which you are referring in this
11 paper you've just distributed?
12 MS. SMUTNY: I'm going to call on my
13 colleague, Lee Steven, who will walk us through
14 exactly how this works.
15 MR. STEVEN: The first tab, Tab 1, is the
16 second amendment to the Tripartite Agreement. If
17 you go to the second to last page at that tab you
18 will note that at the top of the page--this would
19 be page 4--this was one of the amendments to
20 Section 6.02, and this is a provision which says to
21 work out the appropriate details of the purchase

1 and sale agreement, if you cannot work out those
2 details, then you are to go to 354 in accordance
3 with Article 8 of the deed and agreement dated
4 September 11th. So the deed and agreement, Article
5 8, is in Tab 3. Unfortunately, some additional
6 pages were inadvertently included in that tab, but
7 Article 8 is at the end of Tab 3, and that is from
8 the deed and agreement, so the provisions of
9 arbitration are--
10 PRESIDENT STEPHEN: I'm sorry. You're
11 looking at the last page of Tab 3, did you say?
12 MR. STEVEN: Article 8 begins--
13 PRESIDENT STEPHEN: I see, yes.
14 MR. STEVEN: Near the end. There are no
15 page numbers on that one. But Article 8 of Tab 3
16 is arbitration.
17 Tab 2 then is Section 1301 from the
18 Tripartite Agreement. That is the appraisal
19 mechanism of which Ms. Smutny was talking about
20 just a moment ago. So Tab 2 is the appraisal and
21 Tab 3 is the arbitration.

1 PRESIDENT STEPHEN: Thank you.
2 PROFESSOR CRAWFORD: In the agreement
3 which introduced the drop-dead date, there was a
4 qualification relating to the City's refusal to
5 complete in good faith or words to that effect. In
6 the agreement that was eventually signed I think,
7 whether signed by Mondev or by Campeau I can't
8 remember, but there was a qualification in that
9 agreement where the drop-dead date did not apply.
10 MS. SMUTNY: If there was action taken on
11 that date.
12 PROFESSOR CRAWFORD: Did either Campeau or
13 Mondev ever rely on that qualification?
14 MS. SMUTNY: The arguments were made that
15 there was bad faith by the City. This is what the
16 SJC considers. The SJC considers whether there was
17 sufficient evidence that the City acted in bad
18 faith. And the point there is that the SJC first
19 of all looks at a very limited view of the
20 available evidence on that point, and also
21 completely fails to take into account the total

1 context that was available to the jury to consider
2 the circumstances and so on. But the question
3 really--
4 PROFESSOR CRAWFORD: But the jury never
5 had to address that issue.
6 MS. SMUTNY: Right. The jury didn't have
7 to address the issue, so we didn't get to hear what
8 the jury had to say. And also the question really
9 was, I think, a very, very limited one for the SJC.
10 It was just whether or not it was bad faith not to
11 extend the closing date, for example. It was not
12 an analysis of what would have been available to
13 the jury had the question of excuse been remanded
14 to it, and--I'm sorry.
15 PROFESSOR CRAWFORD: I presume their
16 position straight after the drop-dead date, as I
17 understand it, was the Campeau acting on its own
18 behalf and on behalf of Mondev reserved its rights,
19 but then continued to negotiate.
20 MS. SMUTNY: Right.
21 PROFESSOR CRAWFORD: And is there any

1 question that if Campeau had really taken the view
2 or if Mondev had really taken the view that the
3 exception to the drop-dead clause applied, that
4 they shouldn't have tested that at that point,
5 either by recourse to the courts or by arbitration.
6 MS. SMUTNY: I think one needs to view
7 these questions in the context of the commercial
8 realities of these developers who were viewing
9 giving up and just dropping the whole thing and
10 let's start enforcing all of our legal rights to
11 the maximum extent as recognition of a sort of
12 failure, and they all would have at that point been
13 accepting certain losses. Everyone knows that
14 reasonably, that litigation and arbitration and
15 all, they never make you whole. The commercial
16 realities were the importance to these developers
17 of trying to salvage this project and to keep it
18 going. And so the question really is whether in
19 that context were they reasonable to keep going?
20 Yeah.
21 Well, let me talk now--and this is an

1 important point--what would have been the evidence--what is
2 the evidence in the record? And I have to
3 say, I can't do it justice, but I'll try.
4 PRESIDENT STEPHEN: This is the evidence
5 that should have gone to a jury.
6 MS. SMUTNY: Right, that was available to
7 the jury to assess whether or not LPA was excused.
8 First, the City's Real Property Board minutes, you
9 recall that was thrown up on a screen yesterday.
10 The Board expressed its desire to abandon the
11 Tripartite Agreement. The memorandum from the
12 Chairman of the City's Real Property Board,
13 describing the Tripartite Agreement as, quote,
14 "giving a windfall to LPA that should be avoided."
15 Repeated statements to LPA, even in newspapers by
16 the BRA's Director Coyle, that he wanted to change
17 the Hayward Parcel, the deal, to reflect the higher
18 price, or the City together with the stipulation
19 that was in the record that the BRA Director Coyle
20 was left by the Mayor to do as he saw fit. The SJC
21 had that stipulation in the record. Evidence of

1 the coercive manner--

2 JUDGE SCHWEBEL: Stipulation saying what?

3 I'm sorry.

4 MS. SMUTNY: Oh, I'm sorry. If you recall

5 yesterday, there was a stipulation put in the

6 record regarding the fact that the BRA was free to

7 act by the City, the BRA's Director Coyle was left

8 by the Mayor to do as he saw fit, et cetera, et

9 cetera.

10 The evidence of the coercive manner in

11 which the BRA placed various zoning restrictions on

12 the development projects, including arbitrary

13 building height limitations, all of which magically

14 disappeared the moment Campeau agreed to pay the

15 market price plus a series of extra contractual

16 concessions the BRA had extorted from it, and the

17 fact that these zoning obstacles were used to

18 coerce LPA to conclude an amendment to the

19 Tripartite Agreement, this drop-dead date, that

20 established this drop-dead date, and established--the

21 significance of this, that it established an

1 expiration date on LPA's option closure right
2 which, with no expiration date, had existed
3 previously, and which provided no benefit to LPA
4 whatsoever, other than the hope--and again,
5 thinking about the commercial realities of trying
6 to salvage the project, so that at this point LPA
7 is given the contractual hope that maybe now the
8 BRA will work--now that there's a deadline, they'll
9 be wanting, you know, to work in good faith to see
10 at least that the project is not falling apart.
11 Also the minutes of meetings of the City's
12 Real Property Board, discussing this drop-dead date
13 in which these were all put up on screens before,
14 language that the City considered that amendment
15 totally in the City's favor--and in fact, would
16 free the City to dispose of the parcel to another
17 development company, et cetera. Evidence that the--I'm
18 sorry.
19 PROFESSOR CRAWFORD: Let's assume that
20 with this and other evidence one came to the
21 conclusion that there was material on which the

1 jury could or even probably would have decided had
2 they been asked, that the BRA and/or the City had
3 willfully refused to do what it had to do in order
4 to--and therefore the condition on the basic
5 contract rule was met. How do you get from there
6 to a breach of 1105?
7 MS. SMUTNY: Okay. So let's assume you're
8 with me, because I could go on for a long time
9 about the evidence available--
10 PROFESSOR CRAWFORD: We were under that
11 impression, yes.
12 [Laughter.]
13 MS. SMUTNY: Yes. The point is, the story
14 is full of bad faith, and this is obviously what
15 the jury was faced with. The point here is bearing
16 in mind the Court's standard of review, and here's
17 where the 1105 point is, it's nothing short of
18 inconceivable that the SJC could have applied the
19 standard of appellate review, and that is this is
20 the standard. View the evidence from any source in
21 the record in the light most favorable to LPA, and

1 it's inconceivable that they could have reviewed
2 that evidence and still conclude that there was not
3 sufficient evidence upon which a reasonable jury
4 can conclude that the City had not expresses an
5 unwillingness to perform its obligations, that is
6 to say, the futile ceremony--
7 PRESIDENT STEPHEN: Isn't the evidence
8 we're looking for evidence of effective tender by
9 LPA?
10 MS. SMUTNY: No. The evidence you're
11 looking for at this context, in the way the SJC had
12 taken its analysis was whether the totality of the
13 evidence in the record was sufficient to conclude
14 for a jury that LPA was excused from doing anything
15 more than it did, and it was excused from invoking
16 those arbitration and appraisal mechanisms because
17 it would have been a futile ceremony because it
18 wouldn't have caused the City to do anything
19 further towards--
20 PROFESSOR CRAWFORD: Because in effect,
21 there had been a constructive total refusal by the

1 City to perform on its part.

2 MS. SMUTNY: The jury could have concluded

3 that, that all of this evidence in the record was

4 sufficient to conclude that it's not reasonable to

5 ask LPA to do anything more than it did. It would

6 have been a futile ceremony to invoke those

7 provisions.

8 JUDGE SCHWEBEL: Are you arguing in a

9 sense by analogy to the public international rule

10 on the exhaustion of local remedies, namely that

11 local remedies need not be exhausted when they're

12 patently ineffective?

13 MS. SMUTNY: Certainly the principle is

14 the same, yes. The principle is the same. And the

15 point here, regarding 1105, is that the SJC,

16 disregarding the bulk of the evidence in the record

17 that a reasonable jury might have considered as to

18 excuse. The SJC selectively referred to the City's

19 delays in obtaining appraisals and defining precise

20 boundaries of the property because--and concluded

21 that those obstacles, and they pointed to a few,

1 did not demonstrate that the City was unwilling to
2 perform because the SJC noted LPA indicated it
3 would purchase the Hayward Parcel even with those
4 uncertainties. The SJC said that the City's delays
5 in obtaining appraisals, et cetera, the SJC
6 concluded that those obstacles that the City was
7 throwing up did not demonstrate that the City was
8 unwilling to perform, because the SJC noted LPA
9 indicated it would purchase the Hayward Parcel even
10 with those uncertainties. And what the SJC
11 therefore did was judge whether the City was
12 manifesting its intent to abandon the Tripartite
13 Agreement by reference to LPA's intention without
14 regard to the obstacles to perform, and the Court
15 concludes on this point, unlike a situation in
16 which a defendant clearly expresses an
17 unwillingness to perform, here LPA seeks to
18 attribute repudiation to the City based on the mere
19 fact that uncertainties remains in the contract.
20 This of course was not merely a mischaracterization
21 of LPA's position. LPA did not argue that the

1 uncertainties in the contract were evidence of the
2 City not being willing to perform, and in any event
3 it was speculation as to what LPA's position would
4 have been because LPA never had the opportunity to
5 confront this question.
6 JUDGE SCHWEBEL: Not even below?
7 MS. SMUTNY: Well, it might have, but we
8 don't know what the jury would have answered. In
9 other words, the jury might have had the answers to
10 these questions, but it was directed not to answer
11 the question, was LPA excused. I mean all of the
12 whole story was presented to the jury, so the jury
13 was armed with the ability to answer the question
14 had it been posed, and it was potentially proposed,
15 but given the nature of the understanding of the
16 law and the jury instructions, the jury was
17 directed not to answer. So LPA had the--you know,
18 maybe it's a subtle point--LPA got the opportunity
19 to put its full case on, limited by what the law
20 was. The law is then adjusted above in a way that
21 clearly the most important question was not

1 addressed by the jury, so in the end of the day,
2 LPA didn't get the answer, it didn't get an
3 opportunity to hear the trier of facts' response on
4 this most important point. That's what the value
5 of the remand would have been.
6 PROFESSOR CRAWFORD: I mean it's obviously
7 not the function of 1105 to underwrite trial by
8 jury, in civil cases at least, and what you are
9 saying is the effect of the procedures, which
10 obviously Mondev had to take them as they were,
11 provided they were applied in good faith, but the
12 effect of the procedures was to deprive it of the
13 substance of their rights without in the end a
14 hearing.
15 MS. SMUTNY: I would just qualify it. Not
16 so much the effect of procedures, but the fact that
17 the procedures were patently disregarded. It's not
18 reasonable to conclude that this was applying those
19 procedures that were applicable.
20 JUDGE SCHWEBEL: Could I clarify one point
21 on which I may be confused. I don't suggest for a

1 moment that you are or indeed my colleagues are.
2 Below in the initial trial, as the facts were
3 presented to the jury, did LPA argue, presumably
4 not only that it was prepared to perform and did
5 perform, but that as an alternative analysis, if it
6 did not, it did not because of the prior
7 demonstration of unwillingness to perform by the
8 City and BRA? Did it argue that and demonstrate
9 it?
10 MS. SMUTNY: Yes. It argued that if it
11 did not perform, that that was because of the City
12 and the BRA's conduct. And did it demonstrate it?
13 Well, the jury didn't answer the question. I
14 submit it most certainly did demonstrate it, but
15 the jury didn't answer the question, so really we
16 don't know the answer.
17 Just now, how did then in the end, the SJC
18 review this evidence after selectively deciding
19 that the City's failure should be measured by
20 whether or not LPA was willing? In a very confused
21 analysis, the SJC refers to a case called Hastings

1 v. Local 369, and it's an interesting case to
2 consider. It actually is contained in
3 Coquillette's reply Exhibit II, Coquillette
4 obviously being the expert discussing this issue
5 for Mondev. The Hastings case, which the SJC
6 cites, also involves a contract with open terms.
7 By the way, Hastings was decided after the trial
8 before the--obviously before the SJC's decision, so
9 the Hastings jurisprudence was not available to the
10 Trial Court.
11 The Hastings case involved also a contract
12 with open terms as to price, and it also included
13 an independent third-party procedure to fix the
14 price in case of a dispute. And what's interesting
15 is that in that case, which involved a contract
16 between private parties--
17 PROFESSOR CRAWFORD: Yes, it wasn't a
18 government contract.
19 MS. SMUTNY: Exactly, it wasn't a
20 government contract. And the Massachusetts Appeals
21 Court rules that the jury's findings in that case,

1 that the plaintiff need not have invoked the
2 mechanism to demonstrate that it was ready, willing
3 and able. Their excuse was demonstrated because
4 the jury was persuaded that in the circumstances of
5 that case, they didn't have an intention to
6 perform, and so invoking the mechanisms would have
7 been an idle ceremony. And what's interesting is
8 that the Court noted that even though those
9 findings were not compelled by the evidence, the
10 jury was reasonable to conclude it in any event,
11 and that conclusion therefore was determinative.
12 Now, having cited the Hastings case and
13 looking for a way to distinguish the LPA
14 circumstance, it's in that context that then the
15 SJC distinguishes the LPA case from Hastings by
16 saying that where a government contract specifies
17 procedures and mechanisms, a private party must be
18 particularly assiduous to comply with them. A
19 heightened standard clearly as compared to the
20 Hastings case. A private party must be
21 particularly assiduous to comply with the

1 procedures when one's dealing with the government.
2 This is entirely inconsistent with the prevailing
3 Massachusetts law, and that's demonstrated by the
4 fact that even the City, during the trial,
5 requested that the jury be instructed that the City
6 was to be treated like any other private party
7 before the Court. We're talking about a contract
8 dealing here.
9 Thus, rather than remanding the case to
10 the jury to assess whether LPA was excused as the
11 Hastings case suggested was the thing to do even if
12 the evidence didn't compel the conclusion, even if
13 it was just that a reasonable jury might find, the
14 SJC dismisses entirely LPA's contract claim against
15 the City, doesn't give the Trial Court an
16 opportunity to address the most important question,
17 and so at the end of the day, 1105 is transgressed
18 because the SJC denied any meaningful recourse to
19 LPA on its contract claim against the City. It
20 decided the case on the basis that deprived LPA a
21 right of audience on the determinative issues, and

1 in a manner that was manifestly in disregard of its
2 own standard of review, and in that sense in excess
3 of the Court's authority as an appellate body, and
4 this resulted in substantial injustice to LPA in
5 light of the evidence in this case.
6 And that's where I would end unless you
7 have no more questions.
8 PROFESSOR CRAWFORD: I hope you haven't
9 fallen exhausted at the finish line. That
10 sometimes happens in marathons.
11 MS. SMUTNY: No, no, not at all.
12 PROFESSOR CRAWFORD: Can I just take you
13 back?
14 MS. SMUTNY: Yes.
15 PROFESSOR CRAWFORD: Is it the case, the
16 articulation of what I might call the "square
17 corners rule", and was itself in some sense a
18 breach of 1105 or was this simply a sort of one in
19 a series of events, the effect of which was that
20 you never were able actually to put your case.
21 Your case was constructive total refusal, amounting

1 almost to bad faith, in some cases actual bad faith
2 on the part of the City and BRA. And you never had
3 the opportunity to put that case because of the
4 inappropriate application of that maxim; is that
5 right?
6 MS. SMUTNY: Well, what that maxim really
7 is, is clear evidence that the Court is not
8 applying the standard of review. Instead of
9 looking at the evidence in the light most favorable
10 to LPA, it interjects a highly questionable
11 doctrine while--
12 PROFESSOR CRAWFORD: But it may be highly
13 questionable as a matter of Massachusetts law, but
14 is it highly questionable as a matter of the law of
15 NAFTA, 1105? Is it a function of NAFTA to say that
16 you would have the same old contracts for
17 governments as you have for private parties, for
18 example? It doesn't seem to be, provided at least
19 that the law of government contracts is applied in
20 a nondiscriminatory fashion.
21 MS. SMUTNY: Again it comes down to the

1 point that the SJC is obligated to apply its own
2 standard of review, and it's obligated to apply its
3 own laws. And when it does this in a way that
4 clearly regards the standard of review, that's the
5 problem. The essence of the claim of 1105 here is
6 that Court was disregarding its own standards of
7 review. It was disregarding in effect its own
8 procedures. It was riding a little too roughshod,
9 a little too callous, a little too quick, what
10 reasons we'll never know that it could possible
11 come to this conclusion in light of the evidence in
12 this case.
13 At the end of the day, 1105 is not
14 breached because of that comment, no more than the
15 other comment about, you know, governments can lie,
16 cheat and steal. I mean this Court maybe it was
17 viewing the whole case in such a light. We'll
18 never know.
19 Anyway, I'm done if we're ready to break.
20 PRESIDENT STEPHEN: Thank you. We might
21 adjourn now for 15 minutes.

1 [Recess.]

2 PRESIDENT STEPHEN: Sir Arthur?

3 MR. WATTS: Thank you, Mr. President,

4 Members of the Tribunal.

5 I now wish to examine Mondev's claim that

6 its investment was expropriated or subjected to

7 measures tantamount to expropriation in violation

8 of Article 1110. Article 1110 is straightforward,

9 and it provides as follows--let me read it--"No

10 Party may directly or indirectly nationalize or

11 expropriate an investment of an investor of another

12 Party in its territory or take a measure tantamount

13 to nationalization or expropriation of such an

14 investment." Expropriation, except (a), (b), (c),

15 (d), (a) for a public purpose; (b) on a

16 nondiscriminatory basis; (c) in accordance with due

17 process of law in Article 1105(1); and (d) on

18 payment of compensation in accordance with

19 paragraphs 2 through 6.

20 Given the terms of that article and the

21 factual background to the case, there are four

1 questions which the Tribunal has to answer. First,
2 did Mondev's investment come within the scope of
3 Article 1110? Second, if so was Mondev's
4 investment expropriated within the meaning of
5 Article 1110? And third, if so was compensation
6 paid to Mondev? And fourth, if not, was the
7 resulting situation a violation of Article 1110?
8 Now, bearing in mind, Mr. President, your
9 suggestion that we should be succinct and focused,
10 let me deal briefly with two of those questions
11 which I think can be disposed of very quickly. The
12 matter of compensation, what I listed as the third
13 question. It is undeniable that no compensation
14 was ever paid to or even offered to Mondev. And
15 what we have accordingly is an uncompensated loss
16 of an investment. And then the second issue, the
17 property affected by the expropriation, and that is
18 Mondev's investment. Article 1110 prohibits a
19 Party from expropriating, and I quote, "an
20 investment of an investor of another Party in its
21 territory."

1 Mondev is an investor of another Party,
2 Canada. It had an investment in the United States,
3 namely its investment through its wholly-owned
4 local partnership, LPA, in the Lafayette Place
5 project. There seems to be no room for doubt that
6 Mondev's investment is protected by Article 1110.
7 PROFESSOR CRAWFORD: Do you identify the
8 investment as the bundle of contract rights held by
9 LPA or is LPA itself?
10 MR. WATTS: It's, for practical purposes,
11 I think it may be the same thing. What there was
12 at that stage was Mondev with a wholly-owned
13 subsidiary, LPA, having--when things started to go
14 wrong, rights in the physical property which
15 constituted Phase I, the contract right to the
16 option, and other contract right, but basically the
17 option right to purchase and so develop Phase II,
18 and thereby, thirdly, to complete the whole
19 project, which of course has an extra value rather
20 than just the value of its component parts. The
21 third question I come to is whether that investment

1 was expropriated, and this is the first of the
2 major parts of this presentation. NAFTA, in
3 principle, prohibits the expropriation of the
4 investments coming from other NAFTA states. Of
5 that there's no doubt. NAFTA clarifies what is
6 meant by expropriation. A Party may not
7 nationalize or expropriate an investment. A Party
8 may not take a measure tantamount to
9 nationalization or expropriation. Both these
10 prohibitions are embraced by the term
11 "expropriation" and "expropriation" as so
12 understood may not take place either directly or
13 indirectly.
14 Mondev accepts of course that in the
15 present case its investment was not formally and
16 expressly expropriated. Its investment was,
17 however, indirectly expropriated and was subject to
18 measures tantamount to nationalization or
19 expropriation.
20 The meaning of those phrases has been made
21 clear in several cases. The NAFTA Chapter Eleven

1 Tribunal in Metalclad in Mexico set out the
2 position very clearly. It said, and I quote,
3 "Expropriation under NAFTA includes not only open,
4 deliberate and acknowledged takings of property
5 such as outright seizure or formal or obligatory
6 transfer of title in favor of the host state, but
7 also covert or incidental interference with the use
8 of property which has the effect of depriving the
9 owner in whole or in significant part of the use or
10 reasonably to be expected economic benefit of
11 property, even if not necessarily to the obvious
12 benefit of the host state." That's at paragraph
13 103 of the award, and the award itself is in the
14 Claimant's Legal Appendix 4.
15 Referring to the concept of measures
16 tantamount to expropriation, the Tribunal in Myers
17 v. Canada--and this is Legal Appendix 3--concluded
18 that, and I quote, "The drafters of the NAFTA
19 intended the word "tantamount" to embrace the
20 concept of so-called creeping expropriation, rather
21 than to expand the internationally accepted scope

1 of the term expropriation." And that's at paragraph
2 286.
3 And the same Tribunal held that--and I
4 quote again--"The term "expropriation" in Article
5 1110 must be interpreted in the light of the whole
6 body of state practice, treaties and judicial
7 interpretations of that term in international law
8 cases." And that's at paragraph 280.
9 There is ample authority in international
10 law for the proposition that takings of property
11 may be direct or indirect, may take place outright
12 or in stages, or through successive acts or
13 omissions. And several authorities are cited in
14 the Claimant's Memorial at paragraphs 135 and 139.
15 There has also been a very recent award last
16 September and therefore after Claimant's reply was
17 filed in a bilateral investment treaty arbitration,
18 CME v. the Czech Republic. I'll say more about
19 this case in a moment, but for the time being, let
20 me just read one quotation from the judgment. The
21 Tribunal said, quote, "The expropriation claim is

1 sustained despite the fact that the Media Council
2 did not expropriate CME by express measures of
3 expropriation. De facto expropriation or indirect
4 expropriations, i.e., measures that do not involve
5 an overtaking, but that effectively neutralize the
6 benefit of the property of the foreign owner are
7 subject to expropriation claims. This is
8 undisputed under international law. Furthermore, it
9 makes no difference whether the deprivation was
10 caused by actions or by inactions." That passage
11 comes at paragraph 604 to 605.
12 One particularly telling statement of the
13 law comes in the decision of the Iran-United States
14 Claims Tribunal in Starrett Housing v. Iran. And
15 the Tribunal said--this is Legal Appendix No. 30--the
16 Tribunal there said, "It is recognized in
17 international law that measures taken by a state
18 can interfere with property rights to such an
19 extent that these rights must be deemed to have
20 been expropriated, even though the state does not
21 purport to have expropriated them, and the legal

1 title to the property formally remains with the
2 owner." And that's at page 154.
3 This line of reasoning has been taken
4 further in other cases which emphasize that what
5 matters in this context is not that the taking
6 state acquires property, but that the owner of it
7 is deprived of its use or benefits. In the most
8 recent survey of international law in this field by
9 Yoran Dinstein (?) in the Lieber Anacorum (?) for
10 Judge Odo, which was published just a few weeks
11 ago, the term "deprivation" was regarded as the
12 most appropriate. After reviewing the authorities,
13 the writer concluded that, and I quote, "It follows
14 that the concept of deprivation of property is
15 comprehensive enough to encompass any serious
16 direct or indirect interference in the property."
17 And that's at page 855 of Dinstein's contribution.
18 And in that context he's cited at pages
19 853 and 854 both the Starrett Housing case, which I
20 just mentioned, and another decision of the Iran-United
21 States Claim Tribunal, Tippet's v. Iran, in

1 which it was noted very pertinently that the
2 Tribunal prefers the term "deprivation" to the term
3 "taking", although they are largely synonymous,
4 because the latter may be understood to imply that
5 the government has acquired something of value
6 which is not required. And deprivation or taking
7 of property may occur under international law
8 through interference by a state in the use of that
9 property or with the enjoyment of its benefits,
10 even where legal title to the property is not
11 affected.
12 This clear modern state of the law was
13 exemplified in the award which I mentioned a moment
14 ago, handed down last September in CME v. the Czech
15 Republic. And as the award was not available for
16 consideration in the Claimant's reply last August,
17 and I should like if I may to dwell on it for a
18 moment or two, the text was made available to the
19 Tribunal yesterday I believe.
20 The case in fact has quite a number of
21 similarities with the present case. The facts were

1 complicated, but in essence, and so far as
2 presently relevant, I think they boil down to this.
3 A foreign investor, CME, invested in television
4 production in the Czech Republic. It did so
5 through a Czech company, CNTS, in which it held a
6 99 percent interest. A major part of CNTS's rights
7 consisted of an exclusive license to provide
8 television services. And such services in the
9 Czech Republic were regulated by the Media Council,
10 which is a state organ, pursuant to the media law.
11 In broad effect, what happened was that the Media
12 Council, following a change in the media law, by a
13 variety of means prevailed upon CNTS to adopt a new
14 Memorandum of Association, and under this new text,
15 CNTS gave up its exclusive license, and naturally
16 enough that greatly harmed the foreign investor,
17 CME, which had a 99 percent interest in CNTS, and
18 it therefore instituted arbitration proceedings
19 under the relevant bilateral treaty against the
20 Czech Republic.
21 Against that very summary indication of

1 the background, the Tribunal held that--and I
2 quote--"The Media Council's actions and omissions
3 caused the destruction of CNTS's operations,
4 leaving CNTS as a company with assets but without
5 business. What was touched and indeed destroyed
6 was the Claimant's and its predecessor's investment
7 as protected by the treaty. What was destroyed was
8 the commercial value of the investment in CNTS by
9 reason of coercion exerted by the Media Council
10 against CNTS in 1996 and its collusion with a
11 particular individual in 1999." That's at
12 paragraph 591.
13 In reaching that conclusion, the Tribunal
14 had a number of things to say which are very
15 relevant to the present case. And as it noted that
16 the Media Council intentionally required CNTS to
17 give up the right of the exclusive use of the
18 license under the Memorandum of Association. A
19 change of the legal environment does not authorize
20 a host state to deprive a foreign investor of its
21 investment unless proper compensation is granted.

1 That was and is not the case.

2 In reaching its conclusion that de facto

3 or indirect expropriations are subject to

4 expropriation claims, the Tribunal relied on the

5 decisions which I've referred to in the Metalclad

6 and Tippet's cases. It also cited--and this is at

7 paragraph 608--the decision of the Iran-United

8 State Claim Tribunal in Sealand Services v. Iran,

9 where the Tribunal said, quote, "A finding of

10 expropriation would require at the very least that

11 the Tribunal be satisfied that there was deliberate

12 governmental interference with the conduct of

13 Sealand's operation, the effect of which was to

14 deprive Sealand of the use and benefit of its

15 investment."

16 And the CME award continued with the

17 finding that on the face of it--sorry, quote, "On

18 the face of it, the Media Council's actions and

19 inactions in 1996 and 1999 were unreasonable, as

20 the clear intention of the 1996 actions was to

21 deprive the foreign investor of the exclusive use

1 of the license under the Memorandum of Association,
2 and the clear intention of the 1999 actions and
3 inactions was to collude with the foreign
4 investor's Czech business partner to deprive the
5 foreign investor of its investment." That's
6 paragraph 612.
7 And it went on, "The host state is
8 obligated to ensure that neither by amendment of
9 its laws, nor by actions of its administrative
10 bodies is the agreed and approved security and
11 protection of the foreign investor's investment
12 withdrawn or devalued." And that's paragraph 613.
13 Finally, the award held as follows--and
14 this is paragraph 614--"The Media Council's conduct
15 was not compatible with the principles of
16 international law, which the arbitral tribunal is
17 charged with applying. on the contrary, the
18 intentional undermining of the Claimant's
19 investments protection, the expropriation of the
20 value of that investment, is unfair and inequitable
21 treatment. The Media Council's unreasonable

1 actions, the destruction of the Claimant's
2 investment security and protection are together a
3 violation of the principles of international law,
4 assuring the alien and his investment treatment
5 that does not fall below the standards of customary
6 international law."
7 The facts of our present case show a clear
8 instance of so-called creeping expropriation, or as
9 the various cases cited put it, a neutralization of
10 the benefits of the property, or an interference in
11 the use of the property, or with the enjoyment of
12 its reasonably-to-be-expected benefits. At the
13 heart of Mondev's investment was its contractual
14 rights and interests held through its wholly-owned
15 LPA to develop the large multi-use project, the
16 Lafayette Place project. Phase I was completed.
17 And then came the change of administration in
18 Boston. The City and the BRA embarked upon a
19 series of stratagems and delays, all of which were
20 clearly intended to frustrate the completion of the
21 project as envisaged and agreed in the contract,

1 from the terms of which Mondev, through LPA, had
2 invested and relied. There was nothing accidental
3 or unintended about this. The City and the BRA had
4 made their minds up that Mondev should not be
5 allowed to complete the project in the manner and
6 at the price agreed interested Tripartite
7 Agreement.
8 The record of events has been put before
9 the Tribunal, both in the written pleadings and by
10 Mr. Hamilton yesterday, and I can therefore just
11 refer briefly to this record and just pick out some
12 highlights.
13 Thus, in the second half of 1986 the City,
14 in order to calculate the purchase price in
15 accordance with the Tripartite Agreement had to
16 obtain certain appraisals of the Hayward Parcel.
17 The City nevertheless failed to obtain them,
18 despite repeated efforts by LPA to advance the
19 process. In 1986 the BRA several times stated that
20 LPA had to obtain final designation as the approved
21 developer of Phase II. This was obviously

1 unfounded since LPA had already been designated by
2 the Tripartite Agreement--and this was acknowledged
3 eventually by the BRA when it simply dropped this
4 demand later. In January 1987 the Director of the
5 BRA took personal offense at Mondev discussing the
6 Lafayette Place project with the Mayor, who after
7 all was in charge of the BRA, being the superior
8 authority, and he threatened Mondev with future
9 loss of business in Boston.
10 And now if we may have on the screen. In
11 January 1987 the City proposed to route a new
12 street diagonally through the Hayward Parcel,
13 notwithstanding that it was obviously fundamentally
14 inconsistent with LPA's contract rights and would
15 have destroyed the property's commercial
16 development potential. There was a question about
17 this yesterday, so perhaps I might just say a
18 couple of things about that particular proposal.
19 I'd make just two points. Roads in Boston are the
20 responsibility of the transport department. Road
21 proposals affect City planning. It's not credible

1 that proposals like that on the screen would have
2 been made without clearance with the department
3 responsible for planning. The department
4 responsible for planning in Boston is the BRA.
5 My second point. Let's assume that that
6 proposal was put forward as an innocent
7 bureaucratic foul-up. It happens. Once put
8 forward, its impact on the project is both obvious
9 and was drawn to the BRA's attention by LPA. But
10 the proposal wasn't dropped or withdrawn. It
11 stayed in the City's road plans. In other words,
12 an initial, what might have been an initial
13 innocent foul-up then became knowingly adopted and
14 ratified. It lost its innocence.
15 Another example from late 1985 to mid
16 1987, the BRA made numerous time-consuming and
17 conflicting demands in relation to traffic studies.
18 The catalog was explained to you yesterday. In
19 1986 the BRA, without explanation, told LPA that it
20 wouldn't approve the second, and the Tribunal will
21 recall, essential anchor department store for the

1 Hayward Parcel, but now wanted a residential
2 development instead. It later dropped that
3 requirement.
4 In December 1986 and early 1987 the BRA
5 several times agreed with LPA that the Phase II
6 plan included an office building some 310 to 330
7 feet high, and the Tribunal will recall that in
8 April of 1987 the BRA went back on this, claiming
9 that new zoning regulations would limit the height
10 to 125 to 155 feet. Yet when a few years later,
11 1989, Campeau, a larger company, which had acquired
12 LPA's rights in the project for the extorted market
13 price and other concessions, proposed its major new
14 development, covering a large area including the
15 very same Hayward Parcel, the BRA granted it an
16 exception from the then regulations and permitted
17 construction of a building up to 400 feet high.
18 In late 1987 the BRA claimed that the LPA
19 owed certain taxes which were outstanding or said
20 to be outstanding, and the Tribunal recalled that
21 was absolutely a trumped-up claim. The catalog of

1 procrastination and of invented obstacles speaks
2 for itself.
3 But the story is far from over. In the
4 early summer of 1987 the BRA's director made what
5 proved to be a cynical and hypocritical offer to
6 LPA. He told LPA that he'd permit Phase II to
7 proceed as originally planned provided that LPA
8 would agree to amend the Tripartite Agreement to
9 include a fixed deadline 18 months ahead for LPA's
10 closing on or completion of its purchase of the
11 Hayward Parcel development rights. This was in
12 effect an ultimatum. Agree to a deadline and the
13 project will go ahead, but do not agree, and it
14 won't. LPA in effect had no choice. It was forced
15 to agree to the BRA's demand as the only possible
16 way of salvaging something of its substantial
17 investment. The parallel with the situation in the
18 CME v. Czech Republic case is striking where the
19 Claimant was there subjected to, and I quote,
20 "enforced or coerced waiver of legal protection by
21 requiring it to enter into a new Memorandum of

1 Association." That's from paragraph 168 of the
2 award.
3 The existence of the deadline, of course,
4 made it all the more imperative that the BRA should
5 move speedily and in good faith, which indeed
6 Director Coyle duly promised. But it will now come
7 as no surprise to find that the BRA in practice
8 continued in its old dilatory ways.
9 Indeed, right from the start it undermined
10 the arrangement, first by unilaterally chopping a
11 month off the 18-month deadline and fixing it at 1
12 January 1989 instead of 1 February 1989; and then
13 by taking three months to execute the amendment to
14 the Tripartite Agreement, thereby effectively
15 shortening the period still further.
16 The City's and the BRA's successive
17 unreasonable requests to Mondev that
18 procrastinations in their dealings with Mondev and
19 their evident intent to bulldoze aside the agreed
20 terms for the project led LPA to consider
21 alternatives in order to protect Phase II of the

1 project and salve something of value. It sought to
2 sell its interest to Campeau. A purchase and sale
3 agreement of the entire project was negotiated in
4 November 1987, but as the Tribunal will recall, the
5 BRA blocked that sale. It stated very clearly that
6 it had absolutely no intention of giving approval
7 unless the market price was paid for the Hayward
8 Parcel rather than the price paid in the Tripartite
9 Agreement, and that also it wanted other extra-contractual
10 concessions. Without these, Director
11 Coyle even refused to put the sale on the agenda of
12 the BRA board for approval.
13 PROFESSOR CRAWFORD: Is it your case that
14 the refusal of BRA even to contemplate approving
15 that agreement was itself a breach of Massachusetts
16 law?
17 MR. WATTS: I don't think that is the
18 case, although I'm not certain whether that point
19 was actually argued in the proceedings. Insofar as
20 this aspect of the case is concerned, it is, of
21 course, one part of an overall picture of a course

1 of conduct.
2 In short, by the use of its governmental
3 authority, the BRA deprived LPA of its right to
4 sell its interests in the project to Campeau.
5 Subsequent legal proceedings establish beyond doubt
6 that that action was wrongful. The LPA was said to
7 have presented strong evidence that the BRA was
8 improperly attempting to strong-arm it during the
9 review process. And the BRA was never exonerated
10 of that wrongdoing. And the Tribunal will recall
11 the words of the Supreme Judicial Court in this
12 context, and I quote: "It is perfectly possible
13 for a governmental entity to engage in dishonest or
14 unscrupulous behavior as it pursues its
15 legislatively mandated ends." "Dishonest" and
16 "unscrupulous" are not terms which characterize
17 behavior which complies with international
18 standards.
19 Since the proposed sale was effectively
20 blocked, LPA explored another path, and it
21 concluded a lease agreement with Campeau in March

1 of 1998. Campeau prepared ambitious plans for the
2 Hayward Parcel site. All this time the option
3 deadline for completion by now 1 January 1989 was
4 hanging over the process. Campeau repeatedly
5 sought extensions of the deadline, but BRA refused.
6 So on the 19th of December 1988, Campeau
7 gave notice that it wished to complete the
8 transaction and make payment immediately. BRA's
9 director responded that the contract right to
10 acquire the property at the Tripartite Agreement
11 price would expire on 1 January, the deadline date,
12 and that thereafter Campeau would have to purchase
13 the Hayward Parcel for its current market value.
14 That response was by letter dated 30
15 December, obviously, and no doubt intentionally,
16 leaving no time for completion by 1 January. And
17 so the deadline passed without completion. The
18 entire Campeau proposal was then approved in June,
19 but only after Campeau agreed to pay the market
20 price, $17 million, for the Hayward Parcel and had
21 agreed to a series of other concessions. And then

1 came the financial problems of the overall Campeau
2 empire and so on.
3 So far as Mondev was concerned, by mid-1991
4 Mondev's investment in the Lafayette Project had
5 been destroyed. It had been deprived of its
6 investment as surely as it would have been had it
7 been formally expropriated. To adopt the language
8 of the Tribunal in CME v. Czech Republic, the
9 City's and the BRA's conduct had resulted in "the
10 evisceration of the arrangements in reliance upon
11 which the foreign investor was induced to invest."
12 And that's at paragraph 611.
13 In these ways, Mondev was deprived of the
14 economic benefit which it reasonably expected to
15 enjoy under its contract. This was no accident.
16 It was the direct, foreseeable, and intended result
17 of the course of conduct on which the City and the
18 BRA had embarked. Mondev's investment was, in
19 effect, subject to death by a thousand cuts. Some
20 cuts may be large and some small, but at the end of
21 the day, you're still dead. It is--

1 PROFESSOR CRAWFORD: And the date on the
2 death certificate?
3 MR. WATTS: It is, taken overall, a
4 paradigm case of an indirect or creeping
5 expropriation or deprivation by state organs of a
6 protected foreign investor's investment.
7 That brings me to the remaining question,
8 whether there was a violation of Article 1110. Did
9 the--
10 PROFESSOR CRAWFORD: Before you get to
11 that, Sir Arthur, the situation here is that there
12 was a combination of events, some of them
13 attributable to the United States in the context of
14 conduct by a state agency and some of them not,
15 because presumably if Campeau had not gone broke,
16 the lease arrangement that had been made would have
17 reached fruition, and you would have obtained the
18 economic benefit of the original agreement. It
19 wouldn't, of course, have included the economic
20 benefit of the price option. But in other
21 respects, it would have involved the whole project

1 going ahead.
2 What's the position where hypothetically
3 there was wrongful action by a government which
4 only causes loss, whether you classify it as an
5 1105 or an 1110 breach, by reason of the happening
6 of an intermediate event for which the government
7 is not responsible?
8 MR. WATTS: Well, I think the government
9 still would be responsible for that part of the
10 loss or expropriation, as the case may be, for
11 which it is responsible. There may be a question
12 of causation coming in if the intervening event is
13 halfway through the course of conduct. Of course,
14 in this case, the intervening event wasn't so much
15 an intervening event; it was a post hoc event. And
16 it certainly has consequences that need to be taken
17 into account at the next phase of this arbitration,
18 where there's the question of assessing loss and so
19 on. But in terms of constituting an expropriation,
20 it doesn't deprive the state's conduct, the state
21 authority's conduct of its expropriatory character.

1 Moving on, then, to whether the resulting
2 situation constitutes a violation of 1110, I need
3 to emphasize that the question is not the simple
4 one of whether there was an expropriation. As I've
5 explained in the Claimant's submission, there
6 clearly was an expropriation.
7 The question is the somewhat different one
8 of whether there was a breach of Article 1110, and
9 that involves the temporal aspects of Article 1110,
10 which I'll now consider. And then having done
11 that, on a compare-and-contrast basis, I will look
12 at the temporal aspect of Article 1105, which I
13 left over from yesterday because there's certain
14 interplay between the two.
15 So if I may start with Article 1110, that
16 Article establishes that an expropriation may be
17 saved from being prohibited if, among other things,
18 it takes place on payment of compensation in
19 accordance with paragraphs (2) through (6). Those
20 paragraphs which are concerned with modalities of
21 compensation we can leave aside for the moment.

1 They're not directly relevant to the present stage
2 of the case.
3 The basic requirement that, in order to be
4 permissible, compensation must be paid reflects the
5 well-established rule of international law. It is
6 Mondev's submission that there was no breach of
7 Article 1110 until the possibility of obtaining
8 compensation through the normal and applicable
9 legal procedures was finally denied, which was on 1
10 March 1999. It was only then that the breach of
11 Article 1110 occurred, and that was at a time when
12 NAFTA was in force.
13 PRESIDENT STEPHEN: And the date of that
14 is, again? You just mentioned it.
15 MR. WATTS: Of the--the denial of
16 compensation--
17 PRESIDENT STEPHEN: Yes.
18 MR. WATTS: 1 March 1999.
19 PROFESSOR CRAWFORD: Does it follow from
20 that that the amounts involved--I mean, it may be
21 that it doesn't matter whether it was the

1 certiorari, the refusal of certiorari application
2 or some earlier stage in the judicial proceeding.
3 Does it follow that the amounts involved were the
4 compensation which you were wrongfully denied? In
5 other words, does that quantify your loss in
6 respect of the 110 claim?
7 MR. WATTS: Not necessarily, because we're
8 now talking about a different claim. I mean--
9 PROFESSOR CRAWFORD: The point is, if the
10 gist of the wrong was the failure to pay
11 compensation and you say that that happened after
12 1994, the only compensation that was an issue after
13 1994 were those amounts.
14 MR. WATTS: Well, yes, but other
15 consequences followed as well from the fact that
16 the compensation wasn't paid.
17 PROFESSOR CRAWFORD: I see there might be
18 consequential losses flowing from the non-payment
19 of that amount of compensation, for example, in the
20 context of interest. But is it difficult to say,
21 assuming that Claimant's overall loss was much

1 greater than the amounts at stake in the court
2 proceedings, that they were expropriated after
3 1994?
4 MR. WATTS: If I may, I think I would say
5 this is really a matter for the next stage in the
6 proceedings. What Mondev is claiming is
7 compensation in a sum not less than $50 million.
8 Now, in looking at the issue in this
9 present case, it's particularly significant that
10 we're not dealing here with the kind of classic
11 formal expropriation by legislation but, rather,
12 with measures tantamount to expropriation, indirect
13 expropriation or however one may wish to categorize
14 it.
15 In relation to the payment of
16 compensation, the difference is important. If we
17 take the classic situation where the state formally
18 and by legislation nationalizes or expropriates a
19 whole category of property, it will typically
20 include in the legislation provision for the
21 payment of compensation. And, of course, the

1 compensation due is not paid on the day of
2 expropriation. Usually some procedure is provided
3 in the legislation. Property owners must follow
4 that procedure, and at the end of the process,
5 which may take some time, the compensation due will
6 be assessed, whatever the criteria are, and will
7 then be paid.
8 Even in that typical classic situation,
9 one thing is notable. It is not enough that the
10 legislation makes provision for the payment of
11 compensation. It's also necessary that appropriate
12 compensation actually be paid, and for NAFTA that
13 is clear.
14 Article 1110(1)(d) in terms requires
15 payment of compensation. It follows that it cannot
16 be said whether or not the expropriation was
17 unlawful for want of proper compensation until the
18 end of the compensation process has been reached.
19 Now, that was all about the classic formal
20 expropriation. If one compares that situation with
21 the kind of indirect expropriation which is in

1 issue in the present case, there is both an
2 important distinction and an important similarity.
3 The distinction is that whereas the typical classic
4 formal expropriation is accompanied by legislative
5 provision laying down procedures for compensation,
6 this will virtually never be the case with indirect
7 expropriation. All that there will be, best, are
8 the ordinary processes of the courts whereby the
9 investor may seek compensation for having been
10 deprived of his property or whatever other category
11 of claim is permissible within the domestic legal
12 system.
13 The similarity between the classic and the
14 creeping expropriation is that in both cases the
15 lawfulness, or otherwise, of the expropriation can
16 only be definitively determined when the
17 compensation is or is not paid. Until compensation
18 is definitely ruled out, it remains a possibility.
19 And it cannot be said that the deprivation is
20 uncompensated and, thus, unlawful.
21 It was only by either the 20th of May

1 1998, which was the date of the SJC's decision on
2 the substance, or 1 March 1999, which is the
3 Supreme Court's date of decision, only then did the
4 possibility of recovering compensation cease to
5 exist.
6 Where a foreign NAFTA investor has been
7 deprived of his investment, which is what happened
8 to Mondev, the international law duty upon the
9 local state is to pay compensation. It's not
10 sufficient that legal processes are available if in
11 the result, for whatever reason, they fail to
12 result in compensation being paid. But in that
13 case, there will still have been a deprivation of
14 property and it will have remained uncompensated,
15 which is a breach of the international obligation
16 upon the state.
17 The fact is, Mr. President and Members of
18 the Tribunal, that the breach of Article 1110 was
19 only established when it could be shown not only
20 that the taking or deprivation of the investment
21 had occurred, but also that the saving possibility

1 of the prohibited expropriation, that is, that
2 which stops it being contrary to Article 1110, is
3 definitively excluded. That, of course, was only
4 when the courts rendered their final decisions in
5 1998 or '99.
6 Now, this does, of course, require that
7 the wrongfulness of the pre-Treaty deprivation
8 continues into the period when the Treaty is in
9 force. And I shall say more about continuing
10 wrongs in a moment, but here just let me note, in
11 the words of the International Law Commission, a
12 couple of points.
13 First of all--and I take this from
14 paragraph 4 of the commentary to Article 14 of its
15 recent draft articles. I quote: "The Inter-American Court
16 of Human Rights has interpreted
17 forced or involuntary disappearance as a continuing
18 wrongful act, one which continues for so long as
19 the person concerned is unaccounted for."
20 Here we have a disappeared investment
21 rather than a disappeared person. But the legal

1 principle is the same. Even--sorry.

2 PRESIDENT STEPHEN: Sorry. I was going to

3 ask, you're really treating what was sued for as

4 the compensation referred to in 1110.

5 MR. WATTS: Had that amount--

6 PRESIDENT STEPHEN: The damages sought.

7 MR. WATTS: Yes. I mean, had that amount

8 been paid, then I don't think this arbitration

9 would be taking place.

10 PRESIDENT STEPHEN: And that would have

11 been compensation within the terms of 1110.

12 MR. WATTS: Well, I don't think it was

13 ever addressed in that framework because at that

14 stage, of course, we weren't in the situation we're

15 now in.

16 PRESIDENT STEPHEN: But that's the way in

17 which we should see it.

18 MR. WATTS: It could be seen that way now.

19 PROFESSOR CRAWFORD: There have been some

20 decisions of the European Court of Human Rights

21 involving various forms of--

1 MR. WATTS: I was going to mention that.
2 You're one paragraph ahead of me.
3 PROFESSOR CRAWFORD: It's just the analogy
4 to disappearance is a slightly awkward--
5 MR. WATTS: Of course. And so I was going
6 on to say even more directly in point is a case
7 decided by the European Court of Human Rights,
8 Papamikolopolos v. Greece. There, as the
9 International Law Commission explains, and I quote,
10 "A seizure of property not involving formal
11 expropriation occurred some eight years before
12 Greece recognized the court's competence." The
13 court held that there was a continuing breach of
14 the right to peaceful enjoyment of property under
15 Article 1 or Protocol I of the convention, which
16 continued after the protocol had come into force.
17 And that's from paragraph 9 of the commentary on
18 the same article.
19 Now, in our case, it was only in 1998 or
20 1999 that it could be shown that the compensation
21 exception built into Article 1110 did not apply so

1 as to save the expropriation. Only then could it
2 be said that the situation involved an
3 uncompensated expropriation in breach of Article
4 1110.
5 Now, if I may, Mr. President, I'd like to
6 return to those temporals aspects of Article 1105
7 which I--
8 PROFESSOR CRAWFORD: Just while we're on
9 1110, let's take the example of the post-war
10 seizures of property in Central Europe, which were
11 uncompensated and which the claimants to those
12 properties, say the Sudeten Germans, still assert
13 rights to. Assume that the states concerned, Czech
14 Republic principally, are parties to provisions
15 equivalent to 1110 vis-a-vis Germany, does this
16 mean that--and it may well be that this is purely
17 hypothetical, but in the sense that whatever
18 consequence flows, it flows. But does mean that
19 those old expropriations can, in effect, be raised
20 by new Bilateral Investment Treaty claims?
21 MR. WATTS: I think in theory, and if you

1 postulate the right set of facts, the answer is
2 probably yes. In practice, the facts are likely to
3 be such that there may well have been intervening
4 events which would exclude a claim--which the
5 Tribunal would take to exclude the claim, for
6 example, that the parties were estopped from now
7 raising a claim or actions of that kind. But--
8 PROFESSOR CRAWFORD: Or general staleness.
9 MR. WATTS: Yes. Who knows?
10 PRESIDENT STEPHEN: And does it matter at
11 all that--let me start again. Your proposition
12 really is that until compensation is finally
13 denied, ultimately denied, time doesn't run?
14 That's what it comes to.
15 MR. WATTS: Well, that would be one way of
16 putting it, although it's not the way that I would
17 choose to put it given the terms of NAFTA. And
18 that's what I'm focused on.
19 PRESIDENT STEPHEN: Yes.
20 MR. WATTS: NAFTA says you mustn't
21 expropriate unless you pay compensation. And I

1 don't know--

2 PRESIDENT STEPHEN: But--yes--

3 MR. WATTS: --whether that condition has

4 been met until you definitely know what the answer

5 is.

6 PRESIDENT STEPHEN: But if the

7 expropriating power denies all question of payment

8 of compensation, as here, there was never any

9 suggestion that there would be compensation, and

10 there is no compensation paid, that in your view

11 means that 1110 continues to operate indefinitely?

12 MR. WATTS: I would--

13 PRESIDENT STEPHEN: A claim can be made at

14 any time--

15 MR. WATTS: I would need to think about

16 that. I mean, one has got to take into account the

17 various time limits that are built into NAFTA.

18 PRESIDENT STEPHEN: But they wouldn't

19 arise, according to you, because there would not be

20 a completed--

21 MR. WATTS: That's right.

1 PRESIDENT STEPHEN: --creeping
2 acquisition.
3 MR. WATTS: That's right. You understand
4 my reluctance to get drawn into hypotheticals. But
5 I can see that's the way one has to--
6 PRESIDENT STEPHEN: Yes, yes.
7 MR. WATTS: --test a principle.
8 PROFESSOR CRAWFORD: A good example where
9 the creeping--where there was a creeping
10 expropriation was the Foremost case, which started
11 in the Iran Tribunal and ended up in the American
12 courts. And the Iran Tribunal held that it wasn't
13 an expropriation up to the date of the cutoff of
14 its jurisdiction. And the American court
15 subsequently held that subsequent events, in
16 effect, completed the expropriation. Of course,
17 there wasn't an intertemporal problem there because
18 the American court did that under a rule which was
19 in force at all relevant times. But it is to some
20 extent an illustration of the point that a state
21 can be worse off when it creepingly expropriates as

1 compared to when it overtly expropriates.

2 MR. WATTS: Yes. Thank you.

3 So let me now turn to 1105. Of course,

4 the terms of 1105 and the terms of 1110 are

5 different, and that inevitably affects the argument

6 and the analysis.

7 Article 1110 is a straightforward

8 provision which on its face prohibits expropriation

9 unless compensation is paid. Article 1105, on the

10 other hand, is somewhat different. It just

11 requires treatment in accordance with international

12 law, including, of course, the fairness and

13 protection of the parties. And Mondev's submission

14 in relation to Article 1105 is essentially simple,

15 and it can be reduced to four short propositions.

16 One, international law requires a host

17 state's authorities to observe certain standards of

18 conduct in their dealings with alien investors.

19 Two, in the event of any misconduct,

20 international law requires, as part of the

21 treatment to be accorded to alien investors, that

1 there be redress in domestic law.
2 Three, misconduct plus non-redress
3 constitutes noncompliance with the requirement of
4 treatment in accordance with international law.
5 Four, the resulting breach of the
6 requirements of international law creates a
7 situation of wrongdoing which persists until it is
8 remedied.
9 Let me develop some of that thinking.
10 What is in issue here is not so much when the
11 conduct took place, but when the breach of Article
12 1105 occurred, and the two are not necessarily the
13 same. It's the latter, the date of the breach
14 which matters. And it's important to acknowledge
15 at the outset the reality of the present case.
16 We're not talking just of an isolated act
17 in violation of the international law standard of
18 treatment. As the Claimant has been at pains to
19 explain, we're talking about a course of conduct
20 which has to be appraised as a whole, as a single
21 package of wrongdoing. In effect, and I quote,

1 "treatment," the word used in Article 1105. In
2 such circumstances, the breach of international law
3 is not a simple concept.
4 Let me start with a simple, perhaps an
5 over-simple point. Let's assume for the sake of
6 argument that Boston's conduct towards Mondev did
7 not match up to the standard required by
8 international law. That below standard or wrongful
9 conduct will have begun when the first below
10 standard wrongful act took place. And let's say,
11 again, solely for the sake of argument, that this
12 was on the 1st of October 1986, just taken out of
13 the air. But that does not mean that that initial
14 breach of international law was over and done with
15 on that day so that on the 2nd of October it had
16 somehow disappeared. On the contrary, it still
17 existed. There was still a breach on the 2nd of
18 October, and on the 2nd of November and the 2nd of
19 December and so on. Because if that's not the
20 case, one has to answer the question precisely when
21 did the breach come to an end and on what basis.

1 The City's and the BRA's treatment of
2 Mondev was internationally wrongful in that it fell
3 below the standard required by customary
4 international law. It--
5 PROFESSOR CRAWFORD: [inaudible - off
6 microphone].
7 MR. WATTS: Yes. It may or may not have
8 been wrongful in domestic law, and that's a matter
9 for the domestic law to determine. But, of course,
10 we have the luxury of knowing that a jury held that
11 it was wrongful to the tune of $16 million. But
12 because, in any event, from the international
13 perspective the conduct was wrongful, it carried
14 with it as part of the customary international law
15 relating to the treatment of aliens an obligation
16 to make appropriate domestic law redress to the
17 injured alien not to his national State, and that
18 is something for a later stage when the matters
19 reach the truly international plain.
20 In the first instance, the implementation
21 of that obligation to afford redress, its form, the

1 manner of pursuing it, the appropriate defendants,
2 those are matters of domestic law. But it is
3 required in order to comply with international law,
4 for the need for redress is part of the treatment
5 required by international law in respect of wronged
6 aliens.
7 If domestic law redress is forthcoming,
8 that is the end of the matter. The international
9 law standard of treatment both as substance and
10 redress will have been satisfied.
11 If the domestic law redress is not
12 forthcoming, then the matter assumes a directly
13 international law dimension as between the alien's
14 national State and the host State in which the
15 alien suffered wrongdoing.
16 The original wrongful conduct will still
17 be wrongful, and it will be unremedied as a result
18 of the failure of domestic law to afford redress,
19 and it is this situation which gives rise to the
20 classic diplomatic protection analysis at the truly
21 international level.

1 PROFESSOR CRAWFORD: The problem with
2 that--I can see where they may well be cases where
3 there is conduct which is, as it were, questionable
4 at a national level without being definitively
5 contrary to the international minimum standard and
6 where one says that it is the failure by the
7 national system to provide any redress that is the
8 gist of the breach.
9 But the hypothesis of the argument you've
10 just made was that there was a wrongful act on
11 whichever date it was that you picked out, an
12 internationally wrongful act, not just an act
13 contrary to Massachusetts law, and that seems to be
14 contradicted by your analysis.
15 I mean, it would be very odd if an act
16 that was wrongful on the 1st of October, 1986,
17 somehow ceased to be wrongful, as distinct from
18 being remedied, by later conduct.
19 I mean, assume, for example, that Mr.
20 Coyle had actually tortured the managing director
21 of Mondev because of his failure to--

1 MR. WATTS: Only psychologically, I
2 believe.
3 PROFESSOR CRAWFORD: No, no.
4 That torture by a State official would
5 have been a breach of international law, and it
6 doesn't cease to be wrong merely because later on
7 the BRA or the City compensates for the torture.
8 So, surely, once you've got an internationally
9 wrongful act that is an act that does definitively
10 fall beneath the standard, you're going in the
11 field of remedies. I can see that there are
12 analytically two different cases, but the problem
13 is that your arguments seem to hypothesize the
14 second.
15 MR. WATTS: Well, the trouble is that the
16 same conduct has to be looked at in two
17 perspectives. The conduct, if it's wrongful at the
18 international level, it starts off as--one
19 approaches it first at the domestic level, and at
20 the domestic level its wrongfulness is tied in with
21 the requirement of treatment which also brings in a

1 domestic remedy requirement.
2 The same conduct, if you like, or the
3 package of conduct, if it is unremedied, is then
4 lifted up to the international plain and gives rise
5 to the international wrongful conduct, pursued
6 internationally. This is customary international
7 law, not NAFTA, of course.
8 PROFESSOR CRAWFORD: Yes, but there is a
9 serious question of how NAFTA relates to that,
10 because NAFTA gives the investor the choice of an
11 international remedy straightaway without
12 exhausting local remedies.
13 MR. WATTS: Well, I translate my initial
14 analysis into a NAFTA analysis on the next page, I
15 think.
16 So as I was saying on the analysis I was
17 explaining, one gets up to an international level
18 of complaint at the stage at which there has both
19 been wrongful conduct in breach of what is required
20 by international law and the lack of a domestic law
21 remedy.

1 It is at that stage that it is the alien's
2 national State which is entitled to redress for
3 that breach of the host State's international
4 obligations, and that this redress is due at that
5 stage from the host State rather than from its
6 subordinate political or other organs. They had
7 come into the picture at the earlier municipal law
8 level.
9 This analysis shows that there is no
10 inconsistency, as alleged by the Respondent,
11 between it being Mondev, not Canada, which was
12 initially entitled to whatever was the appropriate
13 redress in domestic law against Boston, while it is
14 Canada, not Mondev, which in customary
15 international law is entitled to pursue the
16 eventual breach at this time against the United
17 States rather than against Boston.
18 Furthermore, there is equally no merit in
19 Respondent's further argument that Mondev's
20 reliance on the continuing need for redress is
21 irreconcilable with the plain text of the Treaty or

1 longstanding principles of international law.

2 The Respondent says that Article 1105,

3 paragraph (1), and I quote, "by its plain terms,"

4 or, and again I quote, "on its face addresses"--this is the

5 quote still--"addresses primary

6 substantive rules of conduct and not secondary

7 rules, such as the obligation to make reparation."

8 The Respondent must have a different text

9 of NAFTA from that which I have. Mine just says

10 that "investment shall be accorded treatment in

11 accordance with international law, including," et

12 cetera."

13 Mondev acknowledges that a distinction can

14 be drawn between so-called primary and secondary

15 rules, but nothing on the face of the Article 1105

16 language or in its plain terms indicates that what

17 the Respondent refers to as secondary rules are

18 excluded.

19 Treatment is what Article 1105 is about,

20 and that is a broad notion. It is wide enough to

21 embrace not only proper levels of conduct in the

1 first place, but redress in domestic law should
2 that conduct, in fact, be misconduct.
3 Redress, in the express form of
4 compensation, is expressly included in Article 1110
5 in the specific context of expropriation, and there
6 is no reason to exclude it from the more general
7 context of Article 1105.
8 What the Respondent's argument amounts to
9 is the exclusion from the scope of Article 1105(1)
10 of any duty to make redress for misconduct. Now,
11 tell an investor that NAFTA gives him a promise of
12 proper conduct from the local authorities but no
13 redress if he is met instead with misconduct, and
14 is response will be predictably short and probably
15 rude.
16 The correct position has been expressed in
17 these terms by the International Law Commission in
18 paragraph 3 of its commentary to Chapter 3 of its
19 recent Draft Articles on State Responsibility.
20 There it is said, and I quote, "The essence of an
21 internationally wrongful act lies in the non-conformity of

1 the State's actual conduct with the
2 conduct it ought to have adopted in order to comply
3 with a particular international obligation"; that
4 is, the obligation which flows from the applicable
5 primary rule of international law.
6 In our situation, the primary rule is
7 double-barreled. A State must conduct itself
8 toward alien investors in accordance with certain
9 standards, and in the event of misconduct afford
10 them the means of securing redress. It is when
11 that primary rule is breached--e.g. by the failure
12 in internal law to provide domestic law redress--that the
13 secondary rules of international law come
14 into play, establishing the modalities for securing
15 international redress.
16 In the circumstances of our particular
17 case, the City's and the BRA's wrongful conduct,
18 coupled with the absence of the domestic law
19 redress which forms part of the treatment of alien
20 investors required by customary international law,
21 constituted at the outset a failure to match up to

1 the requirements of customary international law
2 regarding the treatment of foreign investors.
3 It was still a failure to comply with
4 those requirements on 1 January, 1994, when NAFTA
5 entered into force. NAFTA introduced a new element
6 into the equation. It established that as between
7 the United States, Canada, and Mexico and their
8 investors, there was henceforth a treaty
9 requirement that the investments are accorded
10 treatment in accordance with international law.
11 So the question thus becomes this: On 1
12 January, 1994, was Mondev being treated in
13 accordance with international law? And in Mondev's
14 submission, the only possible answer is a simple
15 "no." Nothing in the factual situation had
16 changed. The City and the BRA were still
17 wrongdoers in international law. The single
18 package of wrongdoing was still continuing.
19 Mondev was still uncompensated for that
20 wrongdoing, and its expectations of securing a
21 domestic remedy had not yet materialized, although

1 they were still alive. Respondent's NAFTA
2 obligation to afford Mondev's investments treatment
3 in accordance with international law, including in
4 particular fair and equitable treatment and full
5 protection and security, applied as from 1 January,
6 1994, but it was manifestly not being honored on
7 and after that date.
8 Accordingly, since, on 1 January, 1994,
9 Mondev had not received and was still not receiving
10 treatment in accordance with international law as
11 required by NAFTA, and in particular was not
12 getting the full protection and security which was
13 its due under NAFTA and was still not being treated
14 fairly and equitably, then it follows that on that
15 date the Respondent was in breach of its
16 obligations under Article 1105, paragraph (1).
17 And, of course, that breach continued well beyond
18 the date of NAFTA's entry into force.
19 PROFESSOR CRAWFORD: Let me point the
20 point--and, of course, there may be different ways
21 of achieving the same result. To put the point, I

1 think, slightly differently, she said there was a
2 breach of Massachusetts law, as found by the jury
3 on the 1st of January, 1994, and the subsequent
4 failure to provide a remedy for that was the breach
5 of 1105, whereas you seem to be saying--or there
6 may be two different analyses.
7 One is that because 1105 is essentially
8 declaratory of the minimum standard, that minimum
9 standard was applicable to the United States prior
10 to 1994. There was a breach of it. It was a
11 continuing breach because unremedied, and the
12 effect of NAFTA is, in effect, to NAFTA-ize, if I
13 can invent a word, that breach.
14 And the other argument is that there was
15 continuing conduct of Massachusetts entities,
16 including the courts, which may have started before
17 1994 but wasn't completed until afterwards, and
18 that the normal continuing wrongful act type
19 analysis applies.
20 I suppose these are simply three different
21 ways of producing the same result.

1 MR. WATTS: Well, that's right. There is
2 an overlap because the course of conduct began way
3 back in 1985 or whatever it was, and it continued
4 until 1999. I mean, that's the package, so there
5 is an overlap in the analysis that one makes of
6 that conduct.
7 Now, there is nothing unusual or odd or
8 novel, as the Respondent puts it in the Rejoinder,
9 about past conduct giving rise to present
10 liability, or about the notion of a continuing
11 wrongful act. Both are recognized in international
12 law, and one need look no further than the
13 International Law Commission's final Draft Articles
14 on State Responsibility.
15 One article, Article 14, and 14 paragraphs
16 of commentary are devoted to the matter. Paragraph
17 2 of the article is particularly in point. It
18 reads, and I quote, "The breach of an international
19 obligation by an act of a State having a continuing
20 character extends over the entire period during
21 which the act continues and remains not in

1 conformity with international law."

2 And what sort of acts are these? As the

3 International Law Commission says, it all depends

4 on the circumstances of the given case.

5 PRESIDENT STEPHEN: Can I just be clear on

6 this? The continuing nature really relies on the

7 failure to compensate?

8 MR. WATTS: That is part of it.

9 PRESIDENT STEPHEN: That is all of it,

10 isn't it?

11 MR. WATTS: Sorry?

12 PRESIDENT STEPHEN: That is all of it.

13 Everything else has happened and had there been

14 compensation, all would have been well and there

15 would have been a full stop, as it were. There has

16 not been compensation and that continues.

17 MR. WATTS: Well, that continues both in

18 itself and as a continuation of the whole wrongful

19 package.

20 PRESIDENT STEPHEN: Yes, but it is that

21 that gives the matter a continuity.

1 MR. WATTS: Yes. As I said earlier, had
2 the compensation been paid, we wouldn't be here, as
3 far as I know.
4 PRESIDENT STEPHEN: No, quite, yes.
5 MR. WATTS: And I was asking what sort of
6 acts are there which have a continuing quality.
7 The Commission does give some examples. I've
8 already mentioned the treatment by the Inter-American Court
9 of Human Rights of disappeared
10 persons and the decision in the Papamikolopolos
11 case, both of them clearly in point in our present
12 investment context.
13 But the Commission also dealt with
14 expropriations expressly. In paragraph 4 of its
15 commentary on Article 14, it had this to say, and I
16 quote, "The question whether a wrongful taking of
17 property is a completed or continuing act likewise
18 depends to some extent on the content of the
19 primary rule said to have been violated. Where an
20 expropriation is carried out by legal process, with
21 the consequence that title to the property

1 concerned is transferred, the expropriation itself
2 will then be a completed act."
3 The position with a de facto, creeping, or
4 disguised expropriation, however, may well be
5 different. The Commission's overall conclusion on
6 this point is clear, and I quote, and this is
7 paragraph 12 of its commentary, "Thus, conduct
8 which has commenced sometime in the past and which
9 constituted, or if the relevant primary rule had
10 been in force for the State at the time would have
11 constituted a breach at that time, can continue and
12 give rise to a continuing wrongful act in the
13 present."
14 In the present case, we have a pattern of
15 wrongful conduct constituting a continuing,
16 coherent unity, a wrongful package of conduct.
17 While the facts of this case certainly involve
18 conduct reaching back before 1994, it's not the
19 backward reach of the facts which is important, but
20 the forward reach of the wrongful conduct to the
21 date when NAFTA came into force so as to be in

1 breach of that agreement's terms.

2 Mr. President and Members of the Tribunal,

3 with that exposition of Mondev's claim that its

4 investment was expropriated in violation of Article

5 1110 of NAFTA, and my additional remarks on Article

6 1105, I come to the end of the Claimant's first

7 round of presentation of its claim.

8 And I will, with your permission, Mr.

9 President, return to this lectern on Friday for the

10 second round, and I will do so in order to offer a

11 more substantial conclusion on the Claimant's

12 behalf and to set out formally the Claimant's final

13 submissions to the Tribunal.

14 At the present stage, I should like just

15 to make some preliminary concluding remarks which

16 may serve to place the Claimant's case in a

17 perspective which the Tribunal may find helpful.

18 As to Article 1105(1), Mondev has set out

19 in great detail the facts which underlie this case.

20 They are substantiated by many documents, signed

21 and dated, and are undeniable. There is very

1 little room for any serious questioning of the
2 basic facts, and they speak for themselves. They
3 tell a story of grossly improper behavior on the
4 part of the City of Boston and BRA, behavior
5 intentionally designed to deprive Mondev of the
6 benefits which should have flowed from its
7 investment.
8 Mondev's attempts then to obtain redress
9 were thwarted by some very questionable behavior on
10 the part of the local judiciary. From beginning to
11 end, from 1984 when Boston's new administration set
12 about reneging on its contract, to 1999 when the
13 Supreme Court closed off all possibility of getting
14 compensation, Mondev was subject to treatment which
15 was well below what is required by international
16 law, manifestly not fair and equitable, and lacking
17 in full protection and security for Mondev's
18 investment. In short, Mondev was in no way treated
19 in the manner required by Article 1105(1) of NAFTA.
20 Moreover, Boston's treatment of Mondev was
21 doubly unlawful. In addition to violating Article

1 1105, it piece by piece, step by step, slice by
2 slice, undercut Mondev's investment. At the end,
3 nothing was left of a major investment which had
4 started so promisingly. Mondev was intentionally
5 deprived of its investment as surely as if it had
6 been formally and directly expropriated, and by
7 March 1999 all hope of compensation had gone,
8 apart, of course, from these present NAFTA
9 proceedings. The violation of Article 1110 of
10 NAFTA is, in Mondev's submission, self-evident.
11 At a broader level, there is a general
12 observation which I should like to make. There
13 are, I understand, some half-dozen or so
14 outstanding cases brought against the United States
15 under Chapter Eleven of NAFTA. A decision on the
16 merits has not yet been handed down in any of them.
17 These must be nail-biting times for my colleagues
18 on my left.
19 Our present case is for the United States
20 an uncomfortable case. The United States is in
21 essence being called to account before an

1 International Tribunal for the wrongdoings of the
2 executive and judicial organs not of the Federal
3 Government but of one of its member states. This
4 is not a situation in which the United States has
5 been accustomed to find itself. It is not
6 accustomed to having some outside bodies, such as
7 this Tribunal, telling it that it has broken the
8 law and violated its obligations.
9 The United States in these proceedings has
10 shown signs of regretting that it signed up to
11 Chapter Eleven of NAFTA, but that is what it did.
12 And it did so for a very simple and important
13 reason. It wanted to facilitate and encourage
14 cross-frontier investment within the NAFTA area.
15 And for that it needed to ensure proper standards
16 for the treatment of investments.
17 That is a two-way or three-way process.
18 United States investments get proper protection in
19 Canada and Mexico. But it follows every bit as
20 much that the United States must give proper
21 protection to investments of those states in the

1 United States.

2 Moreover, Chapter Eleven of NAFTA does not

3 stand alone. It is part of a worldwide network of

4 Bilateral Investment Treaties, all using very

5 similar language. United States investments

6 throughout the world benefit hugely from the

7 protection thereby gained. Equally, however, the

8 United States is also obliged to grant such

9 protection to others in its own country, especially

10 under NAFTA, to Canada--Canadian and Mexican

11 investments.

12 Having agreed to NAFTA, the United States

13 must live with the consequences. The United States

14 can now be called to account for failure to live up

15 to the international standards to which it has

16 subscribed in NAFTA. In these present proceedings,

17 Mondev, a Canadian corporation, is calling the

18 United States to account for the loss and damage

19 which Mondev has suffered as a result of the

20 mistreatment to which it has been subjected. It is

21 this Tribunal's task to see that the United States

1 fully complies with the obligations which it freely
2 accepted when entering into NAFTA, in short, to see
3 fair play and that the rules are observed.
4 Mr. President and Members of the Tribunal,
5 that concludes the first round of the Claimant's
6 oral pleading in this case. May I on behalf of
7 counsel express our gratitude to the Tribunal for
8 the patience and courtesy which you have shown us
9 during our presentations on behalf of the Claimant.
10 Thank you very much.
11 PRESIDENT STEPHEN: Thank you, if I can
12 thank you for the concise and excellent arguments
13 that we've heard on behalf of Mondev. Thank you.
14 MR. WATTS: Thank you.
15 PRESIDENT STEPHEN: I assume that there's
16 on point in doing other than adjourning now until
17 tomorrow.
18 MR. BETTAUER: And we're starting tomorrow
19 at 10 o'clock as the original schedule provided?
20 PRESIDENT STEPHEN: There is no suggestion
21 of any earlier start.

1 MR. BETTAUER: Not at the moment.

2 PRESIDENT STEPHEN: Not at the moment.

3 Well, we'll see what time brings. Thank you.

4 [Whereupon, at 12:41 p.m., the hearing

5 recessed, to reconvene at 10:00 a.m., Wednesday,

6 May 22, 2002.]