

Case No. ARB(AF)/99/2

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

BETWEEN:

MONDEV INTERNATIONAL LTD.
Claimant

and

UNITED STATES OF AMERICA
Respondent

AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven
of the North American Free Trade
Agreement, and comprised of:

Sir Ninian Stephen (President)
Professor James Crawford
Judge Stephen M. Schwebel

Date of dispatch to the parties: October 11, 2002

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AWARD

**MONDEV INTERNATIONAL LTD.
Claimant**

v.

**UNITED STATES OF AMERICA
Respondent**

AWARD

A. Introduction

Earlier proceedings concerning the Claim

1. This dispute arises out of a commercial real estate development contract concluded in December 1978 between the City of Boston (“the City”), the Boston Redevelopment Authority (“BRA”) and Lafayette Place Associates (“LPA”), a Massachusetts limited partnership owned by Mondev International Ltd., a company incorporated under the laws of Canada (“Mondev” or “the Claimant”). In 1992, LPA filed a suit in the Massachusetts Superior Court against the City and BRA. The trial was held in 1994 and culminated in a jury verdict in favour of LPA against both defendants. The trial judge upheld the jury’s verdict for breach of the Tripartite Agreement against the City, but rendered a judgment notwithstanding the verdict in respect of BRA, holding BRA immune from liability for interference with contractual relations by reason of a Massachusetts statute giving BRA immunity from suit for intentional torts. Both the City and LPA appealed. The Massachusetts Supreme Judicial Court (“SJC”) affirmed the trial judge’s decision in respect of BRA but upheld the City’s appeal in respect of the contract claim. LPA petitioned for rehearing before the SJC on both claims, and sought *certiorari* to the United States Supreme Court in respect of its contract claim against the City. Each of these petitions was denied. In the event, therefore, LPA eventually lost both its claims.

2. Mondev subsequently brought a claim pursuant to Article 1116 of the North American Free Trade Agreement (“NAFTA”) and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) on its

own behalf for loss and damage caused to its interests in LPA. Mondev claims that due to the SJC's decision and the acts of the City and BRA, the United States breached its obligations under Chapter Eleven, Section A of NAFTA. In particular, the Claimant alleges violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) and seeks compensation from the United States of no less than US\$50 million, plus interest and costs.

The parties

3. Pursuant to Article 27 of the Arbitration (Additional Facility) Rules, Mondev is represented in these proceedings by:

Ms. Abby Cohen Smutny
Ms. Anne D. Smith and
Mr. Lee A. Steven
White & Case, LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807, USA

Mr. Stephen H. Oleskey and
Ms. Lisa J. Pirozzolo
Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109-1803, USA

and since February 1, 2001,

Sir Arthur Watts, KCMG, QC
20 Essex Street
London WC2R 3AL, UK

4. Mr. Charles N. Brower, of the law firm White & Case LLP, represented the Claimant from the beginning of the case until 27 December 2000. On 6 May 2002, the Centre was notified that the Claimant would also be represented by Mr. Rayner M. Hamilton, also of White & Case LLP.

5. Pursuant to Article 27 of the Arbitration (Additional Facility) Rules, the Government of the United States of America is represented in these proceedings by:

Mr. Barton Legum
Chief, NAFTA Arbitration Division
Office of International Claims and Investment Disputes
Office of the Legal Adviser (L/CID)
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037-2800, USA

6. The Respondent was also represented by Mr. David R. Andrews, Mr. Ronald J. Bettauer, Ms. Andrea K. Bjorklund and Ms. Laura Svat of the United States Department of State. Mr. Andrews withdrew upon his resignation as The Legal Adviser of the Department of State. On May 3, 2002, the Respondent notified the Centre that in addition to Mr. Bettauer, Mr. Legum and Ms. Svat, it would also be represented in these proceedings by Mr. William H. Taft IV (who succeeded Mr. Andrews as State Department Legal Adviser), Mr. Mark A. Clodfelter, Mr. David Pawlak and Ms. Jennifer I. Toole.

The other NAFTA State Parties

7. NAFTA was concluded between the Governments of the United States of America, Canada and the United Mexican States, and entered into force on 1 January 1994. Article 1128 entitles a NAFTA Party to make submissions to a Chapter 11 Tribunal on any question of interpretation of NAFTA. Canada by letters of 19 April and 12 June 2000 and Mexico by letter of 7 June 2000 expressed their wish to make such submissions. They also expressed their wish to attend hearings held in the course of the proceedings.

8. Canada was represented by Ms. Meg Kinnear, General Counsel, Trade Law Bureau, Department of Foreign Affairs and International Trade, Department of Justice, 125 Sussex Drive, Ottawa, Ontario, K1A 0G2, Canada.

9. Mexico was represented by Mr. Hugo Perezcano Díaz, Consultor Jurídico de Negociaciones, Consultoría Jurídica de Negociaciones, Secretaría de Comercio y Fomento Industrial (SECOFI), Alfonso Reyes N°30, Piso 17, Col. Condesa 06179, México, D.F., Mexico and Mr. Salvador Behar, Embassy of the United Mexican States, Washington, D.C., USA.

Procedural History

10. As required by NAFTA Article 1119, the Claimant notified the Respondent on 6 May 1999 of its intention to submit its dispute with the United States to arbitration under Section B of Chapter 11 of NAFTA. The Respondent acknowledged receipt of this notice on that same day and by letter of 11 June 1999.

11. By letter of 18 May 1999, the Claimant offered to consult and negotiate on this claim with the Respondent as envisaged by Article 1118 of NAFTA. By letter of 11 June 1999 the Respondent acknowledged receipt of this offer and agreed to meet with Claimant's counsel to discuss the claim. A meeting between the Claimant and the Respondent took place in Washington, D.C. on 9 July 1999 but did not result in a settlement.

12. Pursuant to NAFTA Article 1121(3), Mondev delivered its NAFTA Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures directly to the United States on 31 August 1999. The terms of the waiver covered further domestic claims both by Mondev and LPA. By a Notice of Arbitration dated 1 September 1999, the Claimant requested the Secretary-General of ICSID to approve and register its application for access to the ICSID Additional Facility, and submitted its claim to arbitration under the ICSID Additional Facility Rules.

13. On 20 September 1999, the Acting Secretary-General of ICSID informed the parties that the requirements of Article 4 of the Additional Facility Rules had been fulfilled and that the Claimant's application for access to the Additional Facility was approved, and issued a Certificate of Registration of the case on the same day.

14. In accordance with Article 1123 of NAFTA and Article 6 of the ICSID Arbitration (Additional Facility) Rules, the parties proceeded to constitute the Arbitral Tribunal. The Claimant appointed Professor James Crawford, an Australian national, as arbitrator. The Respondent appointed Judge Stephen M. Schwebel, a U.S. national, as arbitrator. The parties, by agreement, appointed the Rt. Hon. Sir Ninian Stephen, an Australian national, to serve as President of the Tribunal.

15. On 12 January 2000, in accordance with Article 14 of the Arbitration (Additional Facility) Rules, the Secretary-General of ICSID informed the parties that all the arbitrators had accepted their appointment and that the Tribunal was deemed to have been constituted, and the proceeding to have begun, on that date. By that same letter, the Secretary-General informed the parties that Mr. Gonzalo Flores, ICSID, would serve as Secretary of the Tribunal. All subsequent written communications between the Arbitral Tribunal and the

parties were made through the ICSID Secretariat. Mr. Flores having left ICSID in June 2001, Ms. Eloïse Obadia, ICSID, was appointed as Secretary of the Tribunal.

16. On 15 February 2000, in order to “comply fully and unambiguously” with its obligations under Article 1125(b) of NAFTA, the Claimant consented, in writing, to the appointment of each individual member of the Tribunal.

17. On 1 March 2000, the Respondent informed the Centre that it objected to the competence of the Tribunal. By letter of 14 April 2000, the Respondent submitted a request that consideration of competence as a preliminary question be added to the provisional agenda for the first session. In its view there were at least four reasons why it submitted that the dispute was not within the Tribunal’s competence on the grounds that Mondev did not own the rights at issue, that most of Mondev’s claims were time-barred, that Mondev lacked standing under Article 1116 of NAFTA and that there was a lack of a final judicial act. This last objection was later withdrawn by the Respondent.

18. Prior to the first session, on 19 April 2000, the Claimant filed a submission on the issues of confidentiality of the proceedings (requesting that the parties and the Tribunal retain control over the timing and extent of disclosure), place of arbitration (suggesting Montreal or Toronto), and the objections to the competence of the Tribunal (proposing that the objections, being so intertwined with the underlying facts, be joined to the merits).

19. The first session of the Tribunal was held, with the parties’ agreement, in Washington, D.C. on 20 April 2000. During the course of the session, the parties acknowledged that the Tribunal had been properly constituted and were invited to elaborate on the issues of confidentiality, place of arbitration and bifurcation of the questions of jurisdiction and merits. The Tribunal, after deliberation, requested the parties to file memorials on these three issues according to the following schedule: Respondent’s Counter-Memorial due on 12 May 2000, Claimant’s Reply due within three weeks of the date of receipt of the Respondent’s submission, and Respondent’s Rejoinder due within ten days of receipt of the Claimant’s submission.

20. Following the Tribunal's order, the United States submitted, on 12 May 2000, its "Submission on Secrecy, Place of Arbitration and Bifurcation". Mondev responded with a "Reply to the Submission on Secrecy, Place of Arbitration and Bifurcation" on 2 June 2000 and the United States submitted its Rejoinder on 12 June 2000.

21. The Respondent argued that there was no requirement under NAFTA that the parties keep arbitration proceedings secret and that, if Canada were chosen as the place of arbitration, it would do nothing to further the secrecy of the proceedings, since the United States must comply with U.S. law, in particular the Freedom of Information Act ("FOIA"), no matter where the arbitration was held. The Respondent suggested that the place of arbitration be Washington, D.C., for practical reasons and because all relevant evidence was in the United States. Finally, Respondent asked the Tribunal to treat the objections to competence as a preliminary question, following standard practice in international arbitration and since the objections presented questions of law distinct from the merits.

22. The Claimant explained that the issue was not the existence of an obligation of confidentiality but rather its scope: it objected to unlimited disclosure to the public of all documents in the case, such as transcripts, minutes, and tape recordings of hearings, written arguments, expert opinions and witness statements. Claimant argued in favour of Canada as the place of arbitration, since this would best safeguard the confidentiality of the proceedings and would be a neutral site. Finally, the Claimant, denying each of the United States' objections to competence, requested the Tribunal to join those objections to the merits.

23. On 15 May 2000, the Claimant requested the Tribunal, pursuant to Article 41(2) of the Arbitration (Additional Facility) Rules, to call upon the Respondent to produce certain specified documents related to the previous and pending NAFTA Chapter 11 arbitration cases, and in particular to *Loewen Group, Inc. & Raymond L. Loewen v. United States of America* ("the *Loewen* case"). By letter of 2 June 2000, the Respondent agreed to produce those documents generated in other Chapter 11 arbitrations that had been made public, and also to provide Mondev with a broader group of documents under the FOIA. By letter of 15 June 2000, the Claimant considered that the Respondent's proposal complied only partially with its request for documents, which it reiterated. The United States replied by letter of 30 June 2000 asking the Tribunal to deny Mondev's request except for the documents described

in its 2 June 2000 letter which it offered to produce. Copies of these documents were given to the Claimant on 3 August 2000. On 21 August 2000, Claimant acknowledged receipt of these documents but, considering that the United States was still in possession of other documents requested but not produced, reiterated its request.

24. On 25 August 2000, following the Respondent's request and with the consent of the claimant parties in the *Loewen* case, the Centre transmitted to the parties a copy of the *Loewen* tribunal's decision of 2 June 2000 clarifying its 28 September 1999 decision on disclosure. This decision was transmitted to the Tribunal under cover of a 6 September 2000 letter from counsel for the Claimant. As for the Respondent, it made a request for documents on 5 June 2000 which was complied with by Mondev on 8 June 2000.

25. On 17 August 2000, the Centre informed Mexico and Canada that the Tribunal invited them to make NAFTA Article 1128 submissions on the issues of secrecy, place of arbitration and bifurcation by 15 September 2000, as they had respectively requested on 7 June and 12 June 2000. In the event neither Mexico nor Canada made submissions on these points.

26. On 25 September 2000, the Tribunal issued an order and an interim decision regarding the place of arbitration, bifurcation of proceedings, production of documents, schedule of pleadings and procedure for the submission of evidence. The Tribunal concluded that the place of arbitration would be the seat of the Centre in Washington, D.C., which, considering all relevant factors, appeared to be the most appropriate. The Tribunal expressed the view that the Respondent would be bound to comply with any FOIA request wherever the arbitration was conducted, whether in the United States or in Canada. The Tribunal also concluded that except for this consideration, the question of confidentiality was not relevant to the question of the place of arbitration, and that no ruling on confidentiality was needed at this time in the proceedings. Regarding the bifurcation of proceedings, the Tribunal considered that the Respondent's objections to competence could conveniently be, and should be, joined to the merits of the case. Regarding the production of documents, the Tribunal noted that the Respondent had extensively complied with the Claimant's request and did not consider that it should be ordered to make any further disclosure of the types of documents requested by the Claimant. The Tribunal stipulated the number and sequence of pleadings devoted both to competence and the merits, while leaving it for the parties to agree on the

schedule. The Tribunal further ordered that issues of quantum of damages, should they arise for determination, be disposed of separately and subsequent to the findings on liability. Finally, regarding the submission of evidence, the Tribunal adopted the procedures agreed upon by the parties and reflected in a letter of 8 June 2000 from the Claimant.

27. On 4 October 2000, the parties informed the Tribunal that they had agreed on a schedule for the filing of pleadings. On 18 October 2000, the parties supplemented their agreement to include a filing date for NAFTA Article 1128 submissions by the non-disputing NAFTA State Parties. Upon the parties' request, their agreement was reflected in the Tribunal's procedural order of 24 October 2000 according to which the Claimant should file its Memorial on or before 1 February 2001; the Respondent should file its Counter-Memorial on or before 1 June 2001; the non-disputing State Parties should make their submissions, if any, on or before 11 July 2001; the Claimant should file its Reply, including any response to any submissions made by the two State Parties, on or before 1 August 2001; and the Respondent should file its Rejoinder, including any response to any submissions made by the two State Parties, on or before 1 October 2001. It was also agreed that the Claimant could be granted additional time, if needed, to respond to any submissions by the two State Parties, in which event, the Respondent would similarly be granted additional time to respond to such submissions. The week starting 26 November 2001 was reserved for the hearing on competence and the merits.

28. On 20 October 2000, the Respondent informed the Tribunal of its intention to post on its Internet site both the Claimant's Notice of Arbitration and the Tribunal's order and interim decision of 25 September 2000. By letter of 30 October 2000, the Claimant objected to any publication of these documents, of any other documents submitted by the parties and of any orders or decisions of the Tribunal. On 13 November 2000, the Tribunal issued its order and interim decision regarding publication of documents. The Tribunal held that, since the Claimant's Notice of Arbitration was already a public document which pursuant to NAFTA Article 1126(10)(b) and (13) appeared on a public register, the Respondent had the right to publish the Notice of Arbitration by any medium it chose. However, the Tribunal considered that its order and interim decision of 25 September 2000 was not a public document since it represented the outcome of a hearing not open to the public and the minutes of which could not be published without the consent of the parties pursuant to Article 44(2) of the Arbitration

(Additional Facility) Rules. The Respondent was precluded from publishing the Tribunal's order and interim decision until the conclusion of the proceedings; thereafter it could publish the interim decision with the Tribunal's permission.

29. On 13 December 2000, the Respondent informed the Tribunal that it had received and intended to comply with a request under the FOIA for the release of certain of the Respondent's written submissions to the Tribunal and of certain letters that it had addressed to the Claimant and the Tribunal. By letter of 28 December 2000, the Claimant informed the Tribunal that it objected to such release and stated its grounds for that objection. Each party subsequently made written submissions in support of its contentions regarding such proposed release. On 25 January 2001, the Tribunal issued an order and interim decision in which it expressed the view that in general terms the ICSID (Additional Facility) Rules did not purport to qualify statutory obligations of disclosure which might exist for either party. Since it appeared that the FOIA created a statutory obligation of disclosure for the Respondent, the Tribunal rejected the Claimant's request for the Tribunal to prohibit the Respondent from releasing its submissions and correspondence in the case pursuant to the FOIA. By letter of 31 January 2001, the parties asked the Tribunal to clarify its order on the question of whether, in the absence of any statutory obligation of disclosure, the ICSID (Additional Facility) Rules would require the parties to treat as confidential documents such as parties' submissions made to the Tribunal and letters between the parties regarding the conduct of the arbitration. In response, the Tribunal issued on 27 February 2001 an order and further interim decision regarding confidentiality. In view of Articles 14(2), 24(1), 39(2) and 44(2) of the Arbitration (Additional Facility) Rules, and of Annex 1137.4 to Chapter 11 of NAFTA, the Tribunal ordered the parties to treat as confidential until the conclusion of the proceedings such submissions and correspondence that, exempting any applicable statutory obligation of disclosure, do not already exist in a public register held by the Secretariat.

30. The Claimant filed its Memorial on Liability and Competence on 1 February 2001. The Respondent filed its Counter-Memorial on Competence and Liability on 1 June 2001. A NAFTA Article 1128 submission dated 6 July 2001 was made by Canada on 9 July 2001.

31. On 31 July 2001, the Respondent submitted an interpretation of the same date by the Free Trade Commission ("FTC"), established under Article 2001 of NAFTA, regarding the

issues of confidentiality and the minimum standard of treatment in accordance with international law. On 1 August 2001, the Claimant submitted its Reply on Liability and Competence. By letter of 2 August 2001, the Claimant expressed its concern that it had lacked time to examine carefully the FTC's interpretation before submitting its Reply. By letter of 8 August 2001, the Centre informed the parties that the Tribunal acknowledged the reservation of the Claimant's right to comment on the applicability of the FTC's interpretation at a later date.

32. As a separate matter, the Tribunal, having been obliged to depart from the date originally fixed for the hearing on competence and the merits and after consultation with the parties on their availability, requested that the parties confer with each other to determine a five day period at the end of May 2002 for the hearing. The parties informed the Centre on 28 August 2001 that they agreed to hold the hearing during the week of 20-24 May 2002. On 6 September 2001, the Centre informed the parties that the Tribunal had confirmed its availability for those dates.

33. The Respondent filed its Rejoinder on Competence and Liability on 1 October 2001. On 26 November 2001, the Centre informed the parties that the Tribunal agreed to a proposal by the parties of 15 November 2001 that the oral testimony of witnesses was not necessary and that evidence presented at the hearing be confined to written statements and/or opinions. During the written phase of the pleadings, written statements and/or opinions were submitted by the parties. The Claimant submitted statements by Messrs. Stephen H. Oleskey and Martin Surkis, and opinions and reply opinions by Judge Kenneth W. Starr, Professor Robert E. Scott and Professor Daniel R. Coquillette. The Respondent submitted opinions and rejoinder opinions by Judge Rudolph Kass and Professor Karl B. Holtzschue.

34. The hearing on competence and the merits was held from 20-24 May 2002 at the World Bank headquarters in Washington, D.C. The non-disputing NAFTA State Parties were given two weeks following the hearing to make a NAFTA Article 1128 submission, if any. Canada informed the Tribunal on 5 June 2002 that it would not file such a submission.

35. On 4 June 2002, the Claimant transmitted for the Tribunal's consideration a copy of the award on damages rendered on 31 May 2002 in NAFTA Chapter 11 case, *Pope & Talbot*

Inc. v. Canada.¹ By letter of 10 June 2002, the Respondent objected to that submission, but requested permission to present brief comments on the Award if the Tribunal were to consider it. On 28 June 2002 the Tribunal granted an opportunity for the Respondent to file its views on the *Pope & Talbot* Damages Award by 8 July 2002 and for the Claimant to file a reply by 15 July 2002. Canada and Mexico respectively informed the Tribunal on 2 July and 4 July 2002 of their wish to have an opportunity to review the submissions made by the parties. By letter of 5 July 2002, the Tribunal granted seven days from the filing of the Claimant's reply for Canada and Mexico to file a NAFTA Article 1128 submission and seven days from the receipt of the later of the submissions by Canada and Mexico, if any, for the disputing parties to file a final submission in response.

36. The Respondent filed a substantial post-hearing submission on *Pope & Talbot* on 8 July 2002. The Claimant answered by letter of 15 July 2002. Canada and Mexico filed their respective submissions on this issue on 19 July and 23 July 2002, and the Respondent filed its Final Post-Hearing Submission, summarising the submissions made by the three governments, on 29 July 2002. The Claimant replied by letter of 30 July 2002. The Tribunal will refer to the content of these submissions in due course.

B. The Underlying Dispute

37. The dispute arises out of efforts in the late 1970s by the City to rehabilitate a dilapidated area in downtown Boston known as the "Combat Zone", adjacent to a shopping area. BRA, the City's planning and economic development agency, selected Mondev and its then joint-venture partner, Sefrius Corporation, for a project consisting in the construction of a department store, a retail mall, and a hotel in the designated area. In 1978, Mondev and Sefrius formed LPA, through which they would develop, build, own and manage the project. On 22 December 1978, LPA, BRA and the City signed the "Tripartite Agreement", governed by the laws of the Commonwealth of Massachusetts, providing for the development of the area in two phases. Phase I involved the construction of a shopping mall, a parking garage and a hotel. In accordance with the Agreement, LPA acquired in September 1979 the right to develop certain parcels of property necessary for Phase I. Specifically, LPA purchased the "air rights" over the "Lafayette Parcel Phase I". Construction of that Phase was completed in

¹ *Pope & Talbot Inc. v. Canada*, Award in respect of Damages, www.naftalaw.org, 31 May 2002.

November 1985. Phase II contemplated the construction of additional retail spaces, an office building and a department store on four parcels of City-owned land adjacent to those used in Phase I. These four parcels of land were to be assembled into a single parcel, called the Hayward Parcel. At the time of the Agreement the parcels were partially occupied by a city car park, known as the Hayward Place garage.

38. In the Tripartite Agreement, construction of Phase II of the project was made contingent upon the decision by the City to remove the Hayward Place garage. If it did, the City could build an underground parking garage on the site, and LPA would be granted the air rights to build over it. The agreement as to the development of the Hayward Parcel was principally set out in Section 6.02 of the Tripartite Agreement (as amended). Section 6.02 contained an option for LPA to purchase the Hayward Parcel. The option was conditional on notice by the City of its decision to discontinue the Hayward Place garage and to construct an underground car park. LPA could thereupon notify the City within a three-year period of its intent to purchase the Hayward Parcel for a price calculated by a formula described in Section 6.02 of the Tripartite Agreement. The Tripartite Agreement and accompanying maps identified the boundaries of the Hayward Parcel, but indicated several alternatives concerning the rights to be conveyed. In the Tripartite Agreement, the City was stated to have in hand appraisals of the fair market value of two of the four component parcels of the Hayward Parcel, and agreed “forthwith” to obtain appraisals of the two remaining parcels.

39. In the event, the City decided to demolish the Hayward Place garage, and LPA notified its intention to purchase the Hayward Parcel in 1986. But there were various delays and difficulties in realising Phase II. By a further amendment to the Tripartite Agreement made in 1987, the last date for closure under LPA’s option was 1 January 1989 unless otherwise agreed; this was however subject to the proviso that the option would not expire if “the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing”. But this change in the Tripartite Agreement did not accelerate progress. What then happened was described by the SJC in the following terms:

“LPA never demanded and the city never tendered a deed within the required time period or at any other time. The basis of [LPA’s] contract action against the city is that the city in bad faith failed to carry out those of its obligations under the Tripartite Agreement necessary to allow LPA to proceed to demand a closing, and

indeed that it engaged in bad faith actions designed to impede LPA in effecting a timely closing. The reason for these obstructionist tactics by the city, as LPA sought to show... was that the new administration of Mayor Raymond Flynn believed that the price established by the Section 6.02 formula, which was based on 1978 values, was grossly unfair to the city in the light of a strong surge in real estate prices in the intervening years. LPA offered evidence of several instances of what it claimed were the city's obstructionist tactics. These included failing to complete the appraisals necessary to establish the price for the Hayward Parcel, initiating zoning changes that would have greatly reduced the allowable height of the office towers planned for the site, lack of cooperation about determining [certain road closures], and threatening to put a new street through the middle of the parcel, which would have made its development economically unviable."²

In March 1988 LPA leased its rights in the project to another larger Canadian developer, Campeau, which proceeded to redesign the project.³ It was Campeau acting as lessee which vainly sought an extension of the closure date of 1 January 1989. When this was refused, in December 1988 Campeau notified the City that it wished to complete the transaction immediately. But there was no tender of payment at the time, nor was any other formal step taken. Subsequent to 1 January 1989, Campeau obtained permission for the redesigned project. But subsequently it defaulted on its obligations to LPA under the lease agreement, and LPA terminated the lease. In February 1991, the mortgagor, Manufacturers Hanover Trust Co., foreclosed on the mortgage. LPA subsequently, in March 1992, brought proceedings against the City and BRA.

40. For reasons which will appear, the Tribunal does not need to decide all of the contested issues of fact and law which have been pleaded by the parties in relation to this long-running dispute. It is worth stressing at this stage, however, that a Massachusetts jury decided in Claimant's favour against both the City and BRA. It is true that this verdict was not entered against BRA because the Court upheld its statutory immunity. But that aspect of the verdict was at no stage authoritatively contradicted as a matter of fact. Under Massachusetts law, the jury's finding against BRA implied some measure of bad faith or at least the absence of a valid regulatory purpose. The United States argued that the substance of the jury's finding against BRA was never tested on appeal because of the statutory immunity, and that is true. On the other hand the jury did have the advantage of seeing the

² 427 Mass 509, 513-514 (1998).

³ An earlier sale agreement to Campeau was not completed. LPA alleged that the reason was the City's refusal to grant, or even to consider granting, necessary consents for a sale of rights to the project. By contrast the City's consent to the lease agreement with Campeau was not required.

witnesses and reviewing the evidence at length on the particular issues it was asked to address.

C. The Tribunal's Jurisdiction and the Admissibility of the Claim

41. The procedural history of the case has already been described, including the various United States objections to jurisdiction and admissibility, and the Tribunal's decision to join these to the merits. Before turning to the preliminary objections raised by the United States, certain general comments are necessary.

42. International tribunals distinguish between issues going to their jurisdiction and questions of procedure in relation to a claim which is within jurisdiction. Arguably, NAFTA Article 1122 elides that distinction by providing that NAFTA Parties consent to the submission of a claim "in accordance with the procedures set out in this Agreement". The United States raised a series of objections, some apparently of a procedural character, but argued that since these concerned "procedures set out in this Agreement" within the meaning of Article 1122, they went to the Tribunal's jurisdiction. According to the United States, its consent to arbitration was given only subject to the conditions set out in NAFTA, which conditions should be strictly and narrowly construed.

43. In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties.⁴ In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.⁵

⁴ Neither the International Court of Justice nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction. For the International Court see e.g., *Fisheries Jurisdiction Case (Spain v. Canada)*, ICJ Reports 1998 p. 432 at pp. 451-2 (paras. 37-38), 452-456 (paras. 44-56); *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, 39 ILM 1116 (2000) at p. 1130 (para. 42). For other tribunals see, e.g., *Amco Asia Corporation v. Republic of Indonesia (Jurisdiction)*, (1983) 1 ICSID Reports 389 at p. 394; *Ethyl Corporation v. Canada (Jurisdiction)*, decision of 24 June 1998, (1999) 38 ILM 708 at p. 723 (para. 55).

⁵ As the International Court has repeatedly held: e.g., *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 p. 1045 at pp. 1059-1060 (paras. 18-20).

44. It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be “conditions precedent” to submission of a claim to arbitration, and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission,⁶ whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied.⁷ Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.

I. The arguments of the parties

45. The United States made a series of objections to the competence of the Tribunal to hear the present case. Many of these objections centre on the circumstance that the dispute arose in the period from 1985 to 1991, well before NAFTA entered into force, albeit that the final United States judicial decisions denying LPA’s claims occurred after 1 January 1994. This circumstance was said by the United States, first, to deprive the Tribunal of jurisdiction, since under Articles 1116(1)(a) and 1117(1)(a), jurisdiction is limited to breaches of specified obligations arising after NAFTA entered into force; secondly, to render the claim time-barred, since under Articles 1116(2) and 1117(2) a claim may not be brought “more than three years... from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage”, and thirdly, to defeat the claim in substance, since there can be no breach of a treaty which was not in force at the time of the acts constituting the alleged breach. The United States also objected to the claim on the ground that any loss or damage had been suffered by LPA (“the enterprise”), and that the claim should accordingly have been brought on behalf of LPA under Article 1117 and not by Mondev on its own behalf. But since the notice of intention to submit the claim to arbitration did not refer to Article 1117 and did not contain the address of the enterprise, the claim must be considered as having been brought only under Article 1116. The United States reserved the right at a later stage, if necessary, to argue that Mondev had not itself suffered any loss or damage within the meaning of Article 1116(2).

⁶ Cf. *Waste Management v. Mexico*, decision of 2 June 2000, 40 ILM 56 (2001).

⁷ As previous Chapter 11 Tribunals have noted in *Ethyl Corporation v. Canada (Jurisdiction)*, decision of 24 June 1998, (1999) 38 ILM 708 at p. 723 (para. 58), p. 727 (para. 75), p. 729 (paras. 85, 91); *Pope & Talbot Inc., v. Government of Canada*, interim award of 7 August 2000, para. 26.

The United States also argued that since the entirety of Mondev's and LPA's interests in the project had lapsed in 1991, with the foreclosure of the mortgage, Mondev was not an investor, nor was LPA an enterprise or an investment, as defined in Article 1139, at the time NAFTA entered into force.

46. It is convenient to deal with these arguments together, irrespective of whether they may be considered as going to jurisdiction, admissibility or the merits.

The objection ratione temporis

47. The United States argued that, with the exception of the Massachusetts court decisions, all the acts complained of occurred prior to 1 January 1994, when NAFTA entered into force, and cannot therefore sustain a NAFTA claim. It accepted that, if Mondev had been an investor as at 1 January 1994 (which it denied), and if the decisions of the Massachusetts courts had constituted a denial of justice or had otherwise breached Article 1105, those decisions would have been in principle subject to NAFTA review. But it denied that there had been the slightest infringement of the minimum standard of treatment under Article 1105.

48. Mondev for its part argued that the breaches were not perfected until the United States courts had dealt with LPA's claims under Massachusetts law. The pre-1994 conduct of Boston and BRA was wrongful, in terms of the international minimum standard or of Massachusetts law or both, and this created a continuing situation which, under Article 1105, the United States had an obligation to remedy. After 1994, and as a result of the court decisions, the United States failed to provide any remedy. This failure was itself a breach of NAFTA which encompassed the whole dispute between the parties, or at least so much of it as was covered by LPA's claims for breach of contract and tortious interference.

Mondev's standing under Articles 1116(1) and 1117(1)

49. The United States stressed that Mondev's notice of intent delivered under Article 1119 made no mention of Article 1117, nor did it give the address of the enterprise (LPA) required by Article 1119(a). Accordingly, it argued, the claim could only be considered as having been brought under Article 1116 by the investor on its own behalf. Since Mondev had not shown that it had itself suffered loss or damage, the United States reserved the right

to argue at the quantum stage, if necessary, that no claim could be brought under Article 1116. If Mondev wished to claim on behalf of LPA as an enterprise, it could only do so by submitting a further notice of intent under Article 1119 (which would, in any event, be out of time).

50. Mondev argued that its claim was properly brought under Article 1116. It stressed that it had made an investment which it controlled indirectly; that NAFTA applies to pre-existing investments, and that the phrase “owned or controlled directly or indirectly” in the definition of “investment of an investor of a Party” in Article 1139 excluded restrictive definitions of direct investment based upon the principle of separateness of corporate personality laid down by the International Court in the *Barcelona Traction* case.⁸ In any event, if it was necessary to regard the claim as brought under Article 1117 on behalf of LPA, there was no difficulty in the Tribunal doing so. The only information required under Article 1119 which Mondev did not provide was the address of LPA, and this deficiency was soon afterwards corrected.

The three year time bar (Articles 1116(2) and 1117(2))

51. The United States argued that, even if Mondev’s arguments concerning the continuing character of the breaches of Articles 1102, 1105 and 1110 were tenable, the breaches occurred at the latest on 1 January 1994, and Mondev’s commencement of the arbitration was therefore out of time under Article 1116(2). It accepted that this objection did not apply to the denial of justice claim arising from the decisions of the United States courts, the arbitration having been commenced within 3 years of those decisions.

52. In response Mondev argued that the breaches did not occur until the decisions of the United States courts which finally failed to give it any redress; alternatively, until those decisions, Mondev was not in a position to be sure whether it had suffered loss. Thus it was not until those decisions that Mondev “first acquired, or should have first acquired... knowledge that the investor has incurred loss or damage”. The term “knowledge” in Article 1116(2) and 1117(2) required certain knowledge, which by definition until that time Mondev could not have had. Since (as the United States accepted), the time bar was only triggered

when the investor acquired both knowledge of the breach and knowledge of the loss or damage, there was no applicable time bar in the present case.

Ownership of the claim and the foreclosure of the mortgage

53. Another issue on which the parties disagreed concerned the status and extent of LPA's interest in the project following foreclosure of the mortgage by the United States bank, Manufacturers Hanover Trust Co. ("Manufacturers Hanover"), in 1991. Conflicting expert testimony on the point was put forward by Professor Robert Scott (for the Claimant) and Professor Karl Holtzschue (for the Respondent). Essentially the question was whether the mortgage interest of Manufacturers Hanover covered LPA's contractual rights of action against the City and BRA arising from the failure of the project.

54. The United States argued that when Manufacturers Hanover foreclosed on the mortgage over the whole project in 1991, it also acquired all LPA's rights in relation to the Hayward Parcel option, since the mortgage deed expressly covered any "rights of option" associated with the property. Thereafter there was no investment of any kind owned or controlled by Mondev, and Mondev no longer held any rights of action in relation to the project.

55. Mondev pointed to the express exclusion in the mortgage deed of "any rights of the mortgagor hereunder to develop parcels adjacent to the premises", and noted that Manufacturers Hanover had never claimed ownership of the contractual and other causes of action which LPA had pursued before the United States courts. LPA and, through LPA, Mondev thus had subsisting rights in the project and the Tripartite Agreement on 1 January 1994 which NAFTA could protect.

2. *The Tribunal's views on the preliminary issues*

56. The Tribunal has reached the following conclusions on the preliminary issues.

⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970 p. 3. In this respect Mondev cited K.J. Vandeveld, *United States Investment Treaties: Policy and Practice* (Kluwer, Boston, 1992), pp. 45-46.

(a) The United States objection *ratione temporis*

57. Both parties accepted that the dispute as such arose before NAFTA's entry into force, and that NAFTA is not retrospective in effect. They also accepted that in certain circumstances conduct committed prior to the entry into force of a treaty might continue in effect after that date, with the result that the treaty could provide a basis for determining the wrongfulness of the continuing conduct. They disagreed, however, over whether and how the concept of a continuing wrongful act applied to the circumstances of this case.

58. For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.⁹ Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached. In that regard it is convenient to deal initially with Mondev's claim under Article 1110 for expropriation.

59. Mondev's claim under Article 1110 could be put in three ways, partly overlapping. First, it could be said that by the City's action in frustrating the exercise of the Hayward Parcel option – action attributable to the United States – the United States effectively expropriated the value of that option. Secondly, it could be said that by the overall course of conduct of the City and BRA, the United States effectively expropriated the value of the enterprise as a whole. Thirdly, it could be said that by the decisions of its courts, the United States effectively expropriated the value of the rights to redress arising from the failure of the project.

Alleged taking of the Hayward Parcel option

60. As to the Hayward Parcel option, assuming for the sake of argument that LPA's option over the Hayward Parcel could have been expropriated by the conduct alleged, that

⁹ Cf. ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 86/83, 12 December 2001, Article 14 (1).

option nonetheless lapsed on 1 January 1989 in accordance with its terms.¹⁰ If there was an expropriation of that right, it was complete as at that time. Issues of failure to compensate for the taking of the right never subsequently arose, still less did LPA argue at the time that its consent to the Third Amendment to the Tripartite Agreement was void or should be invalidated for coercion or duress. The question was rather whether the City's conduct constituted a breach of the option under the amended Tripartite Agreement.

Loss of LPA's and Mondev's rights in the project

61. As to the loss of LPA's and Mondev's rights in the project as a whole, this occurred on the date of foreclosure and was final. Any expropriation, if there was one, must have occurred no later than 1991. In the circumstances it is difficult to accept that there was a continuing expropriation of the project as a whole after that date. All that was left thereafter were LPA's *in personam* claims against Boston and BRA for breaches of contract or torts arising out of a failed project. Those claims arose under Massachusetts law, and the failure (if failure there was) of the United States courts to decide those cases in accordance with existing Massachusetts law, or to act in accordance with Article 1105, could not have involved an expropriation of those rights.

62. It is accordingly not necessary to consider any issues of attribution or causation, or the circumstances in which the loss of contractual rights can amount to a breach of Article 1110.

63. Similar conclusions apply to Mondev's claims under Articles 1102 and 1105 as they relate to conduct of Boston or BRA which had definitive effect before 1994.

64. As to Article 1102, Mondev complained of certain remarks by officials of Boston and BRA which, it maintained, indicated a certain anti-Canadian animus.¹¹ The United States sought to explain these as *de minimis* or incidental, and it argued that they had and could have had no effect on the outcome of the dispute. It also noted that LPA achieved a striking verdict before a Boston jury, notwithstanding its Canadian ownership.

¹⁰ Although the Third Amendment to the Tripartite Agreement contained a proviso excluding the expiry date in cases of lack of good faith efforts by the City or BRA to conclude a closing (see above, para. 39), this does not appear to have been relied on by Mondev or Campeau.

65. In any event, the statements in question were all made well before NAFTA's entry into force, and Mondev specifically disclaimed any allegation of discrimination or bias in the decisions of the United States courts after NAFTA's entry into force. Moreover there were reasons, independent of LPA's Canadian parentage, for the positions taken by the City and BRA in relation to the Tripartite Contract. It does not matter for the purposes of Article 1102 whether those reasons were or were not discreditable, or whether they involved an intention to breach or assist in the breach of a contract. The Tribunal does not think they were discriminatory, and this conclusion is supported by the City's and BRA's subsequent treatment of Campeau, also a Canadian corporation. As Mondev itself stressed, Campeau rather rapidly obtained the various permissions required for its Boston Crossing project. The project did not proceed because of Campeau's insolvency, which had nothing to do with either the City or BRA. One reason Campeau had no difficulty in obtaining BRA's consent for the project – and it may be the crucial reason – was that it was prepared to pay the market price for the Hayward Parcel, unlike Mondev, which understandably was willing to pay no more than the Tripartite Agreement specified. Moreover no allegation of discrimination was pursued by LPA in the Massachusetts proceedings. In the circumstances these allegations of breaches of Article 1102 would clearly fail on the merits. But, however that may be, they are not relevant to any claim of a breach of NAFTA relating to acts or omissions of the United States after 1 January 1994.

66. As to Mondev's claim under Article 1105(1), this covers conduct both before and after the date of NAFTA's entry into force. Mondev argued that the situation at the end of 1993 was that it had an unremedied claim in respect of conduct of Boston and BRA, which conduct was (or, if NAFTA had been in force at relevant times, would have been) a violation of the standard of protection under Article 1105(1). The subsequent failure of the United States courts to provide any remedy for that continuing situation was itself, in the circumstances, a breach of Article 1105 (1), which matured only with the definitive rejection of Mondev's claims.

¹¹ For example Mr. Coyle, Director of the BRA, is said to have objected to Mondev taking profits from the project and "running back to Canada" with them. Other statements were of a similar character.

67. The United States for its part did not dispute that the decisions of the City of Boston, BRA and the Massachusetts courts were attributable to it for NAFTA purposes.¹² But it denied that any conduct which occurred prior to 1 January 1994 could be taken as constituting a breach of NAFTA. In this respect it cited the following passage from *Feldman v. United Mexican States*:

“Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal’s jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.”¹³

The Respondent also argued that any remedial duty that might have arisen as a result of the acts of Boston and BRA before 1994 could not, *ex hypothesi*, involve any continuing breach of NAFTA obligations. Any such duty could only arise from a breach of NAFTA, which was not in force at the time.

68. The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties¹⁴ and in the ILC’s Articles on State Responsibility,¹⁵ and has been repeatedly affirmed by international tribunals.¹⁶ There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that “this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter”. Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.

69. On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA’s entry into force.¹⁷ To the

¹² See NAFTA, Article 105, and cf. ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 4.

¹³ *Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary jurisdictional issues, 6 December 2000, (2001) 65 ILM 615 at p. 625 (para. 62).

¹⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 28.

¹⁵ ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 13.

¹⁶ E.g., *Amco International Finance Corp. v. Islamic Republic of Iran* (1987) 15 Iran-US Claims Tribunal Reports 189 at p. 215.

¹⁷ Cf. *Papamichalopoulos v. Greece*, ECHR Ser A No. 260-B (1993), a case of continuing *de facto* expropriation of land acknowledged to belong to the applicants.

extent that the last sentence of the passage from the *Feldman* decision, quoted in para. 67 above, appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.

70. Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.

71. It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. A "taking" of property, not acknowledged as such by the government concerned and not accompanied by any offer of compensation, is not rendered conditionally lawful by the contingency that the aggrieved party may sue in the local courts for conversion or for breach of contract. There is a distinction between compensation offered or provided for a lawful taking of property and damages for the wrongful seizure of property.

72. In this respect it should be noted that Article 1110 requires that the nationalization or expropriation be "on payment of compensation in accordance with paragraphs 2 through 6".

The word “on” should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost.

73. The Tribunal has already given reasons for concluding that any expropriation of the enterprise occurred not later than the date of foreclosure, and that it was completed at the latest by that date. Similarly, LPA’s rights associated with the Hayward Parcel option terminated when the option terminated. As to these rights or interests, there was no continuing wrongful act in breach (or potentially in breach) of Article 1110 at the date NAFTA entered into force. There remained only the possibility that the subsequent conduct of the courts in dealing with LPA’s claims under Massachusetts law, seen in the context of the factual dispute out of which those claims arose, might give rise to a NAFTA breach.

74. Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that both Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law (a claim which Canada has never espoused).

75. For these reasons, the Tribunal concludes that the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA’s claims. Moreover it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.

(b) Mondev’s standing under Articles 1116(1) and 1117(1)

76. In substance, only two claims were before the United States courts, although these were formulated in a variety of ways, both under the common law of Massachusetts and under certain Massachusetts statutes. These claims concerned, first, the City’s breach of contract by reason of its failure to sell the Hayward Parcel on the terms agreed, and secondly, BRA’s wrongful interference with the sale contract for the enterprise as a whole between LPA and Campeau. It may be noted that these claims were not coextensive with Mondev’s

overall grievance against Boston. However, for the reasons given in the preceding section, either these broader claims were not covered by NAFTA at all, or (if they survived as domestic law claims which might have been pursued before the Massachusetts courts) they were not pursued and are now on any view time-barred. Thus the only live question for the Tribunal is whether Mondev has standing to protest the United States' court decisions concerning LPA's claims for breach of contract and wrongful interference. For the reasons given, the only basis for challenging those claims is Article 1105.

77. The United States argued that there was no subsisting investment in the project as at 1 January 1994. The project had definitively failed at the time of the foreclosure, and all that was left were certain claims for damages. Since there was no investment at that time, Mondev could not be considered an "investor of a Party" at that time. The United States noted that the exhaustive definition of "investment" in Article 1139 specifically excluded...

“(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h);”

By 1 January 1994, all Mondev had were claims to money associated with an investment which had already failed.

78. Mondev argued that, through LPA, it has subsisting and substantial interests arising from the project, and thus has standing as an investor to assert a breach of Chapter 11. In particular, it stressed the definition in Article 1139 of "investment of an investor of a Party":

“investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;”.

The phrase "owned or controlled directly or indirectly" was, in its view, specifically adopted to avoid the difficulties relating to the standing of shareholders raised by the decision of the International Court in the *Barcelona Traction* case.¹⁸ To interpret Chapter 11 in the light of that case, as the United States sought to do, was inconsistent both with its plain language and with its object and purpose.

79. The Tribunal notes that Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of

¹⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970 p. 3.

“enterprise”, “investment”, “investment of an investor of a Party” and “investor of a Party” in Article 1139. These terms are used with care throughout Chapter 11. NAFTA does not adopt the device commonly used in bilateral investment treaties (“BITs”) to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it.¹⁹ On the contrary, it distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). Under Article 1116 the foreign investor can bring an action in its own name for the benefit of a local enterprise which it owns and controls; by contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing a claim on its own behalf (Article 1117(4)). Faced with this detailed scheme, there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.

80. In the present case, in the Tribunal’s view, Mondev’s claims involved “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory” as at 1 January 1994,²⁰ and they were not caught by the exclusionary language in paragraph (j) of the definition of “investment”, since they involved “the kinds of interests set out in subparagraphs (a) through (h)”. They were to that extent “investments existing on the date of entry into force of this Agreement”, within the meaning of Note 39 of NAFTA. In the Tribunal’s view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. This is obvious with respect to the protection offered by Article 1110: as the United States accepted in argument, a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an “investor” as someone who “seeks to make, is making or has made an investment”. Even if an investment is expropriated, it remains true that the investor “has made” the investment.

¹⁹ See, e.g., Switzerland-Bolivia BIT 1987, 1748 UNTS 414 Art. 1(b)(aa); Protocol to the Sweden-Lithuania BIT 1992, 1823 UNTS 15, para. 2. See further, R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, The Hague, 1995), pp. 38-42.

²⁰ See Art. 1139, definition of “investment”, para. (h).

81. Similar considerations apply to Articles 1102 and 1105. Issues of orderly liquidation and the settlement of claims may still arise and require “fair and equitable treatment”, “full protection and security” and the avoidance of invidious discrimination. A provision that in a receivership local shareholders were to be given preference to shareholders from other NAFTA States would be a plain violation of Article 1102(2). The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e., “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”.²¹

82. Accordingly, there were subsisting interests relating to Mondev’s investment in the project as at 1 January 1994. It is true that these interests were held by LPA, but LPA itself was “owned or controlled directly or indirectly” by Mondev, and these interests were an “investment of an investor of a Party” as defined in Article 1139. It may be noted that the United States did not really contest Mondev’s standing under Article 1116, subject to the question whether it had actually suffered loss or damage. In the Tribunal’s view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.

83. For these reasons, the Tribunal concludes that Mondev has standing to bring its claim concerning the decisions of the United States courts by virtue of Article 1116 of NAFTA in conjunction with paragraph (h) of the definition of “investment” in Article 1139.

84. More attention was devoted in argument to Article 1117 than to Article 1116. In particular the United States argued that Mondev should have brought the action on behalf of the enterprise, LPA, under Article 1117. It pointed to the importance of the distinction between claims brought by an investor of a Party on its own behalf under Article 1116 and claims brought by an investor of a Party on behalf of an enterprise under Article 1117. The principal difference relates to the treatment of any damages recovered. If the claim is brought under Article 1117, these must be paid to the enterprise, not to the investor (see Article 1135(2)). This would enable third parties with, for example, security interests or other rights

²¹ NAFTA, Art. 1102 (1) and (2).

against the enterprise to seek to satisfy these out of the damages paid. It could also make a difference in terms of the tax treatment of those damages.

85. In addition, if a claim is brought under Article 1117, both the investor and the enterprise must waive the right to initiate or continue local proceedings (Article 1121(2)). In the present case, although its Notice of Arbitration purported to be limited to claims under Article 1116, Mondev submitted with that Notice an express waiver not only on its own behalf but also on behalf of LPA, and the United States raised no question about the validity of that waiver vis-à-vis LPA. Accordingly no question of the sufficiency of these proceedings arises under Article 1121 of NAFTA.

86. Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved.²² In the present case there was no evidence of material non-disclosure or prejudice,²³ and Article 1121 was complied with. Thus the Tribunal would have been prepared, if necessary, to treat Mondev's claim as brought in the alternative under Article 1117.²⁴ In the event, the matter does not have to be decided, since the case can be resolved on the basis of Claimant's standing under Article 1116. But it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.

²² Cf. *Mavrommatis Palestine Concessions (Jurisdiction)*, PCIJ Ser. A No. 2 (1924) at p. 34; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia) (Preliminary Objections)* ICJ Reports 1996 p. 595 at pp. 613-614 (para. 26).

²³ As noted already, Mondev's waiver under Article 1121 extended to claims belonging to LPA. Accordingly there is here no question such as arose in *Waste Management v. Mexico*, award of 2 June 2000, 40 ILM 56 (2001).

²⁴ Another possibility, if the case should have been brought under Article 1117, would be for the Tribunal to order that the damages be paid to the enterprise.

(c) The three year time bar (Articles 1116(2) and 1117(2))

87. Since the claims within the Tribunal's jurisdiction are limited to those under Article 1105 which challenge the decisions of the United States courts, no question arises as to the time bar. The present proceedings were commenced within three years from the final court decisions. If it had mattered, however, the Tribunal would not have accepted Mondev's argument that it could not have had "knowledge of... loss or damage" arising from the actions of the City and BRA prior to the United States court decisions. A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear. It must have been known to Mondev, at the latest by 1 January 1994, that not all its losses would be met by the proceedings LPA had commenced in Massachusetts. In any event, the words "loss or damage" refer to the loss or damage suffered by the investor as a result of the breach. Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term "loss or damage" in Articles 1116 and 1117. Thus if Mondev's claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.

(d) Ownership of the claim and the issue of the mortgage

88. The United States also challenged Mondev's standing on the ground that, with the foreclosure of the mortgage in 1991, all rights associated with the project, including the claims asserted by Mondev before the Massachusetts courts, vested in the mortgagee, Manufacturers Hanover Trust Co., a New York corporation.

89. The issue of the construction of the mortgage is one on which the arguments are finely balanced. If it had been necessary to do so, the Tribunal would have been inclined to decide it in Mondev's favour. It is not clear what meaning could be given to the specifically negotiated exclusion in the mortgage if it were not a reference to Mondev's interest in the Hayward Parcel option, and it is arguable that the boilerplate language in the mortgage referring to rights of option should not prevail over a specifically negotiated exclusion. Moreover, this could be so whether the appropriate canon of construction is to be found in the Uniform Commercial Code, as argued by Mondev, or in New York real property law, as

argued by the United States. In any event, it seems that any rights of action covered by the mortgage would have been limited to the contract claims against the City and would not have extended to the tortious claim against BRA.

90. The Tribunal does not, however, need to decide these questions, for two reasons. First, it is not contested by the United States that LPA, a wholly owned subsidiary of Mondev, did in fact commence and conduct the litigation before the United States courts in its own name and on the footing that its own rights were involved. There is no evidence that Manufacturers Hanover disputed that view or sought to assert any rights it might arguably have had under the mortgage. If Manufacturers Hanover took no steps to assert any private rights it may have had, it was in the Tribunal's view not for third parties (including the United States) to do so.²⁵ In the circumstances the Tribunal sees no reason to doubt LPA's ownership of the legal interests which were in issue before the United States courts.

91. Secondly, the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1102(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment.

²⁵ Thus the present case is distinguishable from *Rio Grande Irrigation & Land Co. Ltd. (Great Britain) v. United States* (1923) 6 RIAA 131, at p. 137, where the United States successfully relied on a public Act which it had not previously invoked.

3. *Conclusion*

92. For these reasons, the Tribunal decides that it has jurisdiction over the claim under Articles 1116 and 1122 to the extent (but only to the extent) that it concerns allegations of breach of Article 1105(1) by the decisions of the United States courts. To that extent (but only to that extent) the claim is admissible.

D. The merits of Mondev’s Article 1105 Claim

93. The Tribunal turns to the merits of this claim. In doing so, it will consider first a number of issues relevant to the interpretation of Article 1105, before turning to the application of Article 1105 to the facts of the case.

1. The interpretation of Article 1105

94. There was extensive debate before the Tribunal as to the meaning and effect of Article 1105. The debate included such issues as the binding effect and scope of the FTC’s interpretation of Article 1105, given on 31 July 2001, the origin and meaning of the terms “fair and equitable treatment” and “full protection and security” occurring in Article 1105(1), and the extent of the various customary international law duties traditionally conceived as falling within the rubric of the “minimum standard of treatment” under international law.

95. Article 1105 is entitled “Minimum Standard of Treatment”. It provides as follows:

“(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

(2) Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

(3) Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).”

In the present case only Article 1105(1) is relevant. Article 1105(2) does make it clear, however, by the phrase “[w]ithout prejudice to paragraph 1”, that Article 1105(1) is not limited to issues concerning the treatment of investments before the courts of the host State. This would be clear in any event, since the “minimum standard of treatment” under

international law as applied by arbitral tribunals and in State practice applies to a wide range of factual situations, whether in peace or in civil strife, and to conduct by a wide range of State organs or agencies.

96. This is significant in two ways. First, under the system of Chapter 11, it will be a matter for the investor to decide whether to commence arbitration immediately, with the concomitant requirement under Article 1121 of a waiver of any further recourse to any local remedies in the host State, or whether initially to claim damages with respect to the measure before the local courts. The standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked. Thus under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule “are interlocking and inseparable”.²⁶ Secondly, in the present case, Mondev through LPA did choose to invoke its remedies before the United States courts. Indeed at the time it did so it had no NAFTA remedy, since NAFTA was not in force. The Tribunal is thus concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State’s courts or tribunals.

97. In particular, since the Tribunal lacks jurisdiction to pass upon acts of the City or the BRA that took place before NAFTA came into force, it only needs to consider how Article 1105(1) applies to a case where the measure challenged is that of a local court, here the SJC. This is to be distinguished from a case where the action challenged is that of another branch of government and a court has passed upon that action under its internal law (the situation that would have obtained here if NAFTA had – as it does not have – retrospective effect).

98. In this respect the Respondent initially appeared to argue that Article 1105(1) does not protect intangible property interests such as those arising following LPA’s exercise of the Hayward Parcel option.²⁷ In oral argument, however, the Respondent made clear that “the set of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments”.²⁸ In the Tribunal’s view, there can be no

²⁶ Cf. C. Eagleton, *The Responsibility of States in International Law* (New York University Press, New York, 1928), p. 113.

²⁷ United States Counter-Memorial, p. 37.

²⁸ Transcript, p. 683.

doubt on the point. Many of the decisions cited by the parties as relevant to the scope of the standard involved intangible property, including contract claims.²⁹ Moreover it is clear that the protection afforded by the prohibition against expropriation or equivalent treatment in Article 1110 can extend to intangible property interests, as it can under customary international law. In the Tribunal's view, there is no reason for reading Article 1105(1) any more narrowly.

99. As to the meaning of Article 1105(1), the principal issues debated between the parties concerned the effect of the FTC's interpretations, and in particular, the content of the notion of denial of justice, which is central to Mondev's remaining NAFTA claims.

(a) The FTC's interpretations of 31 July 2001

100. Article 1131 of NAFTA provides that:

"1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

The Commission referred to in Article 1131 is the Free Trade Commission, established pursuant to Article 2001 of NAFTA. It comprises cabinet-level representatives of NAFTA Parties or their designees. One of its functions is to "resolve disputes that may arise regarding [the] interpretation or application" of NAFTA (Article 2001(2)(c)).

101. In pursuance of these provisions, on 31 July 2001 the FTC adopted, among others, "the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions":

"B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

²⁹ See, e.g., *Shufeldt claim (United States/Guatemala)* (1930) 2 RIAA 1081 at 1097; *Norwegian Shipowners' Claims* (1922) 1 RIAA 309 at p. 332; *Philips Petroleum Co Iran v. Islamic Republic of Iran* (1989) 21 Iran-US CTR 79 at 106 (para. 76);

2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

Copies of the interpretations were forwarded to the Tribunal by the United States on the day of their issue. Subsequently they were the subject of extended argument both by the Claimant and the Respondent.

102. The Claimant professed to be “somewhat bewildered” by the interpretations. It maintained that the Respondent saw fit “to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part” and questioned whether it could do so in good faith. It contended that the FTC’s decision was “more a matter of amendment” to the text of NAFTA than an interpretation of it, observing that the interpretations conflicted with “judicially found meaning of the text” in three NAFTA arbitration awards. In the view of the Claimant, the 31 July 2001 interpretations added to the text of Article 1105 by adding the word, “customary”, while treating the terms “fair and equitable treatment” and “full protection and security” as surplusage. The Claimant found “astounding” what it saw as the FTC’s view that a violation of a treaty may constitute treatment in accordance with international law. It submitted that the provisions of Article 1105 for “fair and equitable treatment and full protection and security” could not be read out of the Treaty by the FTC, and that those provisions governed the treatment that the Parties are obliged to extend to investors of another Party. Moreover, if those provisions were to be treated as affording investors no more than the minimum standard provided by customary international law, that law had to be given its current content, as it has been shaped by the conclusion of hundreds of bilateral investment treaties, including NAFTA, and by modern international judgments and arbitral awards.

103. The Respondent maintained that the meaning of Article 1105 had been “conclusively established” by the FTC’s interpretations of 31 July 2001. These constituted “the definitive statement of what the Parties intended from the source designated by the Treaty as the ultimate and most authoritative source of its meaning, the Parties themselves.” The

obligation of Article 1105(1) “was intentionally limited to that pre-existing body of customary international legal obligations.” Fair and equitable treatment and full protection and security were accordingly subsumed within the minimum standard. The NAFTA Parties had adopted the interpretations in view of what they saw as “the misinterpretations” of Article 1105 by earlier NAFTA tribunals. They did not do so in order to frustrate Mondev’s arguments, and there was no basis for an allegation that the Respondent had not acted in good faith or had abused its powers as a member of the FTC in order to improve its position in pending litigation. In any event, Article 1131 is “one of the rules of the game, a rule designed just so that the Parties could assure that what they meant by NAFTA’s terms could be made known whenever there were misinterpretations.” Nor was there ground for the Claimant’s contention that the 31 July 2001 interpretations constituted an amendment to NAFTA. In particular, Paragraph B(3) simply emphasized the original intention of NAFTA Parties not to subject themselves to arbitration of obligations under other international agreements.

104. As noted already, following the Claimant’s post-hearing submission of the award of the *Pope & Talbot* Tribunal on damages,³⁰ both parties as well as Canada and Mexico submitted post-hearing briefs.

105. In its damages award of 31 May 2002, the *Pope & Talbot* Tribunal raised the question whether it was bound by the FTC’s interpretation, in particular in relation to an award already made. It noted that NAFTA treats issues of interpretation (Article 2001(2)) and amendment (Article 2202) differently, and concluded that it was for the Tribunal to determine “whether the FTC’s action can properly be qualified as an ‘interpretation’”.³¹ After referring to newly available *travaux préparatoires* of Article 1105, it expressed the view that the FTC’s decision probably amounted to an amendment rather than an interpretation.³² But even if the FTC’s interpretation bound the Tribunal and had retrospective effect, this did not necessitate a revision of the Tribunal’s decision on the merits. Article 1105 incorporated an evolutionary standard, which allowed subsequent practice, including treaty practice, to be taken into account.³³ In any event, even applying Canada’s own version of the Article 1105 standard,

³⁰ *Pope & Talbot Inc. v. Canada*, Award in respect of Damages, www.naftalaw.org, 31 May 2002.

³¹ *Ibid.*, para. 24.

³² *Ibid.*, para. 47.

³³ *Ibid.*, para. 59.

the conduct complained of would have constituted a breach entitling the claimant to damages.³⁴

106. In a post-hearing submission of 8 July 2002 in these proceedings, the United States criticised the *Pope & Talbot* Tribunal for suggesting that it was not bound by the FTC interpretation, and it argued that the award merited little consideration. According to the Respondent, “nothing in the text of NAFTA supports the view that FTC interpretations would be subject to... review by an *ad hoc* tribunal constituted under Chapter Eleven”. In any event the FTC’s interpretation was supported by well-settled principles of treaty interpretation. Even if it was permissible to refer to the content of other BITs in interpreting Article 1105(1) (which it denied), the United States had consistently taken the position, for example in advising the Senate on ratification of BITs, that the “fair and equitable treatment” standard “was intended to require a minimum standard of treatment based on customary international law”.³⁵ On the other hand the *Pope & Talbot* Tribunal had erred in its automatic equation of customary international law with the content of BITs, without regard to any question of *opinio juris*. In particular, the decision of the Chamber in the *ELSI* case,³⁶ on which the *Pope & Talbot* Tribunal relied, concerned a particular FCN treaty. That decision, in the United States’ view, “cannot reflect an evolution in customary international law... *ELSI* did not even purport to address customary international law standards requiring treatment of an alien amounting to an ‘outrage’ for a finding of a violation. In any event, *ELSI* clearly does not establish that any relevant standard under customary international [law] requires mere ‘surprise’.”³⁷

107. In its letter to the Tribunal of 15 July 2002, the Claimant noted that it had not argued that the FTC’s “Interpretation” should be disregarded; nor did its claims depend on a view of Article 1105(1) which was contradicted by the FTC. It observed that the formulation of “arbitrariness” given by the Chamber in the *ELSI* case had been applied in the context of

³⁴ Ibid., para. 65.

³⁵ Post-Hearing Submission of Respondent United States of America on *Pope & Talbot*, 8 July 2002, p. 11. In support the Respondent attached, by way of example, Letters of Submittal in respect of 11 BITs.

³⁶ ICJ Reports 1989 p. 15 at p. 76, cited by the *Pope & Talbot* Tribunal at para. 63.

³⁷ Post-Hearing Submission of Respondent United States of America on *Pope & Talbot*, 8 July 2002, , pp. 16-17.

denial of justice by an ICSID Tribunal in *Amco Asia*.³⁸ In the Claimant's view it was incorrect to seek to limit the *ELSI* dictum to the particular FCN treaty applicable in that case.

108. In its Article 1128 submission of 23 July 2002, Mexico stressed that most of the problems it saw (in common with the United States) with the *Pope & Talbot* Tribunal award concerned *obiter dicta*, i.e., statements which were not necessary to the decision in that case. In Mexico's words "[t]he *Pope & Talbot* Tribunal created the interpretative problem that it complained of", in particular in adopting an "additive" approach to Article 1105(1). Mexico noted that the customary international law standard "is relative and that conduct which may not have violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today". Mexico agreed with the United States that the *ELSI* Tribunal had considered the notion of "arbitrariness" under a specific provision of a BIT, but also noted that the Chamber's discussion "is nevertheless instructive as to the standard of review that the international tribunal must employ when examining whether a State has violated the international minimum standard". In its view, the core idea was that "of arbitrary action being substituted for the rule of law".

"The key point is that the Chamber accorded deference to the respondent's legal system in applying the standard, finding that even though the mayor's act of requisitioning the factory at issue in the case was unlawful at Italian law as an excess of power, mere domestic illegality did not equate to arbitrariness at international law."³⁹

109. In its submission of 19 July 2002, Canada likewise denied the capacity of Chapter 11 Tribunal's to review FTC interpretations, and submitted that, in any event, the FTC interpretation clearly qualified as such under the standards for interpretation in Article 31 of the Vienna Convention on the Law of Treaties. As to the substance of the Article 1105 standard, Canada noted that its "position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high".⁴⁰

³⁸ *Amco Asia Corp. v. Republic of Indonesia*, Resubmitted Case, Award of 31 May 1990, paras. 136-137, 1 ICSID Rep. 569 at 604.

³⁹ Article 1128 Submission of the United Mexican States in the Matter of *Mondev International Ltd. v. United States of America*, 23 July 2002, p. 17.

⁴⁰ Submission of Canada on the *Pope & Talbot* Award, 19 July 2002, para. 33.

110. In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in *Pope & Talbot* which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the *Pope & Talbot* Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely *opinio juris*. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for “fair and equitable” treatment of foreign investment.

111. The question is entirely legitimate. It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law. Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation,⁴¹ they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*. For example the Canadian Statement on Implementation of NAFTA states that Article 1105(1) “provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law”.⁴² The numerous transmittal statements by the United States of BITs containing language similar to that of NAFTA show the same general approach. For example, the transmittal statement with respect to the United States-Ecuador BIT of 1993 states that the guarantee of fair and equitable treatment “sets out a minimum standard of treatment based on customary international law”.⁴³ It is to be noted that these official statements repeatedly refer not to “the” but to “a” minimum standard of treatment.

⁴¹ Cf. *Anglo-Iranian Oil Company Case (Preliminary Objections)*, ICJ Reports 1952 p. 93 at p. 107; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, ICJ Reports 1996 p. 803 at p. 814 (para. 29).

⁴² Canada, Department of External Affairs, North American Free Trade Agreement, Canadian Statement on Implementation, *Canada Gazette*, 1 January 1994, p. 68 at p. 149.

⁴³ 103d Congress, 1st Session, Treaty Doc. 103-15 (Washington, 1993) p. ix.

112. More recent transmittal statements are even more explicit. For example the transmittal statement for the United States-Albania BIT of 1995 states in relevant part:

“Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord ‘fair and equitable treatment’ and ‘full protection and security’ are explicitly cited, as is the Parties’ obligation not to impair through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. The general reference to international law also implicitly incorporates other fundamental rules of international law: for example, that sovereignty may not be grounds for unilateral revocation or amendment of a Party’s obligations to investors and investments (especially contracts), and that an investor is entitled to have any expropriation done in accordance with previous undertakings of a Party.”⁴⁴

As Mexico noted in its post-hearing submission to the Tribunal, it did not have a practice prior to NAFTA of concluding BITs, but it expressly associated itself with the Canadian Statement on Implementation.⁴⁵

113. Thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?

114. It has been suggested, particularly by Canada, that the meaning of those provisions in customary international law is that laid down by the Claims Commissions of the inter-war years, notably that of the Mexican Claims Commission in the *Neer* case. That Commission laid down a requirement that, for there to be a breach of international law, “the treatment of an alien ... should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁴⁶

⁴⁴ 104th Congress, 1st Session, Treaty Doc. 104-15 (Washington, 1995) pp. viii-ix.

⁴⁵ Article 1128 Submission of the United Mexican States in the Matter of *Mondev International Ltd. v. United States of America*, 23 July 2002, pp. 5, 7.

⁴⁶ *U.S.A. (L.F. Neer) v. United Mexican States*, decision of the General Claims Commission, United States-Mexico, 15 October 1926, *Opinions of Commissioners, 1927*, p. 1, reproduced in the *American Journal of International Law 1927*, pp. 555, 556; 3 ILR 213.

115. The Tribunal would observe, however, that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties,⁴⁷ and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.

116. Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.

117. Thirdly, the vast number of bilateral and regional investment treaties (more than 2000⁴⁸) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord

⁴⁷ As stressed by the ILC in its commentary to the Articles on Responsibility of States for Internationally Wrongful Acts; see Chapter II, para. (3), Article 11, paras. (2)-(3).

⁴⁸ According to UNCTAD's *World Investment Report 2002*, the actual number as at December 2001 was 2099; see www.unctad.org/WIR/pdfs/fullWIR02/pp.1-22.pdf.

foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.

118. When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

119. That having been said, for the purposes of the present case the Tribunal does not need to resolve all the issues raised in argument and in the written submissions concerning the FTC's interpretation. The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.⁴⁹ At the same time, Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was "fair" or "equitable" in the circumstances of each particular case. While possessing a power of appreciation, the United States stressed, the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is "fair" or "equitable", without reference to established sources of law.

120. The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1). In light of the FTC's interpretation, and in any event, it is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive debate about whether any such thing

as a minimum standard of treatment of investment in international law actually exists.⁵⁰ Article 1105 resolves this issue in the affirmative for NAFTA Parties. It also makes it clear that the standard of treatment, including fair and equitable treatment and full protection and security, is to be found by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors.

121. To this the FTC has added two clarifications which are relevant for present purposes. First, it makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties. There is no difficulty in accepting this as an interpretation of the phrase “in accordance with international law”. Other treaties potentially concerned have their own systems of implementation. Chapter 11 arbitration does not even extend to claims concerning all breaches of NAFTA itself, being limited to breaches of Section A of Chapter 11 and Articles 1503(2) and 1502(3)(a).⁵¹ If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected. Moreover the phrase “Minimum standard of treatment” has historically been understood as a reference to a minimum standard under customary international law, whatever controversies there may have been over the content of that standard.

122. Secondly, the FTC interpretation makes it clear that in Article 1105(1) the terms “fair and equitable treatment” and “full protection and security” are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word “including” in paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase “including fair and equitable treatment and full protection and security” adds nothing to the meaning of Article 1105(1), nor did the

⁴⁹ This potential is likewise accepted by A.V. Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, London, 1938, reprinted by Kraus, New York, 1970), p. 570.

⁵⁰ See, e.g., E. Borchard, “The Minimum Standard of Treatment of Aliens”, (1940) *Michigan Law Review* 445; A. Roth, *The Minimum Standard of International Law as Applied to Aliens* (The Hague, Sijthoff, 1949); F.A. Mann, “British Treaties for the Promotion and Protection of Investments”, (1981) 52 *BYIL* 241, and works there cited.

FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation. The minimum standard of treatment as applied by tribunals and in State practice in the period prior to 1994 did precisely focus on elements calculated to ensure the treatment described in Article 1105(1).

123. A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the *travaux*, with normal principles of interpretation and with the fact that, as the Respondent accepted in argument, the terms “fair and equitable treatment” and “full protection and security” had their origin in bilateral treaties in the post-war period.⁵² In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.

124. The Respondent noted that there was some common ground between the parties to the present arbitration in respect of the FCT’s interpretations, namely, “that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time... like all customary international law, the international minimum standard has evolved and can evolve... the sets of standards which make up the international law minimum standard, including principles of full protection and security, apply to investments.”⁵³ Moreover in their written submissions, summarised in paras. 107-108 above, both Canada and Mexico expressly accepted this point.

125. The Tribunal agrees. For the purposes of this Award, the Tribunal need not pass upon all the issues debated before it as to the FTC’s interpretations of 31 July 2001. But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the

⁵¹ See Art. 1116 (1), 1117 (1).

⁵² As noted in UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (United Nations, NY, 1998), pp. 53-55.

⁵³ Transcript, p. 683.

FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for “fair and equitable” treatment of, and for “full protection and security” for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.

(b) The applicable standard of denial of justice

126. Enough has been said to show the importance of the specific context in which an Article 1105(1) claim is made. As noted already, in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal. As a NAFTA tribunal pointed out in *Azinian v. United Mexican States*:

“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”⁵⁴

The Tribunal went on to hold:

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way...

There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of ‘pretence of form’ to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.”⁵⁵

⁵⁴ *Azinian v. United Mexican States* (1999) 39 ILM 537 at p. 552 (para. 99).

⁵⁵ *Ibid.*, at pp. 552-3 (paras. 102-103).

127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”.⁵⁶ It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word “surprises” does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.⁵⁷

2. *The application of Article 1105(1) to the present case*

128. *Mondev* questioned the decisions of the United States courts essentially on four grounds. The Tribunal will take these in turn. Because the United States Supreme Court denied *certiorari* without giving any reasons, it is necessary in each case to focus on the unanimous decision of the SJC, delivered by Judge Fried.⁵⁸ In approaching these four issues the Tribunal has had regard to the contrasting expert opinions tendered for the Claimant by Professor Coquillette and for the Respondent by Judge Kass.

⁵⁶ *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ Reports 1989 p. 15 at p. 76 (para. 128), citing the judgment of the Court in the *Asylum* case, ICJ Reports 1950 p. 266 at p. 284, which referred to arbitrary action being “substituted for the rule of law”.

⁵⁷ One may compare the rule stated in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8 (b), referring to a decision which “unreasonably departs from the principles of justice recognized by the principal legal systems of the world”; reprinted in L.B. Sohn & R.R. Baxter, “Responsibility of States for Injuries to the Economic Interests of Aliens” (1961) 55 *AJIL* 515 at p. 551.

⁵⁸ 427 Mass. 509 (1998).

(a) The dismissal of LPA’s contract claim against the City

129. On this point the Supreme Judicial Court began by noting that whether there was a binding contract, and whether the City was in breach, were issues which “had to be considered together to come to a fair and sensible view of the arrangements between the parties and their dealings with each other”.⁵⁹ This was because the contract contained formulae and procedures to deal with unresolved issues (including the price to be paid for the Hayward Parcel); if those formulae and procedures had not been included, the arrangement would have lacked certainty on essential terms. By the same token, however, “if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement”.⁶⁰ For reasons given in detail in its opinion the SJC concluded “that there was sufficient evidence to find a binding agreement, as the jury indeed did find, but it is also clear, as a matter of law, that LPA failed to follow the steps required of it under the Tripartite Agreement as supplemented to put the city in breach”.⁶¹ In particular the SJC relied on earlier authority, including its own decision of 1954 in *Leigh v. Rule*, for the proposition that a material failure by a plaintiff to put the defendant in breach “bars recovery... unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform”.⁶² The only evidence of LPA’s tender of performance was Campeau’s letter of 19 December 1988, but this, in the Court’s view, was far too unspecific to satisfy the test in *Leigh v. Rule*. There was accordingly no basis in law for finding the City in breach of contract.⁶³ Moreover, the Court held, there was no outright refusal by the City to comply with the contract, and LPA could not “attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving”.⁶⁴ Nor did LPA’s claim based on the City’s bad faith assist it: the basis of that claim was the City’s refusal to extend the expiry date for the exercise of the option, but the City was under no contractual obligation to consent to an extension.⁶⁵

130. The Court noted that its analysis applied particularly in the case of “a complex and heavily regulated transaction such as this one, where public entities and public and elected

⁵⁹ Ibid., 516.

⁶⁰ Ibid.

⁶¹ Ibid., pp. 516-517.

⁶² Ibid., p. 519, citing *Leigh v. Rule*, 331 Mass. 664, 668 (1954).

⁶³ 427 Mass. 509, 521 (1998), qualifying the letter as “an empty gesture that could not possibly have been acted on in the time remaining” before the expiry of the option.

⁶⁴ Ibid., p. 523.

⁶⁵ Ibid., p. 526.

officials with changing policies and constituencies are involved, and the transaction spans many years”, and it went on to note a dictum of Justice Holmes that “[m]en must turn square corners when they deal with the Government.”⁶⁶ By inference, neither LPA nor Campeau had turned such corners – in the absence of which “LPA was not excused from its obligation to put the city in default”.⁶⁷

131. Claimant argued that the SJC’s decision involved a “significant and serious departure” from its previous jurisprudence, which was exacerbated when the SJC completely failed to consider whether it should apply the rules it articulated retrospectively to Mondev’s claims.⁶⁸ In those circumstances the SCJ’s dismissal of LPA’s claims “was arbitrary and profoundly unjust”.⁶⁹

132. The Respondent, on the other hand, argued that the SJC acted reasonably in accordance with its existing jurisprudence, and there was no occasion to consider any question of a new law or of its retrospective application.

133. The Tribunal is unimpressed by the “new law” argument so far as concerns the basic principle set out in *Leigh v. Rule*⁷⁰ and embodied in many other systems of contract law. The question whether an agreement in principle to transfer real property is binding, and whether all the conditions for the performance of such an agreement have been met, is one which all legal systems have to face. In the Tribunal’s view, it is doubtful whether the SJC made new law in its application of the principle in *Leigh v. Rule*. But even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.

134. On balance, the position is the same with the so-called “square corners” rule. It is true that Justice Holmes’s statement was made in a tax case, not a contract case, and it stands in some tension with the general proposition (accepted as part of Massachusetts law) that

⁶⁶ Ibid., p. 524, citing *Rock Island, Ark. & La. R.R. v. United States*, 254 US 141, 143 (1920).

⁶⁷ 427 Mass. 509, 524 (1998).

⁶⁸ See, e.g., Transcript, p. 921, referring to the expert opinions of Professor Coquillette.

⁶⁹ Transcript, p. 933.

⁷⁰ 331 Mass. 664 (1954).

governments are subject to the same rules of contractual liability as are private parties.⁷¹ To the extent that it might suggest the contrary, the “square corners” rule might raise a delicate judicial eyebrow. Indeed a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance. But in the Tribunal’s view, the SJC’s remark was at most a subsidiary reason for a decision founded on normal principles of the Massachusetts law of contracts, and the SJC expressly disclaimed any intention to absolve governments from performing their contractual obligations.⁷² In its context the remark was merely supplementary and was not itself the basis for the decision.

(b) The SJC’s failure to remand the contract claim

135. Alternatively, Mondev argued that, once the SJC had concluded that the issue of tender of performance arose, it should have remanded questions of fact to the jury, in particular the question whether Mondev was willing and able to perform or whether the City had constructively repudiated the contract. The Respondent argued that under Massachusetts law and practice it was for the SJC to decide whether or not to remand a question, and that within extremely broad limits there was no basis on which such a decision could be questioned under Article 1105(1).

136. The Tribunal agrees with the United States on this point. Questions of fact-finding on appeal are quintessentially matters of local procedural practice. Except in extreme cases, the Tribunal does not understand how the application of local procedural rules about such matters as remand, or decisions as to the functions of juries vis-à-vis appellate courts, could violate the standards embodied in Article 1105(1). On the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role. Conceivably there might be a problem if the appellate decision took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case. But LPA had (and exercised) the right to apply for a rehearing and then to seek *certiorari* to the Supreme Court. In these circumstances there was no trace of a procedural denial of justice.

⁷¹ See e.g., *Minton Construction Corp. v. Commonwealth*, 397 Mass 879 (1986); *Space Master International, Inc. v. City of Worcester*, 940 F 2d 16 (1991).

(c) The SJC's failure to consider whether it retrospectively applied a new rule

137. The Claimant noted that the SJC had failed to consider whether the allegedly new rule it was applying to government contracts should be applied retrospectively, and thereby violated its own standards for judicial law-making. But as the Tribunal has already noted, the Court's decision on the point of Massachusetts contract law fell well within the interstitial scope of law-making exercised by courts such as those of the United States – if indeed it was new law at all. In any event, once again it is normally a matter for local courts to determine whether and in what circumstances to apply new decisional law retrospectively.⁷³

138. The European Court of Human Rights has given some guidance on this question under Article 7 of the European Convention in the context of criminal proceedings, where the effect of a new judicial decision is to impose a criminal liability which did not, or arguably did not, exist when the crime was committed.⁷⁴ If there is any analogy at all, it is much fainter in civil cases.⁷⁵ Assuming, for the sake of argument, that standards of this kind might be applicable under Article 1105(1), in the Tribunal's view there was no contravention of any such standards in the present case.

(d) BRA's statutory immunity

139. The Tribunal turns to the question of BRA's statutory immunity for intentional torts under the Massachusetts Tort Claims Act (PL 258). Under §10(c) of that Act, a public employer which is not an "independent body politic and corporate" is immune from "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations". As recalled above, the trial judge

⁷² 427 Mass. 509, 523 (1998).

⁷³ From the cases cited, it appears that the Massachusetts courts may sometimes announce a change in decisional law with prospective effect only (e.g., *Tucker v. Badoian*, 376 Mass 907 (1978)), but they will only do so where there are "special circumstances": *Payton v. Abbott Labs*, 386 Mass. 540, 565 (1982); *Tamerlane Corp. v. Warwick Ins. Co.*, 412 Mass. 486, 490 (1992); *MacCormack v. Boston Edison Co.*, 423 Mass. 652 (1996).

⁷⁴ See *S.W. v. United Kingdom*, ECHR, decision of 22 November 1995, paras. 34-36; *C.R. v. United Kingdom*, ECHR, decision of 22 November 1995, paras. 32-34; *Streletz, Kessler & Krenz v. Germany*, ECHR, decision of 22 March 2001, para. 50.

⁷⁵ See e.g., *Carbonara & Ventura v. Italy*, ECHR, decision of 30 May 2000, paras. 64-69; *Agoudimos & Cefallonian Sky Shipping Co. v. Greece*, ECHR, decision of 28 June 2001, paras. 29-30.

declined to enter the jury's verdict against BRA, holding that it was entitled to immunity as a "public employer" under the Massachusetts Tort Claims Act. That decision was affirmed by the SJC,⁷⁶ which emphasised "the desirability of making the [Massachusetts Tort Claims Act] regime as comprehensive as possible".⁷⁷ That decision was not challenged on *certiorari* to the United States Supreme Court, no doubt on the basis that the matter involved the interpretation of a Massachusetts statute and presented no federal claim or issue.⁷⁸

140. In the present proceedings, Mondey did not challenge the correctness of this decision as a matter of Massachusetts law. Rather, it argued that for a NAFTA Party to confer on one of its public authorities immunity from suit in respect of wrongful conduct affecting an investment was in itself a failure to provide full protection and security to the investment, and contravened Article 1105(1). For its part the United States argued that Article 1105(1) did not preclude limited grants of immunity from suit in respect of tortious conduct. It noted that there is no consensus in international practice on whether statutory authorities should be subject to the same rules of tortious liability as private parties. In the absence of any authority under customary international law requiring statutory authorities to be generally liable for their torts, or any consistent international practice, it could not be said that the immunity of BRA infringed Article 1105(1).

International jurisprudence on immunities of public authorities

141. The parties sought to draw analogies for the present case from the field of foreign State immunity. It is well established that foreign States and their agencies may claim immunities in respect of conduct in the exercise of governmental authority, even if such conduct is or would otherwise be civilly wrongful. Moreover in a series of decisions the European Court of Human Rights has held that the conferral of immunity in ways recognised in international practice does not involve a denial of access to a court, contrary to Article 6(1) of the European Convention of Human Rights.⁷⁹ By analogy, the United States argued, the recognition of a limited statutory immunity for certain torts could not be considered a

⁷⁶ 427 Mass. 509, 527-535 (1998).

⁷⁷ *Ibid.*, p. 532.

⁷⁸ As explained in the expert opinion of Judge Kenneth Starr for the Claimant, 29 January 2001.

⁷⁹ See *Al-Adsani v. United Kingdom*, Application No. 35763/97, (2002) 34 EHRR 11; *McElhinney v. Ireland*, Application No. 31253/96, (2002) 34 EHRR 13; *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12.

violation of the international minimum standard or a denial of justice, given the lack of any clear or consistent State practice requiring the denial of immunity.

142. The Tribunal is not persuaded that the doctrine of foreign State immunity presents any useful analogy to the present situation. That immunity is concerned not with the position of State agencies before their own courts, but before the courts of third States, where considerations of interstate relations and the proper allocation of jurisdictional competence are raised.

143. There is a closer analogy with certain decisions concerning statutory immunities of State agencies before their own courts. In a number of cases the European Court of Human Rights has held that special governmental immunities from suit raise questions of consistency with Article 6(1) of the European Convention on Human Rights, because they effectively exclude access to the courts in the determination of civil rights. As the Court said in *Fogarty v. United Kingdom*:

“it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons...”⁸⁰

On the other hand the Court recognises that it “may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned”.⁸¹ By parity of reasoning, there are difficulties in reading Article 1105(1) so as in effect to create a new substantive civil right to sue BRA for tortious interference with contractual relations. Moreover the distinction between the existence of a civil liability and a defence to a lawsuit

⁸⁰ *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12, paras. 24-25, citing *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, § 65. See also *Tinnelly & Sons Ltd. v. United Kingdom*, (1999) 27 EHRR 249; *Devlin v. United Kingdom*, judgment of 30 January 2002; *Osman v. United Kingdom*, (2000) 29 EHRR 245; *TP & KM v. United Kingdom* (2002) 34 EHRR 2.

⁸¹ *Al-Adsani v. United Kingdom*, Application No. 35763/97, (2002) 34 EHRR 11 at para. 47; *Fogarty v. United Kingdom*, Application No. 37112/97, (2002) 34 EHRR 12 at para. 25; *McElhinney v. Ireland*, Application No. 31253/96, (2002) 34 EHRR 13 at para. 24.

can be difficult to draw, as the case of *Matthews v. Ministry of Defence*, which was debated before the Tribunal, demonstrates.⁸²

144. These decisions concern the “right to a court”, an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA’s guarantee of “treatment in accordance with international law, including fair and equitable treatment and full protection and security”. But the Tribunal would observe that, as soon as it was decided that BRA was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under Article 6(1) of the European Convention.

Rationale for exempting public authorities from liability for intentional torts

145. More important than analogies from other legal regimes is the question of the rationale for the BRA’s immunity. The United States argued that the conferral of a limited immunity on certain State authorities for intentional torts was neither arbitrary nor indiscriminate. It adduced in support evidence of two kinds, first, that related to the legislative history and rationale underlying the exemption for intentional torts, and secondly, comparative law indications that there is nothing approaching an international consensus on the appropriate extent of the immunities of public authorities in tort.

146. As to the first point, the United States noted that governmental immunity in actions in tort had been general for many years. The Federal Tort Claims Act 1946 abrogated that immunity for the United States itself, but subject to various exceptions including interference with contractual rights (28 USC §2680(h)). In Massachusetts the equivalent change in the law did not occur until 1978.⁸³ As in other common law jurisdictions, governmental immunity could sometimes be avoided, e.g., by suing the responsible officials in person,⁸⁴ but

⁸² See [2002] EWHC 13 (QB), decision of Keith J, 22 January 2002, overturned on appeal, [2002] EWCA Civ 773, [2002] 3 All ER 513, Court of Appeal, decision of 29 May 2002.

⁸³ Following *Whitney v. City of Worcester*, 373 Mass. 208 (1977).

⁸⁴ *Larson v. Domestic & Foreign Commerce Corporation*, 337 US 682, 687 (1949); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971).

this did not affect the principle that the government itself could not be sued without its consent. The United States argued that the existence of certain immunities of public authorities with respect to intentional torts is relatively well known,⁸⁵ and cannot be regarded as exceptional or eccentric in international terms.

147. For its part, the Claimant argued that any governmental immunity from suit in contract or tort, at least where the only remedy sought was damages, was increasingly seen as anomalous,⁸⁶ and that it was inconsistent with the express requirement in Article 1105(1) for “full protection and security” that the government be able to avoid liabilities arising under the general law of the land.

148. The Tribunal notes that the broad exception for intentional torts in United States legislation, and the sometimes artificial ways in which they have been circumvented,⁸⁷ have led to criticism and to suggestions that the exception be repealed, leaving the government to rely on the “discretionary functions” exception in the legislation, or to defend the case on the merits.⁸⁸ On the other hand, it does not appear that these suggestions have been acted on at federal or state level.

The comparative law experience with tortious immunity of public authorities

149. As to the second point, the United States referred to a comparative review which concluded that “in no legal system today is [the liability of officials for wrongful acts] the same as that of private individuals or corporations”.⁸⁹ The authors of that study, Professors Bell and Bradley, go on to develop the range of limitations on governmental liability still existing in many States, while noting at the same time a general tendency towards widening the scope of liability. It also noted the rather brief comparative review of jurisprudence on interference with contractual rights, undertaken in the context of the ILC’s work on State responsibility, which concluded that there were important differences in approach to tortious interference within Western legal systems, and even more so if non-Western systems are

⁸⁵ There is an equivalent immunity from suit for foreign States under the Foreign Sovereign Immunities Act 1976 (USA), Stat. 2891, § 1604.

⁸⁶ As an early example of this trend it referred to *Larson v. Domestic & Foreign Commerce Corp.*, 337 US 682, 703-4 (1949), although the Court did in fact grant immunity in that contract case on the ground that the United States was indirectly impleaded.

⁸⁷ E.g., *Andrews v. United States*, 732 F. 2d 366 (1984); *Sheridan v. United States*, 487 US 392 (1988).

⁸⁸ See, e.g., Davis & Pierce, *Administrative Law Treatise* (3rd edn., 1994), pp. 244-5.

taken into account. In short, there is no international consensus on the proper scope of that tort.⁹⁰

150. The Claimant argued that comparative reviews of the position in non-NAFTA States, and decisions of the European Court of Human Rights, were irrelevant to the question of the extent of NAFTA protection. NAFTA provided its own standard for full protection and security. The conferral on a public employer such as BRA of a blanket immunity from suit for tortious interference infringed that standard, and did so irrespective of whether the conduct immunized was itself a breach of NAFTA. According to the Claimant, Article 1105(1) requires that there be a remedy “when a State breaches its own laws in a manner that is aimed directly at and interferes with a foreign investment”.⁹¹ In any event, the conferral of a general immunity for intentional torts would be disproportionate under Article 6(1) as applied by the European Court, and *a fortiori* under the more explicit standard of full protection afforded by NAFTA.

The Tribunal’s conclusions

151. In the Tribunal’s opinion, circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA. Indeed the United States implicitly accepted as much. It did not argue that public authorities could, for example, be given immunity in contract vis-à-vis NAFTA investors and investments.

152. But the distinction between conduct compliant with or in breach of NAFTA Article 1105(1) cannot be co-extensive with the distinction between tortious conduct and breach of contract. For example, the Massachusetts legislation immunizes public authorities from liability for assault and battery. An investor whose local staff had been assaulted by the police while at work could well claim that its investment was not accorded “treatment in accordance with international law, including... full protection and security” if the government were immune from suit for the assaults. In such a case, the availability of an

⁸⁹ J. Bell & A.W. Bradley, *Governmental Liability: A Comparative Study* (United Kingdom Comparative Law Series, vol. 13, 1991) p. 2.

⁹⁰ J. Crawford, Second Report on State Responsibility, A/CN.4/498/Add. 3, 1 April 1999.

⁹¹ Transcript, p. 910.

action in tort against individual (possibly unidentifiable) officers might not be a sufficient basis to avoid the situation being characterised as a breach of Article 1105(1).

153. The function of the present Tribunal is not, however, to consider hypothetical situations, or indeed any other statutory immunity than that for tortious interference with contractual relations. This was the immunity relied on by BRA and upheld by the trial judge and the appeal courts. In that specific context, reasons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations and the power to interfere in those relations by granting or not granting permissions. If sued, it will be able to plead that it was acting in good faith and in the exercise of a legitimate mandate – but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.

154. After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply.⁹² On the other hand, within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.

155. In the same context *Mondev* complained that the Massachusetts Act dealing with unfair or deceptive practices in trade and commerce (G.L. Chapter 93A) was held by the trial judge to be inapplicable to BRA notwithstanding that it engaged in the regulation of commercial activity or acted for commercial motives. But if what has been said above as to the partial immunity of BRA from suit is correct, then *a fortiori* there could be no breach of

Article 1105(1) in holding Chapter 93A inapplicable to BRA. NAFTA does not require a State to apply its trade practices legislation to statutory authorities.

156. In reaching these conclusions, the Tribunal has been prepared to assume that the decision to allow BRA's statutory immunity could have involved conduct of the Respondent State in breach of Article 1105(1) after NAFTA's entry into force on 1 January 1994. That assumption may be questioned. The United States' courts, operating in accordance with the rule of law, had no choice but to give effect to a statutory immunity existing at the time the acts in question were performed and not subsequently repealed, once they had concluded that the statute in question did apply.⁹³ It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterised as in itself a breach of Article 1105(1).⁹⁴ In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (*ex hypothesi* correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's Article 1105(1) claim was bound to fail, and to fail whether or not one classifies BRA's statutory immunity as "procedural" or "substantive".

E. Conclusion

157. For these reasons the Tribunal dismisses Mondev's claims in their entirety.

⁹² As noted already, in the present case the conduct immunized took place well before NAFTA entered into force, and NAFTA protections do not apply to it as such.

⁹³ There was earlier Massachusetts authority in favour of the (unsurprising) proposition that BRA in exercising its planning powers was "a public agency acting in its public capacity": *Reid v. Acting Commissioner of Community Affairs*, 362 Mass 136, 141 (1972).

⁹⁴ Compare *Consuelo et al. v. Argentina*, IACHR, Report N 28/92, 2 October 1992, where immunity from prosecution and suit was extended after the entry into force of the Convention in respect of acts committed before its entry into force. The Inter-American Commission had no difficulty in rejecting Respondent's objection *ratione temporis*; it went on to hold that the conferral of immunity was in breach of the Convention.

158. As to the question of costs and expenses, the United States sought orders that Mondev pay the Tribunal's costs and the legal expenses of the United States on the basis that its claim was unmeritorious and should never have been brought.

159. NAFTA tribunals have not yet established a uniform practice in respect of the award of costs and expenses. In the present case the Tribunal does not think it appropriate to make any order for costs or expenses, for several reasons. First, the United States has succeeded on the merits, but it has by no means succeeded on all of the many arguments it has advanced, including a number of arguments on which significant time and costs were expended. Secondly, in these early days of NAFTA arbitration the scope and meaning of the various provisions of Chapter 11 is a matter both of uncertainty and of legitimate public interest. Thirdly, the Tribunal has some sympathy for Mondev's situation, even if the bulk of its claims related to pre-1994 events. It is implicit in the jury's verdict that there was a campaign by Boston (both the City and BRA) to avoid contractual commitments freely entered into. In the end, the City and BRA succeeded, but only on rather technical grounds. An appreciation of these matters can fairly be taken into account in exercising the Tribunal's discretion in terms of costs and expenses.

AWARD

For the foregoing reasons, the Tribunal unanimously DECIDES:

- (a) That its jurisdiction is limited to Mondev's claims concerning the decisions of the United States courts;
- (b) That to this extent only, Mondev's claims are admissible;
- (c) That the decisions of the United States courts did not involve any violation of Article 1105(1) of NAFTA or otherwise;
- (d) That Mondev's claims are accordingly dismissed in their entirety;
- (e) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

Done at Washington, D.C. in the English language.

SIR NINIAN STEPHEN
President of the Tribunal
Date:

PROFESSOR JAMES CRAWFORD
Member
Date:

JUDGE STEPHEN SCHWEBEL
Member
Date: