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

MONDEV INTERNATIONAL LTD., *Claimant/Investor,* *-and-* UNITED STATES OF AMERICA, *Respondent/Party.*	Case No. ARB(AF)/99/2

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

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

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

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

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

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

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

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

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

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

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

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