**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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| MONDEV INTERNATIONAL LTD., *Claimant/Investor,* v. THE UNITED STATES OF AMERICA, *Respondent/Party.* | ICSID Case No. ARB(AF)/____ |

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# NOTICE OF ARBITRATION


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# NOTICE OF ARBITRATION

## I. INTRODUCTION

1. Mondev International Ltd. ("Mondev" or "Claimant"), a corporation duly incorporated under the laws of Canada,[1] submits this Notice of Arbitration pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA") and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID"). Mondev hereby commences arbitration against the United States of America ("United States" or "Respondent") to recover damages for the breach by the United States of certain obligations under Chapter 11 of NAFTA that were committed (1) by virtue of the execution and enforcement of the *Massachusetts Tort Claims Act*, Massachusetts General Laws c. 258, by the Commonwealth of Massachusetts ("Massachusetts"); and (2) in connection with the trial and appeal of a case in the

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[1] *See* Documents relating to Mondev (Appendix ("App.") A).

Massachusetts state courts, in respect of which a subsequent petition to the Supreme Court of the United States for a writ of certiorari was denied.

2 Pursuant to Article 1116 of NAFTA, Mondev brings claims under this Notice of Arbitration on its own behalf for loss and damage caused to its investments in the United States, including loss and damage to its interests in Lafayette Place Associates ("LPA"), a Massachusetts limited partnership owned and controlled by Mondev.[3] The damage to Mondev's investments arose out of a May 20, 1998 decision by the Supreme Judicial Court of Massachusetts ("SJC"), the enactment by the Massachusetts legislature, and enforcement by the SJC, of the Massachusetts *Tort Claims Act*, and a March 1, 1999 refusal by the Supreme Court of the United States to grant an appeal and reverse the errors committed by the SJC, all of which constitute a denial of justice within the meaning of that term under international law and measures tantamount to an expropriation of an investment, as further described herein.

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[3] LPA was originally structured as a Massachusetts general partnership. On June 14, 1979, however, Mondev reconstituted LPA as a Massachusetts limited partnership pursuant to Mass. Gen. L. c. 109. *See* Documents relating to Lafayette Place Associates (App. B). *See also* NAFTA, Arts. 1139 and 201 (App. D) (including an "enterprise" within the meaning of an "investment" and defining an enterprise as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association") (emphasis added).

LPA's two original general partners were Mondev Massachusetts, Inc. ("Mondev Mass."), Mondev's wholly owned Massachusetts subsidiary, and Sabina Corporation, a Massachusetts corporation that Mondev purchased from its original French owner in the early 1980's. In 1985 Mondev's wholly owned Massachusetts subsidiary The Sabina Corporation became LPA's sole limited partner, and in 1989 Mondev U.S.A., Inc., a Delaware corporation wholly owned by Mondev, replaced Sabina as a general partner of LPA. Finally, on September 1, 1992 a new Mondev affiliate, also called Mondev U.S.A., Inc. (incorporated in Massachusetts and the successor to the original Mondev U.S.A., see App. C), became the sole general partner of LPA. The Sabina Corporation remained the sole limited partner of LPA. *See* Lafayette Place Associates, Sixth Amendment to the Limited Partnership Agreement, Lafayette Place Associates, First Amendment to Amended and Restated Certificate of Limited Partnership (App. B).

3. Mondev has been a major developer of commercial real estate in the United States and Canada for the past thirty years. In the late 1970s Mondev formed LPA as the vehicle to implement a multi-phased, multi-million dollar commercial real estate development in a dilapidated section of the City of Boston ("City") in Massachusetts. To achieve the planned development, Mondev directed LPA to negotiate and sign a three-party contract with the City and the Boston Redevelopment Authority ("BRA") (the City's planning and development agency), which agreement was signed on December 22, 1978. *See* Tripartite Agreement Among City of Boston, Boston Redevelopment Authority and Lafayette Place Associates (Dec. 22, 1978) ("Tripartite Agreement"), SJC Record Appendix (vol. 6), at A924 (Exhibit 1).[3]

4. The Tripartite Agreement contemplated a development in two phases. Phase I involved the development of a piece of property to be known as Lafayette Place, including the construction of a large, underground parking garage, a retail mall complex (later named the Lafayette Place Mall), and an up-scale hotel. *See id.* §§ 4–5 & Annex D. The Tripartite Agreement also gave LPA the sole and exclusive right and option to buy from the City a piece of property adjoining Lafayette Place known as the Hayward Parcel.[4] *See id.* § 6.02. The Hayward Parcel was crucial to the success of the entire development because it was the intended site for Phase II of the project. During this Phase II, LPA planned to construct on the Hayward Parcel an

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[3] Exhibits are submitted herewith in a separately bound volume entitled "Exhibits to Claimant's Notice of Arbitration." Citations to "SJC Record Appendix" refer to the Appendix of the Record submitted to the Supreme Judicial Court of Massachusetts, *Lafayette Place Associates v. Boston Redevelopment Authority et City of Boston*, Case No. SJC-07596 (Mass. Dec. 19, 1997). The entire SJC Record Appendix, encompassing 29 volumes and 4754 pages, will be submitted at a later date as deemed appropriate.

[4] The Hayward Parcel consisted of four parcels of land, described in the Tripartite Agreement as Parcels D-1, D-2, D-3, D-4, and certain air rights over New Essex Street (later relocated and renamed Avenue de Lafayette). *See* Tripartite Agreement § 6.02 & Annexes A, F (Exhibit 1).

office tower, additional parking, and an essential second "anchor" department store to be connected with that portion of the Lafayette Place Mall built during Phase I.

5. The option contained in Section 6.02 of the Tripartite Agreement (the "Hayward Parcel Option") conditioned LPA's right to exercise the option upon the City's decision to discontinue its operation of the Hayward Place Garage, a then existing parking garage located on one section of the Hayward Parcel, and its notification to LPA as to whether it would construct an underground parking facility at the Hayward Parcel. If and when the option arose, LPA had a three-year period in which it could exercise its option by notifying the City of its intention to purchase the Hayward Parcel for a price calculated by a formula described in Section 6.02 of the Tripartite Agreement. The relevant formula agreed to by the parties in the Tripartite Agreement ensured that LPA could acquire the Hayward Parcel at one-half its 1976 value, adjusted to add one-half of any additional value resulting from the construction of Phase I and from public improvements to the area. The Hayward Parcel Option and the formula price were plainly intended to provide LPA with an incentive to complete Phase I successfully.

6. The City demolished the Hayward Place Garage in 1979, shortly after the conclusion of the Tripartite Agreement, causing LPA's option right to arise. The three-year option period did not commence until December 16, 1983, however, when the City notified LPA that, subject to certain contingencies, it intended to build an underground parking garage at the Hayward Parcel. *See* Letter from Bernard F. Shadrowy, Jr., Commissioner of the City's Real Property Department and Chairman of the City's Real Property Board, to LPA (Dec. 16, 1983), SJC Record Appendix (vol. 6), at A1052 (Exhibit 2). By November 1985 LPA had completed Phase I of the project. Then on July 7, 1986, before the expiration of the three-year option period and after LPA had secured a commitment, crucial to the success of the entire project, from

Bloomingdale's Department Store (a major U.S. "high-end" retailer) to be the second anchor department store, LPA exercised its Hayward Parcel Option by notifying the City of its intent to acquire the Hayward Parcel at the formula price pursuant to Section 6.02 of the Tripartite Agreement. See Letter from I. Rocke Ransen, President of Mondev Mass., General Partner of LPA, to J. Edward Roche, Commissioner of the City's Real Property Department (July 2, 1986), SJC Record Appendix (vol. 6), at A1063 (Exhibit 3).

7. Thereafter LPA repeatedly requested that the City complete its obligations under the Hayward Parcel Option and convey the property to LPA; the City repeatedly and flatly refused, however, to perform its contractual obligations necessary to complete the sale and transfer of the Hayward Parcel to LPA.

8. During the 1980s the City of Boston experienced an economic renewal that dramatically increased property values in the City's downtown area. One consequence of this rise in property values was that by the time LPA exercised the Hayward Parcel Option in 1986, the fair market value of the Hayward Parcel far exceeded the formula price for its acquisition under Section 6.02 of the Tripartite Agreement. The great increase in value of the Hayward Parcel was also due in substantial part to LPA's successful completion of Phase I of the development project. The City, however, well aware of the substantial difference between the current market value of the Hayward Parcel and the formula price for its acquisition under the Tripartite Agreement and now headed by the newly elected administration of Mayor Raymond L. Flynn,[1] was utterly unwilling to sell the Hayward Parcel to LPA at the price agreed upon in 1978. The Flynn Administration believed in hindsight that the previous administration of Mayor Kevin White had

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[1] Raymond Flynn served as Mayor of the City of Boston from January 1984 to July 1992.

struck a bad deal for the City and that the Tripartite Agreement acquisition formula would allow a politically unacceptable monetary "windfall" and "bonanza" to go to a Canadian company. Ignoring LPA's eight years of faithful performance under the Tripartite Agreement, that the Hayward Parcel Option had been included in the Tripartite Agreement precisely to induce Mondev to initiate a high risk commercial development in a blighted and decaying part of town, and that the increase in the market value of the Hayward Parcel was attributable in good part to the heavy investment that Mondev then made during Phase I, the City and the BRA rejected the formula price prescribed by the Tripartite Agreement and undertook a series of actions intended to coerce LPA into paying the much higher prevailing market value of the Hayward Parcel. The City brazenly memorialized in its official records its decision to repudiate its contractual obligations and thereby to breach the Tripartite Agreement, noting its intention "*to receive the fair market value for the Hayward Parcel (disregarding the Tripartite formula).*" Minutes of the City's Real Property Board Meeting of 22 January 1998, at 3, SJC Record Appendix (vol 10), at A1873, A1875 (emphasis added) (Exhibit 4)

9. Under Section 6.02 of the Tripartite Agreement, the City was obligated to establish the final dimensions of the Hayward Parcel and to obtain the various property appraisals needed to calculate the formula price. Despite Mondev's repeated requests to the City to take these actions, the City refused to do so. In addition, City and BRA officials openly stated publicly, as well as privately to Mondev's principals, that the City had no intention of selling the Hayward Parcel at the previously agreed formula price and would allow LPA to acquire the property only if LPA agreed to make extra-contractual concessions that it was not obliged to make. The City and the BRA made good on their objective to coerce a higher payment for the Hayward Parcel by taking a variety of actions to thwart LPA's acquisition of the Hayward Parcel.

Among other actions, the City Traffic Commissioner announced plans for a new road straight through the middle of the Hayward Parcel, splitting it in two, the BRA announced plans to down-zone the parcel to impose dramatically lower building height restrictions than those on which it knew LPA already had planned; and the BRA repeatedly and without good cause stalled LPA's efforts to have its Phase II designs approved, all of which made it economically and legally impossible for LPA to complete its plans for Phase II of the development project.

10. Falsely promising LPA that the City would ultimately fulfill its obligations under the Tripartite Agreement to convey the Hayward Parcel to LPA, the City and the BRA pressured LPA into accepting a "drop dead" date of January 1, 1989 for completing a closing on the acquisition of the Hayward Parcel. See Third Supplemental Agreement and Amendment to the Tripartite Agreement (Oct. 29, 1987), SJC Record Appendix (vol. 7), at A1130 (Exhibits 1-C). LPA agreed to this termination date only upon the City's promise finally to perform its contractual obligations to complete a closing and because LPA believed that this would be the only way to secure the BRA's cooperation in the completion of the design review process for Phase II. By late 1987, however, LPA realized that the City and the BRA would never act in good faith and were determined not to sell the Hayward Parcel at the agreed formula price. LPA therefore negotiated a distress sale of all its interests in the project, including the Hayward Parcel Option, to the Campeau Corporation ("Campeau"), which was then an extremely large and successful Canadian real estate development company. Before the sale could be completed, however, LPA and Campeau first had to obtain the BRA's approval of the transfer of ownership in the project. This approval should have been given quickly and routinely in light of Campeau's extensive experience and resources.

11. Once again, however, the City and the BRA took steps to prevent LPA from realizing the benefit of its rights under the Tripartite Agreement. City and BRA officials publicly stated that they would not approve the transfer of the project to Campeau unless the City obtained the then current market value for the Hayward Parcel. *See* Michael K. Frisby, *New Lafayette deal asked; City wants more for adjacent lot, increase in net payments*, BOSTON GLOBE, Dec. 10, 1987, at 61 (Exhibit 5). The Executive Director of the BRA also told Mondev's Chairman that he would not approve the sale to Campeau "until I [sic] get a higher value for the [Hayward Parcel]. *And I don't want you to take all that profit and run back to Canada with it.*" Trial Transcript Day 4, SJC Record Appendix (vol 16), at A3185 (emphasis added) (Exhibit 6). Similarly, the Commissioner of the City's Real Property Department (the City agency directly responsible for the sale of the Hayward Parcel) wrote confidentially to his boss, Mayor Flynn:

> If, without negotiation, the BRA and City allow the sale or transfer to occur, the new owner, Campeau (and also the prior owner) would realize an immediate monetary windfall due to the 'Option Agreement' in this Tripartite Agreement and the existing favorable lease Mondev has with the City executed in 1980/81 by the White Administration.

Letter from J. Edward Roche, Commissioner of the City's Real Property Department, to Raymond L. Flynn, Mayor of the City of Boston (Dec. 30, 1987), SJC Record Appendix (vol. 12), at A2503 (Exhibit 7). In furtherance of this objective, the BRA Executive Director refused to put the application for approval of LPA's transfer of the project to Campeau on the agenda of the BRA Board. The BRA Board therefore never acted on the application for approval and, as a result, LPA was forced to abandon its sale to Campeau. In the end, LPA could only transfer its interests under the Tripartite Agreement to Campeau by a lease arrangement made in March of 1988. The lease was substantially less valuable to LPA than the previous sales contract had been

Under this lease, LPA delegated to Campeau complete authority to acquire the Hayward Parcel at the Tripartite Agreement formula price.

12. After Campeau entered into the lease with LPA, it proposed a much larger project than LPA's original Phase II development plans. When the BRA showed no signs of approving these new plans before the expiration of the January 1, 1989 deadline for completion of the transfer of the Hayward Parcel, Campeau repeatedly asked the City to extend that deadline. The City, however, ignored all of Campeau's requests and continued to refuse to perform its contractual obligations necessary to complete the sale of the property. With the January 1, 1989 date quickly approaching, the CEO of Campeau, Robert Campeau, finally wrote directly to Mayor Flynn stating that because the BRA Executive Director refused to extend the deadline "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." Letter from Robert Campeau, Chairman and Chief Executive Officer of Campeau Corporation, to Raymond L. Flynn, Mayor of the City of Boston (Dec. 19, 1988), SJC Record Appendix (vol. 5), at A811 (emphasis added) (Exhibit 8). The City did not respond until December 30, 1988, when the BRA Executive Director replied officially on behalf of the City that the expiration of the Hayward Parcel Option on January 1, 1989, just two days later, "simply puts the question of the disposition of Hayward Place in a current context" and that Campeau thereafter could purchase the property for its "fair reuse value." Letter from Stephen Coyle, BRA Executive Director, to Robert Campeau, Chairman and Chief Executive Officer of Campeau Corporation (Dec 30, 1988), SJC Record Appendix (vol. 10), at A1940 (Exhibit 9).

13. As a result of the City's bad faith breach of the Tripartite Agreement and the BRA's successful effort in blocking LPA's sale of the project to Campeau, neither LPA nor Campeau was able to complete the purchase of the Hayward Parcel by January 1, 1989.

Although LPA later reacquired its interests under the Tripartite Agreement, including its rights in the Hayward Parcel, when Campeau defaulted on its lease from LPA in the spring of 1990, LPA could not complete Phase II of the project without the acquisition of the Hayward Parcel. Without construction of the second anchor department store planned by LPA for Phase II, the Lafayette Place Mall ultimately failed and was foreclosed. As the owner of LPA, Mondev suffered substantial financial harm from these events as well as substantial damage to its business reputation.

14. Mondev caused LPA to file suit against the City and the BRA on March 16, 1992 in Suffolk County Superior Court in Boston, Massachusetts (the "trial court"), alleging that the City and the BRA had breached their contractual obligations to LPA under the Tripartite Agreement and also that the BRA had intentionally and tortiously interfered with performance of LPA's 1987 contract for the sale of the project to Campeau. LPA also asserted two statutory claims based on (1) Chapter 93A of the Massachusetts General Laws ("Mass. Gen. L."), a Massachusetts statute prescribing unfair and deceptive practices in the conduct of trade or business; and (2) the *Massachusetts Civil Rights Act*, Mass. Gen. L. c. 12, a Massachusetts statute proscribing interference with the free exercise of federal or state civil rights by threats, intimidation, or coercion. In a pre-trial summary judgment ruling, the trial court dismissed LPA's two statutory claims but allowed the breach of contract and interference with contract claims to go forward for trial. On October 21, 1994, after a fourteen-day trial, the jury returned special verdicts on nine written questions in favor of LPA, including a verdict of breach of the Tripartite Agreement against both the City and the BRA, and, in addition, a verdict against the BRA for the tort of intentional interference with the 1987 Campeau sales contract. *See* Special Jury Verdict Pursuant to Mass. R. Civ. P. 49(a), *Lafayette Place Associates v. Boston Redevelopment*

*Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Oct. 21, 1994), SJC Record Appendix (vol. 4), at A710 (Exhibit 10). The jury awarded LPA $9.6 million against the City for breach of contract and $6.4 million against the BRA in tort.[4] *Id.* The total amount awarded, $16 million, closely tracked the total amount of damages that LPA's expert appraisal witness had testified at trial had resulted to LPA from the breach by the City and the BRA of the Tripartite Agreement. *See* Trial Transcript Day 7, SJC Record Appendix (vol. 21), at A3879 (Exhibit 11). The testimony of LPA's expert witness also was the only evidence at trial from which the jury could have determined the dramatic difference between the Tripartite Agreement formula price and the fair market value of the Hayward Parcel on January 1, 1989.

15. After the return of the jury's special verdicts, the trial judge, Judge Robert A. Mulligan, who had earlier declined to recuse himself despite the fact that his brother, Joseph Mulligan, had served as Corporation Counsel for the City at the time of the events challenged by LPA, made two erroneous rulings directly against LPA's interests. First, in direct contradiction to the jury's findings, Judge Mulligan ruled that the $6.4 million verdict in tort against the BRA for interference with the Campeau sales contract was "swallowed up" by the $9.6 million damage award against the City for breach of the Tripartite Agreement. Second, in deciding the BRA's motion for judgment notwithstanding the verdict, Judge Mulligan completely dismissed the damage award against the BRA, holding that the BRA had sovereign immunity under Section 10(c) of the *Massachusetts Tort Claims Act* notwithstanding that it had waived its right to rely on the defense of sovereign immunity by first submitting to the litigation and fully defending on the merits of the case and thereafter not asserting its defense until after the close of all evidence at

[4] All monetary figures presented in this Notice of Arbitration are in United States dollars.

trial. Judge Mulligan absolved the BRA of any liability whatsoever for the BRA's wrongful conduct in interfering with the Chapeau sales contract by entering judgment for the BRA on August 17, 1995. *See* Judgment on Jury Verdict for Defendant, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A766 (Exhibit 12).

16. The City filed its own motion for judgment notwithstanding the verdict, arguing alternatively that no valid contract existed for the purchase and sale of the Hayward Parcel or that, in any event, the City had not breached the contract. Judge Mulligan denied the City's motion, however, and ordered judgment against the City for the $9.6 million awarded by the jury. *See* Judgment on Jury Verdict for Plaintiff, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A765 (Exhibit 13).

17. Both LPA and the City appealed and the SJC, Massachusetts's highest court, granted direct appellate review. During oral argument in that appeal, counsel for the City openly mischaracterized the arguments it had made in its appellate briefs and at trial, and further sought to escape liability for its wrongful conduct by brazenly reminding the SJC that LPA was foreign controlled, arguing that LPA should not recover because "you want back to Canada with money in your pocket." Transcript of Oral Argument, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07396, at 5 (Mass. Mar. 9, 1998) (emphasis added) (Exhibit 14).

18. In a May 20, 1998 decision authored by then Justice Charles Fried and reported at *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509 (1998) (Exhibit 15), the SJC affirmed the trial court's ruling that the Massachusetts Tort Claims Act

provided the BRA with sovereign immunity from civil liability even for intentional torts such as interference with contractual relations, and that such immunity could not be waived. *See id.* at 527–35. The SJC also upheld the trial court's pretrial order dismissing LPA's claim under Mass. Gen. L. c. 93A, holding that the City and the BRA, in pursuing the commercial redevelopment project contemplated by the Tripartite Agreement, were not engaged in trade or commerce within the meaning of the statute since they were motivated by a legislative mandate. *See id.* at 535–36. In so holding, the SJC impliedly conceded the commercial nature of the development project but chose instead to focus on the Tripartite Agreement's *purpose*, ruling that in Massachusetts "*[i]t is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends.*" *Id.* at 535 (emphasis added).

19 In responding to the City's appeal, the SJC agreed with the trial court that the Tripartite Agreement, including the option on the Hayward Parcel, was an enforceable contract; nevertheless, it vacated the $9.6 million breach of contract judgment against the City by creating radically new standards and rules of contract law and applying them retroactively to LPA's claims. First, the SJC rejected the jury's explicit finding of fact that LPA had performed its contractual obligations, creating instead a new rule of law in order to find that LPA had not sufficiently established at trial that it had been ready, willing, and able to perform its part of the contract. *Id.* at 520–22. Second, the SJC concluded that, as a matter of law, LPA could not claim that it was excused from performing its obligations under the Tripartite Agreement because of the City's prior breach even though its own judicial precedent had firmly established this as a question of fact for a jury. *Id.* at 522–26. Third, the SJC ruled for the first time that it would hold private parties to a higher standard in breach of contract claims brought against a governmental defendant, stating that "a private party must be particularly assiduous to comply"

with the requirements of a government contract because in Massachusetts "*[o]ne must have square corners when they deal with the Government.*" *Id.* at 524 (quoting dictum from *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920)) (emphasis added).

20. LPA timely petitioned the SJC for a rehearing of its appeal, *see* Petition for Rehearing Letter from Counsel for LPA to the Honorable Neben P. Wilkins, Chief Justice of the SJC (June 10, 1998) (Exhibit 16), but the SJC quickly denied the Petition without comment on July 1, 1998. *See* Notice of Denial of Petition for Rehearing, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07596 (Mass. July 1, 1998) (Exhibit 17). LPA subsequently petitioned the Supreme Court of the United States for a writ of certiorari, which petition the Supreme Court denied on March 1, 1999. *See Lafayette Place Associates v. City of Boston*, 119 S. Ct. 1112 (1999) (Exhibit 18). After the Supreme Court of the United States denied LPA's certiorari petition, counsel for the City publicly declared that "*hope we glad taxpayers won't have to pay about $20 million to a Canadian developer that's already made a lot of money.*" Greg Gatlin, *One less legal case for Hub parcel*, BOSTON HERALD, Mar. 3, 1999, at 29 (emphasis added) (Exhibit 19).

21. The actions recounted above, and in greater detail below, amount to several breaches of Chapter 11A of NAFTA, including breaches of the United States' obligations to accord investors of another NAFTA Party national treatment, to accord investments of investors of another NAFTA Party treatment in accordance with international law, including fair and equitable treatment and full protection and security, and to allow expropriation of an investment of an investor of another NAFTA Party only for a public purpose, on a non-discriminatory basis, in accordance with due process of law and international law, and on payment of full

compensation. *See* NAFTA, Chapter 11 (App. D). Specifically, (1) the Massachusetts statutory immunization of the BRA from the legal consequences of its commercial acts, as set forth in Section VI below, is incompatible with international law; and (2) the arbitrary and capricious decision by the SJC to set aside the jury's verdicts for LPA, as also set forth in Section VI below, constitutes a denial of justice within the meaning of that term under international law, particularly insofar as an expropriation of Mondev's property rights has resulted therefrom.

22. Mondev has incurred loss and damage as a result of these various breaches of the United States' NAFTA obligations and has no further recourse in the United States' judicial system to correct the various court and statutory errors that constitute the NAFTA breaches. LPA is therefore entitled to recover against the United States under NAFTA Chapter 11 for the wrongful deprivation of (1) the jury's award of $16 million in damages in both contract and tort, which the jury rightfully and properly determined was due LPA for the City's and the BRA's improper action in denying LPA its contractual rights under the Tripartite Agreement; (2) the funds required to pay for the protracted prosecution of its claims against the City and the BRA over many years and several fora; and (3) interest on all the foregoing. The measure of Mondev's damages amounts to not less than $50,000,000.

23. The United States is directly responsible for the above breaches of NAFTA on at least two bases. First, Article 105 of NAFTA requires the United States to ensure that its state governments, including state judiciaries and legislatures, comply with the terms of NAFTA. *See* NAFTA, Art. 105 (App. D) ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."). Article 105, in other words, codifies for the NAFTA Parties the international law principle that a State is

responsible for the acts of its constituent political subdivisions that violate international law. *See also Statement of Administrative Action*, H.R. Doc. No. 103-159 (1993), *reprinted in* 1 NORTH AMERICA FREE TRADE AGREEMENT: TREATY MATERIALS, Booklet 6 (Oceana 1994) ("Article 105 makes clear that state, provincial and local governments must, as a general rule, conform to the same obligations as those applicable to the three countries' federal governments, subject to the same exceptions."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 (1987) ("A state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . the government or authorities of any political subdivision of the state . . . .").

24. Second, by refusing to grant a writ of certiorari and thereafter to correct in any respect the NAFTA breaches described herein, the Supreme Court of the United States, an equal member with the Executive and Legislative Branches of the United States Government, failed to remedy these breaches of the protections afforded by Chapter 11A of NAFTA, thereby leaving the United States directly liable for them. *See* Letter from U.S. Trade Representative Michael Kantor to Congressman Henry A. Waxman (Sept. 7, 1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2562 ("Article 105 is intended to ensure that the federal government in each of the three NAFTA countries is fully accountable for any state or provincial measure covered by the agreement . . . . [It means] that the federal government will be held accountable if it cannot secure state or provincial compliance with NAFTA obligations.").

25. The adjudication of Mondev's claims in this arbitration, claims that arise principally out of the presence and enforcement of a Massachusetts statute and the improper actions of the Massachusetts judiciary, necessarily will require a thorough appreciation for and understanding of the specific factual elements underlying the judicial proceedings, including all elements of the

singular set of cumulative events relating to Mondev's large-scale commercial real estate development in the City of Boston. To locate the meaning and effect of the Massachusetts statute and the proceedings of the Massachusetts judicial system in their proper and necessary context, therefore, this Notice of Arbitration includes in Sections V and VI below a substantially more detailed statement of the facts and outline of the legal grounds upon which Mondev's claims are based.

## II. PARTIES TO THE ARBITRATION

26. Mondev International Ltd., the Claimant/Investor in this arbitration, is a closely held corporation incorporated under the applicable laws of Canada (*see* App. A) and has its principle place of business in Montreal, Quebec, Canada. Mondev exercises its ownership and control of LPA through its wholly owned Massachusetts subsidiaries Mondev U.S.A., Inc. (General Partner of LPA) and The Salem Corporation (Limited Partner of LPA). *See* App. B. Mondev's address is as follows:

MONDEV INTERNATIONAL LTD.
One Westmount Square
Suite 600
Montreal, Quebec
Canada H3Z 2R3

27. The United States of America, the Respondent/Party in this arbitration, is a sovereign State and a Party to NAFTA. For purposes of disputes arising under NAFTA, the United States' address is as follows:

Robert J. McCarroll, Esq.
Executive Director (L/EDR)
Office of the Legal Advisor
U.S. Department of State
Room 5519
2201 C Street, NW
Washington, DC 20520

*See* 58 Federal Register 68,457 (Dec. 27, 1993) (App. E).

## III. AGREEMENT TO ARBITRATE

28. The relevant provisions embodying the agreement of the Claimant and the Respondent to refer this dispute to arbitration, including the number of arbitrators and the method of their appointment as well as certain other procedural matters, may be found in Articles 1115–1138 of NAFTA. *See* App. D. By submission of this Notice of Arbitration, the Claimant accepts the Respondent's offer to arbitrate investment disputes under NAFTA and, as required by Article 1121(1)(a) of NAFTA, specifically consents to arbitration in accordance with the procedures set out in NAFTA by submitting herewith its NAFTA Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures (App. F). As further required by 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 August 31, 1999. *See* Certificate of Service of NAFTA Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures (Aug. 31, 1999) (App. F)

29. Pursuant to NAFTA Article 1121(1)(b), both Mondev and LPA waive rights they may have to submit this dispute to other dispute settlement procedures. The specific content of this waiver is included in the NAFTA Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures, submitted herewith (App. F) and previously delivered to the United States on August 31, 1999. *See supra* ¶ 28. Proof of proper authorization to sign the NAFTA Article 1121 Consent to Arbitration and Waiver of Other Dispute Settlement Procedures, as well as to initiate and pursue this arbitration, is included in Apps. A and C.

30. As required by Article 1119 of NAFTA, Claimant notified Respondent of its intention to submit its dispute with the United States to arbitration on May 6, 1999. *See* Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American

Free Trade Agreement (NAFTA) (App. G). Respondent acknowledged receipt of the Article 1119 Notice on the day it was served, see id., and by letter to Claimant's counsel dated June 11, 1999. See Letter from Ronald J. Bettauer, Assistant Legal Adviser for International Claims and Investment Disputes, U.S. Department of State, to Charles N. Brower of White & Case LLP (June 11, 1999) (App. H).

31. The approval by the Secretary-General of ICSID of the agreement to submit this dispute to the Additional Facility, as required under Article 4 of the Additional Facility Rules, is hereby requested and the date of such approval shall be supplied when it becomes available.

## IV. OFFER TO CONSULT

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

## V. STATEMENT OF FACTS

### A. Events Giving Rise to the Trial Court Proceeding

#### The Transit Agreement

33. In the early 1970s much of the City of Boston's central waterfront retail area was blighted, decaying, and vacant. A number of dilapidated, unused buildings lined Washington Street directly abutting the City's core retail district and to its south; beyond that, the so-called "Combat Zone" housed pornography shops and striptease joints, and was a magnet for prostitution and drug trafficking. To reverse the decline of this area, the BRA conceived and

approved the Bedford West Urban Renewal Project ("Urban Renewal Project") in January 1973. See Tripartite Agreement, Annex I (Exhibit I). This initiative included redevelopment of a substantial parcel of property to be known as Lafayette Place, bounded by Washington Street and Bedford Street and adjacent to an existing Jordan Marsh department store. See id. at Annex A & Annex I, p. I-28. The Urban Renewal Project also encompassed additional parcels of property, including the Hayward Parcel just south of Lafayette Place, a large parcel that included the City-owned Hayward Place Garage. See id. at Annex A. The City demolished the garage in 1979, leaving the Hayward Parcel vacant.

34. Despite the substantial economic risks associated with a large scale commercial development in this area of the City, Mooney agreed to undertake a large portion of the redevelopment contemplated by the Urban Renewal Project. On December 22, 1978, after negotiations, LPA, the BRA, and the City concluded the Tripartite Agreement, which contemplated a development project in two phases. Phase I involved the construction of three major components on Lafayette Place, (1) a large underground parking garage; (2) a multi-level retail mall complex (the Lafayette Place Mall) connected to the existing Jordan Marsh department store, and (3) a first class hotel (the Hotel Lafayette, later renamed Swissotel Boston). In Phase II of the development, LPA planned to construct on the Hayward Parcel a second department store, office space, and additional parking.

35. After execution of the Tripartite Agreement, LPA filed an application with the BRA in June 1979 seeking authorization and approval of the Lafayette Place project under Chapter 121A of the Massachusetts General Laws. Chapter 121A provides tax incentives to encourage the development and renewal of blighted, decaying areas in Massachusetts cities that

are not likely to be remedied by the ordinary operations of private enterprise. In its Report and Decision on LPA's application, the BRA found that:

> The size of the blighted area making up the Project site and the seriousness of the decay and of the depressed economic conditions, together with the deserted and substandard condition of adjacent properties, necessarily require a large-scale development effort to reverse the steady trend toward decay and to provide a sufficiently credible economic presence to encourage smaller scale private revitalization of salvageable neighborhood buildings and businesses. . . .
>
> . . .
>
> For these reasons it is found that the Project Area is a blighted open and decadent area within the meaning of Chapter 121A, as amended. It is unlikely that the conditions will be remedied by the ordinary operations of private enterprise.
>
> The project will provide substantial financial return to the City of Boston.

Report and Decision on the Chapter 121A Application of Lafayette Place Associates, at 5–6 (Sept. 6, 1979), SJC Record Appendix (vol. 9), at A1792, 1797–98 (Exhibit 20). The BRA Board of Directors adopted the Report and Decision on September 6, 1979, thereby granting Chapter 121A status to the Lafayette Place project. Following this decision, LPA entered into a "Regulatory Agreement" with the BRA, as required by Section 18C of Chapter 121A, as well as an agreement with the City specifying the payments to be made in lieu of taxes and other assessments, as contemplated by Section 6A of Chapter 121A (the "Section 6A Contract").

36. In accordance with the terms of the Tripartite Agreement, LPA purchased the Lafayette Place parcel on October 12, 1979 and thereafter began construction of the Phase I retail mall, hotel, and, when the City could not do so itself, the underground parking garage. Mondev also caused Lafayette Place Parking Associates ("LPPA"), a second special purpose vehicle, to operate the underground parking garage. In May 1981 Mondev caused LPPA to enter into a

written lease with the City that gave LPPA the right to operate the parking garage for 40 years (the "Parking Garage Lease")

**The Hayward Parcel Option**

37. Section 6.02 of the Tripartite Agreement was crucial to LPA. It granted LPA an option to acquire the Hayward Parcel, a piece of property adjacent to and just south of the Lafayette Place parcel. After completion of Phase I of the development project, LPA intended to use the Hayward Parcel as the site for the construction of an office tower complex and a second anchor department store to be physically connected to the Lafayette Place Mall. The City also planned to build more underground parking at the Hayward Parcel. The second department store was to complement the Jordan Marsh department store already connected to Lafayette Place on the opposite (north) side of the mall and was an essential element of the entire project because it was needed for the Lafayette Place Mall to generate the revenue essential to its financial success. In addition, without the second department store on its south side, the mall had a "blind side" that greatly obstructed the natural flow of pedestrian traffic in and through the mall complex and thereby undermined the mall's success.

38. As provided in Section 6.02 of the Tripartite Agreement, the Hayward Parcel Option gave LPA "the sole and exclusive right and option" to purchase the Hayward Parcel. In a 1982 amendment to the Tripartite Agreement, the parties also agreed that upon LPA's exercise of its option "there shall automatically be created an agreement by the Developer to buy and by the City to sell" the Hayward Parcel. *See* Second Supplemental Agreement and Amendment to the Tripartite Agreement (Feb. 26, 1982), SJC Record Appendix (vol. 6), at A1078 (Exhibit I-B). The option agreement in Section 6.02 also gave LPA a three-year "option period" within which to exercise its rights from the date upon which the City gave notice of its decision whether it would

create subsurface parking at the Hayward Parcel. This three-year option period began to run on December 16, 1983 when the City, by a letter written by the Chairman of the City's Real Property Board, notified LPA that, subject to certain contingencies, it had determined to build an underground parking garage at the Hayward Parcel. *See* Letter from Bernard P. Shadrawy, Jr., Commissioner of the City's Real Property Department and Chairman of the City's Real Property Board, to LPA (Dec. 16, 1983), SJC Record Appendix (vol. 6), at A1052 (Exhibit 2). LPA subsequently agreed that December 16, 1983 was the beginning date for the option period under Section 6.02 of the Tripartite Agreement. *See id.*

39. Under the terms of the Hayward Parcel Option, LPA was to exercise its option, if at all, by notifying the City within the three-year option period that it desired to purchase the Hayward Parcel. Upon such notification the City was obligated to sell the parcel at a price to be established by a formula also laid out in Section 6.02 of the Tripartite Agreement. This formula stated that:

> The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half (1/2) of the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of the construction of the Public Improvements and the Project.[7]

The "appraisals" cited in this formula consisted of (1) 1978 appraisals of the various parcels of property making up the Hayward Parcel (*i.e.*, Parcels D-1 to D-4 and certain air rights over New

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[7] Section 6.02 of the Tripartite Agreement called for a different formula in the event that the City chose not to retain its subsurface rights in the property. The above formula is the applicable provision, however, because by its December 16, 1983 letter the City notified LPA that it was retaining the subsurface rights. The alternative formula reads as follows:

> The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project.

Eaton Street, as described in Footnote 4), and (2) an "after appraisal" of the Hayward Parcel that was to account for the increase in value caused by LPA's Phase I development and City improvements to the area. At the time of the Tripartite Agreement, the City had already obtained appraisals of Parcels D-1 and D-2, and it obtained an appraisal of Parcel D-3 in 1979. As the City later conceded at trial, however, it never did the 1978 appraisals for Parcel D-4 and New Eaton Street, nor did it ever undertake the "after appraisal" necessary to complete the formula. The City's failure to act was motivated solely by the Flynn Administration's conclusion that it was no longer in the City's financial self-interest to sell the Hayward Parcel to LPA at the agreed-upon formula price.

## LPA Exercises the Hayward Parcel Option

40. Before exercising the Hayward Parcel Option, LPA needed to complete several important project tasks. First, it successfully completed all components of Phase I: the Lafayette Place Garage opened in early 1984, the Lafayette Place Mall opened in late 1984, and the Hotel Lafayette opened in early 1985.* The total cost of completing this first phase of the project was approximately $175,000,000. Second, in an ongoing series of meetings between 1984 and 1986, LPA met with the BRA to present and discuss its plans for Phase II of the project. In these meetings, LPA candidly discussed the height, density, and scope of its intended development and made submissions regarding the project's environmental impact, including several traffic, wind load, and shadow studies. Third, despite substantial difficulty in attracting a first-rate department store to the project site because of its location adjacent to the City's Combat Zone, LPA secured

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* As required by Section 4.06 of the Tripartite Agreement, the BRA issued a Certificate of Completion for Phase I of the development in November 1985.

a commitment from Federated Department Stores (parent of Bloomingdale's Department Stores) in April 1986 to lease a Bloomingdale's store in the 160,000 square foot, multilevel department store space that LPA was planning for Phase II. This commitment was of enormous significance because, as LPA's project manager testified at trial, "finally, after all these years, we had been able to find the second department store needed to make the whole shopping center work." Trial Transcript Day 2, SJC Record Appendix (vol 14), at A2754 (Exhibit 21).

41. After securing this crucial commitment from Bloomingdale's, LPA felt confident that Phase II of the project could be successfully completed, thereby insuring the success of the entire project. Accordingly, on July 2, 1986, more than five months before the expiration of the three-year option period, LPA exercised its Hayward Parcel Option in accordance with Section 6.02 of the Tripartite Agreement by a letter to the City's Real Property Board notifying that Board that it "hereby exercises the option granted" LPA by the Tripartite Agreement to purchase the Hayward Parcel. *See* Letter from I. Rocke Ransen, President of Mondev Mass., General Partner of LPA, to J. Edward Roche, Commissioner of the City's Real Property Department (July 2, 1986), SJC Record Appendix (vol. 6), at A1063 (Exhibit 3).

42. LPA's exercise of the Hayward Parcel Option triggered several City obligations under Section 6.02 of the Tripartite Agreement. *First*, the City still needed to obtain appraisals reflecting the 1978 fair market value of Parcel D-4 and the air rights over New Essex Street, appraisals it had agreed in the Tripartite Agreement to obtain "forthwith." Second, the City needed to obtain the current fair market value appraisal for the Hayward Parcel to satisfy the "after" portion of the purchase price formula. Third, to allow appraisal of the current market value of the Hayward Parcel, the City had to establish the final dimensions of the parcel due to the fact that one boundary had been affected by the laying out of Avenue de Lafayette after the

conclusion of the Tripartite Agreement. As described below, however, the City refused to perform these contractual obligations and thereby wrongfully prevented LPA from completing its purchase of the Hayward Parcel.

The City and the BRA Obstruct Phase II of the Project

43. By the mid-1980s economic conditions in the City had greatly improved and downtown property values had increased dramatically. Demand for downtown office and commercial space exploded and developers were competing fiercely for the right to pursue development projects in and around the downtown retail area. In these circumstances, the BRA was able to wield extraordinary influence over, and to obtain generous concessions from, developers who recognized that the BRA's decisions could make or break them and their project proposals. Further, the highly politicized nature of the City's and the BRA's operations required developers to go out of their way to accommodate and defer to the BRA in order to secure necessary BRA approval of their development plans and thereby avoid costly delays.

44. In 1983 the City's recently elected Mayor, Raymond L. Flynn, appointed Stephen F. Coyle to be the BRA's new Executive Director. In this position Mr. Coyle had broad discretion over the BRA's agenda and could exercise a great deal of its authority over development in the City without formal action by the BRA Board of Directors. As Mayor Flynn later candidly acknowledged, he had delegated the City's responsibility for development generally to BRA Executive Director Coyle and he was content to let "Mr. Coyle act as he saw fit." Stipulation, SEC Record Appendix (vol. 5), at A908–909 (Exhibit 22). Soon after Mr. Coyle assumed the Executive Directorship of the BRA, he concluded that the terms of the Hayward Parcel Option, the Parking Garage Lease, and the Section 6A Contract were too favorable to LPA and decided that the City should not fulfill its contractual obligations to LPA unless LPA

paid the City the full current market value for the Hayward Parcel. Eventually, in early 1987, BRA Executive Director Coyle bluntly told Mendez's Chairman I. Rocke Ranson that the "option price was too cheap" and that he wanted "to change the deal now to reflect the values in 1987." Trial Transcript Day 1, SJC Record Appendix (vol. 13), at A2678 (emphasis added) (Exhibit 23).

45. As described in greater detail below, when LPA insisted on its rights to the Hayward Parcel as agreed upon in the Tripartite Agreement, Executive Director Coyle and his staff began a deliberate campaign to delay and obstruct the approval of Phase II by improperly and in bad faith exercising the BRA's supervisory control over project approvals. In response, Mr. Ranson ultimately sought and was accorded a meeting with Mayor Flynn in which he explained his belief that the actions of Executive Director Coyle and his staff were jeopardizing the successful implementation of Phase II. This did not result in any change in the BRA's conduct, however, and when Executive Director Coyle learned of Mr. Ranson's meeting with Mayor Flynn he became angry and personally affronted, brusquely warning Mr. Ranson not to deal with Mayor Flynn again because: "Next time you go around me you won't be building in Boston anymore. I look after development, not the Mayor." Trial Transcript Day 1, SJC Record Appendix (vol. 13), at A2676–77 (Exhibit 23).

46. Thereafter the BRA and the City continued to work diligently to obstruct and delay the approval of the development program for Phase II of the Lafayette Place project in an attempt to coerce LPA into paying a substantially greater price for the Hayward Parcel than that which had been contractually agreed. As an example, LPA, its architects, and its consultants met repeatedly with the BRA (at least five times within the first three months of 1987) to discuss the details of LPA's design for the Phase II development, which design specifically included plans for

a 310-330 foot office tower on the Hayward Parcel. During all of these meetings, the BRA staff continually expressed support for LPA's plan and never once suggested that the proposed office tower was too high. Indeed, at a March 19, 1987 meeting, the BRA expressly confirmed LPA's plans for a 500,000 square foot, 310-330 foot office tower. Nonetheless the BRA notified LPA in April 1987 that it had placed the Hayward Parcel in a newly created City building zone that limited building heights to 155 feet. This was an especially egregious turn of events, not only because LPA had already expended considerable time and expense in developing its Phase II plans in light of its numerous meetings with the BRA, but also because less than one block from the Hayward Parcel the BRA created a separate building zone in which 400 foot buildings were permitted.

47 LPA thereafter requested that the BRA revise the new zoning boundaries to allow the Hayward Parcel to be included in the adjacent zone in which higher buildings were permitted. The BRA refused, and over the next six months repeatedly advised LPA that LPA would have to revise its Phase II development plans to conform to the 155 foot height limitation. Then in November 1987 the BRA abruptly changed course once again and suggested to LPA, in two separate meetings, that it might be possible after all for the Hayward Parcel to accommodate an office tower exceeding the 155 foot height restriction. The BRA later made it clear, however, that while a higher building might be possible on the site, the BRA would not give its approval for such a building unless LPA abandoned its right to purchase the Hayward Parcel at the Tripartite Agreement formula price and instead agreed to pay the City the higher, current market value of the property.

48 The BRA also used its supervisory power over the design review process in other ways in an attempt to squeeze financial concessions from LPA. Starting in the summer of 1985,

LPA met with the BRA to discuss issues associated with existing streets and traffic patterns. In November 1985 LPA presented to the BRA the results of traffic engineering studies that it had commissioned at its own expense. On February 24, 1986 LPA sent the BRA five alternative traffic circulation patterns that had been prepared by LPA's traffic consultant and then presented further traffic solutions at a March 11, 1986 meeting with the BRA. Instead of responding to these many traffic studies, the BRA proposed instead at the March 11, 1986 meeting that LPA participate in a new traffic study, known as the Fabian study, that the BRA indicated was just beginning. LPA began preparing for its part in the study, but then did not hear back from the BRA regarding the Fabian study for over a year. During this year, LPA repeatedly contacted and met with the BRA to urge progress on the study, noting that the delay directly affected its ability to conclude the design and planning for Phase II.

49. Ignoring both its own delay and LPA's previously submitted studies, the BRA wrote to LPA on April 22, 1987 to indicate that the BRA now required submission and approval of, among other things, a transportation access plan and additional traffic analyses. For its part, the City delayed even further, waiting until July 6, 1987, a full two years after the BRA and LPA had first discussed traffic issues in the summer of 1985, before the City's Traffic Division finally issued its transportation access plan scope of work for Phase II. This plan, however, merely set the parameters for a further evaluation of traffic studies that LPA would need to complete. As it turned out, the transportation issues relating to Phase II were not finally resolved until June 1989, four years from the date LPA had first met with the BRA on the issue and notably only after the purported expiration date of the Hayward Parcel Option.

50. The most direct action by the City to delay LPA's acquisition of the Hayward Parcel and thereby force an extra-contractual concession from LPA was the City's refusal to

complete the appraisals necessary to establish the purchase price for the Hayward Parcel as required by Section 6.02 of the Tripartite Agreement. In its July 2, 1986 letter exercising the Hayward Parcel Option, LPA reminded the City that the property appraisals were needed before a sale could occur. After hearing nothing from the City for over three months, LPA wrote again on October 15, 1986, noting that the appraisals were "long overdue" and that the City's failure to obtain the appraisals seriously impeded LPA's progress in the implementation of Phase II. Later that month, the City informed LPA that no appraisals could occur until after the BRA had defined the dimensions of the Hayward Parcel. The City reiterated this position in a December 18, 1986 letter to LPA. Further, although the Tripartite Agreement did not condition the purchase and sale of the Hayward Parcel on completion of the Phase II design review process, the City nevertheless asserted that it would not convey the Hayward Parcel until it knew exactly what LPA would build there. On May 5, 1987 LPA wrote again to urge the City to proceed with the necessary appraisals, but it did not receive a response.

51. The City never did obtain the necessary appraisals. Although the City's Real Property Board's July 1986 official minutes acknowledge that LPA had exercised its option to purchase the Hayward Parcel and its September 1986 minutes contain an authorization to its Chairman to obtain the unfinished appraisals, the Real Property Board took no action until October 1987 (16 months after LPA exercised its option), when it finally began to solicit bids for appraisals of the Hayward Parcel's then current value. This solicitation, however, did not include the 1978 appraisals for Parcel D-4 and New Essex Street. One month later, the City abruptly and without notice or explanation to LPA abandoned its tentative effort to complete the appraisal process and never took it up again.

52. Just as the City refused to obtain the necessary appraisals, it also refused to define the final dimensions of the Hayward Parcel. Indeed, not only did the City fail to act on these requirements, but LPA also learned in early 1987 that the City's Transportation Department had proposed a plan to route a new street through the middle of the Hayward Parcel, a move that blatantly ignored LPA's vested rights in the entire Hayward Parcel. Moreover, the proposed street would have cut the parcel into two smaller lots, neither of which would have accommodated the proposed Bloomingdale's Department Store. Both the City and the BRA were well aware that a road running through the middle of the Hayward Parcel would have destroyed the property's value to LPA. Even BRA Executive Director Coyle testified that "you can't put a road with 40-foot dimensions or 50-foot dimensions through the middle [of the Hayward Parcel], going diagonally, across a development site and still build," adding also that "I don't believe the project [in that instance] would be viable economically." Trial Transcript Day 11, SJC Record Appendix (vol. 26), at A4461, A4464 (Exhibit 24). Coyle also testified that even he had been concerned about the Transportation Department's plan because he realized that it would not be "prudent" to build a department store "with a road going through it because the road would have a 550-foot dimension and that would cut into men's garments," noting sardonically that in such circumstances "the development is dead." Deposition of BRA Executive Director Stephen F. Coyle, at 202–203 (Aug. 31, 1994) (Exhibit 25).

Amendment to the Hayward Parcel Option

53. Instead of working to fulfill the City's contractual obligations relating to the Hayward Parcel, the City demanded that LPA agree to a definite deadline for the closing on the Hayward Parcel, stating through the BRA Executive Director that it would not allow LPA to

develop Phase II unless it agreed to the new deadline.[9] At the same time, the City and the BRA promised that they would work in good faith to conclude the closing within the new period. Believing that this agreement was the only way to secure the cooperation of the City and the BRA in achieving the Phase II development, and in an effort to establish a definite deadline for the City finally to act on its obligation to conclude a closing, LPA agreed to this proposal and the parties executed the Third Supplemental Agreement and Amendment to the Tripartite Agreement dated October 29, 1987. This amendment established January 1, 1989 as the deadline for the closing on the Hayward Parcel, but it also provided for the possibility of an extension beyond that date if the City or the BRA failed to work in good faith with LPA to conclude the closing. In pertinent part, the amendment altered Section 6.02 of the Tripartite Agreement to read as follows:

> unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, *unless 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.*

Third Supplemental Agreement and Amendment to the Tripartite Agreement (Oct. 29, 1987), SJC Record Appendix (vol. I), at A1130 (emphasis added) (Exhibit I-C).

14. As events unfolded after the adoption of this amendment, it became clear that the City and the BRA regarded their explicit good faith commitment to be no more than empty rhetoric. As is clear from the official minutes of the September 25, 1987 meeting of the City's Real Property Board, the City and the BRA privately viewed the amendment as "totally in the City's favor and in fact would free the City to dispose of the parcel to another development entity

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[9] Originally the Tripartite Agreement extended LPA's right to close on the purchase of the Hayward Parcel until the City substantially completed the underground parking garage that is intended to build at the Hayward Parcel. By mid 1987, however, the City had done nothing toward such construction.

if Lafayette Place Associates were unable to perform satisfactorily within the option period." Minutes of the City's Real Property Board Meeting of 25 September 1987, at 1, SJC Record Appendix (vol. 8), at A1376 (Exhibit 26). What was further left unstated in these minutes was that whether LPA performed "satisfactorily" was a subjective decision resting solely with the BRA. This soon became apparent because, although LPA increased its efforts to work with the BRA to obtain the necessary design review approval for Phase II, the BRA continued to delay the process and to refuse its approval without justification.

55. It also became increasingly evident that the City would never make any effort to convey the Hayward Parcel to LPA at the formula price called for by Section 6.03 of the Tripartite Agreement. In fact, in a January 22, 1988 meeting of the City's Real Property Board, the Board made an express decision to abandon its Tripartite Agreement obligations and to reject the formula price for the Hayward Parcel in order to obtain instead the much higher current market value of the property. *See* Minutes of the City's Real Property Board Meeting of 22 January 1988, at 3, SJC Record Appendix (vol. 10), at A1873, 1875 (Exhibit 4) (noting the Board's intention "*to receive the fair market value for the Hayward Parcel (abandoning the Tripartite formula)*") (emphasis added). The City, in other words, willfully chose to repudiate its contractual obligations, eagerly undertaken a decade earlier when it was desperate for a massive infusion of private investment in a rundown area of the core central retail district, while it simultaneously repudiated the huge investment of time and financial resources that LPA had expended in the faithful performance of its contractual obligations.

## The Proposed Cambrass Sale

56. As Mondev became resigned to the fact that the BRA and the City would continue to prevent LPA from purchasing the Hayward Parcel and completing the Phase II development, it

began to entertain proposals relating to the Lafayette Place project from the Campeau Corporation, a Canadian retailing and development conglomerate with (at that time) enormous development experience and access to capital. Campeau had recently acquired Allied Stores, the parent of Jordan Marsh, and around this time also became the owner of Federated Department Stores, the parent of Bloomingdale's. Campeau initially approached Mondev's Chairman, Mr. Ramon, to discuss possible forms of cooperation between LPA and Jordan Marsh, but it then decided that acquisition of the entire Lafayette Place project would be preferable. Given the difficulty that LPA was having with the BRA and the City, and the animosity that BRA Executive Director Coyle had expressed personally, Mondev concluded that it would be in both its best interests and the City's to sell LPA's rights in the project to Campeau so as to enable the successful completion of the Lafayette Place project. Accordingly, in November 1987 Mondev and Campeau reached an agreement for the sale to Campeau of LPA's interests in the Tripartite Agreement, including the Hayward Parcel Option.[8]

57. Campeau could not purchase LPA's interests in the project, however, without the approval of the BRA because the project had received Chapter 121A status, as described above at paragraph 35. Accordingly, after discussing the proposed sale with BRA Executive Director Coyle, on December 4, 1987 LPA and Campeau promptly submitted a formal application for the necessary BRA approval. Given Campeau's financial power and development experience at that time, as well as the project's long and successful history (LPA had completed Phase I successfully more than two years before), such approval should have been routine. Indeed, a December 17,

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[8] The terms of the proposed sale provided for an $88 million purchase price: $24.5 million in cash and the balance in assumption of project debt. The proposed sale to Campeau was a distress sale that would not have been profitable for Mondev given its own investment in the project by that time.

1987 BRA staff memorandum to BRA Executive Director Coyle, prepared after a review of the transfer application and supporting documents, specifically noted Campeau's qualifications and recommended that the BRA Board approve the application. Moreover, because of the time sensitiveness of this major real estate development transaction, both LPA and Campeau made numerous requests for an expedited BRA Board vote on the application for approval.[11]

58. The BRA Executive Director intervened, however, to thwart the transfer application. Executive Director Coyle made a deliberate decision to "table" BRA Board consideration of the application by Billing without good cause to place the application on the BRA Board's agenda at any time during the following two months. As a result, the BRA Board never voted on whether to approve the transfer application. On behalf of the City, Executive Director Coyle also stated for publication on December 10, 1987 that the BRA would not approve the application unless LPA renegotiated the Tripartite Agreement and made other economic concessions that it was not obligated to make. Thus, for example, Executive Director Coyle stated that before the City would approve the transfer of the project to Campeau, it wanted "to receive a *market rate acquisition payment* for the adjacent lot [*i.e.*, the Hayward Parcel], linkage and tax payments on any new construction and possibly a new lease agreement for the city-owned parking garage." Michael K. Frisby, *New Lafayette deal asked: City wants more for adjacent lot, increase in tax payments*, BOSTON GLOBE, Dec. 10, 1987 at 61 (emphasis added) (Exhibit 5).

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[11] Foreign approval of the transfer was needed because the Lafayette Place Mall could not be managed effectively after the sale was publicly announced and while the transfer application was pending. As LPA's project manager testified at trial, "You cannot have a big ship like the Lafayette Place phase I go without — without a master, a well-defined master and without management basically. . . . [W]ithout anybody making decisions for too long." Trial Transcript Day 3, SJC Record Appendix (vol. 15), at A2865 (Exhibit 27).

Noting that the fair market value of the Hayward Parcel was many millions of dollars higher than the price calculated under the Tripartite Agreement formula, Executive Director Coyle bluntly stated further that the Agreement "must be changed. *It was made at a time when the city was begging and the developers got a good deal. But it was a 1975 deal.*" *Id.* (emphasis added). Another City official stated that the Tripartite Agreement "was made in 1975 and it does not reflect today's market" and that if it were allowed to stand the developers would have "a sweetheart" deal. *Id.* Then, in a direct conversation with Mr. Ramos, Executive Director Coyle expressly threatened that he would not approve the transfer "*until I [sic] get a higher value for the land. And I don't want you to take all that profit and run back to Canada with it.*" Trial Transcript Day 4, SJC Record Appendix (vol. 16), at AJ185 (emphasis added) (Exhibit 6).

59. The City's demands were undeniably at complete variance with its long-standing commitments and obligations to LPA contained in the Tripartite Agreement, the Section 6A Contract and the Parking Garage Lease. The demands ignored that these contracts, concluded in the late 1970s and early 1980s, had been made as an inducement to make possible the redevelopment of a critical but blighted and decaying part of the City by LPA, a private developer. They also ignored the serious and substantial risks that LPA had been willing to shoulder, as well as LPA's substantial investments and operating losses on the project to that date. In turn, the statements and actions of municipal officials like BRA Executive Director Coyle were openly extortionate since they were meant to block LPA from exercising its contractual rights to obtain title to the Hayward Parcel at the agreed price and to coerce LPA into renegotiating and abandoning those vested contract rights so that the City could capture greater financial benefits from the project than those to which it was contractually entitled.

## The Campeau Lease Transaction

60. LPA had originally planned to close the sale transaction with Campeau on January 1, 1988. When the BRA failed to consider LPA's and Campeau's transfer applications at either its December 1987 or January 1988 Board meetings, and in light of the various public statements by City officials regarding the City's intent to abandon its Tripartite Agreement obligations and coerce a sale of the Hayward Parcel at higher market prices, LPA realized that the BRA would never approve the Campeau sale unless LPA abandoned its vested contract rights. LPA therefore structured an alternative arrangement with Campeau that did not require BRA approval under Chapter 121A. On March 15, 1988 LPA and Campeau Massachusetts, Inc., a Campeau affiliate, executed an agreement in the form of a lease by which LPA leased the Lafayette Place Mall to Campeau, assigned it the Parking Garage Lease, and gave it an option to purchase LPA's rights and interests under the Tripartite Agreement. *See* Indenture of Lease Between LPA and Campeau Massachusetts, Art. I (Mar. 15, 1988) (the "Campeau Lease"), SJC Record Appendix (vol. II), at A1352 (Exhibit 28). LPA also delegated its rights in the Hayward Parcel to Campeau and gave it "complete authority, control and responsibility to pursue the development of" the Hayward Parcel. *Id.* Art. 14.4. The financial return to LPA from the Campeau Lease was considerably less even than from the earlier abortive distress sale [n]

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n Campeau paid LPA $12 million in cash (which went to pay a portion of the debt that LPA had incurred on the project) and gave a promissory note in the amount of $9,468,417. Campeau also agreed to pay LPA $5 million if and when it exercised its option to purchase LPA's interest in the Lafayette Place project. However, because of Campeau's ensuing financial difficulties and its ultimate default on the lease transaction, as described below at paragraph 65, LPA received only half of the amount due on the promissory note and nothing on the purchase option, which Campeau never exercised.

61. After concluding its lease with LPA, Campeau promptly announced its own development plan called the "Boston Crossing Project," which encompassed LPA's Phase II plans for a department store and office tower on the Hayward Parcel and also called for a rebuilding of the Lafayette Place Mall, a rebuilding of the Jordan Marsh store, and the construction of a new office tower above the Jordan Marsh store. The BRA expressed strong public support for the Boston Crossing Project and actively encouraged Campeau to pursue and undertake this ambitious development program, which was more than twice the size of LPA's proposed Phase II development.

62. Campeau could not begin construction of the Boston Crossing Project, however, without first acquiring the Hayward Parcel from the City and also having its proposed design approved by the BRA. Although the BRA encouraged Campeau in its plan for the Boston Crossing Project, it did not expedite its design review process and Campeau soon realized that the project was not likely to be completed by the end of 1988. Accordingly, in numerous meetings and in at least six letters beginning in April 1988 and continuing through to December 1988, Campeau sought agreement by the City and the BRA to extend the January 1, 1989 deadline for the closing on the Hayward Parcel Option. The City and the BRA, however, refused to respond to Campeau's numerous requests, so that Campeau finally decided to close on the Hayward Parcel even without BRA approval of its development plans (as it had a right to do under Section 6.02 of the Tripartite Agreement). In a December 19, 1988 letter sent directly to Mayor Flynn, Campeau's CEO Robert Campeau stated that "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." Letter from Robert Campeau, Chairman and Chief Executive Officer of Campeau Corporation, to Raymond L. Flynn, Mayor of the City of Boston (Dec. 19, 1988), SJC Record Appendix [vol. 5], at A811 (Exhibit 8).

The City did not respond, however, until December 30, 1988, two days before the expiration of the Hayward Parcel Option. In his letter of that date, BRA Executive Director Coyle stated on behalf of the City that, in effect, Campeau now would have to purchase the Hayward Parcel for its current "fair reuse value" because the Hayward Parcel Option would expire on January 1, 1989. Letter from Stephen Coyle, BRA Executive Director, to Robert Campeau, Chairman and Chief Executive Officer of Campeau Corporation (Dec. 30, 1988), SJC Record Appendix (vol. 10), at A1940 (Exhibit 9).

63. Campeau responded to the December 30, 1988 letter with a letter delivered by hand to BRA Executive Director Coyle later on the same day, objecting to the suggestion that it did not have a right to an extension of the January 1, 1989 deadline and reserving "any and all rights of Campeau and Lafayette Place Associates, under the Tripartite Agreement or otherwise." Letter from Lenard McQuarrie of Campeau Massachusetts to Stephen Coyle, BRA Executive Director (Dec. 30, 1988), SJC Record Appendix (vol. 5), at A813 (Exhibit 29). The City never responded to this letter and thereafter consistently maintained that Campeau's and LPA's rights to acquire the Hayward Parcel at the Tripartite Agreement formula price had expired as of January 1, 1989.

## Campeau's Default

64. Campeau continued to pursue its development project through the first part of 1990. Indeed, after January 1, 1989 the BRA finally started to work seriously with Campeau in the design review process and eventually approved the Boston Crossing Project in June 1989. In this approval, the BRA authorized Campeau to build office towers substantially in excess of the 155 foot limit that it had earlier imposed on LPA's Phase II plans, but notably did so only after Campeau finally agreed to pay the City the "fair reuse value" of approximately $17 million that it

demanded for the Hayward Parcel and to provide the City with an additional benefits package worth approximately $38 million.

65. Thereafter Campeau emptied the Lafayette Place Mall of its tenants in preparation for the development of its Boston Crossing Project. However, Campeau also encountered financial difficulties arising from its own numerous corporate acquisitions in the late 1980s (it would eventually file for bankruptcy), and in the spring of 1990 it defaulted on its payment obligations to LPA under the Campeau Lease. As a result of this default, LPA terminated the Campeau Lease in June 1990 and all rights and interests under the Tripartite Agreement, including the Hayward Parcel Option, reverted to LPA. However, because neither LPA nor Campeau had been able to construct the crucial second department store on the Hayward Parcel as a result of the obstructive and delaying tactics repeatedly employed by the City and the BRA (the Hayward Parcel remains to this day an open-air parking lot), and because few tenants remained after Campeau had emptied the Lafayette Mall in preparation for its building projects, the mall ultimately failed. In February 1991 the project lender, Manufacturers Hanover Trust Company ("MHTC"), foreclosed on Campeau's and LPA's interests in the mall. Although LPA lost the Lafayette Place Mall in this foreclosure, it retained all of its interests in the Hayward Parcel because these interests were not part of the security that LPA had given MHTC.

### B. The Massachusetts Trial Court Proceeding

66. On the basis of the wrongful actions described above, LPA filed suit on March 16, 1992 against the City and the BRA in Suffolk County Superior Court in Boston, a court created by the Commonwealth of Massachusetts under Mass. Gen. L. c. 211B. In its complaint, LPA asserted six claims: (1) specific performance of the Hayward Parcel Option; (2) damages for breach of the Tripartite Agreement; (3) damages for breach of the implied covenant of good faith

and fair dealing, (4) damages for tortious interference with the Campeau sales contract; (5) damages for violation of Mass. Gen. L. c. 93A, which statute provides a private right of action against unfair and deceptive acts and practices in the conduct of trade and commerce; and (6) damages for violation of the *Massachusetts Civil Rights Act*, Mass. Gen. L. c. 12, §§ 11H & 11I, which statute provides a private right of action against interference by threats, intimidation, or coercion in the free exercise of a person's federal or state civil rights.[13]

67. Continuing its pattern of delay and obstruction, the City and the BRA (collectively the "municipal defendants") actively sought to hinder and delay the orderly progression of this case to trial by refusing to comply with LPA's discovery requests and by interposing unmeritorious motions, as detailed below. In addition, both before and after trial, the trial court wrongfully expropriated LPA's rights to pursue certain claims against the municipal defendants and improperly denied LPA the benefits of certain special verdicts that the jury returned in LPA's favor.

Dispute over the Deposition of the City's Mayor

68. On April 12, 1993, after LPA had noticed the deposition of the City's Mayor, Raymond L. Flynn, the City moved the trial court for a protective order to prevent the deposition. The trial court responded to this motion with an order that the City first make Mayor Flynn available for a one-hour interview so that LPA might determine if the Mayor had sufficient knowledge of facts at issue in the case to warrant his deposition. In this one-hour interview, Mayor Flynn expressly acknowledged that he had delegated all of the City's responsibility for

[13] Before trial, LPA dropped its specific performance claim and proceeded only on its damages claims.

developments generally to the BRA and that further he was content to let BRA Executive Director "Coyle act as he saw fit." Stipulations, SJC Record Appendix (vol. 5), at A908–909 (Exhibit 22).

69. In June 1993 LPA moved the trial court to take a one-hour videotaped deposition of Mayor Flynn in order to record for trial use the statements that the Mayor had made during his one-hour interview. Rather than allowing the deposition, the motion judge ordered the parties to stipulate to a summary of the Mayor's statements in order to permit LPA to introduce the summary into evidence at trial. The trial judge, however, later flatly refused to admit the stipulation into evidence, even though the sole purpose for which it had been ordered by the motion judge was to preserve the Mayor's statement so that LPA could offer it at trial. The combined effect of these decisions was to make it impossible for LPA to introduce at trial any direct testimony by Mayor Flynn, the most important witness on the crucial issue of the BRA's role as agent for the City in the sale of the Hayward Parcel to LPA. As a result, LPA could not put before the jury Mayor Flynn's statements concerning the BRA's role as the City's agent and BRA Executive Director Stephen Coyle's broad discretion in using the development process to block LPA's acquisition of the Hayward Parcel.

## First Summary Judgment Motions

70. On July 22, 1993 the City and the BRA filed motions for summary judgment on all six of LPA's claims. The municipal defendants' principal argument, which already had been extensively argued in briefs filed with the court in February 1993, was that the only admissible evidence of the actions taken by the BRA and the City were the official minutes of meetings and the votes of the BRA Board, the Real Property Board, the Zoning Commission Board, and the Board of Zoning Appeals. Nothing in such evidence, the municipal defendants claimed, could possibly support any of LPA's claims. On LPA's statutory claim under Mass. Gen. L. c. 93A, the

municipal defendants argued that the BRA and the City were acting in their governmental capacities and thus were not engaged in trade or commerce. Finally, on LPA's claim under the *Massachusetts Civil Rights Act*, the municipal defendants argued that there was no evidence that the BRA and the City used threats, intimidation, or coercion against LPA and that, to the extent such evidence did exist, it showed that such actions were not part of a governmental policy approved by the highest authority at either the BRA or the City.

71. LPA responded to these arguments by noting that, under the facts of this case, the official minutes and votes of the various City agencies were not the only admissible evidence because the motivations and actions of the City employees dealing directly with LPA were directly at issue in LPA's contract claims. Further, even if the evidence was confined to the official minutes of meetings, the evidence was sufficient to support LPA's claims. The minutes from the January 28, 1988 Real Property Board meeting, for example, indicated that the Board had expressly instructed its attorney that any approval of the pending transfer of the project to Campeau should be conditioned on the abandonment of the City's and the BRA's contractual agreements with LPA and LPA's payment of extra-contractual concessions.

72. LPA also argued that it had a viable Chapter 93A claim because (1) this Massachusetts statute included government agencies within the class of persons to which it applied, (2) the statute defined trade and commerce to include "the offering for sale, rent or lease, the sale, rent, lease or distribution of any services or property," a definition that unambiguously applied to the Hayward Parcel Option; and (3) the municipal defendants' actions evidencing their intent to abandon their contract obligations and force concessions from LPA were squarely within the statutory meaning of "unfair or deceptive acts or practices" as construed in prior decisions.

73. Finally, in defense of its claim under the *Massachusetts Civil Rights Act*, LPA pointed to BRA Executive Director Coyle's threat to Mr. Ranuca that Mandev would never again be allowed to build in Boston if Mr. Ranuca ever "went over his head" to the Mayor again. The BRA had made other threats as well, such as stating that it would allow LPA to complete Phase II if and only if it agreed to the January 1, 1989 "drop dead" date for closing on the Hayward Parcel Option; stating that it would not allow Mandev to take its "profits" and "run back to Canada"; and stating that it would not approve the transfer of the project to Campeau unless LPA agreed to concessions it was not obligated to make under the Tripartite Agreement.

74. On September 15, 1993 the trial court, in an order not supported by reasons, granted the municipal defendants' summary judgment motions on LPA's two statutory claims (*i.e.*, its claims under the *Massachusetts Civil Rights Act* and Mass. Gen. L. c. 93A) and further ruled that the BRA's refusal to extend the January 1, 1989 deadline on the Hayward Parcel Option was not a proximate cause of the failure by Campeau to purchase the Hayward Parcel. Memorandum and Order, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Sept. 15, 1993), SJC Record Appendix (vol. 3), at A489 (Exhibit 30). The trial court, however, denied the municipal defendants' summary judgment motion as to all other claims. *Id.*

Dispute over Request for Production of Documents

75. During the pre-trial stages of the litigation between the parties, a dispute arose over the extent and nature of the documents that the City and the BRA were required to turn over to LPA in response to its requests for discovery of documents. Similar to their arguments in their summary judgment motions, both the City and the BRA argued that they should not have to turn over any documents other than the official votes and minutes of the relevant City agencies since

any other documents, in their view, would not be admissible at trial. This discovery dispute was referred to a special master, who recommended that, except for objections based on a valid claim of privilege, the municipal defendants' objections to disclosure should "be overruled as to all documents created or which describe events occurring between December 22, 1978 (the date of the Tripartite Agreement) and January 1, 1989 (the date upon which the option on the Hayward Parcel purportedly expired)." Master's First Report and Recommendation, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 93-1664-A, at 2 (Mass. Superior Ct. Dec. 15, 1993) (Exhibit 31).

76. The special master based her findings on two principal grounds. First, she was not persuaded that the official votes of the agencies would be the only admissible evidence against the municipal defendants. *Id.* at 2-3. Second, admissibility of the documents was not the proper test in a discovery request. Rather, LPA needed only to show (and had shown) that the documents it sought would be reasonably calculated to lead to the discovery of admissible evidence. *Id.* at 3. In making her report, the special master also noted, in a clear reference to the City's and the BRA's uncooperative behavior, that the parties' "resources might be more wisely used to battle over the merits of the lawsuit rather than to devise imaginative roadblocks to discovery. . . . I would encourage all parties to approach discovery in that spirit so that this case can move forward expeditiously to a resolution." *Id.* at 4.

77. Instead of heeding the special master's advice to work in a spirit of cooperation, the City and the BRA immediately objected to the report on December 24, 1993, requiring LPA to respond with yet another memorandum in opposition. Notwithstanding the municipal defendants' objections, the trial court approved the special master's report and recommendation on February 18, 1994. *See* Massachusetts Superior Court Docket Sheet, *Lafayette Place*

*Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1644-A, at 7 (Mass. Superior Ct. 1992-97) (docketing court's approval of Master's First Report and Recommendation on Feb. 18, 1994) (Exhibit 32).

Second Summary Judgment Motions

78. Not content to delay the proceedings by their initial motions for summary judgment and by their repeated objections to LPA's discovery requests, the City and the BRA interposed yet another motion for summary judgment on January 19, 1994. In this so-called "supplemental" motion for summary judgment, the municipal defendants argued that "new evidence" discovered in documents produced by LPA in pretrial discovery directly contradicted the central allegations in LPA's complaint. Yet in their memorandum of law in support of the new motion for summary judgment, the municipal defendants could not point to any evidence that had not already been available to them in the documents in their possession before they filed their *first* motion for summary judgment. The municipal defendants' argument, in fact, was so repetitive of the first motion for summary judgment and based on such speculative and unsupported inferences, that LPA sought an award of attorney's fees and costs for defending the motion.[N] The trial court agreed with LPA that the municipal defendants' "supplemental" motion for summary judgment was without merit and denied the motion on all counts on February 28, 1994. *See id.* (docketing court's denial of Supplemental Motion of the City of Boston and the Boston Redevelopment Authority for Summary Judgment on Feb. 22, 1994).

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[N] On February 18, 1994 the trial court "denied as premature" this motion for attorney's fees and costs. *See id.* (docketing court's denial of Plaintiff's Motion for Attorney's Fees and Costs on Feb. 18, 1994)

LPA's Motion for a Mistrial

79. After the delay caused by the municipal defendants' pretrial tactics, the trial on the merits began on October 3, 1994 before a jury of twelve men and women in Suffolk County Superior Court in the City of Boston.[11] On October 7, 1994 the trial court permitted into evidence, over LPA's objection, documents and oral testimony that were irrelevant, highly confusing, and prejudicial to LPA. LPA immediately moved the court orally for a mistrial and then followed up with a written motion for a mistrial on October 11, 1994.

80. The court allowed into evidence over LPA's objection certain prejudicial evidence on three subjects that did not relate in any way to the case against the City and the BRA. First, it allowed documents and testimony relating to previous litigation by LPA regarding Campeau's breach of the Campeau Lease. This previous litigation, dealing as it did with actions that occurred in the latter half of 1989 and 1990 under a contract completely separate from the Tripartite Agreement, had no relation to LPA's claims against the City and the BRA, which only involved actions, and their consequences under the Tripartite Agreement and the 1987 Campeau sales contract, occurring before and up to January 1, 1989. Despite the facial irrelevance of this previous litigation, the trial court allowed into evidence the complaint filed in the case and Mondev's interrogatory answers, and also allowed counsel for the BRA to question Mr. Rassen (Mondev's Chairman) about claims made in that case.

81. Second, the trial court also allowed the BRA's counsel to cross-examine Mr. Rassen, again over LPA's objection, about the 1991 foreclosure of the Lafayette Place Mall by

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[11] The trial lasted fourteen days, from October 3, 1994 to October 21, 1994. All the jurors were residents of, and taxpayers in, Suffolk County, whose county seat and largest city is the City of Boston.

MHTC. The court allowed the BRA cross examination not only about the foreclosure proceeding itself but also about why LPA had not resumed payment on its mortgage after Campeau's default on the Campeau Lease. Such testimony was completely irrelevant to LPA's pending suit because the mortgage held by MHTC covered neither the Hayward Parcel, which was owned by the City, nor the Hayward Parcel Option. There was nothing about the 1991 foreclosure, in short, that spoke either to LPA's claim against the municipal defendants for breach of the Hayward Parcel Option or to LPA's damages for its inability to buy the Hayward Parcel. LPA argued to no avail that the only purpose the testimony could serve was to confuse the jury and make it appear that LPA was somehow irresponsible because it had defaulted on the MHTC loan.

82. The third category of irrelevant evidence that the trial court allowed over LPA's objections related to a previous claim filed by Mondev Mass. against its former partner in the Hotel Lafayette, and the amount received by Mondev Mass. in settlement of that suit. The trial court allowed the BRA's counsel to question Mr. Ramos about whether LPA considered Mondev Mass.'s "chose in action" against its former partner to be an asset at the time of MHTC's foreclosure on the Lafayette Place Mall. The BRA's counsel was also allowed to establish the amount of money Mondev Mass. had received in settlement of the claim. This evidence and questioning allowed the BRA's counsel to suggest improperly that LPA should have relied on this "chose in action" to make payments on the Lafayette Place Mall mortgage so as to avoid its foreclosure.

83. Taken together, the admission of the above evidence was more than enough to warrant a mistrial. Yet despite LPA's strenuous objections to the introduction of the evidence in the first place, followed by its oral and written motions for a mistrial, the trial court denied LPA's motion and allowed the trial to continue.

## Motions for a Directed Verdict

84. On October 14, 1994, after LPA had concluded the presentation of its case, both the City and the BRA moved for a directed verdict, arguing essentially that the evidence most favorable to LPA did not support a finding (1) that an option contract on the Hayward Parcel existed; (2) that either defendant had breached the contract even if it did exist; (3) that either defendants acted in bad faith during the design review process; or (4) that any alleged breach by the municipal defendants caused LPA damage. The trial court denied these motions on October 14, 1994 immediately after they were presented.

85. After the close of their case, the municipal defendants renewed their motions for a directed verdict. These motions presented essentially the same arguments as their first motions for directed verdicts; in addition, however, the BRA now also asserted for the first time that it was entitled to a directed verdict under the doctrine of sovereign immunity. The trial court denied these motions on October 19, 1994.

## The Jury Verdict

86. After the close of all the evidence and the denial of the above motions, the case went to the jury upon a special verdict form, which consisted of nine questions. After deliberation, the jury found on October 21, 1994 that (1) the Tripartite Agreement contained a valid and enforceable contract between LPA and the City for the purchase and sale of the Hayward Parcel, (2) LPA had performed its obligations under that contract, (3) the City had breached the contract; and (4) LPA was entitled to recover $9.6 million for the City's breach. *See* Special Jury Verdict Pursuant to Mass. R. Civ. P. 49(a), *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Oct. 21, 1994), SJC Record Appendix (vol. 4), at A710 (Exhibit 10). In separate findings the jury also

found that (1) the BRA had intentionally interfered with the contractual relations between LPA and Campeau, and (2) LPA was entitled to recover $6.4 million for this intentional interference.[14] *Id.*

87. The total value of the jury verdict, $16 million, closely tracked uncontradicted expert testimony offered by LPA at trial demonstrating that the difference between the contract price and the fair market value for the Hayward Parcel on January 1, 1989 was $16,420,000. *See* Trial Transcript Day 7, SJC Record Appendix (vol. 21), at A3179 (Exhibit 11). Neither the City nor the BRA offered any testimony or evidence whatsoever at trial as to either the fair market value of the Hayward Parcel or its price as calculated under the Tripartite Agreement formula.

88. The jury verdicts against the City and the BRA encompassed two distinct findings of liability. The verdict for LPA against the City compensated LPA for the damage resulting from the City's breach of the Hayward Parcel Option, whereas the verdict against the BRA compensated LPA for the harm arising out the BRA's interference with the Campeau sales contract, which contract had been for *all* of LPA's rights in the Lafayette Place project, not just LPA's rights in the Hayward Parcel. Despite this clear distinction between the two damage awards, the trial court erroneously ruled as soon as the jury announced its special verdicts that the $6.4 million award against the BRA for tortious interference with the Campeau sales contract was "swallowed up" by the $9.6 million award against the City for breach of the Tripartite Agreement. *See* Trial Transcript Day 14, SJC Record Appendix (vol. 29), at A4751–54 (Exhibit 33).

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[14] The jury also found that the BRA had breached the contract for the purchase and sale of the Hayward Parcel. The trial court struck this special verdict, however, on the stated ground that the jury was not required to answer that question in light of its previous finding in a separate special verdict that the BRA was not acting as the City's agent for the sale of the Hayward Parcel. *See* Trial Transcript Day 14, SJC Record Appendix (vol. 29), at A4750–51.

Motions for Judgment Notwithstanding the Verdict

89. A week after the return of the jury's special verdicts, both the BRA and the City moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. These new motions relied on substantially the same arguments as the two previous motions for directed verdicts. After substantial briefing and a post-trial hearing on these motions, the trial court took the case under advisement but did not rule until the following summer, deciding the motions in two separate decisions rendered on August 17, 1995.

90. In its August 17, 1995 decision on the City's post-trial motion, the trial court ruled that the evidence presented at trial was sufficient to support the jury's finding that Section 6.02 of the Tripartite Agreement created a binding purchase and sales agreement between LPA and the City for the Hayward Parcel, and that the City had breached that agreement. See Memorandum of Decision and Order on Defendant City of Boston's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A745 (Exhibit 34). In particular, the trial court ruled that Section 6.02 unequivocally identified the parcels of property subject to the sales contract, provided a sufficiently precise formula for calculating the purchase price, and established the intention of the parties to be presently bound, noting on this last point that "it is not insignificant that for many years the parties treated § 6.02 as binding." *Id.* at 3. As to the breach of the contract by the City, the trial court noted that there was sufficient evidence introduced at trial for the jury to find that the City had not fulfilled its obligations to complete the appraisals necessary to calculate the final purchase price of the Hayward Parcel and that the motivation behind the breach was a desire to extract a higher purchase price. *Id.* at 4–5. Accordingly, the

trial court affirmed the jury's special verdicts in respect of the City's breach of the Tripartite Agreement and entered judgment against the City for $9.6 million. *See* Judgment on Jury Verdict for Plaintiff, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A765 (Exhibit 13).

91 In its decision on the BRA's post-trial motion, the trial court incorporated the above findings concerning the existence of an enforceable contract for the purchase and sale of the Hayward Parcel. *See* Memorandum of Decision and Order on Defendant Boston Redevelopment Authority's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A, at 5 (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A750 (Exhibit 35). The trial court also was forced to deal with several other arguments advanced by the BRA. Once again the BRA reasserted its oft-repeated argument that its acts could not be proved except by the record of actions taken at a duly constituted meeting. The BRA argued that because LPA had not introduced into evidence any minutes of meetings to show that it had interfered with the Campeau sales contract, it was now entitled to judgment in its favor. The trial court again rejected this argument, noting that official minutes were not the only admissible evidence in this case because LPA had established at trial that BRA Executive Director "Coyle wielded a degree of authority and control sufficient to attribute his actions to the BRA." *Id.* at 3. The trial court also ruled that the jury's finding on the BRA's tort liability was well founded because LPA had introduced evidence sufficient to show that BRA Executive Director Coyle had "unlawfully attempted to exact a higher price for the

'Hayward Parcel' than would have been obtained using the formula in the Tripartite Agreement." *Id.*

92. The trial court also ruled against the BRA on its arguments in respect of damages, noting that there was ample evidence that LPA had sought BRA approval for the sale of its interests to Campeau and that it had suffered a financial loss when it was forced to abandon the sales contract and enter into a lease contract instead. *Id.* at 4–5.

93. However, in addressing the BRA's argument that it was completely protected from liability by sovereign immunity, which the BRA had asserted only after the close of all evidence in the case, the trial court ruled against LPA. The BRA argued that the *Massachusetts Tort Claims Act* ("MTCA") exempted it from liability for "any claim arising out of an intentional tort, including . . . intentional interference with contractual relations" because the BRA was a public employer within the meaning of the statute. LPA argued in response that the BRA was an "independent body politic and corporate" (a phrase used in the statute) and, as such, expressly excluded from the definition of public employer in the MTCA. The trial court rejected LPA's position, ruling instead that the BRA was not sufficiently independent financially or politically from either the City or the State to take it outside the protection of the MTCA and was therefore entitled to immunity even for such intentional torts as interference with contractual relations. *Id.* at 6–15. Accordingly, the trial court entered judgment in favor of the BRA, thereby immunizing the BRA from all liability for the misconduct found by the jury. *See* Judgment on Jury Verdict for Defendant, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 17, 1995), SJC Record Appendix (vol. 4), at A766 (Exhibit 12).

**LPA's Motion to Amend the Judgment**

94. When the trial court entered judgment against the City for $9.6 million, it ordered interest to run from March 16, 1992, the date on which LPA had filed suit. In a September 22, 1995 Motion to Amend the Judgment, LPA argued that the proper date to begin the running of interest was January 1, 1989, the date on which the City was unequivocally in breach of its contract with LPA for the purchase and sale of the Hayward Parcel since the option had purportedly expired on that date. For reasons never expressed, the trial court delayed its decision for almost two years before denying LPA's motion on August 20, 1997. *See* Memorandum of Decision and Order on Plaintiff's Motion to Amend Judgment, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1664-A (Mass. Superior Ct. Aug. 20, 1997), SJC Record Appendix (vol 4), at A775 (Exhibit 36)

95. Under Mass. Gen. L. c. 231, § 6C, prejudgment interest for breach of a contractual obligation is to run at the rate of 12 per cent per annum (if not otherwise established by the contract) from the date of the contract breach, or, if such date is not established, from the date of the action's commencement. LPA argued that in light of the Hayward Parcel Option's unambiguous "drop dead" date established by the Third Supplemental Agreement and Amendment to the Tripartite Agreement, which required conveyance of the Hayward Parcel by January 1, 1989, the jury, when it determined that the City had breached the contract, necessarily had established the date of the breach as January 1, 1989. January 1, 1989, in other words, was the last possible date by which the City's performance could occur and therefore interest should have run from that date.

96. The trial court ruled, however, that since the jury did not specifically establish the date of the contract breach, the court could not evaluate the evidence and make a finding on its

own as to that date. *See id.* at 3. Ignoring Massachusetts case law that allows a court to establish the date of a breach that is "readily ascertainable" from the evidence (*see, e.g., Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 841–42 (1986)), the trial court ordered that interest should run only from March 16, 1992, the date of the commencement of the action. *See* Memorandum of Decision and Order on Plaintiff's Motion to Amend Judgment, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Civil Action No. 92-1654-A, at 4 (Mass. Superior Ct. Aug. 20, 1997) (Exhibit 36).

C. Appeals to the Massachusetts Supreme Judicial Court

97. Following the trial court's denial of LPA's Motion to Amend the Judgment, final judgment at last was entered in the trial court, making the case ripe for appeal for the first time. Both the City and LPA appealed, and the SJC granted direct appellate review. In its appeal, the City sought a reversal of the judgment entered against it on LPA's breach of contract claim. LPA, in turn, challenged the trial court's ruling on the BRA's sovereign immunity, its order holding the $6.4 million verdict in tort against the BRA to be subsumed within the $9.6 million verdict against the City for breach of contract, and its order that statutory interest run only from March 16, 1992 rather than from January 1, 1989. In addition, LPA appealed the trial court's pre-trial ruling that had dismissed LPA's claims against both the City and the BRA under Mass. Gen. L. c. 93A (the statute prescribing unfair and deceptive practices in trade and business).[17]

98. In an arbitrary decision grossly favoring the interests of the Commonwealth of Massachusetts against the interests of Mondev, the Canadian owner of LPA, the SJC affirmed the

[17] [LPA did not appeal] the trial court's pre-trial ruling that had dismissed LPA's claim under the *Massachusetts Civil Rights Act*.

judgment notwithstanding the verdict for the BRA and, in a series of unanticipated and unprecedented holdings, also vacated LPA's $9.6 million judgment against the City. The SJC's decision ran contrary to long-standing common law precedent in Massachusetts and other U.S. cases by articulating new rules governing obligations of a party seeking to enforce its contract rights and by holding that these new rules would be applied in Massachusetts with special force to parties seeking to recover in contract against the government. Indeed, the SJC's sharp break with established precedent and the retroactive application of its new rules to LPA's claim operated to take LPA's vested property rights and give them to the City without compensation, in violation of established state, federal, and international law.

## The SJC's Response to the City's Appeal

99. The City advanced two main arguments in its appeal: (1) the Tripartite Agreement was too indefinite to constitute an enforceable contract for the purchase and sale of the Hayward Parcel; and (2) even if a valid contract existed, the City had not breached it in any material way. In addition, the City repeatedly tried to escape liability for the jury verdict by arguing to the SJC that the $16 million verdict was a "windfall" that would result in LPA being awarded a "bonanza" of "millions of dollars of taxpayer money." *See, e.g.*, Reply Brief of the Appellant City of Boston, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07596, at 1, 25 (Mass. Feb. 17, 1998) (Exhibit 37). Further, the City sought to escape liability for its wrongful conduct by highlighting LPA's foreign ownership, arguing that LPA should not recover because "you never have to Canada with money in your pocket." Transcript of Oral Argument, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07596, at 8 (Mass. Mar. 9, 1998) (emphasis added) (Exhibit 14).

100. The SJC rejected the City's first argument, agreeing with the trial court that there was sufficient evidence for the jury to have found a binding agreement between LPA and the City for the purchase and sale of the Hayward Parcel. In so holding, the SJC noted that "[i]f parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding." *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509, 515 (1998) (Exhibit 15). Looking at the procedures and formula in Section 6.02 of the Tripartite Agreement, as amended, the SJC concluded that "the Tripartite Agreement, as amended, was an enforceable contract, under which both parties had certain rights and obligations." *Id.* at 519.

101. In addressing the City's second argument, however, the SJC directly repudiated and reversed the explicit jury finding of fact that the City had breached its valid and enforceable contract with LPA for the purchase and sale of the Hayward Parcel and thereby vacated the $9.6 million jury award against the City.[18] *Id.* at 519–27. In its decision, the SJC ignored its own long standing precedent holding that issues relating to the sufficiency of performance under a contract and the materiality of a breach lie peculiarly within the jury's province (see, *e.g.*, *Brooklby v. Paxton, Inc.*, 414 Mass. 468, 481 (1993) ("The question of satisfactory performance is a question of fact for the jury."), *Charles River Constr. Co. v. Kirksey*, 20 Mass. App. Ct. 333, 340 n.6 (1985) (the question of whether a contract breach is material is "a question of fact for the jury, the answer to which must be upheld if there is support for it in the record")) and instead boldly substituted its own assessment of the facts for the jury's. It also neglected to mention, much less

[18] As a result of this ruling, the SJC did not address LPA's appeal of the order fixing the date of interest to run from March 16, 1992.

apply, its own well-established appropriate standard of review, namely "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" *Abrahams v. Woburn*, 383 Mass. 724, 727 (1981) (quoting *Powter v. Town of Plymouth*, 374 Mass. 206, 212 (1978)).

102. As a basis for its ruling, the SJC first invoked and then sharply changed the meaning of the following rule of contract law: "when performance under a contract is concurrent one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance." *See Lafayette Place Associates*, 427 Mass. at 519 (Exhibit 15). Against the weight of all previous case law in Massachusetts, as well as the jury's explicit findings of fact, the SJC ruled that LPA had not sufficiently established that it had been ready, willing, and able to tender payment for the Hayward Parcel and that, in particular, Campeau's December 19, 1989 letter, in which it stated that it was ready to complete the transaction and make payment immediately, was an insufficient tender. *Id.* at 520. Instead, the SJC created a new rule never before stated or applied in the Commonwealth of Massachusetts: "To place a seller in default, a buyer must manifest that he is ready, able, and willing to perform *by setting a time and place for passing papers or making some other concrete offer of performance.*" *Id.* (emphasis added).

103. None of the decisions on which the SJC relied in articulating this new rule ever had specified the precise manner in which a buyer must demonstrate that it is "ready, able, and willing to perform," or required that a time and place be designated for the passing of papers. To the contrary, the SJC's own precedent *always* required evidence of ability and willingness to make tender and a manifestation of such willingness and ability "by some offer of performance." The evidence at trial had clearly established the willingness and ability of LPA and Campeau (which

stepped into LPA's shoes in March 1988) to perform. It was on this basis that the jury found, as a matter of *fact*, that LPA had performed its contractual obligations and that it was therefore entitled to receive $9.6 million in compensation for the City's breach.

104. LPA also argued that it had been excused from tendering performance because the City's delaying tactics, threats, and express statements had unequivocally demonstrated that the City would not perform under the contract. Although the SJC acknowledged that a party may be excused, under the established doctrine of anticipatory breach, from tendering performance if the other party has shown that it cannot or will not perform, *see id.* at 522, it patently ignored crucial evidence in the case on this point—and its own decisions that had established this question to be one for the jury—to find that LPA was not excused from performance. *See id.* at 522–24.[39] To reach this decision, the SJC interposed its own interpretation of the facts, actively rectified the evidence, and resolved perceived conflicts and ambiguities in favor of the City, whereas under its own appropriate standard of review it was required to resolve them in favor of the jury's verdict for LPA. In particular, the SJC completely discounted or ignored the import and effect of (1) the City's failure to obtain the necessary appraisals to complete the Tripartite Agreement formula despite repeated requests from LPA; (2) the City's active pursuit of its announced plans to build a

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[39] As a procedural matter, the jury did not answer directly the question whether LPA was excused from performance because the special verdict form instructed the jury to consider this question only if it concluded that LPA had *not* performed its obligations under the Tripartite Agreement. *See* Special Jury Verdict Pursuant to Mass. R. Civ. P. 49(a), *Lafayette Place Associates v. Boston Redevelopment Authority and City of Boston*, Civil Action No. 92-1666-A (Mass. Superior Ct. Dep. 21, 1994) (Exhibit 10). Since the jury concluded that LPA had fulfilled its obligations under the Tripartite Agreement, it properly did not address whether LPA was excused from performance. At the very least, LPA was entitled under Massachusetts law to have a jury pass on that issue rather than have the SJC, whose justices were not present at the trial and who had not heard the evidence or observed the witnesses, decide the question upon its own distorted interpretation of the facts.

road through the middle of the Hayward Parcel, which even BRA Executive Director Coyle testified would have destroyed LPA's projected Phase II project; (3) the City's and the BRA's repeated obstruction of the design review process for Phase II; and, most importantly of all, (4) the numerous instances in which City officials expressly stated that the City intended to abandon the Tripartite Agreement formula and force LPA to pay the current market value of the Hayward Parcel.

105. The SJC also based its opinion on issues that had not been briefed or raised by the parties in any meaningful way, either at trial or on appeal, thereby contravening its own principles that issues not raised are waived, see, e.g., *Stall v. Commissioner of Employment & Training*, 423 Mass. 805, 806 n.3 (1996), and those not fully briefed on appeal shall not be addressed, see, e.g., *Shafmaster v. Raymond James & Assocs., Inc.*, 425 Mass. 734, 735 n.14 (1997). In particular, the SJC held that one of the reasons LPA was not excused from tendering performance under the Tripartite Agreement was because LPA had not availed itself of certain arbitration procedures contained in Section 6.02 of the Tripartite Agreement, as amended. *See id.* at 922. Yet this issue was raised only briefly for the first time after more than two years of litigation (when, under established law, the City should have been deemed to have waived any rights to arbitration) and was never fully argued either at trial or on appeal. Indeed, in its appellate briefs, the City made only three fleeting references to the arbitration provision and only in connection with its argument, which the jury had explicitly rejected, that LPA had repudiated the Tripartite Agreement.[38]

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[38] During oral argument before the SJC, counsel for the City, in response to questions from the Court, brazenly misled the Court by falsely asserting that the City had argued at trial and in its appellate briefs that it was legal error for the trial court not to instruct the jury that LPA's exclusive remedy

(continued...)

106. In addition, the SJC reasoned that LPA had not put the City in default of the Tripartite Agreement because it had not invoked the Tripartite Agreement procedures for settling disagreements over the appraised value of the property. *See id.* at 523–24. Yet neither the City nor the BRA briefed this issue on appeal, nor did they raise any objection at trial when the trial court chose not to include a reference to such procedures and instead simply instructed the jury on LPA's obligations under the Tripartite Agreement in the following terms:

> Question 2: Did LPA perform its obligations under the contract? Did LPA do what it was supposed to do? Did it do what it was supposed to do pursuant to the terms and conditions of the contract? One cannot seek to enforce a contract unless one lives up to and meets its obligations under the contract.

Trial Transcript Day 12, SJC Record Appendix (vol. 27), at A4658 (Exhibit 38). Further, the facts at trial established that the Tripartite Agreement procedures referenced by the SJC were not implicated in the case: the City and LPA never even came to a dispute over the value of the various properties making up the Hayward Parcel because the City refused to fulfill its obligations to set the final boundaries of the parcel and then obtain the necessary appraisals.

107. The SJC chose to overlook these obvious facts, writing instead dismissively and remarkably that in Massachusetts parties must be "particularly assiduous" in complying with all procedures contained in a government contract because "'[m]en must turn square corners when they deal with the Government.'" *Id.* at 524 (quoting dicta from *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920)). In creating this new, differential

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(...continued)

under the Tripartite Agreement was arbitration. *See* Transcript of Oral Argument, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07196, at 6–8 (Mass. Mar. 9, 1998) (Exhibit 14). In fact, the City never made any such argument in its briefs or at trial.

contractual standard favoring the Massachusetts government over citizens, the SJC patently ignored its own long-settled decisions and principled holdings that the government "will be held answerable 'exactly as though it were a private individual,'" *Milton Constr. Corp. v. Commonwealth*, 397 Mass. 879, 880 (1986) (quoting *Nash v. Commonwealth*, 174 Mass. 335, 339 (1899)), and that rules of contract law apply "to municipalities equally with other buyers." *Babcock Coal Co. v. City of Boston*, 303 Mass. 518, 521 (1939). *See also Space Master Int'l, Inc. v. City of Worcester*, 940 F.2d 16, 19 (1st Cir. 1991) ("Massachusetts applies general principles of contract law to public contracts."); *Brumfield v. Treasurer & Receiver-General*, 390 Mass. 665, 669 (1983) ("The presumption exists that the Commonwealth will honor its obligations.").

108. The SJC's decision to create a deferential contractual standard in favor of the government also ran contrary to the City's own arguments at trial and on appeal. Indeed, the City had requested that the following instruction be given to the jury at trial:

> For the purpose of your deliberations, it makes no difference, and you should not consider, that the City of Boston (City) [the defendants] is [are] a large municipal entity. The City is entitled to rely on its legal rights to the same extent as any individual person. Just as an individual's means are totally irrelevant to your determination of his or her legal rights and obligations, so are those of the City [defendants]. *All persons, including the City of Boston [defendants], stand equal before the law and are to be dealt with as equals in a court of justice.*

City of Boston's Proposed Jury Instructions, SJC Record Appendix (vol. 4), at A659 (emphasis added) (Exhibit 39). Moreover, both the Supreme Court of the United States and the highest court of at least one other state have expressly rejected the deferential standard adopted by the SJC. The New Jersey Supreme Court, for example, previously rejected the SJC's formulation of the standard, holding instead directly to the contrary:

> We have in a variety of contexts insisted that governmental officials act solely in the public interest. *In dealing with the public, government must "turn square corners."* *This applies, for example, to government contracts.* Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. . . . Its primary obligation is to comport itself with compunction and integrity, and in doing so may have to forego the freedom of action that private citizens may employ in dealing with one another.

*F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313, 1317–18 (N.J. 1985) (citations omitted) (emphasis added). The Supreme Court of the United States also has held that the government should not benefit from a special deferential standard in contract matters but instead that "[a] Government contract should be interpreted as are contracts between individuals." *Hollerbach v. United States*, 233 U.S. 165 (1914). Further, in directly addressing the proposition that "men must turn square corners," the Supreme Court of the United States has stated:

> We have also recognized, however, that "'it is no less good morals *and good law that the Government should turn square corners in dealing with the people* than that the people should turn square corners in dealing with their government.'" *Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 61 n. 13 (1984) (*quoting St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting). *See also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387–388 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.")

*United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (emphasis added). *See also Downes v. Immigration and Naturalization Service*, 35 F.3d 1332, 1343 (9th Cir. 1994) ("The dissent's reference to turning 'square corners' in dealing with the government alludes to condemnation of sharp practice, but the only evasion of a solemn promise in this case was by the government itself.").

109. In sum, in ruling for the City, the SJC broke sharply with its own well-established precedent by (1) creating obligations never before required for parties to recover in contracts in

Massachusetts; (2) concluding, based on its own review of the facts, that LPA was not excused from performance even though established law had reserved this question for the jury; and (3) applying its new rules retroactively with special deference to the City for the sole reason that LPA sought to recover from a municipal government. The extent of the surprise in the SJC's holding is clearly demonstrated by the fact that the City, despite extensive briefing by skilled outside special counsel, never made any of the arguments relied on by the SJC. The City never cited a single case relied on by the SJC in its holding on lack of breach, for example, and never argued that LPA or Shapeco had not been ready, willing, and able to perform (no doubt because established law would have rendered such an argument frivolous). Nor was the City, as noted above, bold enough even to contend that it should be entitled to special deference in its contracting activities simply because it was a governmental entity.

## The SJC's Reasons to Let LPA's Appeal

110. LPA, in its appeal of the trial court's dismissal of its claims against the BRA, argued that the BRA was not entitled to sovereign immunity because (1) it had waived the defense by fully litigating the merits of the case and not raising a plea of immunity until after the close of all evidence at trial; (2) the BRA was an "independent body politic and corporate," rather than a "public employer," and thus explicitly excluded from the MTCA; and (3) even if the MTCA applied to the BRA generally, it did not immunize it from liability for intentional torts. On this third point, LPA argued that § 10(c) of the MTCA did not exempt public employers from liability for intentional torts, but merely made the MTCA inoperative in such situations. LPA argued that because the MTCA did not apply to claims arising out of intentional torts, the BRA was subject to the statutory regime applying before the adoption of the MTCA, which regime unequivocally subjected the BRA to civil liability for intentional torts

111. In response to LPA's first argument, the BRA responded that sovereign immunity under the MTCA was a matter of subject matter jurisdiction that could not be waived. As such, the BRA contended that it was entitled to rely on the defense of sovereign immunity even though it had defended the case fully on its merits and had raised its plea of immunity only after the close of all evidence at trial. LPA, in contrast, argued that, as in most U.S. states, the defense of sovereign immunity for municipal agencies is not considered jurisdictional and is therefore waived unless raised as an affirmative defense in the early pleadings in the case. Although LPA's argument comports with the practice of other U.S. states and with established principles of international law, the SJC nevertheless sided with the BRA and held that the BRA could rely on the defense despite not asserting it until after the close of all evidence at trial. *See Lafayette Place Associates*, 427 Mass. at 527–28 (Exhibit 15).

112. On LPA's second and third arguments in respect of the BRA's immunity, the SJC explicitly ruled as a matter of law that: (1) the BRA was a public employer within the meaning of the MTCA and hence included within the scope of the statute's protections, *see id.* at 528–33; and (2) the MTCA operated to immunize public employers like the BRA from civil liability for intentional torts, including specifically intentional interference with contractual relations, *see id.* at 533–35. The SJC therefore affirmed the trial court and held, as a matter of Massachusetts law, that the BRA was statutorily immune from liability for the intentional and wrongful actions the jury found that the BRA took to undermine and destroy LPA's contract rights in the Cooperation Agreement contract. *Id.* at 535.

113. Finally, in response to LPA's argument that the trial court had erred in its pre-trial dismissal of LPA's claims under Mass. Gen. L. c. 93A (which proscribes "unfair or deceptive acts or practices in the conduct of any trade or commerce"), the SJC held that LPA had no claim

under this statute because the City and the BRA were not engaged in trade or commerce in their dealings with LPA. *See id.* at 535–36. The SJC ruled that the City and the BRA, despite being in a contractual relationship with LPA to commercially develop a crucial part of the City's core central retail district, were not engaged in trade or commerce within the meaning of the statute because they were acting solely in pursuit of the legislatively mandated end of redeveloping a "blighted open and decadent" area of the City. *Id.* In so holding, the SJC impliedly conceded the commercial nature of the Lafayette Place project, but, contrary to international law, denied LPA's claim by focusing on the *purpose* of the project rather than on its *nature*. In addition, the SJC also ruled that the City and the BRA were free to violate all standards of commercial good faith and fair dealing in their transactions with LPA because *"[i]t is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends."* *Id.* at 535 (emphasis added). Such a rule clearly violates contemporary international standards for foreign investor-host government commercial relations.

LPA's Petition for Rehearing

114. The SJC rendered its decision on May 20, 1998. On June 10, 1998, LPA petitioned the SJC for a rehearing on the grounds that the decision departed from settled law on the standard of review for jury verdicts, rested on misapprehensions of both fact and law, undermined long-settled principles respecting the sanctity of jury verdicts in Massachusetts, and adversely affected the willingness of private parties in Massachusetts to conduct business with, and repose trust in, their government. *See* Petition for Rehearing Letter from Counsel for LPA to the Honorable Herbert P. Wilkins, Chief Justice of the SJC, at 1–6 (June 10, 1998) (Exhibit 16).

115. LPA further argued that the SJC decision violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution by effecting a taking of LPA's property

without compensation. *See id.* at 7. LPA contended that the SJC had improperly conducted its own review of the factual evidence, drawn inferences against, rather than in favor of, LPA, discounted and disregarded certain evidence in LPA's favor, and created new legal rules, which it retroactively applied to the facts it had improperly determined. *Id.* This unfair and unjust retroactive application of new common law rules caused an uncompensated transfer of all of LPA's valuable vested contract rights in the Hayward Parcel to the City, and thereby worked an unlawful taking of LPA's property in violation of LPA's constitutional rights.

116. LPA also drew the SJC's attention to its own settled decisions that require a governmental entity to be held answerable in contract actions "exactly as though it were a private individual." *See id.* at 9. Contrary to the SJC's ruling that "one must turn square corners when dealing with the Government" and that government entities may "engage in dishonest or unscrupulous behavior," prior case law made it clear that the courts of the Commonwealth of Massachusetts must apply general principles of contract law to government contracts and that private parties are justified in acting on the presumption that the Commonwealth will honor its obligations like any private party. *See id.* at 9-10.

117. Despite these arguments, the SJC summarily denied LPA's request for a rehearing on July 1, 1998. *See* Notice of Denial of Petition for Rehearing, *Lafayette Place Associates v. Boston Redevelopment Authority & City of Boston*, Case No. SJC-07596 (Mass. July 1, 1998) (Exhibit 17). Given that its decision on LPA's claims broke sharply with its own past precedents and unfairly worked to benefit the government of the largest, most influential city in Massachusetts, the SJC's actions can only be described as arbitrary and capricious, directly and purposely benefiting Massachusetts's own self-interest at the expense of a foreign investor which

now had little chance to recoup the many years and tens of millions of dollars it had invested in good faith reliance in a high risk, urban development project.

D. Petition to the Supreme Court of the United States for Writ of Certiorari

118. With no further recourse available in the Commonwealth of Massachusetts to redress the harm it had suffered by the actions of the City, the BRA, the trial court and the SJC, LPA petitioned the Supreme Court of the United States for a writ of certiorari on November 25, 1998. *See* Petition for Writ of Certiorari, *Lafayette Place Associates v. City of Boston*, Case No. 98-363 (U.S. Nov. 25, 1998) (Exhibit 40). In this petition, LPA set forth the facts and arguments recounted above and further argued in detail that the SJC decision constituted a taking of LPA's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States refused, however, to hear LPA's appeal, denying the petition on March 1, 1999. *See Lafayette Place Associates v. City of Boston*, 119 S. Ct. 1112 (1999) (Exhibit 18).

119. Immediately after the announcement of the Supreme Court's denial of LPA's petition for writ of certiorari, in a statement that fully demonstrates the ill-will and prejudicial discrimination to which Mondev has been subjected in Massachusetts, the City of Boston's counsel stated for publication that "*We're glad taxpayers won't have to pay about $20 million to a Canadian developer that's already made a lot of money.*" Greg Gatlin, *Last legal woe for Hub parcel*, BOSTON HERALD, Mar. 3, 1999, at 29 (emphasis added) (Exhibit 19).

## VI. NAFTA VIOLATIONS

120. As a result of the actions described above, Mondev, through its ownership and control of LPA, has been deprived improperly of (1) a $16 million jury award in both contract and

tort, which the jury rightfully and properly determined was due LPA as compensation for the City's and the BRA's improper action in denying LPA its contractual rights under the Tripartite Agreement, (2) all recourse other than the present arbitration for compensation for the damages and loss it has suffered; (3) the funds required to pay for the protracted prosecution of its claims in several fora over many years; and (4) interest on the foregoing. This damage and loss amounts to not less than $50,000,000.

121. The United States is liable to Mondev under Chapter 11 of NAFTA for this loss and damage. Section A of Chapter 11, including Articles 1102, 1105, and 1110, outlines substantive obligations of the NAFTA Parties in respect of private investors of the other NAFTA Parties, while Article 1116 provides that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." NAFTA, Art. 1116(1) (App. D). Mondev is entitled to bring this arbitration under Article 1116 because (1) Mondev, by virtue of being duly incorporated under the applicable laws of Canada and making investments in the United States, is an investor of a NAFTA Party[21]; (2) LPA, as a Massachusetts limited partnership whose general and limited partners are corporations wholly owned and controlled by Mondev, is an investment of Mondev in U.S. territory within the

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[21] NAFTA defines an investor of a NAFTA Party as, in relevant part, "a national or an enterprise of [a NAFTA] Party, that seeks to make, is making or has made an investment." NAFTA, Art. 1139 (App. D). An "enterprise" is defined as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." NAFTA, Art. 201(1) (App. D). An "enterprise of a Party" refers to "an enterprise constituted or organized under the law of a [NAFTA] Party." NAFTA, Art. 1139 (App. D). An investment includes an enterprise, ownership interests in an enterprise, and various property and contract rights. *See id.*

meaning of NAFTA Chapter 11, as are LPA's assets, interests, and rights[22]; (3) the United States and the Commonwealth of Massachusetts (for which the United States is responsible under Article 105 of NAFTA as well as under international law generally) breached their obligations under NAFTA in respect of Mondev and its U.S. investments, as further described below; and (4) Mondev has incurred loss and damage by reason of, or arising out of, these breaches.

A. Expropriation and Discrimination (Articles 1110 and 1102)

122. Article 1110 of Chapter 11 of NAFTA obliges the Parties to allow on their territory no expropriation of an investment, or any measure that is tantamount to an expropriation, unless it is for a public purpose, on a non-discriminatory basis, in accordance with due process of law and international law, and on payment of full compensation. Article 1102, in turn, requires NAFTA Parties to accord investors and investments of the other Parties treatment no less favorable than the treatment accorded their own investors and investments.

123. An expropriation, or a measure tantamount to an expropriation, occurs when government action interferes with an alien's use or enjoyment of property. As the Iran-United States Claims Tribunal has held, "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (June 22, 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984). The essence of an expropriation,

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[22] NAFTA defines an "investment of an investor" of a NAFTA Party as "an investment owned or controlled directly or indirectly by an investor of such Party." NAFTA, Art. 1139 (App. B). For the definition of investment, see *id.* For the partnership structure of LPA, see *supra* note 2 and App. B. Under the Massachusetts law of partnerships, LPA has full legal personality with the right to own and dispose of property. *See generally* Mass. Gen. L. c. 108A & 109.

according to Professor Ian Brownlie, "is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 534 (5th ed. 1998). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. g (1987) (expropriation refers to "actions of the government that have the effect of 'taking' the property, in whole or in large part, outright or in stages" and a State is responsible for any "action that is confiscatory, or that prevents, unreasonably interferes with or unduly delays, effective enjoyment of an alien's property").

124. It is also a settled principle of international law that a State is responsible for the acts of its judiciary. As the International Law Commission has formulated in its Draft Articles on State Responsibility:

> *Article 5*
>
> *Attribution to the State of the conduct of its organs*
>
> 1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

*State Responsibility: Draft articles provisionally adopted by the Drafting Committee on its second reading*, International Law Commission, 50th Sess., at 2, U.N. Doc. A/CN.4/L.569 (Aug. 4, 1998), *available at* <http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm#Draft Articles 2>. *See also* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); ALWYN V. FREEMAN, THE INTERNATIONAL

RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 25 (reprint 1970) (1938) ("The fundamental principles which underly [sic] international responsibility apply with equal force to the responsibility of the State for acts and omissions on the part of its judicial organs."); MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 7 (1937) ("The wrongful acts of the respondent state, which may be in the nature of positive acts or consist in the failure of the state to prevent the injury, . . . may be committed through . . . the judicial authorities.").

125. A State may be held responsible for a court judgment or decision that works to wrongfully deprive an alien of its property rights. In holding the Islamic Republic of Iran liable for an expropriation caused by a decision of the Islamic Court of Ahwaz, for example, the Iran-United States Claims Tribunal stated that "[i]t is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court." *Oil Fields of Texas, Inc. v. Islamic Republic of Iran*, Award No. 258-43-1 (Oct. 8, 1986), *reprinted in* 12 Iran-U.S. Cl. Trib. Rep. 308, 318 (1986). Similarly, the Franco-Italian Conciliation Commission, in a decision holding France responsible for the sequestration and liquidation by French courts of property of Italian nationals in Tunisia, stated that:

> A decision rendered by the judicial branch is an emanation of an organ of the State, just like a law promulgated by the legislative branch or a decision taken by the executive branch. The non-observance, by a court, of an international rule of law creates the international responsibility of the body of which the court is an organ, even if the court has applied municipal law that is in conformity with international law. *Either the French courts ordered the liquidations in conformity with French municipal law but in violation of the Treaty, and France is responsible for the legislative act violating its international obligations, or the French courts ordered the liquidations in*

> *violation of French municipal law and of the Treaty, and France is responsible for the judicial act violating its obligations.*[30]

*Difference Concerning the Interpretation of Article 79, Section 6, lit. C, of the Treaty of Peace (Fr. v. Italy)*, Decision No. 196, Franco-Italian Conciliation Commission (Dec. 7, 1955), *reprinted in* 13 R.I.A.A. 422, 438 (1964) (emphasis added) (citations omitted).

126. The types of investments that Article 1110 of NAFTA protects from expropriatory measures include the same kinds of property rights at issue in this arbitration. Article 1139 of NAFTA includes the following as part of its definition of "investment":

> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> . . . .
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution . . . ;
>
> (g) real estate or other property, tangible and intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

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[30] Translation by counsel. The original reads as follows:

> La sentence rendue par l'autorité judiciaire est une émanation d'un organe de l'Etat, tout comme la loi promulguée par l'autorité, ou la décision prise par l'autorité exécutive. La non-observance d'une règle internationale, de la part d'un tribunal, crée la responsabilité internationale de la collectivité dont le tribunal est un organe, même si le tribunal a appliqué un droit interne conforme au droit international. Ou bien, les tribunaux français ont ordonné les liquidations, conformément au droit interne français mais en violation du Traité, et la France est responsable de l'acte législatif portant atteinte à ses obligations internationales; ou bien, les tribunaux français ont ordonné les liquidations en violation du droit interne français et du Traité et la France est responsable de l'acte judiciaire portant atteinte à ses obligations [redacted].

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where [redacted] depends substantially on the production, revenues or profits of an enterprise.

NAFTA, Art. 1139 (App. D). An "enterprise" is defined as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." NAFTA, Art. 201(1) (App. D).

127. In the instant case, the SJC, through an unprincipled, arbitrary decision, expropriated LPA's rights under the Tripartite Agreement, including its right to receive $16 million in damages that a jury of Massachusetts citizens determined was the proper compensation for the City's and the BRA's improper conduct. The City's refusal to convey the Hayward Parcel, coupled with its overt attempts to coerce LPA into paying a higher purchase price than LPA was contractually obliged to make, was an arbitrary bad faith breach of the City's contractual obligations to LPA. When LPA tried to mitigate the effects of this bad faith breach by negotiating the sale of the Lafayette Place project to Campeau, the BRA intentionally interfered with the sales contract so as to keep LPA from realizing the benefit of its contractual rights under the Tripartite Agreement (to which the BRA itself was a party). This breach of contract and interference with contract then became a full-blown expropriation when the SJC, *after expressly holding that LPA and the City had concluded a valid and enforceable contract for the purchase and sale of the Hayward Parcel*, denied LPA any compensation for the City's and the BRA's wrongful actions, despite the jury's special verdicts establishing LPA's right, in accordance with Massachusetts law, to receive $16 million in compensation for the wrongful conduct. By replacing the jury's findings of fact with its own interpretations, creating new,

retroactive rules of contract law and applying them with heightened deference to the City and the BRA because they were governmental entities, and by finding the BRA statutorily immune from civil process seeking to hold it responsible for acts commercial in nature, the SJC took away LPA's rights in and to the Maynard Parcel and gave them back to the City, leaving LPA with empty hands. *See* Louis B. Sohn & Richard R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Explanatory Note, Article 12, ¶ 4, 55 AM. J. INT'L L. 545, 574 (1961) ("A State may deprive an alien of valuable rights . . . by taking measures to relieve its nationals from contractual obligations to aliens, by importing new terms and conditions into existing contracts, or by adopting new rules relating to the interpretation and performance of such instruments"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. i (1987) ("An alien enterprise that has been lawfully established is protected by international law against changes in the rules governing its operations that are discriminatory . . . or are so completely without basis as to be arbitrary in the international sense, *i.e.*, unfair").

128. This expropriation violated NAFTA provisions on all four bases listed in Article 1110. First, the expropriation was not for a legitimate public purpose since the only basis for the City's refusal to honor its Tripartite Agreement obligations was to extract a higher purchase price than it was entitled to receive. Under international law, such a motivation is arbitrary and capricious and implicates state responsibility. *See, e.g., Antigua R.R. & Power Co. Claim*, Decision No. 13-E, Am.-Mex. Cl. Rep. 538, 540 (1948)[24] (a government steps out of the role of a

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[24] American-Mexican Claims Commission under the Act of Congress Approved December 18, 1942: Report to the Secretary of State with Opinions Showing the Reasons for the Allowance or Disallowance of the Claims (Dept. of State Pub. No. 2859, Arbitration Series No. 9) (1948) [hereinafter Am.-Mex. Cl. Rep.]. *See also supra* note 25 and accompanying text.

contracting party when it seeks "to escape vital obligations under its contract by exercising its superior government power. Such action under international law has been held to be a confiscatory breach of contract and to constitute a denial of justice."); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 49 (1987) (an expropriation "like every other right of the State must be exercised by its competent organs in accordance with the requirements of good faith").

129. Second, the expropriation was not carried out on a non-discriminatory basis since, on all the facts set out above, it would not have occurred had Mondev been a national of the United States. The naked animosity displayed by the City against Mondev, articulated by City agents such as BRA Executive Director Coyle ("I don't want you to take all that profit and run back to Canada with it") and the City's counsel ("(Y)ou went back to Canada with money in your pocket" and "We're glad taxpayers won't have to pay about $20 million to a Canadian developer that's already made a lot of money") unequivocally shows that the City sought to escape its contractual obligations, at least in part, because it did not want a Canadian investor to reap the benefit of the contract. This was followed by court decisions that, by overturning and denying LPA $1¢ million in jury verdicts, upheld and condoned the City's discriminatory conduct, thus violating not only NAFTA Article 1110(1)(b) (no expropriation on a discriminatory basis) but also Article 1102 (requiring the Parties to accord national treatment to investors of the other Parties).

130. Third, the expropriation was not done in accordance with due process of law and international law, despite all of Mondev's attempts to ensure that it would be. In deciding to abandon its Tripartite Agreement commitments, the City acted without allowing LPA recourse to any proceeding or hearing, or even proper notice. Then after a jury explicitly found as a matter of

fact that LPA had fulfilled its contractual obligations while the City had not, the SJC—an appeals court that had not heard the facts or observed the witnesses—reversed the jury's verdict by substituting its own version and interpretation of the facts. Despite the City's and the BRA's unequivocal conduct and statements evidencing their intention to abandon their contract obligations under Section 6.02 of the Tripartite Agreement, the SJC concluded on its own review of the facts that LPA was not excused from performance even though the SJC's own established precedent had reserved this as a question for a jury. Further, the SJC created radically new rules of contract law never before articulated in Massachusetts and then applied them retroactively to LPA's claim, even though neither the City nor the BRA had urged any such rules in their appellate briefs and oral arguments to the SJC, which thus acted entirely *sua sponte*. And as if this were not enough, both the trial court and the SJC used the MTCA and Mass. Gen. L. c. 93A to shield the BRA with a sovereign immunity that they ruled could not be waived, thereby categorically excluding the application of due process in this or any other case and allowing the City, acting through the BRA, to expropriate anyone's investment in this and future cases without the expropriated person having any judicial recourse even for such extreme intentional misconduct.

131. Finally, and most importantly, the expropriation described herein was completed without any compensation to LPA. Despite the fact that a valid and enforceable purchase and sales contract for the Hayward Parcel was created automatically and immediately upon LPA's exercise of its Hayward Parcel Option—a fact that the SJC affirmed on appeal—the City wrongfully retained title to the Hayward Parcel and refused to convey it to LPA. The BRA, in turn, wrongfully prevented LPA from selling its contractual rights in the Hayward Parcel to a third party. LPA then won $16 million in jury verdicts in compensation for the City's and the BRA's wrongful actions, only to have this compensation taken away by the SJC's arbitrary, unjust

judgment. LPA and its Canadian owner, after years of faithful performance of the Tripartite Agreement and the investment of an enormous amount of capital in the Lafayette Place project, were left with nothing, while the SJC handed the City the right to reap the benefit of the Hayward Parcel's substantial increase in value, an increase that was due in large part to LPA's investment activities.

132. Moreover, regardless of the underlying reasons under Massachusetts law for the SJC's decision to deny LPA compensation, the decision directly violated Article 1110 of NAFTA because it denied LPA compensation despite expressly finding that LPA had vested contract rights in the Hayward Parcel under the Tripartite Agreement—rights that receive special protection from governmental action under the provisions of NAFTA. Even if the court's decision to deny LPA compensation somehow had been rendered in accordance with Massachusetts law, in other words, it still would violate an express treaty obligation of the United States. Further, the United States cannot escape responsibility for this treaty violation by arguing that the SJC has the right to determine the content of Massachusetts law because it has long been established that a State "*may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*" Vienna Convention on the Law of Treaties, May 23, 1969, Art. 27, 1155 U.N.T.S. 331 (emphasis added). The United States is therefore liable to Mondev for the actions of the SJC, for as the Franco-Italian Conciliation Commission has expressed it, "[t]he non-observance, by a court, of an international rule of law creates the international responsibility of the body of which the court is an organ, *even if the court has applied municipal law rules in its*

conformity with international law."[23] *Differences Concerning the Interpretation of Article 79, Section 6, lit. C, of the Treaty of Peace (Fr. v. Italy)*, Decision No. 196, Franco-Italian Conciliation Commission (Dec. 7, 1955), *reprinted in* 13 R.I.A.A. 422, 438 (1964) (emphasis added). *See also* Louis B. Sohn & Richard R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Article 8, 55 AM. J. INT'L L. 545, 574 (1961) ("A decision or judgment of a tribunal or an administrative authority rendered in a proceeding involving the determination of the civil rights or obligations of an alien . . . and either denying him recovery in whole or in part or granting recovery against him or imposing a penalty, whether civil or criminal, upon him is wrongful . . . *if it otherwise involves a violation by the State of a treaty*.") (emphasis added).

133. As a result of the above described breach of the United States' obligations to accord national treatment to Mondev and to allow on its territory no expropriation of Mondev's investment except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and international law, and upon full compensation, Mondev has suffered significant financial harm. The United States is therefore responsible under NAFTA Articles 1102 and 1110 to make good Mondev's loss.

### B. Failure to Accord Minimum Standard of Treatment (Article 1105)

134. Article 1105 of Chapter 11 of NAFTA obliges the Parties to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA, Art. 1105(1) (App. D). The City's and the BRA's breach of the Tripartite Agreement and the BRA's

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[23] Translation by counsel. For the original, see *supra* note 21.

international interference with the Campeau sales contract, followed by the conduct of the Massachusetts courts and the Supreme Court of the United States in allowing these wrongful actions to go unremedied, failed to satisfy the proper standard of treatment under international law to which Mondev, as a Canadian investor, was entitled under this provision.

1. Substantive Denial of Justice

131. Under established principles of international law, an unjust judicial judgment may amount to a substantive denial of justice for which the State must be held responsible. *See* ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 309 (reprint 1970) (1938) (denial of justice includes "gross defects in the substance of the judgment itself"); Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, Article 9, 23 AM. J. INT'L L. 131, 173 (Special Supp. 1929) ("A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists where there is . . . a manifestly unjust judgment.").

136. International tribunals have awarded compensation to claimants for arbitrary or unjust court decisions on numerous occasions. The American Mexican Claims Commission,[38] for example, held that in cases of "clear and notorious injustice" an international arbitral tribunal may "put aside a national decision presented before it" and "scrutinize its grounds of fact and law." *Roberts Claim (U.S.-Mex.)*, Decision 27-C, Am.-Mex. Cl. Rep. 254, 257 (1948) (quoting *Fabiani Claim (U.S. v. Mex.)*, Opinions of the Commissioners (1927)). Applying this principle to the case

[38] Established under Final Settlement of Certain Claims, Nov. 19, 1941, U.S.-Mex., 53 Stat. 1947, 9 Bevans 1099 (entered into force Apr. 2, 1942).

before it, the Commission reviewed a Mexican Supreme Court decision and found it "to be such a gross and wrongful error as to constitute a denial of justice." *Id.* In the *Jalapa R.R. & Power Co. Claim*, the Commission reviewed a Mexican Supreme Court decision that had allowed the State of Veracruz to escape liability for its breach of contract with a U.S. national. In reviewing the evidence in the case, the Commission found that the actions of the State of Veracruz "constituted an arbitrary and confiscatory breach of contract, and [the Supreme Court decision] approving such actions constituted a denial of justice which imposes responsibility upon the Mexican government." *Jalapa R.R. & Power Co. Claim*, Decision No. 13-E, Am.-Mex. Cl. Rep. 538, 543 (1948). Similarly, in *Brower v. Mexico* an international umpire awarded compensation to a claimant whose goods had been confiscated by Mexican customs authorities. *Brower v. Mexico (U.S. v. Mex.)* (Nov. 4, 1874), *reprinted in* 3 MOORE'S INT'L ARBITRATION 3134 (1898).[37] A Mexican court had concluded that the confiscation was permissible, but the umpire determined that this court decision was "so unfair as to amount to a denial of justice." *Id.* at 3134.

137 For its part, the United States has long recognized that arbitrary and unjust court judgments, whether at the state or federal level, are violations of international law for which a State must be held responsible. The U.S. Department of State, for example, has officially stated that:

> The United States is responsible under international law to provide aliens *fair and impartial justice* and access to the United States court system. In some cases treaties provide specific standards of access to the judicial process, but even without a treaty, an alien is entitled to certain internationally recognized minimum standards of justice. *Under international law, moreover, the Federal government is responsible for*

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[37] JOHN B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (reprint 1995) (1898).

> *any denial of justice by a State court, even though the Federal government has no direct authority over those tribunals.*

Letter from Powell A. Moore, Assistant Secretary for Congressional Relations, U.S. Department of State to Congressman Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary (Aug. 9, 1983), *reprinted in* Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 77 AM. J. INT'L L. 135, 135 (1983) (emphasis added). In another Department of State communication it was stated that:

> This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law.

Report of Mr. Bayard, U.S. Secretary of State, to the President of the United States (Feb. 26, 1887), *reprinted in* 6 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 667 (1906). *See also Separate Opinion and Study of James Oliver Murdock for Submission to the Inter-American Council of Jurists with the Majority's Report of the Inter-American Juridical Committee*, at 31 (Sept. 1961), *reprinted in* 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1967) ("The State becomes responsible when there is a pronounced degree of improper administration of justice by the courts [including] . . . [d]ecisions of the tribunal irreconcilable with the treaty obligations or the international duties of the State.").

138. The above described Massachusetts court decisions constitute a substantive denial of justice for which the United States must be held responsible to Mondev under Article 1105 of NAFTA. The unjust, arbitrary nature of these decisions is manifest in several places. In holding that the $6.4 million verdict in tort against the BRA for interference with the Campeau sales contract was subsumed within the verdict against the City for breach of its agreement to sell the

Hayward Parcel, the trial court blatantly ignored the jury's answers to the special verdict questions. In vacating the remaining $9.6 million verdict against the City, the SJC ignored established Massachusetts case law that reserved issues relating to the sufficiency of performance under a contract and the materiality of a breach to decision by a jury. The SJC failed to apply or even mention the appropriate standard of review, choosing instead simply to interpose its own interpretation of the facts—even though it had not observed the witnesses or heard the evidence—while it ignored or disregarded crucial pieces of evidence in the record that clearly supported LPA's claims. It also created new rules of contract law never before articulated or applied in the Commonwealth of Massachusetts, applied the new rules retroactively to LPA's claim, and, in direct violation of established SJC precedent, did so with a heightened standard of deference to the municipal defendants specifically because they were government entities.

139. The result of the unjust, arbitrary decisions of the trial court and the SJC was a complete denial of any compensation to LPA and a ratification both of the wrongful breach of the Tripartite Agreement by the City and the BRA and of the BRA's intentional interference with the Campeau sales contract. The decisions allowed the City and the BRA to escape liability for their misconduct and gave the City unencumbered title to the Hayward Parcel without providing any compensation to LPA. Such conduct is a clear denial of justice from which Mondev has suffered significant financial harm. The United States has breached its obligations under NAFTA Article 1105 to accord Mondev treatment in accordance with international law and therefore is liable for Mondev's damages.

2. Procedural Denial of Justice

140. In the same way that an unjust judgment constitutes a substantive denial of justice, a denial of access to courts, of procedural fairness, or of due process constitutes a procedural

denial of justice. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 71, cmt. a (1987). *See also* 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE 543–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("If the courts or other appropriate tribunals of a state refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice . . . there will be a 'denial of justice' for which the state is responsible."); Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 131, 173 (Special Supp. 1929) (denial of justice includes "denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, [and] failure to provide those guarantees which are generally considered indispensable to the proper administration of justice").

141. Many of the same facts described above in paragraph 130 concerning expropriation without due process of law also constitute a procedural denial of justice. After a jury explicitly found as a matter of fact that LPA had fulfilled its contractual obligations while the City had not, the SJC—an appeals court that had not heard the facts or observed the witnesses—reversed the jury's verdict by substituting its own version and interpretation of the facts. Rather than returning the case to a jury, as it was obligated to do under its own settled precedent, the SJC decided on its own review of the facts that LPA was not excused from performance of the Tripartite Agreement despite the City's and the BRA's unequivocal, antecedent breach of Section 6.02 of the Tripartite Agreement. The SJC also created radically new rules of contract law never before articulated in Massachusetts and applied them retroactively to LPA's claim, even though

neither the City nor the BRA had urged any such rules in their appellate briefs and oral arguments to the SJC, which thus acted entirely ex cathedra.

142. In addition, both the trial court and the SJC used the MTCA and Mass. Gen. L. c. 93A to shield the BRA with a sovereign immunity that they ruled could not be waived, thereby categorically excluding the application of due process in this or any other similar case and allowing the City, acting through the BRA, to expropriate anyone's investment in this and future cases without the expropriated *persons* having any judicial recourse even for intentional misconduct.

143. The decision by the trial court and the SJC to interpret the MTCA, or alternatively, that the Massachusetts legislature enacted this statute in the first place, to provide the BRA with a sovereign immunity defense that *cannot* be waived, even when the BRA is engaged in a commercial activity, is a procedural denial of justice because it completely denies claimants, such as LPA, any recourse for the BRA's intentional wrongdoing in a commercial manner. In the *present* case, a jury awarded LPA $6.4 million against the BRA for the BRA's intentional interference with the Campeau sales contract, which interference the BRA undertook as part of its effort to wrongfully force LPA to abandon LPA's vested Tripartite Agreement rights (an agreement to which the BRA was also a party). The trial court and the SJC then denied this recovery, not by exonerating the BRA's actions, but by holding that the MTCA precluded LPA's claim on sovereign immunity grounds. Contrary to international law, the MTCA does not provide an exception to sovereign immunity for intentional torts committed in a commercial context and, also contrary to international law, the courts held that the BRA had not waived the statute's protections despite submitting to the full litigation of the case on the merits without raising the defense of sovereign immunity until after the close of all evidence at trial.

144. The SJC also wrongfully denied LPA a remedy by interpreting Mass. Gen. L. c. 93A to exclude LPA's claim under this separate statute. Despite conceding that an entity engages in trade or commerce within the meaning of Chapter 93A "when it acts in a 'business context'" and that LPA's claim that it was wrongfully cheated out of the benefit of its contract with the BRA and the City was "the kind of claim that is often made under c. 93A," the SJC nevertheless held that the BRA and the City were not engaged in trade or commerce in their dealings with LPA. *See Lafayette Place Associates*, 427 Mass. at 535 (Exhibit 15). Focusing on the purpose rather than the nature of the BRA's and the City's activities, the SJC held that LPA had no claim under Chapter 93A because the BRA and the City were acting within the mandate of a statute for the redevelopment of a blighted urban area. According to the SJC, the BRA and the City were therefore protected from the consequences of their wrongdoing because "*[i]t is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends.*" *Id.* (emphasis added).

145. As a result of these rulings, the Commonwealth of Massachusetts has categorically denied LPA, and any other potential claimant, a judicial remedy for the BRA's intentional misconduct in this or any other similar investment context. This categorical denial of remedy is a procedural denial of justice for which the United States is responsible, not only because it helped effect an expropriation without compensation, but also because it contravenes the international law principles relating to sovereign immunity. Under international law, sovereign immunity is a procedural right that can be waived at any time. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 340 (5th ed. 1998) ("[N]o fundamental principle prohibits the exercise of jurisdiction, and [sovereign] immunity can be waived by the state concerned either expressly or by conduct. Waiver may occur, *inter alia*, . . . by actual submission to the proceedings in the local

court"). The United States has embraced this principle for purposes of its own domestic courts, stating in its Foreign Sovereign Immunities Act ("FSIA") that a foreign sovereign lacks immunity from jurisdiction if "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1) (1994).

146. In contravention of this waiver principle, the SJC interpreted the MTCA so as to preclude the possibility of waiver by the BRA. Yet the facts in the case unequivocally demonstrated that the BRA waived its sovereign immunity by submitting to the trial court, vigorously litigating the merits of the case from beginning to end, and then raising its sovereign immunity defense *only after the close of all evidence at trial*. By holding that the BRA could not waive its sovereign immunity defense by submitting to the trial but instead could assert it at the end of the proceedings, the trial court and the SJC violated international law and wrongfully denied LPA its due process right to prosecute its claim against the BRA.

147. In addition, the SJC decisions in respect of both LPA's Chapter 93A claim and its intentional interference with contract claim contravene the now well established international law principle that a sovereign waives its immunity when it engages in a commercial activity and that it is the *nature* of the activity, not its *purpose*, that determines whether an activity is commercial. *See, e.g.*, M. Somarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 31 Int'l & Comp. L.Q. 661, 663 (1982) ("The wide prevalence of State trading has brought about a change in outlook to sovereign immunity and it is generally accepted that a State which seeks to trade through public corporations should not be allowed to plead sovereign immunity and thereby avoid the commercial obligations it has undertaken. The restrictive theory of immunity, it can safely be concluded, has come to receive general acceptance within the international

community."); FSIA, 28 U.S.C. § 1603(d) (1994) ("A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."). The BRA and the City were undeniably engaged in commercial activity when they entered into a large-scale commercial real estate development agreement with LPA, and the evidence at trial established conclusively that their decisions to breach the Tripartite Agreement and interfere with the Empyrean sales contract were motivated solely by their desire to reap greater financial rewards from the transaction. The BRA's and the City's purpose in entering the Tripartite Agreement may have been to upgrade a decaying part of the City, but the nature of the agreement was a straightforward commercial real estate transaction. Thus, the SJC decision to afford the BRA and the City immunity against LPA's Chapter 93A claim, as well as to afford the BRA immunity against LPA's intentional interference with contract claim, was in violation of international law and constituted a denial of justice because (1) it allowed the BRA and the City to step out of their status as commercial contracting parties and escape liability for actions taken in bad faith against a foreign investor, and (2) it cut off all possible remedies against the BRA for the many wrongful actions it took against the investment of a foreign investor.

148. Mondev has suffered significant financial harm as a result of the above-described procedural denial of justice. The United States failed to accord Mondev treatment in accordance with international law and therefore is liable to Mondev under Article 1105 of NAFTA.

3. Denial of Fair and Equitable Treatment

149. Under Article 1105 of NAFTA, a Party may be held liable for any action that is not "fair and equitable" and that causes injury to a foreign investor. Cf. RESTATEMENT (THIRD) OF

THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712(3) (1987) ("A state is responsible under international law for injury resulting from . . . arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state."); *id.*, reporters n. 11 ("'Arbitrary' in Subsection (3) . . . refers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation under Comment g."). This standard of fairness and equity, drawn from several U.S. bilateral Investment Treaties ("BITs"), including the Model U.S. BIT, affords investors even greater protection than the denial of justice and expropriation principles described above. As one expert of the U.S. BIT program has explained, the fair and equitable treatment standard is an additional standard that provides "a baseline of protection" even where "other substantive provisions of international and national law provide no protection." KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 76 (1992). In explaining the phrase "fair and equitable treatment" in British BITs, F.A. Mann has explained that

> while it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary international law, unfair and inequitable treatment is a much wider conception which may readily include [State actions] as are not plainly illegal in the accepted sense of international law. In particular it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment. . . .
>
> . . . *The terms "fair and equitable treatment" envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed words.*

F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, [1981] 52 Brit. Y.B. Int'l L. 241, 243-44 (1982) (emphasis added).

150. For all the same reasons described above under the headings of expropriation and substantive and procedural denial of justice, the United States is responsible for its failure to

accord Mondev fair and equitable treatment. Indeed, even if the facts of this case did not constitute an expropriation or denial of justice under international law, they are sufficiently egregious to fall the much broader Article 1105 fair and equitable treatment standard. Under no conception of fairness and equity can the City and the BRA be allowed to profit from their bad faith breach of contract and tortious interference with contract, deliberately perpetrated simply to extract extra-contractual concessions from a Canadian investor which had undertaken substantial risk and a significant outlay of financial and capital resources in developing a decaying, blighted part of the City, and which had faithfully performed its contractual obligations over many years. Under no conception of fairness and equity can the SJC's arbitrary, unprecedented, unprincipled decision be allowed to strip Mondev of the $16 million verdict that a jury of Massachusetts citizens, after hearing the witnesses and weighing all the evidence, determined was the proper compensation for the damage and loss that Mondev had incurred.

## VII. RELIEF SOUGHT

151. Mondev hereby requests that the Arbitral Tribunal to be constituted in this case issue a final award:

1. Declaring that the United States has breached its obligations under Chapter 11 of NAFTA and is liable to Mondev therefor;
2. Awarding Mondev compensatory damages of not less than $50,000,000;
3. Awarding Mondev costs associated with these proceedings, including all professional fees and disbursements;
4. Awarding Mondev pre-award and *post*-award interest at a rate to be fixed; and
5. Awarding Mondev such further or other relief as the Tribunal may deem appropriate.

## VIII. CONSTITUTION OF THE TRIBUNAL

152. Pursuant to Article 1123 of NAFTA, the number of arbitrators to be appointed in this arbitration shall be three. Also pursuant to Article 1123 of NAFTA, Mondev hereby appoints

Professor James Crawford SC of the University of Cambridge as arbitrator in this arbitration. Professor Crawford's curriculum vitae is included herewith (App. J). He may be contacted at the following address:

James Crawford SC
Whewell Professor of International Law
University of Cambridge
Lauterpacht Research Centre for International Law
5 Cranmer Road
Cambridge CB3 9BL
UNITED KINGDOM

Tel.: 44 (0)1223 335 358
Fax: 44 (0)1223 300 406

## IX. APPOINTMENT OF COUNSEL

153. As authorized by the appropriately appended signatures below and Mondev's August 23, 1999 Unanimous Written Resolution of the Board of Directors (App. A), Mondev hereby appoints White & Case LLP and Hale and Dorr LLP as its counsel in this arbitration and authorizes such counsel to initiate and pursue the present proceedings on its behalf. All communications regarding this arbitration should be directed to Mondev's counsel at the following addresses:

Charles N. Brower, Esq.
Lee A. Steven, Esq.
White & Case LLP
601 Thirteenth Street, NW
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Tel.: (202) 626-3600
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Stephen H. Oleskey, Esq.
Lisa J. Pirozzolo, Esq.
Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109-1800

Tel.: (617) 526-6000
Fax: (617) 526-5000

## IX. AUTHORIZED SIGNATURES

154. As authorized by the appropriately appended signatures below and Monsey's August 23, 1999 Unanimous Written Resolution of the Board of Directors (App. A), this arbitration is brought by and on behalf of Monsey International Ltd.

J. Roche Kumpa
Chairman and President
Monsey International Ltd

Martin Surbis
Secretary-Treasurer
Monsey International Ltd

DATE OF ISSUE: September 1, 1999