

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES

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In the matter of Arbitration between:      :
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INTERNATIONAL THUNDERBIRD GAMING CORPORATION, :
:
    Claimant/Investor,                      :
:
    and                                       :
:
THE UNITED MEXICAN STATES,                  :
:
    Respondent/Party.                       :
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Volume IV

Thursday, April 30, 2004

The World Bank
1818 H Street, N.W.
The "MC" Building
Conference Room C1-108
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant

to

notice, at 1:30 p.m. before:

ALBERT JAN VAN DEN BERG, President of the
Tribunal

THOMAS WALDE, Arbitrator

AGUSTIN PORTAL-ARIOSA, Arbitrator

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P R O C E E D I N G S

1
2 PRESIDENT VAN DEN BERG: Mr. Crosby, your
3 side ready?
4 MR. CROSBY: Yes.
5 PRESIDENT VAN DEN BERG: Mr. Perezcano,
6 your side ready?
7 MR. PEREZCANO: Yes, sir, I'm ready.
8 PRESIDENT VAN DEN BERG: Then I open the
9 hearing for day four in the UNCITRAL arbitration
10 under NAFTA rules of Thunderbird versus Mexico.
11 Before we proceed with the closing
12 statements, there are still a number of outstanding
13 matters, as usual. I see, Mr. Crosby, you are
14 already looking in some despair.
15 Should we simply go over first the
16 positive news what you have?
17 MR. CROSBY: I think all we have
18 outstanding is the time line; right? And Hugo sent
19 it to me a couple of days ago, and I pulled it up
20 last night, and it was in Spanish, and frankly, I
21 couldn't do anything with it.

1 So, I don't mean any disrespect to the
2 Tribunal. I would suggest if Hugo and I can
3 exchange by E-mail over the next you couple of
4 days, and we'll put it together and give it to you.
5 And I mean no disrespect. It just hasn't come
6 together.
7 MR. PEREZCANO: I agree with Mr. Crosby.
8 PRESIDENT VAN DEN BERG: Then, a printout
9 of your corporate structure charts, Mr. Crosby?
10 MR. CROSBY: They're done. We will E-mail
11 them at the break and run one off on legal size
12 hard copy, too.
13 PRESIDENT VAN DEN BERG: Then we have one
14 other for the respondent is the \$300,000. There
15 was a question how it was recorded in the financial
16 documents.
17 MR. CROSBY: It is referenced in--it is
18 referenced in the audited financials for
19 International Thunderbird as a footnote in--it's in
20 the EDM audited financials, which are an exhibit,
21 and I will get them the exhibit number, but they're

1 reflected in the evidence before the Tribunal.

2 MR. ATALLAH: It's in the notes of the
3 financials, the standard-type notes.

4 PRESIDENT VAN DEN BERG: Then the
5 respondent, Mexican LEXIS/NEXIS search.

6 MR. PEREZCANO: Yes, Mr. Chairman, we do
7 have the decisions of the court. It's very
8 voluminous, if you will, and perhaps we could
9 actually transfer them to PDF format and perhaps we
10 would do that instead of giving more papers to the
11 Tribunal.

12 PRESIDENT VAN DEN BERG: If you could do
13 that, that would be perfect.

14 MR. PEREZCANO: We have not yet given a
15 copy to the claimant. If they want the paper copy,
16 the hard copy, we'll be glad to give it to them.
17 Or, if not, a PDF.

18 PRESIDENT VAN DEN BERG: I suggest you
19 give it in PDF format to the claimant.

20 MR. PEREZCANO: Yes, sir.

21 PRESIDENT VAN DEN BERG: And then the

1 other question were the pending appeals, the two
2 pending appeals. We have received more information
3 on it.

4 MR. PEREZCANO: As far as I understand, it
5 was just one. There were two references, or
6 Mr. Crosby made two references in connection to the
7 same appeal for revision, or review, rather, and
8 that document is not in the file. We do have it.
9 We can actually give it to you, but we, as
10 Mr. Crosby said, did not attach that document to
11 any of our pleadings.

12 PRESIDENT VAN DEN BERG: You do have
13 documents?

14 MR. PEREZCANO: Yes, yes, we do have it.

15 PRESIDENT VAN DEN BERG: I suggest we
16 present it to the parties just after the hearing,
17 and so that your side also, Mr. Crosby, can comment
18 on the documents in your posthearing brief.

19 MR. CROSBY: That's acceptable.

20 PRESIDENT VAN DEN BERG: I think it's not
21 something which you need to explore with the

1 witnesses. Either there is an appeal pending or
2 there is not an appeal pending. That's the
3 question.

4 MR. CROSBY: That's fine. And we don't
5 need to address it in our closing today.

6 MR. PEREZCANO: That's correct.

7 PRESIDENT VAN DEN BERG: Is there any
8 other matter of an administrative or procedural
9 nature that the parties would like to address prior
10 to the closing statements? Mr. Crosby?

11 MR. CROSBY: No, Mr. President.

12 MR. PEREZCANO: Not by the Government of
13 Mexico, sir, no.

14 PRESIDENT VAN DEN BERG: Mr. Crosby, you
15 may proceed with the closing statement.

16 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

17 MR. CROSBY: First of all, I would like
18 thank the Tribunal for hearing us, and for,
19 personally, the experience of this type of
20 proceeding. It was very interesting for me
21 professionally, so I appreciate it.

1 With deference to the Tribunal, I'm going
2 to proceed with what I call a more traditional
3 closing argument. I'm going to try to use sort of
4 the outline that we presented in opening and try to
5 mix in some of the additional facts that we found
6 in live testimony. We will be--we are already
7 working on it. We will present a detailed brief on
8 the point-by-point issues in our post-closing
9 memorial.

10 In our opening, I started off, at least on
11 the facts, talking about what I felt to be the
12 central elements of Thunderbird's claims on the
13 four theories, and we asserted or I'd asserted that
14 those claims are largely undisputed, and if
15 undisputed, they're uncontradicted by evidence.
16 And I made a point, and I tried to make the same
17 point in our briefs that we believe this is an
18 evidentiary hearing, and I think that that's
19 appropriate, and we need to look at the evidence
20 and whether they supports the evidence.

21 We've now had live testimony to further

1 flesh out the facts. At times that testimony has
2 been directly on point. At times it's been far
3 afield. At times it's been surprising, but the
4 critical factual elements of our claim remain in
5 place after full presentation of the evidence.

6 The August 3 solicitud. The issuance of
7 the August 15th opinion letter. The opening of the
8 three facilities, the efforts to open the other
9 facilities. The formation of the six EDM entities,
10 the initial closure of Nuevo Laredo, the reopening
11 of Nuevo Laredo after the agreement with the
12 government. The July 10 hearing, and this probably
13 deserves a little bit of comment. We had asserted
14 in our briefs that this was largely not in dispute
15 about what happened at that hearing, and I would
16 just note for the record that Ambassador Montano
17 testified about that, and Mr. Alcantara testified,
18 but was not directed--there was no direct testimony
19 on what happened at that hearing. And we would
20 believe that the weight of the evidence indicates
21 that there is very little real dispute about what

1 happened at that July 10 hearing.

2 And then back into it, the issuance of the
3 October 10 order, and the final three closures of
4 the facilities. We presented live testimony from
5 the principal parties involved on our side of the
6 case. They have been cross-examined very sharply
7 by Messrs. Perezcano, Becker, and Mowatt. There is
8 some inconsistencies, as there is always in live
9 testimony in any trial. But we believe that the
10 overwhelming support of the evidence supports the
11 principle and factual elements of our claim.

12 We believe again it's important to impress
13 upon the Tribunal the lack of witness statements
14 from Mexico's side, particularly from the
15 government officials involved in these events. No
16 witnesses from Antunano, from Orozco Aceves, from
17 Guadalupe Vargas, from Aguilar Coronado, from
18 Cabeza de Vaca, and from La Bastida.

19 Their response to that is that the
20 documents tell the story. In some respects we
21 agree with that, and I think in my closing here I'm

1 going to try to point particular areas out where
2 neither the witness statements on their side nor
3 the documents tell the story.

4 But, in any trial, the best evidence is
5 the best evidence, and we believe that we've
6 provided--attempted to provide live testimony of
7 all the critical elements of our claim.

8 1105 breach based upon detrimental
9 reliance. Again, very simple case. Previous
10 administration told us that our proposed business
11 activity would not be prohibited. We were given,
12 as the Chair has called it, a negative clearance to
13 proceed, and, and it set forth the standard under
14 which we could operate in the future.

15 Two things. We proceed with the
16 investment activities in reliance upon those
17 government assurances. The new administration
18 reneged and acted in contravention to the prior
19 government assurances. It seized our investments
20 in compliance--it seized our investments in
21 contradiction to the negative clearance we had

1 obtained and in contradiction to our performance in
2 direct compliance with the articulated standards.
3 And I would cite you to Ambassador Montano's
4 testimony on that point at transcript 149 line 21
5 through 151, line eight, where he speaks to the
6 change in policy and the double standard applied as
7 to us before and us afterwards.

8 Clear case of detrimental reliance, in our
9 view. Again, the facts: 1999 to 2000, we started
10 pursuing development of skill machine operations in
11 Mexico. The backdrop of that has been further
12 illuminated by the testimony of Mr. Alcantara.
13 There were still machine facilities open and
14 operating at that time with skill machines.
15 Mr. Alcantara testified to that at page 852, lines
16 15 through 17. He testified that the skill machine
17 phenomenon arose in 1998 and 1999, principally with
18 Guardia. There was some litigation in 1999, and
19 there was litigation in 2000. So, he supports the
20 assertion that the backdrop of our initial efforts
21 in Mexico was against the backdrop of operating

1 skill machines at the time.

2 Our original plan was to open without any
3 input from the government, and that was based upon
4 the advice of Ivy Ong, Aspe, and Arroyo. We
5 changed courses and considering the risks and
6 seeking certainly, we changed our course, and I
7 would refer the Tribunal to Jack Mitchell's
8 testimony at page 234, one, to 236, line four, and
9 I asked him the direct question: Why did you
10 decide to approach the government. He's the CEO of
11 Thunderbird, and he articulated it very well.

12 In July of 2000 we learned that
13 Gobernacion was willing to issue a formal letter
14 addressing the legality of our proposed skill
15 machine operations. We prepared through the
16 attorneys the August 3 solicitud. Now, there has
17 been a lot of testimony about what it said, what it
18 did not say, and what perhaps it should have said,
19 and I just point out to the Tribunal that that's a
20 rather convenient argument for respondent. If they
21 want to cast doubt on the knowledge and

1 understanding of the government, they can say,
2 well, why didn't it say this, why didn't it say
3 this, why didn't it say this. We could go on
4 forever. We would assert that the letter has to be
5 viewed as a whole, as a whole, and there is a
6 description of how the machines work in there, and
7 we just have to view it as a whole and not pick it
8 apart and say where is this, where is this, where
9 is this, where is that.

10 The purpose of the letter was clear: We
11 wanted certainty as to the propriety and legality
12 of the proposed business operations. We received
13 back the August 15th opinion letter, which provided
14 us with, again, the negative clearance we sought to
15 proceed, and that August 15th letter specifically
16 referred to video games of skill and ability, and
17 that they were not prohibited by Mexican law. And
18 it provided the standard upon which we set forth on
19 our further operations.

20 And I would note that--and that standard
21 is set forth in an English translation that has not

1 been contradicted in our statement of defense at
2 page 11, and we have gone through it.

3 But I do want to note to the Tribunal that
4 that standard set forth in that August 15th letter
5 is consistent with the standards articulated by
6 James Maida, by Lozano, by McDonald at the July 10
7 hearing. It's consistent with the witness
8 statements of McDonald, Carson, and Watson.

9 And it actually is consistent with the
10 witness statement of Nelson Rose, who states at
11 paragraph 12, "A skill game, in the international
12 gaming industry, is a game which is predominantly
13 skill, not merely a game with some player
14 interaction with the machine."

15 So, the standard that they provided to us
16 is consistent with numerous witness statements in
17 here and consistent with their experts' indication
18 of what the emerging standard was in the
19 international market.

20 We acted in reliance upon that letter. We
21 opened our skill-machine facilities. We operated

1 in compliance with the standards of the August 15th
2 letter. The new administration came in, a new
3 director of Juegos y Sorteros was appointed, and we
4 were shut down in contravention to what we were
5 told before.

6 Now, we have been asserting throughout
7 this case from day one that there is no evidence
8 that Thunderbird operated the EDM machines outside
9 the standard set forth in the August 15th letter.
10 We have been saying that since day one. Now, it's
11 our position that they should have provided us with
12 that evidence three years ago at the time they were
13 attempting to close us down, but we have indicated
14 even in these briefs they have never provided us
15 with that kind of evidence, and we still say that's
16 to the case.

17 I would also note that we made the
18 reference to the PGR report. Mr. Becker pointed
19 out in cross-examination a draft of that report,
20 took a poke at me, took a poke at my client. What
21 Mr. Becker didn't point out is that that draft was

1 contained in the bundle of documents identified as
2 Exhibit 69, which is the bundle of documents that
3 was provided to Guadalupe Vargas at the
4 administrative hearing, and I would refer you to
5 Atallah, his declaration at paragraph 50.

6 To the extent that those were comments on
7 the report, they were provided at the hearing along
8 with the report. They are in bundle 69. So, the
9 implication that we did not fully disclose our
10 operations or our machinery at the time of the
11 hearing is dispelled to the extent that they were
12 comments, and I think it's fairly good to draw that
13 conclusion. They were provided to the
14 administrator at the administrative hearing.

15 We held nothing back with respect to the
16 Netcomm report. Now, can you quibble, and there
17 has been argument raised as to the conclusions
18 drawn in that report, but there is no evidence that
19 my client either sought or did have any influence
20 on its ultimate conclusions.

21 So, we have been asserting that there is

1 no evidence of their operation in contravention to
2 the August 15th letter. So, enter Professor Rose.

3 We view Professor Rose's late appearance
4 in this case as, in essence, an acknowledgement
5 that Mexico has not previously provided any
6 evidence of noncompliance with the August 15th
7 letter. We view that as an effort to change the
8 topic from lack of jurisdiction or lack of
9 compliance for failure or lack of justification,
10 excuse me. We view it as an effort to change the
11 argument from lack of compliance with the
12 August 15th letter to an overall assertion that
13 skill games are gambling and inappropriate.

14 And I would refer you to again, and I
15 think we used this in opening, Mr. Rose's--the
16 summary of Mr. Rose's testimony in the statement of
17 rejoinder at paragraph 71. Mr. Rose says the
18 following: Nelson Rose, a recognized expert in
19 gambling law in the United States, testifies that
20 the machines of the nature described by Thunderbird
21 itself, especially those with skill-stop buttons,

1 have routinely been held to be gambling equipment
2 in the United States, and that he, in fact, is
3 unaware of any jurisdiction in which they have been
4 found not to be gambling machines.

5 So, you see what that is? In our view,
6 that is an effort to change the topic. The topic
7 that we presented, and we believe is the
8 appropriate topic, is compliance with the standard
9 set forth in the August 15th letter. They have no
10 evidence of that, so they bring Nelson Rose in at
11 the very end and have him opine irrespective of
12 that, the introduction of skill-stop features into
13 these machines doesn't make them legal, and I would
14 ask you to take a look at his prepared witness
15 statement, which is exactly what he says.

16 In his prepared witness statement, he
17 provided no opinion as to the specific operation of
18 the EDM machines, and--and to the effect their
19 operation relates to the standards set forth in the
20 August 15th letter. His statement even indicates
21 that he wasn't even aware of that letter because if

1 you look in the preamble of documents that he
2 relied upon, there is no indication that the
3 sollicitud nor the August 15th response are
4 provided. So, it's an effort to change the focus
5 away from what we believe to be a hole in their
6 evidence.

7 And I would note that the machines have
8 been in Mexico's possession for three years, and
9 they could have made them available to their expert
10 if they sought to do so, and he testified that they
11 discussed that topic, and that because of logistics
12 in scheduling, and I'm paraphrasing, that was
13 precluded.

14 So, then, Professor Rose appears here, and
15 actually he's a very interesting fellow, and I
16 liked his testimony, and it was very illuminating,
17 but he comes here, and he offers his what we view
18 his next new opinion, and he comes in here, and at
19 the start of his testimony says, the EDM machines
20 were predominantly chance. That's what he said at
21 the start of his testimony. But later, under

1 cross-examination, he conceded--he conceded upon
2 examination by Mr. van den Berg, from the
3 President, that you can't really tell unless you
4 play them, and I would cite the Tribunal to page
5 782, I believe line one through 783, line 16, and I
6 won't go through the whole thing, but the starting
7 question from Mr. President was, you said, when you
8 saw the machines I was really convinced that they
9 were slot machines. How did you know that? And
10 I'm paraphrasing. And he went through a couple of
11 paragraph explanation, and then he said, but unless
12 you played them, you don't know what they are. S,
13 it's his testimony, and he concedes he had never
14 seen our machines, he's never operated our
15 machines. He doesn't really know how they work
16 other than in the generic sense.

17 So, we view his testimony, though
18 interesting and illuminating on other issue, as
19 applied to this specific issue, our operation in
20 compliance with the August 15th letter, to be
21 largely lacking any factual basis or any

1 credibility. He said you got to play them to know
2 what they are, and he never played them.

3 So, in our view, to this day, Mexico has
4 yet to produce any evidence or maybe modifying
5 that, any credible evidence, that EDM operated its
6 machines in any way violative of the August 15th
7 letter.

8 And just let me make sure the
9 Tribunal--respectfully, let me make sure that the
10 Tribunal understands what I'm saying. It's really
11 not an issue for determination right now. It
12 should have been presented to us, if it existed,
13 three years ago. What we are trying to make--but
14 we are trying to make the point in argument that
15 they just don't have that evidence. First evidence
16 that you saw of that was when Professor Rose
17 appeared here yesterday, first time they ever
18 presented any evidence of that. We believe that we
19 should have been presented with that type of
20 evidence at the time that we were closed so that we
21 could address it.

1 Now, Mexico next argues that--let's talk
2 about the reliance issues, and this was a critical
3 issue of much questioning by the Tribunal. Mexico
4 argues that the officials of the previous
5 administration misunderstood or were misled by
6 Thunderbird as to the exact nature of the machines,
7 and this we had plenty testimony and plenty of
8 colloquy on what the particular words of the August
9 3 letter meant. Some of that was cleared up by
10 Mr. Alcantara's testimony yesterday about prizes
11 and prizes including dollars. So, come of that
12 inconsistency was cleared up there.

13 But it's important to understand, and in
14 our view, it's important to understand the
15 implications of the statement, this argument, if
16 you step back from the to and fro of the lawyers
17 and all the evidence.

18 These letters were issued or this letter
19 was issued by the highest authority in the Mexican
20 Government with authority over these activities.
21 Sometimes I think that Mexico speaks of this

1 position as if it's a fellow handing passports out
2 on a side street in Ontario or something like that.
3 They would have us to believe that the Government
4 of Mexico would issue this letter with its enormous
5 financial circumstances and significance without
6 any clear understanding of what it was doing. And
7 Mr. Alcantara said here that that letter was issued
8 with the full authority of the Mexican Government
9 under all applicable laws. He said that twice.
10 So, if you step back from it, it simply doesn't
11 make sense to me.

12 But they would also have us believe that
13 this government official, who has not provided any
14 testimony in this case, would undertake to define a
15 standard for the operation of these machines, a
16 standard that was not asked for. If he was just
17 responding to our sollicitud, he could have said,
18 you haven't described them enough, no, you can't do
19 it, or, yes, you can do T or no, you can't do it.
20 Go get a license. It could have been a one
21 sentence response in response to our sollicitud.

1 But he took it upon himself to do more.
2 He took it upon himself to articulate a standard in
3 which we could operate, and that standard is
4 consistent with all of these other witnesses and
5 the experts who have testified. It's consistent
6 with what Professor Rose says is the emerging
7 standards for skill machines in jurisdictions.

8 And I think the significance of that
9 refining of the standard, and I think maybe this is
10 a little too tactical, but I think that if you look
11 at the way Mr. Becker and Mr. Perezcano questioned
12 the witnesses on that letter, they never asked him
13 about that paragraph. It was left to the Tribunal
14 to ask about that paragraph and inquire into it.

15 And we believe that the statement and
16 further refining of that standard, irrespective of
17 the other implications in the case, is an
18 indication that the Mexican Government knew exactly
19 what it was doing, knew exactly how these machines
20 worked, and knew exactly what it intended to do.
21 If it didn't know how the machines worked, how

1 could it attempt to set forth these standards?

2 You know, and I just again go back to
3 another point, the manner in which the respondent
4 treats their own officials in this case is rather
5 interesting. I mean, Mr. Orozco Aceves, over whose
6 authority the August 15th letter was signed, is
7 treated as if he was somebody that didn't know what
8 he was doing. Guadalupe Vargas sitting in the same
9 position a year later--he's basically cast aside in
10 this room on their side of the case. They barely
11 talked about him and his conduct at the August 10th
12 hearing.

13 So--

14 PRESIDENT VAN DEN BERG: The 10 July
15 hearing?

16 MR. CROSBY: Yes, 10 July hearing, excuse
17 me.

18 The manner in which they implicitly
19 castigate these two government officials is rather
20 stark, considering that it's the Mexican Government
21 sitting across from us at the table.

1 So, we believe there is no direct evidence
2 that Mexico was misled or misunderstood. There is
3 no direct evidence that they sought information
4 from us, that we didn't give to them. There is no
5 evidence that they didn't fully understand what
6 they were doing.

7 And this is one of those areas where the
8 argument that Mexico makes, the documents are best.
9 They've made this numerous times, and I think
10 they're attempting to address the hole in the
11 witness statements. They say documents are best.
12 Contemporaneous documents are best.

13 There is absolutely not one document
14 provided by Mexico that addresses that issue, the
15 understanding of the government at the time they
16 issued the August 15th letter. They simply pick
17 apart the sollicitud and the response to that, and
18 attempt to infer and imply what these government
19 officials knew.

20 Now, again, as we presented in opening, we
21 believe that there is evidence in the record

1 to--and we believe this is Mexico's burden to come
2 in and establish their lack of understanding for
3 the letter that they issued with their authority
4 upon which we--they knew we would rely. We don't
5 believe we even have the burden to establish that.
6 If we have the burden to establish the knowledge of
7 a government upon who we rely to undertake business
8 activities, it's an impossible burden, especially
9 in these proceedings when we cannot compel
10 testimony from those officials. I can't bring them
11 in here and take their depositions and compel their
12 testimony.

13 So, we believe that burden is
14 appropriately on Mexico.

15 But, we would like to take a look at the
16 evidence. We think it's been further fleshed out
17 by the witness testimony.

18 First of all, the letter, Mr. Alcantara
19 was very clear about that. He said the letter was
20 issued with the full power of the Mexican
21 Government. He said these words: It was issued

1 with full authority under all applicable laws of
2 Mexico.

3 I think just as a matter of presumption
4 that you must assume that the matters stated in
5 that letter are made with the full authority and
6 understanding of the signatory to that letter.

7 Next, Gobernacion had been litigating with
8 Guardia over the issue of skill machines.
9 Alcantara fleshed that out a little bit. There had
10 been skill machine phenomena had arose in 1998.
11 1999, there had been litigation, so his testimony
12 confirms what we had been saying as to the
13 knowledge of Gobernacion and the director of Juegos
14 y Sorteros at the time that he issued the letter.

15 No request for additional information, and
16 this is juxtaposed against the amazing world
17 circumstance, and this is the solitud that Carlos
18 Gomez sent at about the same time. To be precise,
19 I think it was about two months later to the same
20 official requesting approval or a negative
21 clearance to run slot machines, and that was a less

1 detailed letter, and Gobernacion and Director of
2 Juegos y Sorteros came back and said you need to
3 provide more information. You need to provide make
4 and model numbers. You need to tell us how they
5 operate.

6 So, that juxtaposes the fact that they are
7 aware of the type of information they needed at the
8 time. They didn't ask us for any information.

9 Again, its statement refining the
10 standard, we believe that it denotes their
11 knowledge. We believe that Watson's consequent
12 discussions with La Bastida, something he fleshed
13 out in his direct testimony.

14 And then I think again, simply the
15 unfettered operation of our facilities for six or
16 seven months before action was taken, and I think
17 that is again placed in the context of Ambassador
18 Montano's testimony about what he believed to be
19 the double standard of conduct in the previous
20 administration and new administration. And we
21 think that that is fairly good evidence that was

1 that we were allowed to operate, open and obvious
2 in a very open manner for a period of time. We
3 believe until the administration change, we and the
4 prior administration were on the same page about it
5 exactly what we were doing in our machines.

6 Reliance, in fact. I don't think I need
7 to spend a whole lot of time about this. This is
8 the issue where they say we didn't, in fact, rely
9 upon the government. The evidence there, as we
10 stated in the letter, and this is really recapping
11 what I said in opening, that we stated it in the
12 letter. We had the witness statements, and again I
13 would refer you to Mr. Mitchell's quotation or
14 his direct testimony that we provided to you
15 earlier by page and line number.

16 But the argument that they have not
17 addressed, and frankly, in my view, they can
18 address, and that's the notion that once we
19 approach the government, reliance is established.

20 And they've made an argument that we were
21 opening. We don't believe the factual record says

1 that. We just don't say that. But let's assume
2 that we were open for a week. Let's assume that we
3 were open and operating for a week. If we went to
4 the government at that point in time, we still have
5 reliance in fact, because we have gone to them, we
6 disclosed our activities, we've cast our fate with
7 the government, we have to do with what they come
8 back with.

9 PRESIDENT VAN DEN BERG: One question at
10 this point, Mr. Crosby. Is it the claimant's
11 position at the time of making the request on 3
12 August 2000 and 15 August 2000 EDM was not
13 operating any of the facilities?

14 MR. CROSBY: EDM did not open up a
15 facility until August 15th, three days until after
16 the August 15th letter.

17 PRESIDENT VAN DEN BERG: But the letter
18 itself refers to the 3 August letter.

19 MR. CROSBY: It does.

20 PRESIDENT VAN DEN BERG: They were
21 operating or there is language about at least there

1 is activity going on.

2 MR. CROSBY: It does. And the August 3
3 letter says, and I don't know what the verbiage is
4 right now, but it says we are operating as opposed
5 to we intend to operate. It says what it says, but
6 the fact is we didn't open and operate until
7 August 15th, and that's the factual record. It's
8 set forth in the witness declarations. It's set
9 forth in the contemporaneous financial records.
10 And that's just the fact. I know the letter says
11 what it says, but that's just the fact that we
12 started on August 15th.

13 PRESIDENT VAN DEN BERG: But you said 18.

14 MR. CROSBY: August 18, excuse me.
15 August 18.

16 But back to the point I was trying to
17 make, let's assume for the purposes of argument we
18 opened on August 10th, and we opened a week before
19 the August 15th opinion letter. The fact that we
20 went to the government and asked for that letter
21 still establishes reliance because let's assume we

1 were open for two weeks. We didn't have a permit,
2 we didn't have the ability to operate legally. We
3 said, wait, we need to go to the government and
4 determine whether we are doing is appropriate.

5 At that point, again we've cast our fate
6 with the government. And however they respond is
7 going to dictate how we react at that point. If
8 they tell us our activity is prohibited, we are
9 going to have to stop. We are going to have to
10 stop. Our investors would not have allowed us to
11 operate in direct contravention to a government
12 directive.

13 So, that reliance, in fact, argument, I
14 believe, is just impossible to surmount. They
15 could say we relied upon our lawyers. They can say
16 we relied upon Aspe and Arroyo, and maybe it's a
17 fair argument that we relied upon them in our
18 initial forays into Mexico. I might even coincide
19 that point. But at the point that we turned to the
20 government and asked for their assistance and
21 approval, we cast our fate with them, and reliance

1 is established.

2 Now, reasonable reliance. We haven't
3 spent a while lot of time, and I'm trying to
4 take--again, this seems kind of sample, but it's
5 really a case of setting forth the elements of a
6 detrimental reliance case.

7 Reasonableness of the reliance. Our
8 position is relatively clear. I mean, you can look
9 at the witness statements in their whole and the
10 weight of the evidence as to why we did it, but the
11 simple fact is what could be more reasonable than
12 approaching the government and asking of them if we
13 can do what we want to do, and that seems very
14 simple and basic, but the reality is, what is more
15 reasonable than that.

16 PRESIDENT VAN DEN BERG: One second,
17 Mr. Crosby.

18 (Pause.)

19 PRESIDENT VAN DEN BERG: Please proceed.

20 MR. CROSBY: The point is what is more
21 reasonable than that? It would be hard-pressed to

1 call that unreasonable unless we were attempting to
2 mislead the government and cover it up with our
3 efforts to proceed on government assurances, and we
4 don't believe the evidence supports that.

5 Second theory. 1105 breach for lack of
6 procedural fairness and arbitrariness of result.

7 PRESIDENT VAN DEN BERG: Mr. Crosby, if we
8 may interrupt at this point only because you're
9 moving to the next theory, and Professor Walde had
10 a number of questions in relation to I think the
11 first theory, if I may call it that.

12 ARBITRATOR WALDE: Yes. You can only rely
13 on something that was discovered by the reliance
14 letter. If you get a letter which says this is
15 what we assure you, and then you--if they say this
16 behavior is something we can't accept and then you
17 do something else, that's not reliance.

18 MR. CROSBY: Professor Walde, I would
19 agree with you, and I think if there was evidence
20 to indicate--I mean, I would say it in my more
21 basic Southern California terms, that we pulled a

1 fast one on them. I don't believe that we would
2 deserve to be in this room. If that's what you're
3 getting at, I would take that point.

4 ARBITRATOR WALDE: So, if I look at the
5 first sollicitud, there is a lot of reference that
6 the moment chance is involved, then that's not the
7 types of machines you're using. In these games
8 where your client described the video games, this
9 says in these games chance and wagering or betting
10 is not involved.

11 Later it says the player can receive
12 points that he can trade for a prize as a reward
13 for the skills achieved, and I highlight, in no way
14 as a result of chance.

15 And then in the next paragraph, and the
16 opposite, the games of chance are described, and
17 always depends on chance, and is not subject to the
18 control of the user.

19 Now, you're right, as you say the letter
20 is kind of perhaps on a very fine analysis
21 contradictory, but don't you--what would you say to

1 that highlighting of what I've done, that you are
2 partly in that letter describing the games as
3 having nothing to do with chance? Now, what we
4 have seen and discussed or learned clearly much
5 more than was learned at that time is that these
6 games clearly do involve chance.

7 MR. CROSBY: I think your point is well
8 taken.

9 ARBITRATOR WALDE: First on the sollicitud
10 and then I will turn to the letter.

11 MR. CROSBY: I think your point's well
12 taken. I said a couple of times in this hearing
13 the letter says what it says, and I tried to make
14 the point earlier on, and maybe not very
15 articulately, that we believed that the letter has
16 to be viewed as a whole and in the context of the
17 knowledge of Gobernacion at the time.

18 And then you also need to take a look at
19 letter. We specifically describe how the machine
20 works, too, and how the description of how it's
21 played is directly consistent with the description

1 of skill machines that have been provided in this
2 testimony. I guess if I had drafted this letter or
3 maybe it wouldn't be as good, but maybe it would be
4 better. The letter says what it says, but I also
5 want to focus on the fact that there are two things
6 working here. It's not only one what we deem to be
7 a statement from Gobernacion that we can operate
8 these machines, and our understanding that they
9 knew exactly what we were talking about. That's
10 number one.

11 But the second issue is the response,
12 which is in the later portions of the August 15th
13 letter, which is a defining of the standard, and we
14 view it as both. We believe Mexico knew exactly
15 what we were talking about, and we don't have any
16 indication to the contrary.

17 So, in our view, the August 15th solicitud
18 allows us--

19 ARBITRATOR WALDE: August 3.

20 MR. CROSBY: I'm trying it into the
21 attempt, and I may be jumping it ahead, but I think

1 you need to jump it ahead because our reliance is
2 not only on the statement that you can proceed with
3 these video games as skill and ability. That is in
4 the negative clearance portion of the letter, but
5 we are also proceeding in compliance with the
6 standard articulated in the later portions of the
7 August 15th letter.

8 So, in reality, we believe that that
9 letter allowed us two circumstances under which to
10 proceed with our machines: Both, there is no
11 prohibition on what you want to do, as we
12 understand it to be; and two, if you proceed on,
13 this is the standard that you must proceed under,
14 and we believe that we've complied with those
15 standards in the operation of our machines.

16 Your point is taken that the August 3
17 letter is inartfully drafted, and somewhat--I'm not
18 going to use legalese here, it's somewhat
19 inconsistent in some of the statements it made. I
20 mean, I'd be fool to sit here and say that it's
21 not. It is. It's inartfully drafted.

1 ARBITRATOR WALDE: If I turn to the note
2 of the August 15th letter, which I see a
3 translation now in. The Mexican government here,
4 SEGOB, describes or recalls, paraphrases your
5 description, and it says, according to your
6 statement, the machines that your representative
7 operates, just to make sure, what you're saying is
8 they didn't operate it. They were just ready to
9 operate. That's what you have been saying before,
10 otherwise my issue, because I think that's how I
11 understand you.

12 MR. CROSBY: Oh, yeah. The facts
13 are--there is a statement in the--I don't even know
14 highway you pronounce the tense, but there is a
15 statement in the August 3 letter saying we are
16 opening. I don't know how to explain that because
17 we didn't open until August 18th, it's just a fact.
18 If I might proceed, with respect, the only factual
19 argument they've made in that point is to point to
20 that letter, and that there is that sentence in
21 that letter.

1 We haven't denied we are getting up and
2 running. We set that forth in our statement of
3 claim.

4 ARBITRATOR WALDE: So, what you're saying
5 is what they kind of said is somewhat confusingly
6 or perhaps confused. They write as if the
7 operations are already up and running, but you've
8 saying they were kind of being built up, but there
9 were not actually people--kind of the public wasn't
10 in these places with their money.

11 THE WITNESS: Not until the 18th.

12 ARBITRATOR WALDE: Good. Is it I could go
13 on and read it again, according to the statement,
14 the machines that your representative operates are
15 recreational video games for purposes of enjoyment
16 and entertainment of its users with the possibility
17 of obtaining a prize, and now I highlight, without
18 the intervention of luck or gambling, but rather
19 the user's ability of skillfulness.

20 Does this not suggest and I go to the next
21 one, the sentence afterwards, does this not suggest

1 that what the Mexican Government here assumed,
2 based on your previous letter that, these are
3 machines, exclusively machines of skill with no
4 intervention of luck? That's what they literally,
5 literally, they say you said to us, these machine
6 have no luck.

7 How do you deal with this?

8 THE WITNESS: I agree with you. They are
9 mimicking back to you the language set forth in the
10 August 3 solicitud, and again, the document says
11 what it says. I would be a fool to argue that it
12 doesn't say what it says. It says what it says.
13 But we were seeking this assurance from the
14 government in the context of an operating knowledge
15 of these machines. And I think Mr. Mitchell
16 elucidated that in his testimony, and I think that
17 as to that first part of it, in fact the direct
18 response to what we were asking, we would just ask
19 the Tribunal to take a look at the evidence and
20 view that in the context of the circumstances of
21 the time, and our understanding, our reasonable

1 expectation that Director of Juegos y Sorteros knew
2 exactly what we were attempting to do. We wanted
3 to run machines like Guardia's, but then we fall
4 under the second half of the letter, and it's the
5 second prong of our compliance with that August 15t
6 letter.

7 ARBITRATOR WALDE: So just to continue,
8 because I assume you will come up with the same
9 counter argument on this, basically then said what
10 you cannot--what you cannot operate later something
11 where there is or can you operate something where
12 there is no intervention of luck. And then they
13 say be warned, that if you operate with your
14 devices that operate under the concept, I read the
15 English here, we do have to look at the Spanish
16 again, that operate under the concept of ability
17 and skillfulness, which is something I have not a
18 clear view of what it means.

19 All this kind of suggests that not a
20 percent of chance, which is clearly not the case.

21 THE WITNESS: I think it's just the

1 converse of the point you made in the language
2 before.

3 ARBITRATOR WALDE: Yes, it is.

4 MR. CROSBY: My response would be the
5 same. It's the converse language.

6 ARBITRATOR WALDE: So then is the--

7 MR. CROSBY: If I might interrupt, if
8 that's all the language that there was in the
9 15th--if you assume the absence of no knowledge on
10 anybody, if you assume we were just a party coming
11 to the government and there had been no Guardia,
12 there had been no skill machines, we are the first
13 one to come to the government and ask for that,
14 they know nothing about these operations. They
15 know nothing about these machines. We send that
16 letter, we get the first half of the August 15th
17 opinion letter back. I think the points are
18 well-taken.

19 But I think have you to--that's why we
20 tried to set the contextual nature of all of this
21 in our statement of claim, and I think in some of

1 the direct testimony and our witness statements.

2 ARBITRATOR WALDE: One difference in that
3 famous letter is--

4 MR. CROSBY: The penultimate letter.

5 ARBITRATOR WALDE: The penultimate, yes,
6 is in which the principal factor is lack of
7 gambling and not the user's skillfulness.

8 How did your client see this? How did you
9 interpret this? Was it an interpretation of the
10 Mexican law by SEGOB? Does it not contradict with
11 this? Before they say no luck at all, now they say
12 principle. How does one explain that
13 contradiction?

14 MR. CROSBY: Well, I think that the
15 contradiction in the letter, with respect, is not a
16 contradiction. I think it's two things, and I've
17 tried to make this point, and maybe I'm not making
18 it very well, but in the first half of the letter I
19 think it's a direct response to our solicitud, and
20 I have asked the Tribunal to view that in the
21 context of what was going on at the time.

1 But I viewed the second half of the letter
2 as attempt by the authority to control, with the
3 authority to articulate a standard for the future
4 operations of our machines.

5 Now, whether that was intended for an
6 effort to articulate a standard for everybody, I
7 have no idea, and my client has no idea, but we
8 viewed that, and I think a fair reading and proper
9 reading, a fair and reasonable reading of that
10 document is an indication of the government that
11 this predominant factor or principal factor,
12 however you translate that, principal or
13 predominant factor test and the operation of the
14 machines is the--is the principle to be applied as
15 to whether they are legal or not.

16 And if you take--if I may make another
17 point in response, and it kind of plays into what
18 we feel is happening on the defense's side of this,
19 too, is that it's one sense, and you can pull out
20 the principle or predominant factor of that portion
21 of that sentence, but it also--that is a

1 description of the words token swallows, coin
2 swallows, and the other language that's in there.

3 And see, I think what's going on in
4 defense of this case is they take the word "coin
5 swallows," they take it out of the context of
6 that description and say, well, if it takes bills,
7 it's a coin swallower, it's illegal gambling. But
8 we view that letter as an articulation of what we
9 could or could not do in the operation of our
10 machines.

11 And you know, we could quibble, and I
12 could take your fair point on the other side of
13 that, that the August 3 letter is not, in some
14 respects, and I think on a whole, if you read it as
15 a whole, if you pull out language, but I can take
16 your point that the language could have been or
17 should have been better, and I could take your
18 point that on the first half of the August 15th
19 letter, they're responsive to what we said.

20 But I would argue and assert that that
21 second half of the letter is a standard, is an

1 articulation of how these machines are to be
2 defined and determined to be legal or legal or
3 illegal in our operation of our facilities.
4 Now, whatever that is it was our
5 reasonable expectation to rely on that
6 articulation. If it was a regulatory refining of a
7 new standard by the authority that possibly could
8 do that, I don't know, but it's the letter, and it
9 sets forth the standard, and we relied upon that.

10 ARBITRATOR WALDE: The last question is
11 why did SEGOB not examine the machines, or to put
12 it slightly differently, significantly differently,
13 why did you not bring the machines to SEGOB and say
14 these are the machines? Here they are physically.
15 Look at them properly. At least we had an
16 experiment demonstration.

17 MR. CROSBY: Well, I think that your
18 question respectfully presumes that they hadn't
19 seen the machines, and with all due respect, we
20 don't know that. For all I know, Mr. Antunano
21 could have had a Bestco machine sitting in an

1 office, and I don't say that facetiously. I say
2 that to make the point that we have no idea what
3 their knowledge was, looking at the record today,
4 and the fact that they did not ask us for a
5 demonstration, at least based upon the evidence
6 that we have here today, in my view, is indicative
7 of the fact that they knew exactly what they were
8 doing.

9 Again, we are not dealing with, and I
10 don't mean this derogatory to anybody, but a
11 passport shop on a side street of San Diego. This
12 is the highest authority in the Mexican Government
13 who is issuing us this assurance.

14 And, you know, you can pick apart the
15 letter and say why didn't you show them this, and
16 why didn't you show them this, we could do that all
17 day long, but I guess the simple factual answer to
18 that is there is no indication that it was ever
19 requested of us. And there is no indication that
20 they hadn't seen the machines.

21 ARBITRATOR WALDE: If I could ask you

1 something else. Let's get between the facts and
2 the law. You call this concept detrimental
3 reliance. I always use legitimate expectation. I
4 think they are--

5 MR. CROSBY: It's the same thing. I take
6 your point.

7 ARBITRATOR WALDE: But if you rely on
8 something legitimately, particularly in a sensitive
9 matter where you are, let me say, close at the
10 margins of the law, would you not think that an
11 expectation is only then fully legitimate if it is
12 based on a crystal clear commitment, which we are
13 here having a very courageous letter? We're here
14 between law and facts, a letter which you don't
15 have to kind of go around and say, well, these
16 words are not really that relevant because you have
17 to see the whole. Is it really kind of a good
18 commitment? It's like saying you ask a woman to
19 marry you and then she says, who knows, and
20 perhaps? Sorry, I'm not supposed to get on the
21 record with my marriage proposal.

1 MR. CROSBY: But I take your point, and I
2 think that maybe the best way to look at it is to
3 break it down a little bit. Let's assume that we
4 had never written the August 3 letter, and let's
5 assume that there was never a response to that.
6 But let's assume that on August 15th, for reasons
7 of its own, the Director of Juegos y Sorteros
8 issued a directive, you know, some government
9 indication that this is the new refined standard
10 for the operation of skill machines.

11 I would argue that we would be allowed to
12 rely upon that. And we reviewed the second half of
13 that letter as nothing more than that, or nothing
14 less than that with respect to our future
15 operations.

16 And again, I think your points about the
17 unclear nature of the letter both coming and going,
18 or going and coming are legitimate. But I think
19 that on the first half of that you look at the
20 context, and the second half of that, I don't think
21 that it is reasonable to state that they're not

1 telling us exactly how we are supposed to operate
2 in the future exactly.

3 Now, what they intended to do with that
4 second paragraph in the larger context, I have no
5 idea, and neither does my client, but that's what
6 they told us, and we acted in compliance with, we
7 believe, both paragraphs of that letter. But even
8 if you come to the conclusion the first half of
9 that letter, and the first half of the response
10 goes away, the second half of that letter is a very
11 clear directive of the notion of predominantly
12 skill, and we believe that we operated in
13 compliance with that, and I think that we showed
14 that in the evidence today.

15 I understand, I don't think the Tribunal
16 is in, with respect, is appropriately in the role
17 of determining that fact. I mean, we view that the
18 focus should be on Mexico's actions towards us.
19 But even if this Tribunal were to take it upon
20 itself and make that determination, I think the
21 factual record before you would allow you to make

1 that determination.

2 Anything further?

3 PRESIDENT VAN DEN BERG: Please proceed,
4 because you were at your second theory. Remember
5 where you were because you can be distracted.

6 MR. CROSBY: Frankly, I'd enjoy questions
7 rather than giving a speech.

8 Article 1105 breach for lack of procedural
9 fairness and contrariness of result, and the focus
10 here is on, Mr. Guadalupe Vargas, the July 10
11 hearing, the issuance of the administrative order,
12 sort of the period of time post the first closing
13 at Nuevo Laredo.

14 And again, as I stated earlier, we believe
15 that the overwhelming weight of the evidence is
16 that what we say happened at that hearing actually
17 happened at that hearing, and Mr. Aguilar Coronado
18 wasn't there, and that it was presided over,
19 however you use the word presided, the fellows
20 there on behalf of the Mexican Government were
21 Guadalupe Vargas and Mr. Alcantara.

1 And in our view, if you accept our factual
2 recitation and our facts of what happened, I just
3 don't think you could reasonably come to the
4 conclusion that that hearing was anything but
5 unfair, arbitrary, and predestined to come to a
6 result. That's our view.

7 Mexico's response to that, and I think
8 it's fair to say this, and the evidence is just we
9 want nothing to do with that hearing. Let's focus
10 on the order and what happened afterwards. And
11 again, this is my language, the order cleaned up
12 the Guadalupe Vargas mess. I think that that's
13 probably the simplest way to put their response to
14 this.

15 But I would--and Mr. Perezcano and
16 Mr. Becker have repeatedly said that the documents
17 say what they say, and I agree, and I would invite
18 the Tribunal to look at the full text of that order
19 and those administrative findings. We set it out
20 in detail. We set the whole order out, and the
21 entire administrative findings in an English

1 translation that's not been objected to in our
2 statement of claim. We don't run away from our
3 arguments on this theory because of what the order
4 says. And if you look at that order, first of all,
5 there is--the principal base if you look at that or
6 the principle after all the dealing with the
7 evidence and whether it's in or whether it's out,
8 we believe you can read it for yourself.

9 The principal basis for the signatory of
10 that letter, Mr. Aguilar Coronado, or that order
11 for determining that our machines were illegal
12 gambling machines was, number one, that they
13 accepted dollars, and number two, that there was no
14 skill involved in the operation, and that's exactly
15 what he said. He said these machines run entirely
16 on chance, entirely on chance. Dollar
17 acceptors--it uses dollar bills, and it runs
18 entirely on chance, and I'd make note that there is
19 no mention of this ticket dispensing transfer for
20 dollars issue in the October 10 administrative
21 finding and order. It had nothing to do with the

1 determination.

2 On the first point, Mr. Alcantara, who
3 answered this question four different times or
4 three different times yesterday, stated that
5 Gobernacion's position is that prizes include the
6 terms dollars. That's what he said. Tokens,
7 dollars, dollars, tokens, prize, dollars, they're
8 the same in Gobernacion's opinion and position.

9 And frankly, when he said that, I thought
10 it was a mistake the first time, but he was allowed
11 to rehabilitate twice, and he said it under oath
12 and we believe that that's actually probably fair
13 and truthful testimony, and that's Gobernacion's
14 position.

15 So, the basis of the administrative order
16 is finding our machines to be illegal based upon
17 the acceptance of dollars is contradictory to the
18 testimony in this Tribunal from Mr. Alcantara.

19 PRESIDENT VAN DEN BERG: May I ask a
20 question here, Mr. Crosby. If you go back to the 3
21 August letter, although I understand now that you

1 don't find it a very efficient letter, if I may use
2 that word, or at least in drafting.

3 MR. CROSBY: I don't--and I take your
4 point, too, but we've never run away from the exact
5 language of that letter. It was stated verbatim in
6 our statement of claim.

7 PRESIDENT VAN DEN BERG: Do you remember
8 also the question by the Tribunal concerned the
9 question of a premio and the dollars versus the
10 pesos that fall under it, but if you go one
11 paragraph further, and you probably have not the
12 Spanish version, but there they do very
13 specifically use the dinero, as opposed to premio,
14 and then in the context with the payout, and what
15 is represented in that letter is, if you look at
16 machines we are operating, are not machines that
17 have payout by dinero, if I read it correctly.

18 MR. CROSBY: I believe that that's a fair
19 reading of that. The evidence is they paid out
20 tickets for a period of time, and then they started
21 paying out in exchange for dollars like every other

1 skill machine operator in the country. And I think
2 we presented evidence to that effect through
3 Mr. Alcantara and through our witness statements.

4 But, if you take Mr. Alcantara at his
5 point, at his testimony here in this Tribunal,
6 that's not a relevant issue at all either in the
7 August 3 letter or in the August 10th
8 administrative findings and order, because if
9 that's their position, he stated that under oath,
10 it's interchangeable, and I would note that
11 Mr. Gomez stated the same thing, that American
12 currency is a commodity in Mexico, and that's the
13 reason why we elicited that testimony from him.

14 So, again, I do want to make the point,
15 and please don't take affront to this, that your
16 introductory comment to that question was that we
17 are backing away from this letter. We're not--

18 PRESIDENT VAN DEN BERG: I'm not saying
19 that. You're not backing away, but you described
20 it--well, I would have written it differently.

21 MR. CROSBY: I think everybody in this

1 room--

2 PRESIDENT VAN DEN BERG: I try to do honor
3 to yourself.

4 MR. CROSBY: I think--I appreciate that.
5 I think that every lawyer in this room probably
6 acknowledges that that letter should have been
7 written a little better and probably should. So
8 should the first half of the August 15th letter.
9 The reason we, in presenting our evidence in this
10 case, we didn't pick it apart. We set it forth in
11 total based upon our translation. So, in that
12 respect we are not running away from the letter,
13 and I appreciate your comments.

14 PRESIDENT VAN DEN BERG: In that
15 connection, you said well, you have to look--you
16 ask us to look into context, and you say, well, all
17 indications are were there, that the Gobernacion
18 knew what it was doing.

19 THE WITNESS: That's correct.

20 PRESIDENT VAN DEN BERG: And the
21 indication includes the Guardia machines operation.

1 MR. CROSBY: Yes.

2 PRESIDENT VAN DEN BERG: Where in the
3 records do I find that the machines operated by
4 Guardia were the same or substantially the same as
5 the machines referred to in the 3 August letter,
6 the Bestco and the SCI?

7 MR. CROSBY: I believe, and I don't have
8 the references for you, but I can provide them to
9 you, but I believe that Steve Sawin testified to
10 that. I believe that his wife testified to that.
11 As you recall, they were the individuals who went
12 down and did some investigation for us. I believe
13 that Mr. Mitchell testified to that in sort of the
14 historical context of his determinations. I
15 believe Mr. McDonald testified to that, but I may
16 be wrong. I could provide references to you, but I
17 think he said that as well.

18 And I might point out that Mexico doesn't
19 dispute that point either. They don't. They've
20 never disputed that point that the machines are
21 similar, if not substantially identical. In fact,

1 their whole national treatment argument is based
2 upon the presumption that they are the same, but
3 they're treated differently.

4 PRESIDENT VAN DEN BERG: The reference to
5 Bestco machines and SCI machines, specific
6 references, the Tribunal is to assume that the
7 Gobernacion knew exactly which machines were meant
8 by that?

9 MR. CROSBY: I think so.

10 PRESIDENT VAN DEN BERG: You think so, but
11 what is the--

12 MR. CROSBY: Our position is they knew and
13 I guess if the point that you are making is whether
14 they--

15 PRESIDENT VAN DEN BERG: I don't make the
16 point. I only ask the questions. I would like to
17 know to see if you make a contention, what's the
18 basis for it?

19 MR. CROSBY: It's our contention, and the
20 letter itself says the Bestco machines, and we
21 believe that they understood, we believe that Aspe

1 and Arroyo understood. We believe the government
2 understood.

3 Now, if the point is whether Guardia was
4 operating Bestco machines and therefore that would
5 give rise to the Director of Juegos y Sorteros to
6 understand exactly what that machine was, I don't
7 think that we are making that point, and I don't
8 think that we would make that point. The point we
9 are making is that these are, as a group, skill
10 machines, and if our position is if our claim is
11 taken to be that the Director of Juegos y Sorteros
12 knew the Bestco reference because it knew that
13 Guardia was running Bestco machines, that's not
14 what we are saying. It's a larger context in that
15 these are all skill machines operating the same or
16 a substantially similar fashion.

17 PRESIDENT VAN DEN BERG: Thank you.

18 MR. CROSBY: The second determining
19 factor, the second basis for the administrative
20 determination and order is that there was no skill
21 involved--no skill--no skill--all chance involved

1 in the operation of the machine. Every witness
2 that has testified here, even Nelson Rose says that
3 there is an element of skill in these machines,
4 every one of them. The issue is not whether there
5 is no skill. It's the sliding scale of
6 predominance or the principal factor of skill.

7 So, we believe that Aguilar Coronado made
8 his determination upon a fact that's not relevant
9 to the making of that determination, especially in
10 light of the standards set forth in the August 15th
11 letter. The way he dealt with the August 15th
12 letter is in converse. He looks at these things
13 and says you're using dollar bills, there is no
14 skill involved, they're slot machines, therefore
15 the August 15th letter doesn't apply. He didn't
16 say the August 15th letter sets forth this
17 standard, this predominance of skill standard. Now
18 we need to analyze the operation of the machines
19 against that standard. It says they're slot
20 machines. Therefore, using the conditional
21 language that Mr. Walde--and I hope I'm pronouncing

1 your last name right--used, they used that
2 conditional language to then say that the letter
3 doesn't apply, so it's kind of back end.

4 The other point to be made there is that
5 he is making a determination upon the operation of
6 the machine, and there is no evidence he ever saw a
7 machine. He wasn't in the room when the thing was
8 demonstrated. Aguilar Coronado signed this order
9 sometime later, and there is no evidence that he
10 was in the room. In fact, the evidence is
11 essentially uncontradicted that he wasn't in the
12 room.

13 And we assert that that whole
14 administrative process from Guadalupe Vargas'
15 treatment, his treatment of us at the hearing
16 through the execution of this order is just tainted
17 as destined to reach a predetermined conclusion.

18 Aguilar Coronado could not have made the
19 determination that he made because he didn't see a
20 demonstration of the machine, and he wasn't there,
21 and I know that they will argue that this wasn't

1 subterfuge, but we believe in the pleadings--we
2 believe in the pleadings they attempted to cover
3 that up with this whole presiding and not present
4 thing.

5 Fairly, maybe that is a language issue in
6 and a translation issue, and it's my not
7 understanding the way the administrative rules work
8 down there, but the fact is, is that Aguilar
9 Coronado is making determinations on something that
10 he could not have made determinations on because he
11 wasn't there, and at its basic, that is not fair.
12 That is arbitrary. And mixed in with Guadalupe
13 Vargas' treatment of us at the July 10 hearing, we
14 think it combines to be a breach of 1105.

15 You know, we view this on thing as sort of
16 an after-the-fact justification of a change in
17 government policy, is what it is. There is a
18 change in government policy, we operate for six or
19 seven months, and nobody cares. We have government
20 officials coming into play in the facility. We are
21 open and obvious. We're employing people. We are

1 paying people. We are paying taxes. We are paying
2 for permits, and we are on the main streets of
3 Matamoros, and nobody cares. In fact, they all
4 love us. We are employing hundreds of people.
5 There is a change of administration. Guadalupe
6 Vargas comes into office. Two weeks later we are
7 shut down, two weeks later, based on--

8 ARBITRATOR WALDE: Two weeks later after
9 which event?

10 MR. CROSBY: We believe, and the evidence
11 is little clear as to whether it's two weeks or
12 not, but we believe that the evidence, which is
13 uncontradicted by Mexico is that there was an
14 election in 2000, there was--

15 PRESIDENT VAN DEN BERG: I push now the
16 skill-stop button.

17 (Brief recess.)

18 PRESIDENT VAN DEN BERG: Mr. Crosby,
19 please proceed. You were in the middle of a
20 sentence. Perhaps you could repeat the last
21 sentence where you were.

1 MR. CROSBY: I think I was concluding a
2 sentence, but in the middle of responding to a
3 factual question. That was how soon after the
4 change or how soon after--what was the period of
5 time between Guardia going into office and the
6 shutdown of Nuevo Laredo. Guadalupe Vargas, excuse
7 me.

8 We believe it was a matter of weeks. I
9 said two because that's what we believe the
10 inference infers, and I don't have the declaration
11 references, but I believe that it can be found in
12 our statement of facts in the statement of claim,
13 that we were very detailed in the reference there.
14 As we understand the evidence to be, there was a
15 change of government in 2000. Don't know the
16 month. I think it was midyear. The Fox
17 administration came in at the turn of the year, and
18 we believe--

19 ARBITRATOR WALDE: End of 2000?

20 MR. CROSBY: End of 2000, they came into
21 power start of 2001, and Guadalupe Vargas came into

1 the position of Director of Juegos y Sorteros in
2 early February.

3 We believe and I think the evidence
4 indicates this, that he shut down Nuevo Laredo in a
5 matter of weeks, and that we were the first closure
6 of the new administration, and it was performed
7 personally by Mr. Guadalupe Vargas, and you
8 remember the colloquy or the questioning we had
9 about his position in doing so, whether he was
10 doing it in his director position or he was acting
11 as an inspector at the time. So, that's how we
12 understand the facts and what we believe the record
13 shows.

14 PRESIDENT VAN DEN BERG: And you say we
15 were the first, the other were closed around the
16 same time as well?

17 MR. CROSBY: No, we believe the evidence
18 shows that the next closure, in fact, the evidence
19 does show, and there is a series of closure orders
20 that are in the Mexico annexes. The first of them
21 is a letter indicating a graphic of the closure

1 dates, and then each closure order is after that.

2 Nuevo Laredo was closed in I think the
3 third week of February. Recalling the evidence, I
4 think the next closure was not until July of 2001,
5 and then there was a series of them in August, in
6 September, and then a glut of them sometime in
7 early, and then another glut of them in late 2003.
8 Speaking generally, but I believe that's what the
9 closure orders indicate.

10 MR. WEILER: Just to interrupt, R-9 is the
11 reference point for that.

12 MR. CROSBY: R-9, as I recall, is the
13 letter that sets forth in graphic form the dates of
14 the closures and then following R-9 the actual
15 closure orders themselves.

16 Moving into the national treatment
17 argument, and I'm going to turn this over to Todd
18 here very shortly because I seem to be the fact
19 person here, but we believe that we have a fairly
20 strong national treatment case, and I think it's
21 become stronger with the live testimony, and that

1 it was further supported by Alcantara's, and I
2 probably am mangling his name every time, testimony
3 yesterday.

4 And you know the analysis. We set it
5 forth as we understand it. The group of
6 comparators are the operating skill-machine
7 facilities. Guardia, through CPD, his entity, and
8 there's Club 21 in Mexico City and Ciudad Juarez.
9 The evidence is that they are both open and
10 operating.

11 As I understand the evidence now, is that
12 Club 21 is operating under an amparo, has been for
13 quite some time, and that there as of now, is no
14 evidence of an appeal pending.

15 Now, I accept Mr. Perezcano's
16 representation that there are records to that
17 either, but they're not in the evidence today.

18 Now, I would make this point, I was going
19 to make it later, but I would make this point now,
20 that if you look at the argument that they are
21 making with respect to like circumstances, like

1 circumstances is they concede the group of
2 comparators. They concede that the group of
3 comparators were all the same were in like
4 circumstances, were undertaking similar business
5 activity. They concede that there has been less
6 favorable treatment accorded to the EDM entities
7 because the obvious point, they're closed and we
8 are open.

9 But their issue is like circumstances, and
10 to the evidentiary point of that, their issue is
11 that they are in unlike circumstances because they
12 are operating under what I would call provisional
13 relief or injunctive relief, pending further
14 resolution of appeals or further court proceedings,
15 and I know I'm speaking in general language, but
16 the issue is they have provisional relief from a
17 court that allows them to stay open, even though
18 the issue of their illegality is still pending in
19 some other court proceeding.

20 If the evidentiary record is such that
21 there is no other court proceeding, there is no

1 appeal, there is nothing else going on, then that
2 argument falls apart, because then you're relying
3 upon them taking some action in the future to put
4 them back into the position to put that operator
5 back into the position of like circumstances.

6 So, it's not really a legal point. It's
7 an evidentiary point to bring them and keep them
8 within their like circumstances argument.

9 So, we would argue that, for example, for
10 Club 21, if they are unable, and they haven't to
11 date, as of right now the evidence right now on the
12 record is such that there is no appeal pending,
13 there is nothing going on with Guardia at Club 21.
14 There is no legal proceedings going on. He's
15 operating under an amparo. That destroys their
16 like circumstances argument because it's not the
17 notion of provisional relief subject to further
18 judicial determination. He's just operating
19 legally with an amparo, and nothing else is going
20 on.

21 And I would note something that

1 Mr. Alcantara said yesterday, and again, if this is
2 a translation issue, forgive me, but when you asked
3 him about Club 21, and then we went through that
4 whole series of questions about the appeal pending
5 and I was trying to make the point that there
6 wasn't an evidentiary record for that aspect of it,
7 but right before that, he was asked a general
8 question, I don't know if it was by Mr. Perezcano
9 or myself, what was going on there, and he said
10 that there was an amparo pending subject to further
11 negotiations of the issue.

12 Now, I would indicate that maybe there is
13 something going on other than an amparo and some
14 ongoing legal proceeding, and I think that maybe
15 that was frank testimony that there was an amparo,
16 and there is something else going on.

17 And so, that is just a factual, and
18 understand that I'm trying to make a factual
19 argument and an evidentiary argument as to the
20 operation of their defense, their justification,
21 their like circumstances defense, and whether there

1 is an evidentiary basis for that in the record.

2 And I would turn it over to Mr. Weiler.

3 PRESIDENT VAN DEN BERG: Mr. Walde has
4 some questions.

5 ARBITRATOR WALDE: My question relates to
6 the question of the procedural flows.

7 Now, which are the flows you consider
8 serious enough to be falling under, if we assume,
9 two processes as a subcomponent of fair and
10 equitable under 1105? Is it any of these, the fact
11 that the subordinate staffed it and the board
12 signed, which I should say I've seen often in
13 administration, but is it the fact of Guadalupe not
14 looking carefully at the documents?

15 MR. CROSBY: If I might interrupt you
16 there, and excuse me, and maybe I can restate the
17 point that I'm making with respect to these
18 subordinate signing the order. It is not that
19 somebody signed the order on his behalf. We see
20 that with magistrates in U.S. courts. We see that
21 with arbitrators. We see that in any number of

1 government activities.

2 The point I was trying to make is that
3 Mr. Aguilar Coronado could not have made the
4 determinations that he made in his order without
5 having been there because he didn't see the
6 demonstration of the machine, and there is no
7 indication he really saw the evidence.

8 Now, we don't know if he saw the evidence
9 or not. The order indicates that there was a
10 review of the evidence by the signatory of that
11 order, but I'm making a point about the
12 understanding of the operation of the machine.
13 It's not that somebody signed the order on his
14 behalf. It's that it's his order. He's the
15 issuing government official, and he could not have
16 made his determinations on the operation of the
17 machine because he wasn't there to see them, and if
18 somebody else made those determinations, he
19 shouldn't have been signing the order. That's the
20 point I'm trying to make. It's not a chain of
21 command issue. It's an

1 exercise-of-discretion-based-upon-what-he-saw
2 issue.

3 ARBITRATOR WALDE: What I'm trying to get
4 is precisely how you present the factual
5 circumstances of the procedural flows in terms of
6 their weight and intensity and sequence. Are you
7 saying each one is grave enough for NAFTA 1105 to
8 be triggered?

9 MR. CROSBY: I understand what you're
10 saying.

11 ARBITRATOR WALDE: In your factual
12 account, do you actually present here a consequence
13 of these or you present each one separately, and if
14 you present each one separately, could you actually
15 rank them in terms of as you see it factually the
16 relative weight and priority and seriousness?

17 MR. CROSBY: Well, let me make the
18 following comment, is that the--each of these
19 factual arguments for a breach of 1105 stands on
20 its own. For example, if we had--and this is going
21 back to the detrimental reliance issue, too. For

1 example, if the facts that we rely upon for
2 detrimental reliance are assumed to be true, okay,
3 let's just assume for the purposes of argument that
4 we relied upon the letter, it was reasonable, and
5 they reneged and all of that.

6 If the manner in which they changed their
7 position was done in a completely fair hearing,
8 completely fair in every sense of the word, under
9 any standard, international, U.S., any standard,
10 completely fair hearing, we believe we would still
11 have the basis to recover under 1105 for
12 detrimental reliance because it's based upon the
13 change of position, not how they did it, but it's
14 based upon government assurances and then sometime
15 later after we relied, a change of position to our
16 detriment, our financial detriment. They did
17 something that they told us they wouldn't do.

18 Now, conversely, we believe that, let's
19 say we had a license or we were
20 operating--everybody understood we were operating a
21 machine that was not prohibited by the gambling

1 law. We are operating, we are moving along, they
2 come in and they close us down, and then we go
3 through the hearing process and the order process,
4 as we've described it. Everything was wonderful up
5 to that point. Everybody was fine. And then we
6 went through this hearing process, and in our view,
7 it was as harsh and as arbitrary and as
8 predetermined as we indicated in our papers. That
9 alone would be, in our view, an 1105 breach,
10 irrespective of anything that happened before.

11 So, the point I'm making is that those are
12 separate and distinct theories of recovery. Even
13 separate and distinct from national treatment, too.
14 They stand alone. They can stand together, but
15 they can stand alone as theories of recovery.

16 Now, with respect to the administrative
17 portion of it, now as we've called it arbitrariness
18 and result, in essence in general terms, procedural
19 due process, I think that you need to look at it in
20 the context of a time period, that being from the
21 date of the closure to the date of the issuance of

1 the October 10 order and the closures, and I think
2 that what I tried to do, and maybe I presented it
3 in more too sequential and too period of time
4 oriented, but there is a whole process there where
5 we were shut down, we got our lawyers, we went in
6 and got amparos. We were successful. We were
7 pointing out the errors in the manner by which they
8 shut us down. The government comes back to us and
9 says, okay, dismiss your amparos. We will open up
10 the place. We're going to enter into a fair
11 dialogue, and that's how Mr.--Ambassador Montano
12 described it and Mr. Mitchell described it. We are
13 going to enter into a good faith, looking at this
14 issue about the operation of your skill machines.

15 So, we said fine, we don't have anything
16 to worry about. We are operating exactly like they
17 told us we could operate, so we proceed on. We
18 have dialogues with various government officials.
19 They tell us one thing, and this is all in
20 Mitchell's declaration and Peter Watson's
21 declaration and some in Mitchell's testimony,

1 Mr. Mitchell's testimony here. They tell us one
2 thing, and they do another. They say we are the
3 good guys, and then they send us packing. I'm
4 using my own language.

5 Then we come into the October hearing,
6 which in our view the evidence indicates it was
7 arbitrary and predetermined, and then we get an
8 order that indicates that the signatory of the
9 order could not have made the determinations that
10 are set forth in the order.

11 Now, if you want me to rank those, those
12 individual events, I can do it for you, but I think
13 you got to look at it in context.

14 ARBITRATOR WALDE: I misexpressed myself.
15 What I'm trying to find is are you trying to say in
16 your factual presentation there is one big flaw,
17 kind of a fist consisting of a number of limits,
18 minor flaws, the mother of all flaws, or are you
19 saying we are all into the mother of things now?
20 Are you saying we are five flaws each one so to say
21 big flaw and the relevant flaw for 1105?

1 MR. CROSBY: You know, from my
2 perspective, and I think Todd wants to speak to
3 this as well, but from my perspective under 1105,
4 my perspective, the hearing stands alone as a flaw,
5 but mixed together in the context of the whole
6 thing, it's a flawed procedure that led to an
7 arbitrary result. Maybe I'm not speaking to your
8 point.

9 ARBITRATOR WALDE: Yes, I think you are
10 now.

11 MR. WEILER: The only concept that I would
12 add is that we have proposed
13 essentially--Mr. Crosby has very well juxtaposed
14 the notion that a detrimental reliance case and
15 fairness/arbitrariness case can stand each on their
16 own independent of the other.

17 With regard to theories of arbitrariness
18 and due process, essentially what we are trying to
19 say is that those are two proposed methods of
20 analyses that both get you to the same place. You
21 can choose to embark upon a dissection of what you

1 see and rank it against an international standard
2 of customary law concerning one due process norms
3 must be and say well, this looks wrong, this
4 doesn't look so good, this looks wrong, this is
5 okay, this looks wrong, and on a whole say, well,
6 that's not good.

7 Or rather than dissecting on a procedural
8 fairness basis, you could more holistically look at
9 the result and say this result is arbitrary. It is
10 really inexplicable given our knowledge of the
11 circumstances of this case. So, you can really go
12 at it in two different ways, and no matter which
13 method of analysis you use, both of which are
14 justified under customary international law, I
15 think that we will end up in the same place, which
16 is there is a breach.

17 In a sense, both analyses gets you the
18 same place, which is a gut check of whether or not
19 something seems fair or doesn't seem fair in the
20 results or in the process.

21 ARBITRATOR WALDE: So, to make sure we

1 understand you, in terms of the factual
2 presentation of each flaw and their holistic view
3 altogether, so to say the mother of all flaws,
4 you're saying each one is looking at the facts
5 presented so intensive that it actually justifies
6 intervention of NAFTA?

7 MR. WEILER: Well, I think there is a
8 causation analysis that needs to take place. You
9 can look at any hearing, any hearing in any
10 context, local or international, and identify a
11 discrete flaw. Someone forgot to give someone a
12 chance to speak, and you can say that was not just
13 right. I think if you were to apply a proper
14 causation analysis, you would probably be able to
15 say, well, despite the fact that that took place,
16 we can't say that the whole process rises to the
17 level, if you will, of an international wrong.

18 So, I think that the effort, particularly
19 if you use the dissection approach, if you will, if
20 you use the procedural fairness dissection approach
21 you can't help but analyze these discrete factual

1 points and have to basically do a balancing test, a
2 weighing test and conclude at the end of the day
3 was there enough here to taint the process, rising
4 to some level which, as you know, as all scholars
5 would probably agree is indefinable in the abstract
6 concerning what constitutes a breach or a wrong in
7 any given case. The arbitrariness analysis is just
8 a different way of doing that.

9 PRESIDENT VAN DEN BERG: Mr. Portal has a
10 question.

11 ARBITRATOR PORTAL-ARIOSA: It was not
12 clear to me, and I would like to ask you to help me
13 to really understand it.

14 MR. CROSBY: Okay.

15 ARBITRATOR PORTAL-ARIOSA: When you're
16 talking about the comparators, you mentioned that
17 the theory would fall down, but then--would you--am
18 I correct in interpreting that the fact that others
19 were operating while you were close is the basis
20 for comparison, or am I understanding you
21 mistakenly?

1 MR. CROSBY: Further, I apologize if I
2 haven't explained it well. It's probably my fault,
3 but the analysis is a three-part analysis. You
4 identify the comparators, those that you compare
5 your business activities to. You identify the
6 treatment that is being accorded to those
7 comparators. And once we establish a group of like
8 comparators, the comparison is appropriate, and
9 that the treatment is less favorable to our client,
10 we've established our prima facie case for national
11 treatment. The burden shifts to Mexico to
12 establish, as Professor Weiler would say, a good
13 reason, good justification for the difference in
14 treatment, the less favorable treatment to the EDM
15 entities.

16 And we believe that the first two, our
17 burden on that is established, and they largely
18 don't dispute that. We are in the comparators of
19 our conduct or our business activity are Guardia,
20 CPD, these other skill machine operators, and they
21 don't dispute that we are undertaking the same

1 business activity. They don't dispute that we run
2 the slot machines.

3 So, the next element in the analysis is
4 whether there was different treatment being
5 accorded, and our analysis there is very simple.
6 They're open, we are closed. The treatment is
7 different because we are closed and we are here in
8 this room, and they're open and operating and
9 making money.

10 So in our view, the burden shifts to them,
11 and they need to satisfy--they need to provide a
12 justification for that difference in treatment.

13 ARBITRATOR PORTAL-ARIOSIA: A sub question.
14 So, it is right that the comparison is made on the
15 basis of matters of fact and not matters of law?

16 MR. CROSBY: That's our view, that it's a
17 factual determination. That's why we tried to late
18 lay out the facts of grouping the competitors and
19 the treatment that is being accorded to us as
20 compared to that group of competitors, it's fact
21 based.

1 ARBITRATOR PORTAL-ARIOSIA: Thank you.

2 You've clarified it.

3 But I do have, however, another question
4 which relates to two other actions of the Mexican
5 Government that has brought us here. In fact, in
6 your statement of complaint you do single out
7 specific actions that you've mentioned, the Cabeza
8 de Vaca actions, the hearings and so forth. I'm
9 thinking like five or six different--short
10 descriptions, very accurate.

11 What it is not clear to me if you consider
12 all of them together what causes a violation, or if
13 it's each one of them.

14 And I understand your different potential
15 approach. It's just that it is not clear to me if
16 you are arguing that each is a measure that is in
17 violation of the different Articles that you say or
18 if we are to--if your argument is that we should
19 look at all of them together.

20 MR. WEILER: It may just be a matter of
21 classifying the measure appropriately. Obviously

1 the claimant has the burden of establishing what
2 the nature of the measure is, what the nature of
3 the treatment is and how they are receiving it. My
4 friends obviously argue very much for a holistic
5 approach, though they wouldn't just stop at
6 discrete examples of what we would call unfairness.
7 They would say that's great, but you have to go
8 further. You have to look at the whole product of
9 the system as sort of a sausage-making approach
10 that includes the courts. You can't stop and just
11 look at the official without looking at the
12 remedies that were available to you to deal with
13 that official problem. That's their theory.

14 I think that if we go to the definition of
15 measure in the NAFTA text, that probably gives us
16 the necessary guidance that we need. It's a
17 procedure, a practice, a governmental decision.
18 So--in this case, I think that the decision was to
19 close us. That decision was made on more than one
20 occasion. You could either look at the one
21 occasion and say, they closed you, that was really

1 unfair and say that that's enough, or you could
2 look at it in terms of all three decisions that
3 ended up in the same results, string them all
4 together, look at them as a bundle and say, yes,
5 that was enough.

6 ARBITRATOR PORTAL-ARIOSA: Again, which is
7 your argument decisions for us?

8 MR. WEILER: I think both work.

9 ARBITRATOR PORTAL-ARIOSA: So, you're
10 suggesting that we could either look at each action
11 separately or all of them?

12 MR. WEILER: I think if we just had here
13 today the Vargas hearing, this is just a thesis,
14 thrown at the end of the room, and that was the end
15 of the day. We are under no obligation whatsoever
16 to contact any officials above him, make any
17 attempt to go further than that, go to court, what
18 have you, we were not under an obligation--that was
19 a measure, and the NAFTA says that once that
20 measure has been visited upon you, and you have
21 suffered damages as a result, if you can prove

1 that, you can a breach. You have enough.

2 The fact that we went further demonstrates
3 good faith on our part and nothing more.

4 ARBITRATOR PORTAL-ARIOSIA: Again, just to
5 be very clear, so, your position would be that we
6 can analyze each action separately to look for a
7 violation. If we group them and find even more
8 evidence, it doesn't matter?

9 MR. WEILER: From a businessman's
10 perspective obviously, at the end of the day they
11 want to know are they open or are they closed, and
12 really that's what the nature of NAFTA protection
13 is about. It's about whether or not that person
14 can or can't have the certainty of being in
15 business.

16 ARBITRATOR PORTAL-ARIOSIA: Difficult to
17 put words. The effects of the government breach?

18 MR. WEILER: Yes.

19 MR. CROSBY: Let me see if I can put it
20 in--I have been thinking now as he's been talking,
21 and I think that you can look at the bad sausage,

1 and you can look at the way the way the bad sausage
2 was made, and either would give rise to an Article
3 1105 treaty breach. Can you look at the result,
4 bad sausage or you can look the at way it was made,
5 either way.

6 ARBITRATOR PORTAL-ARIOSIA: Thank you.

7 ARBITRATOR WALDE: On the national
8 treatment, how important in terms of your factual
9 assessment is the fact that the different treatment
10 is based on the different luck of the parties in
11 court? If I look at--there are many cases you get
12 treated differently by government. I have a
13 factory in Puebla and another group has a factory
14 in Huixquilucan, and I get much better--the Mexican
15 gets much better police protection than--is it the
16 German car factory in Puebla I think? Is it in
17 terms of the intensity of differentiation, is it
18 enough? Or perhaps the Tribunal in Huixquilucan
19 manages to deal with the police chief in a more
20 friendly way, perhaps in Huixquilucan they have more
21 police people. How do you distinguish between

1 discrimination from when it is, if I may say so, a
2 lack of life?

3 MR. WEILER: I would say two things. The
4 first is that I always advise my moot court
5 students to answer the question when it's asked
6 rather than going back to one's prepared text, and
7 I'm going to therefore answer your question even
8 though I would like get to my prepared text and
9 hopefully give you a more fulsome answer by doing
10 so.

11 But the second thing I'll say is it all
12 depends on how you define the measure. If your
13 factory owners are complaining about one had one
14 court decision that went one way and one had one
15 court decision that went the other way, well, then
16 the measure is the court decision, and if the
17 measure is a court decision, then I think there is
18 fairly decent authority that would suggest that you
19 should probably wait for the outcome of that court
20 proceeding; i.e., appeal that court decision until
21 you get to a final result, and then we'll see at

1 the end of the day if the sausage-making system
2 which is the court system, gives you a differential
3 result or not. But we are not talking about the
4 court decision here today or the challenge to any
5 court decision. We are talking about measures
6 which are not related to the Mexican court system.
7 We are talking about a closure which took place at
8 the administrative level.

9 But with your permission, Professor Walde,
10 I will see if I can al provide a more fulsome
11 answer through my national treatment text.

12 PRESIDENT VAN DEN BERG: Before that, may
13 I ask you a question, Mr. Weiler.

14 MR. WEILER: No.

15 PRESIDENT VAN DEN BERG: Then I shut up.
16 Because I'm still puzzled about--I'm unclear about
17 what you understand the measure that's actionable
18 in the NAFTA, more particularly Chapter 11.

19 Is it your position that any measure that
20 may cause whatever damage to an investor, who
21 qualifies as an investor in the NAFTA is actionable

1 under NAFTA?

2 MR. WEILER: Yes. Article 1101, if I may,
3 states this chapter applies to measures adopted or
4 maintained by a party relating to investors of
5 another party, investments of investors of another
6 party in the territory of the party and with
7 respect to Articles 1106 and 1114, all investments
8 in the territory of the party.

9 And then Article 201 says that a measure
10 includes any law, regulation, procedure,
11 requirement, or practice.

12 PRESIDENT VAN DEN BERG: It's always
13 interesting to see where are there limits, if any.
14 Because what you're stating here is, at least what
15 I understood to you argue, is there are no limits,
16 provided you are a investor and you qualify.

17 MR. WEILER: Well, I think one of the
18 limits would be that if the loss that I suffered
19 was about \$10, I most likely am not going to strike
20 a NAFTA Tribunal to deal with that \$10 loss.

21 PRESIDENT VAN DEN BERG: Why not?

1 MR. WEILER: Well, because of the costs
2 award that would come against me would probably
3 preclude the wealth that I would gain from that \$10
4 award I would receive.

5 PRESIDENT VAN DEN BERG: But that's a more
6 practical aspect. But essentially if you had a
7 loss of \$10, and you are an investor, qualify and
8 it falls under one of the Articles in Chapter 8, it
9 would be actionable, whatever it would be even if
10 it would de minimis measure and impact.

11 MR. WEILER: I think that if the NAFTA
12 tribunals were fully funded and the practicality
13 were erased, I think the tribunals would most
14 likely find it prudent to develop a de minimis role
15 concerning government action and concerning the
16 loss in damages involved.

17 That is unnecessary to do simply because
18 the practical realities of a NAFTA arbitration
19 preclude the need for that, but I'm not suggesting
20 that the need for limits might not appear someday.
21 They don't appear in this case by any means. We

1 are talking about real serious problem of an
2 investor with a real serious investment.

3 PRESIDENT VAN DEN BERG: Assuming I was
4 part of an American law firm and I set up an
5 establishment in Mexico Ciudad. That would be an
6 investment, isn't it?

7 MR. WEILER: You're a member of a North
8 American law firm?

9 PRESIDENT VAN DEN BERG: Yes. Assuming I
10 would be setting up as the American law firm would
11 set up there a--

12 MR. WEILER: So, the law firm is
13 organized, okay. So it's an enterprise, and what
14 did you do in Mexico?

15 PRESIDENT VAN DEN BERG: Set up a branch
16 office.

17 MR. WEILER: Okay. Assuming that you
18 didn't have any problems under Chapter 12
19 concerning cross border delivery of services, I
20 would assume that you would have an investment that
21 would qualify for protection under chapter 11.

1 PRESIDENT VAN DEN BERG: I'll make it
2 easier. I'm a shoe manufacturer. I'll suggest a
3 classical one. Otherwise we get nails in Chapter
4 14 for other reasons. I set up my shoe
5 manufacturing in Chihuahua, and on Monday I park my
6 truck wrongly, at least that's what the local
7 police thinks. Absolutely not wrong because there
8 is no sign whatsoever that you may not park your
9 truck there. I get a parking ticket of 80 pesos.
10 And then I could go to the local courts, to the
11 police or to the court, local courts, criminal
12 courts, argue my case because I got a parking
13 ticket where it was not justified to have a parking
14 ticket.

15 Now, is it your case that I have a choice
16 instead of going to the local court to argue my
17 case, that I have wrongly gotten here a parking
18 ticket because there was no sign that prohibited me
19 to park, but instead I can go before a NAFTA
20 Tribunal?

21 MR. WEILER: It depends on the breach. If

1 the breach alleged is not based on the nature of
2 your facts necessarily, but if the breach alleged
3 was Article 1110, probably, yes. Article 1106,
4 probably, yes. 1102, probably, yes. Article 1105?
5 No. I guess what colloquially could be called the
6 "something more" test, which was alluded to in the
7 Mondev Tribunal and alluded to in the Loewen
8 Tribunal.

9 The notion that you simply have a breach
10 of local law, there is a number of places,
11 Barcelona Traction you could go for that. The
12 notion that you simply have a breach of local law
13 does not mean, or if you will from the Canadian
14 perspective, if you have a ultra vires action of a
15 regulator does not mean that you have an
16 international wrong. You need something more.

17 Now, that doesn't mean that, as the Mondev
18 and the Loewen Tribunals pointed out, that does not
19 mean that you need bad faith, malice. You don't
20 need to go that far, but you need that elusive
21 something more.

1 PRESIDENT VAN DEN BERG: Would you define
2 something more.

3 MR. WEILER: Unfortunately--in this case I
4 could define something more. In the abstract it
5 would be more difficult.

6 PRESIDENT VAN DEN BERG: Why? Something
7 is more is when I see it?

8 MR. WEILER: Something more is when I
9 see it.

10 ARBITRATOR WALDE: Something shocking?

11 MR. WEILER: The original test going back
12 to the--well, it depends. One chamber of the
13 Mexican Claims Commission 80 years ago talked about
14 something that shocks the senses, that every
15 reasonable and honest man or something like that
16 would be shocked and appalled or whatever it was.

17 Other tribunals--once again, the Mondev
18 Tribunal looks at this, and plays with it, and so
19 does ADF. Even the Propentavo Tribunal looks at
20 this. At the end of the day, we know that we're
21 talking about something that would at least appear

1 somewhat shocking, something that sticks in one's
2 craw, if you want to use a legal expression, the
3 kind of thing where you hear that a local official
4 comes into power and two weeks later he closes down
5 just the foreigner. When he gets a chance to hear
6 something, he just throws the book to the side and
7 says this is just a thesis, and he seems to ignore
8 you for the rest of the hearing, and the next thing
9 you know, you are closed, even though everyone
10 tells you, don't worry, he's not in charge, you
11 will get a fair hearing, and that never comes.
12 Something like that. Something that shocks you.
13 Something that seems really unfair.

14 PRESIDENT VAN DEN BERG: And then, because
15 I know this whole discussion about exhaustion of
16 local remedies rule, but even if you have in those
17 circumstances and even assuming that you appear
18 before an official who had a bad day, God knows if
19 you go to psychoanalysis of the law, you know,
20 people can come to a judgment, but you have a bad
21 day or bad night before, which is usually the

1 analogy.

2 Is that already sufficient reason to look,
3 too bad, we had--an official was a bad day, and it
4 is shocking what he did, now we can immediately go
5 before NAFTA, or should you not go, wait a moment,
6 it could happen everywhere, somewhere it goes
7 wrong, and that you would then say, well, look,
8 first go and have a look whether you have a
9 redress, and then if it still remains shocking or
10 something more of what you say, then we still have
11 recourse to NAFTA. Because if you are arguing that
12 somebody is having a bad day, now I could tell you
13 in many countries, judging the first instance in
14 particular from time to time have bad days, and if
15 that would give rise each time to the possibility
16 that you can go before international tribunal, then
17 you get the discussion about the floodgates
18 argument.

19 MR. WEILER: Of course, one has to define
20 the measure properly. In this case, I think it's
21 pretty clear that Guadalupe Vargas gave us a bad

1 year and probably had a bad year, if not a couple
2 of them opposed to just a bad day, but one would
3 define the measure.

4 For example, I once served as a Customs
5 appeal, a tariff classification appeal officer, and
6 I made decisions on behalf of the Deputy Minister,
7 and it was the tariff classification of equipment
8 such as this translation device. Someone below me
9 might have gotten it wrong. Well, there is an
10 appeal mechanism in the Customs Act that gives you
11 basically two rungs of appeal. I think it's one
12 now, but it used to be two rungs of appeal. I
13 don't think one would take an 1105 case even if
14 involved a lot of money because classification of
15 tariff goods could involve a lot of money if the
16 measure in question had a sort of discrete sort of
17 package involved, where you have--you have an
18 official that makes one decision, but a timely
19 appeal of 30 days that one can make with the result
20 that you know you're guaranteed in about a month
21 after that.

1 So, if we had that kind of hypothetical
2 measure, I think one could argue even I wouldn't to
3 want use the word exhaustion, but some sort of
4 implicit finality concept with regard to the
5 measure that we are talking about, which would be
6 laid out in the statute or laid out in the
7 regulation. But we are not dealing with that here.

8 PRESIDENT VAN DEN BERG: I'm asking the
9 question more generally because it's one of the
10 issues is indirectly addressing that one.

11 MR. WEILER: Certainly. So, in that
12 context it is possible that there may--it really
13 goes back to the definition of the measure, the
14 nature of the measure in question.

15 PRESIDENT VAN DEN BERG: So, basically,
16 there is something more test--

17 MR. WEILER: Under 1105, just to be clear,
18 not 1102 or 1106 or any other.

19 PRESIDENT VAN DEN BERG: Can include the
20 possibility of appeal?

21 MR. WEILER: If we are talking about a

1 discrete mechanism, and I use the example of the
2 Customs Act on purpose. I use one of the words
3 very discrete and timely. Because you instantly
4 when you set up this hypothesis, you run into the
5 potential for a roguish official to hide in the
6 provisions of any particular statute that may have
7 some far flung appeal, or one can simply point to a
8 court appeal and say, well, you know in the Mondev
9 case, not in the Mondev case, sorry, in the Loewen
10 case, that Tribunal said that you had to go to the
11 Supreme Court of the U.S. This library fine,
12 well, obviously you could have taken that to court
13 if you wanted to. You could instantly go too far
14 in your search for this appeal mechanism.

15 What you need to do is really try to
16 discretely understand the nature of the measure
17 just as any administrative lawyer would try to
18 understand the nature of the measure in the
19 domestic context. And, no, by that I'm not saying
20 that the international lawyer adopts the domestic
21 standards as to how to define and classify a

1 measure. We trade lawyers do that on our own,
2 using our own tools.

3 PRESIDENT VAN DEN BERG: I think Professor
4 Walde has a follow-up question.

5 ARBITRATOR WALDE: Playing sort of the
6 double in tennis, same ball, if I understand you
7 properly, you would regard as a distinct measure
8 suitable of being complained about under NAFTA is
9 not--first not a de minimis measure. It must be of
10 a certain gravity, either in its egregiousness or
11 in its effect or both? Tell me if I'm right. But
12 then with the appeal, what you're saying if it is
13 the measure, to say, come in a distinct package
14 where there is the first act and then there is a
15 relatively rapidly available appeal, rapidly and
16 practical appeal measure, then this is the
17 ensemble, the totality of the act which is
18 complained about.

19 As well as there is an act, an
20 administrative act, and with theoretical very slow
21 and perhaps not very practical appeal possibility,

1 then you would think the original measure, without
2 the appeal, is the focus of your examination.

3 MR. WEILER: Yes. The danger would be
4 that if you simply left it at the notion, oh, well,
5 any appeal mechanism would work, that would allow
6 the state to design a system whereby they would
7 have an instant excuse for whatever measure they
8 did.

9 We're basically trying to--we must keep in
10 mind the whole points of the NAFTA and the whole
11 point of all of the Bilateral Investment Treaty
12 mechanisms is to give certainty to the investor
13 with regard to the decision they are going to make
14 so that they will make the right investment
15 decisions and create wealth through generating
16 business. They won't do that unless they feel
17 comfort with that regulatory atmosphere, and that
18 they have remedies that they may pursue on a
19 realistic basis.

20 PRESIDENT VAN DEN BERG: Please proceed.

21 MR. WEILER: Our argument about national

1 treatment is simple. Prior to February 2001, the
2 EDMs operated skill machines. At the same time,
3 other domestic investors operated skill gaming
4 machines. Soon thereafter, the EDMs were closed
5 while many of these of these other facilities were
6 open.

7 Today, in 2004, the EDM facilities remain
8 closed and yet, as late as last week, the
9 facilities of a number of their competitors remain
10 open. Some of these places, such as Mr. Guardia's
11 Club 21, have been open for years enjoying the
12 benefits of what appears to be largely unfettered
13 freedom to operate.

14 The national treatment standard is not
15 just a NAFTA obligation. Article 102 stipulates
16 that it is also an interpretive principle of the
17 NAFTA. In other words, it is a foundational
18 principle of protection for enterprises that
19 operate within the North American Free Trade Zone.

20 When fully and properly observed by a
21 NAFTA government, the national treatment obligation

1 promises investors and investments an effective
2 equality of competitive opportunity vis-a-vis their
3 competitors in the territory of the host state.

4 In order to satisfy this positive
5 obligation generated by Article 1102, Mexico must
6 ensure that whatever treatment it provides, and by
7 "treatment" I mean whatever measures Mexico puts
8 into place relating to investors and their
9 investments in the relative industry, has the
10 result of ensuring that no locals enjoy a
11 competitive leg up on any foreigner or its
12 investment.

13 As demonstrated by the WTO aquis, which we
14 have cited in our memorials, sometimes the state
15 will meet this obligation to accord treatment no
16 less favorable by according the exact same
17 treatment to the foreigner that it provides to its
18 locals. Other times, the obligation can only be
19 satisfied by providing differential treatment to
20 the foreigner and its local competitors. The
21 fundamental touchstone for determining which

1 approach to apply in any given case is to focus
2 upon the results of whatever treatment is being
3 provided.

4 In other words, the only way to ensure
5 that national treatment has been provided in any
6 given case is to ask whether, as a result of
7 whatever the governmental activity which has taken
8 place, as a result of that activity, is the
9 claimant enjoying the best results available to
10 anybody competing in his or her industry?

11 Turning to the evidence of this case, one
12 clear trend emerges, and that's that Mexico has
13 failed to explain why Thunderbird and its EDMs
14 suffered less favorable treatment than their
15 domestic competitors?

16 Mexico has failed to explain why its
17 officials visited far more severe enforcement
18 measures upon Thunderbird than upon other local
19 competitors, and Mexico has failed to explain in
20 light of the fact that many of its competitors have
21 been open for years now, why it has not taken the

1 steps that are available to it to ensure that an
2 effective equality of competitive opportunity
3 exists between skill-gaming industry members.

4 Mexico effectively says that the EDMs are
5 not in like circumstances with local competitors
6 such as Mr. Guardia because Mr. Guardia obviously
7 knows the ins and outs of the domestic legal court
8 system far better than Thunderbird's lawyers
9 apparently did.

10 We have heard from various Thunderbird
11 officials and consultants that the decision to
12 abandon any more attempts to gain special relief in
13 Mexico in favor of a damages claim before an
14 impartial and independent NAFTA Tribunal stem from
15 the fact that they just seem to be spinning their
16 wheels locally while other operators stayed open
17 and can't make any money.

18 Just to be clear, as Ambassador Montano,
19 Mr. Mitchell, and Mr. Watson all confirmed, they
20 felt that their wheels were spinning because every
21 assurance they received from government officials

1 after the July hearing, that Mr. Vargas was not the
2 final decision maker on the closures and that they
3 really would get a fair shake at the end of the day
4 turned out not to be true.

5 As we alluded to in our opening remarks,
6 Mexico's argument that Thunderbird's decision to
7 abandon domestic pursuit of extraordinary relief in
8 favor of a NAFTA proceeding was fatal to its
9 Article 1102 claim fails for many reasons. The
10 first is that Mexico has failed to provide
11 compelling evidence explaining how comparable
12 operators could have been open for so much longer
13 and so many different locations in contrast to the
14 experience of the EDMs.

15 As a matter of fact, Mr. Alcantara could
16 not provide any confirmation as to when, if ever,
17 facilities such as Mr. Guardia's Club 21 or the
18 Bellavista facility in Monterey will ever actually
19 be permanently and finally closed. You can find
20 some of that at pages 880 to 881 of the text from
21 the third day.

1 He expressed a personal desire to close
2 them today, but he also admitted it is simply
3 object within his authority to get that task
4 accomplished.

5 Mexico's argument also fails because it
6 always remained open to Gobernacion officials, had
7 they been so inclined, to exercise their authority
8 under Article 3 of the Federal Law of Gaming and
9 Raffles to permit the EDMs to remain open at least
10 until the issue of whether skill games should be
11 used was determinedly settled by a suitable
12 domestic appellate court. Given that we may be
13 years and years away from such a date,
14 crystallizing what should be a level playing field
15 for all members of the industry, such action would
16 have complied fully with Mexico's national
17 treatment obligation without prejudicing a final
18 determination as to the alleged legality of skill
19 games in Mexico.

20 And, albeit after some prodding,
21 Mr. Alcantara did confirm at page 931 that such

1 authority does, indeed, exist under Article 3 under
2 that law.

3 Given that Thunderbird's EDMs were the
4 only participants in the industry to even both to
5 approach Gobernacion officials asking them for
6 confirmation that their activities that they
7 proposed to undertake in Mexico were not prohibited
8 under Mexican law, it does not seem too much to ask
9 of the new government to at least provisionally
10 honor the word of the old government. At least
11 until such time as the matter was determinatively
12 settled for the entire industry.

13 Instead, we have a patchwork of
14 enforcement where the foreigner who petitioned the
15 Government for its opinion and operated under in a
16 completely transparent manner is closed while
17 numerous other facilities remain inexplicably open.
18 Years later they remain open even when
19 Mr. Alcantara says they are or at least should be
20 closed.

21 Mr. Alcantara tells us that once his

1 colleagues close a facility, they expect it to stay
2 closed. And yet there is absolutely no evidence on
3 the record of even the most rudimentary kind of
4 enforcement program that one would expect to see
5 from a regulator intent on ensuring any modicum of
6 consistency and conformity industrywide or on a
7 nationwide basis. Rather than the targeting of the
8 usual suspects, such as Mr. Guardia, that one would
9 expect to see with an appropriate level of
10 enforcement, it appears there was a complete
11 failure on the part of Mexican Government officials
12 to follow up on their alleged closure of any of
13 these facilities.

14 The evidence of unevenness and enforcement
15 is manifest on the record. With Mr. Alcantara
16 admitting that many months have existed between
17 enforcement actions and never mentioning any hint
18 of coordination between his office and the other
19 units within Gobernacion concerning the enforcement
20 of closure orders, and going forward, I should add,
21 the damages suffered by the EDMs are indefinite

1 because there is no indication on the record of
2 just exactly how long these so-called temporary
3 processes really are. So far, Mr. Guardia has four
4 years and running.

5 The only evidence actually of any
6 regulatory coordination on the record was when
7 Mr. Alcantara mentioned that action was taken
8 against one facility only after SECOM officials
9 defending this case informed Gobernacion about it.
10 That's the only evidence of any coordination of any
11 targeted enforcement, any kind of program such as
12 that.

13 By contrast the Director of Games and
14 Raffles for the entire country took so special an
15 interest in the EDMs that he visited their
16 facilities within weeks of being installed to
17 personally, quote-unquote, inspect and immediately
18 close them down.

19 The next closure of a comparable facility
20 by Gobernacion official apparently did not take
21 place until July 2001. Of course, Mr. Vargas

1 neglected to bring an expert with him that day in
2 2001, in February, an expert in skill machines, and
3 in fact there is no evidence that he actually took
4 the time to test them during his short visit before
5 ordering the employees out and the doors closed.

6 He did so even though Professor Rose
7 acknowledged that one would basically be required
8 to look at a machine, to do something with the
9 machine before ascertaining what the level of
10 relevant skill might be involved.

11 But Mr. Vargas, he didn't even bother to
12 commission an expert report prior to taking any
13 sort of action the way the PRG would later do. He
14 just performed his infamous ocular inspection and
15 shut them down. In fact, the Government's first
16 step of procuring such evidence that these EDM
17 machines were, in fact, illegal did not take place
18 until a couple of months ago when Nelson Rose was
19 hired.

20 The basic fact of the ongoing operations
21 of so many other comparable facilities belies the

1 simple truth that there has been a gross imbalance
2 in enforcement in this case. And then there is the
3 uncontroverted testimony about enforcement norms
4 generally in place for the administration of
5 Mexican law, which had been a grace period of many
6 months before administrative order is enforced.

7 Mr. Vargas and his crew gave the Laredo
8 and Matamoros facilities a total of 15 minutes
9 notice before permanently closing them down after
10 communicating their administrative decision to
11 them.

12 Now, in conclusion, Thunderbird has
13 established that its EDMs have received less
14 favorable treatment for comparable businesses
15 operating in Mexico--I'm sorry, then-comparative
16 businesses operating in Mexico at the time that the
17 EDMs were closed, at the day its claim was filed,
18 and even today. The evidence on the record and
19 recorded over the past few days removes any doubt
20 about the appropriate comparators. We are talking
21 about other skill game operators.

1 Although I would note that the appropriate
2 comparator for this 15 minute closure would
3 probably be anybody doing business in Mexico who is
4 subject to an administrative order expecting more
5 than 15 minutes before they get closed down.

6 They're open, we're closed. As a matter
7 of fact, in Reynosa another operator is operating
8 what could well be the very same facility that we
9 would have been operating had we been able to do
10 so, and they're operating 500 machines there as we
11 speak. Sorry, Monterey, not Reynosa. Monterey.

12 There is no valid policy justification for
13 these results, and there is no policy justification
14 for such unevenness in enforcement, and the burden
15 does fall upon Mexico to explain why it has treated
16 the EDMs so poorly, and it is a burden that I would
17 submit Mexico has been unable to bear.

18 MR. CROSBY: We would conclude at that
19 point. We are going to address damages and other
20 issues in our brief.

21 PRESIDENT VAN DEN BERG: Thank you.

1 Before we conclude, can you please help us with one
2 thing, and that concerns issue number four on the
3 list, tentative list of issues. Simply help us.

4 As you know, Article 1121, paragraph two,
5 of NAFTA, requires both consent and waiver by both
6 the investor and the enterprise. Could you help us
7 where we can find in the record the EDM consents
8 and waivers. I think we have the Thunderbird
9 consent and waivers. Do we have also the EDM
10 Companies?

11 MR. WEILER: We could get you that. I
12 recall it was in November.

13 MR. CROSBY: I'm not sure the answer to
14 that question.

15 PRESIDENT VAN DEN BERG: If you go to 1121
16 of the NAFTA text. A disputing investor may submit
17 a claim under 1117 to arbitration only if both the
18 investor and the enterprise, A, consent to
19 arbitration, and B, waive their right.

20 So, it would seem here that both
21 Thunderbird and EDM Companies are supposed to give

1 a consent and waiver. So, could you help us find
2 it in the record.

3 MR. WEILER: I would have to look at that.
4 I mean, I recall that the claim--

5 PRESIDENT VAN DEN BERG: That is something
6 you could perhaps look up during the break.

7 MR. WEILER: Yes.

8 PRESIDENT VAN DEN BERG: You could simply
9 help us there.

10 And also in that connection, issue three,
11 there are two questions actually. But that also
12 applies to the respondent. One is the first
13 question is that refers to the relevant times. We
14 invite both parties to specify relevant times in
15 their submission, and the second question we have
16 for the parties is whether a definition can be
17 given of, A, direct control, and B, indirect
18 control, under Article 1117. Definition of A,
19 direct control, and B, indirect control under
20 Article 1117. Don't need to give it now. You may
21 do it in your posthearing.

1 MR. WEILER: Was that definition or
2 example or both.

3 PRESIDENT VAN DEN BERG: The test. Define
4 the test. It's not a definition because otherwise
5 you have to look at 1103 language. That's another
6 story. Simply how do you find the test.

7 And same applies also for the respondent.

8 As regards issue 5.4, are proceedings
9 before SEGOB or the Gobernacion, which same story
10 for this case, indeed, administrative proceedings
11 or are they proceedings before the executive? And
12 if so, what is the difference? You don't need to
13 answer it now. Same question goes to the
14 respondent.

15 There is one further question by Professor
16 Walde.

17 ARBITRATOR WALDE: On the 1102, is it an
18 obligation of providing exercising best efforts by
19 government within its capabilities and resources
20 and usual operating standards in terms of ensuring
21 there is no discrimination or is the government

1 liable for the de facto result which would mean it
2 gives a kind of political risk guarantee for
3 different results produced by its society? I can
4 specify this, but I hope you understand.

5 MR. WEILER: It is definitely the latter.
6 It is an absolute obligation taken upon itself by
7 the government of Mexico, and it is based upon this
8 obligation that investors choose or don't choose to
9 invest. It's most certainly an absolute obligation
10 which cannot be weakened by a claim of lack of
11 government resources one day or what have you. The
12 only exception might be civil war and strife, and
13 that example is actually already in the NAFTA in
14 Article 1105.

15 ARBITRATOR WALDE: So you would not accept
16 a defense saying we have done our very best, this
17 gambling, gaming thing is like a hydra, you hit up
18 some heads and they come up again. We go after
19 them again, but we are not allowed under human
20 rights standards just to go and simply federales at
21 any moment. We do need to follow our procedures

1 and we only got 17 and a half inspectors. You
2 would not accept this as an defense, under no
3 circumstances, under any circumstances, under some?

4 MR. WEILER: I would certainly submit that
5 we don't have that here, and so the hypothetical
6 doesn't apply, and I don't think there is any
7 evidence in the record that we are anywhere near
8 that.

9 I think it's an absolute obligation, it's
10 a promise to provide the best available treatment,
11 and if that means having to go out of one's way to
12 give that to the foreigner, then that's the
13 obligation they took. If it didn't to want take
14 that obligation, they shouldn't have signed the
15 NAFTA.

16 MR. CROSBY: We are done, and thank you
17 very much.

18 PRESIDENT VAN DEN BERG: Thank you very
19 much, Mr. Crosby and Mr. Weiler. I would suggest
20 10-minutes recess, and then we have the closing
21 arguments by respondent.

1 (Brief recess.)

2 MR. WEILER: The Tribunal had asked a
3 question just before we ended concerning waivers,
4 and I had a discussion with the Secretary of the
5 Tribunal, and it appears because this is an
6 UNCITRAL arbitration, not an ICSID arbitration,
7 there was a little administrative mixup in terms of
8 files, and a document that had been sent to the
9 respondent November 11th, 2002, which was an
10 amended notice of arbitration, statement of claim,
11 which added Article 1117 and contained the three
12 waivers, did not make it into the record, and we
13 have copies here.

14 PRESIDENT VAN DEN BERG: I assume,
15 Mr. Perezcano, you have no objection to them
16 putting it into the record?

17 MR. PEREZCANO: In principle, no.

18 PRESIDENT VAN DEN BERG: I understand from
19 Mr. Weiler that they had been sent to you, to your
20 side. I suggest that you at the end of or during
21 the break or perhaps we have the final break that

1 you show them to Mr. Perezcano or simply to clear
2 it up so we have no confusion.

3 Mr. Perezcano, please proceed with the
4 closing argument on behalf of the Government of
5 Mexico.

6 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

7 MR. PEREZCANO: Thank you very much,
8 Mr. President.

9 Mr. President, before beginning, we have
10 prepared a table with excerpts from the record, the
11 transcript, which compares the arguments, certain
12 admissions and contradictions that we heard in the
13 course of the hearing on certain specific points.
14 We provided to Mr. Crosby just a moment ago. We
15 would also like to provide a copy to the Tribunal,
16 and we will be making reference to some of these
17 things. They are just excerpts from the
18 transcript.

19 Thank you, Mr. President.

20 In my opening, in the opening arguments by
21 the Government of Mexico, Ms. Alejandra Trevino

1 asked the Tribunal to bear in mind in the course of
2 the hearing who this company is, what it has been
3 involved in, and what it is involved in, and that
4 in that context--that in that context to bear in
5 mind the business activity that it wanted to get
6 into--that it did want to get into that it wanted
7 to develop in Mexico.

8 Ms. Trevino referred to the documents by
9 which the company provides information on itself
10 and its activities towards investors, mainly, its
11 annual reports and how Thunderbird describes itself
12 in those documents.

13 In general terms, from the very name of
14 the company, it is involved in the gaming industry
15 and not any gaming, gaming with betting. That is
16 what it does, that is the type of activities that
17 it's engaged in, and indeed in those documents in
18 which it describes itself to the investing public,
19 it describes itself as a company that developed
20 Mexico's, including in Mexico of gaming with
21 betting, and it doesn't draw a distinction between

1 the business activity it was involved in in Mexico
2 from the business activity that it is involved in
3 in other parts of the world, including in some of
4 those documents, and we've already provided the
5 respective references. It describes them in
6 general terms as casinos. And this is the business
7 that it wanted to develop in Mexico, it's the
8 business it wanted to get involved in, and its
9 first steps in Mexico, indeed, corroborate this.

10 The first businesses that it explored are
11 clearly businesses involving gaming with betting,
12 certainly permitted under law as explained by
13 Mr. Alcantara yesterday, horse racing, sports
14 books, businesses that involve gaming with betting
15 that is allowed for which, in any event, require a
16 formal permit from Gobernacion, not a mere generic
17 approval. One needs to apply for and obtain
18 express permission from Gobernacion, and in the
19 absence of such permission or license, the activity
20 is illegal.

21 For various reasons, including, according

1 to what we were told by Mr. Luis de Velasco, the
2 race course had problems with Gobernacion, and as
3 he confirmed, those problems could only be due to
4 the jurisdiction of Gobernacion over the matter
5 which is gaming and lotteries, and for other
6 reasons as well. That wasn't the only one, but for
7 that reason and other reasons they did not go
8 forward with the investment.

9 And so, they explored other types of
10 activities which they had already developed in the
11 United States and elsewhere and which they've
12 continued to develop in other places, neither the
13 United States or Mexico. What has been called here
14 the operation of skill games or what the claimant
15 has so characterized.

16 And its first approach to Mexico with its
17 business partners was with the many times named
18 throughout this proceeding and particularly in the
19 course of the hearing Mr. Jose Maria Guardia.
20 Mr. Mitchell was crystal clear they were operating
21 identical machines or very similar machines. For

1 all practical purposes, it seems that there is no
2 dispute that they were identical machines.

3 And the method of operation, through that
4 method of operation, it was to wait for Gobernacion
5 to shut down the businesses that operated such
6 machines. Before Thunderbird made the investment,
7 if, indeed, it did make the investment in EDM, Jose
8 Maria Guardia had already had what the claimant
9 calls a significant legal altercation with
10 Gobernacion over the operation of such machines.
11 And it is precisely because Gobernacion had
12 considered the operation of those machines illegal,
13 since they involve the elements of chance and
14 betting.

15 And it seems to me that having conducted
16 the hearings we can refer with total certainty to
17 these machines not as skill machines, but what they
18 are: Gaming machines and, to be more precise,
19 gaming machines with betting, even if there may be
20 some element of skill involved in the games.

21 Mr. Luis de Velasco indicated that this is

1 not just any business. It's not the same to
2 establish one of these businesses as it is to
3 establish a distributorship of automobiles, a
4 clothing store, a restaurant, or another sort of
5 business, normal sort of business we could call it.
6 And, in fact, Mr. Luis de Velasco stated yesterday
7 or the date before yesterday that if one were to
8 establish simply a business such as this without
9 more and if one were to open such an establishment,
10 it was foreseeable, and more than foreseeable that
11 it was to be expected that Gobernacion would
12 proceed to shut down the establishment. Indeed,
13 this is what Messrs. Aspe and Arroyo recommended as
14 a strategy for the claimant to carry out its
15 business.

16 In very simple terms, in the questions
17 that I put to Mr. Luis de Velasco, the strategy or
18 what we could call the Guardia method consisted of
19 opening up an establishment, waiting for
20 Gobernacion to shut it down, seek an amparo, as
21 part of the amparo, ask for temporary suspension of

1 the closure order and continue operating until such
2 time as the judicial proceeding concluded. And
3 perhaps in the interim pursuing the necessary
4 procedural strategies so that the proceedings would
5 be drawn out as much as possible so as to be able
6 to extend the operation of the business.

7 So, based on this method--and it's
8 important to bear this perfectly in mind because it
9 was, indeed, Mr. Luis de Velasco's opinion--based
10 on what the claimant has called the significant
11 legal altercation between Guardia and Gobernacion,
12 Mr. Luis de Velasco himself pointed out two things
13 that are important to bear in mind.

14 First, that that operation would not fall
15 within the scope of the law, in the opinion of the
16 attorney of the claimant firm in this case. And
17 second, that it was to be expected that Gobernacion
18 would proceed to shut down the facilities.

19 And Mr. Luis de Velasco al confirmed what,
20 in effect, is perfectly logical; that if
21 Gobernacion considers an activity to be illegal for

1 one operator, then as it is up to the Secretariat
2 to enforce the law, it would have to be considered
3 that that same activity and as of today, there is
4 though doubt that Guardia's activity was the same
5 as EDM's activity, that Gobernacion would have to
6 consider that activity illegal for all other
7 operators, and the evidence shows that that has
8 been the consistent and uniform position of
9 Gobernacion.

10 So, to have a complete picture, one must
11 bear in mind, and I would like to synthesize one
12 must bear in mind that the company is a company
13 dedicated to the gaming business, that it went into
14 Mexico with that business knowing that it was an
15 activity that Gobernacion objected to, that there
16 were legal subterfuges or legal strategies, if you
17 want to call them something else, that could make
18 is possible for them to operate temporarily without
19 any certainty, and that it was to be expected,
20 indeed, that Gobernacion would take action against
21 such activities.

1 And it is in this context that we should
2 address what I would call here the Thunderbird
3 method or the EDM method, to be more precise, as
4 contrasted to the Guardia method. First, based on
5 the evidence that has been presented in this
6 procedure and the testimony that we've heard from
7 the witnesses this week, the Guardia method was
8 analyzed, and the company's attorneys admitted that
9 was a mistake in strategy, and indeed that that
10 method of operation would be unlawful.

11 And it was decided to seek an opinion from
12 Gobernacion through a formal consultation.
13 Mr. Mitchell, the President of the company, notes
14 that his instructions to the attorneys, speaking in
15 generic terms, was that they should fully inform
16 Gobernacion about the type of activities that they
17 intended to carry out, and the type of machines and
18 games that they intended to operate.

19 Mr. Luis de Velasco at least said that he
20 had not been given those instructions, at least not
21 directly, and this is one of the issues that we

1 touched on in the brief summary of points that we
2 have provided to you.

3 Mr. Mitchell also said that he gave
4 instructions that they should inform Gobernacion.
5 Mr. Mitchell did not say that attorneys should
6 assume that Gobernacion knew, but they should
7 inform Gobernacion that the machines that they
8 intended to operate were of the exact same type of
9 machine that Mr. Guardia had been operating.

10 Mr. Mitchell said that one fundamental
11 aspect of the machines was that they received money
12 and they paid money out as a prize, and not just as
13 an exchange of one good for another, but rather in
14 the clear context of the player putting at risk a
15 given sum of money, and if he were to obtain a
16 certain result, he would win more money, and if
17 not, he would lose money. In a word: Betting.

18 And even if one could consider that the
19 cash dollars are merchandise or commodities, and I
20 could say that pesos are also commodities. The
21 difference is that it's a commodity that is legal

1 tender. In the Republic of Mexico, the dollar is
2 not legal tender in Mexico, but that's an entirely
3 secondary point.

4 Not as an exchange of one good for
5 another, but rather it entailed the player risking
6 money for the objective of winning more money, and
7 if he didn't obtain this objective, he would lose
8 money.

9 Mr. Mitchell apparently gave instructions,
10 but not to Mr. Luis de Velasco, that they should
11 fully identify the machines to Gobernacion, and
12 they should fully identify the games. And he
13 points out that there were a series of preliminary
14 negotiations prior to the presentation of the
15 application, and prior to the issuance of the
16 official letter by Gobernacion. And in this
17 respect, I would simply note that Mr. Crosby had
18 stated in his arguments his surprise at the
19 supposed lack of witnesses offered by the
20 Government of Mexico; but where--what there is no
21 evidence of is what happened to those meetings,

1 what was said, what was discussed, what drafts were
2 exchanged.

3 The Government of Mexico requested those
4 documents on several occasions, with great
5 specificity, drafts exchanged, preparatory
6 memoranda of the meetings, notes from the
7 attorneys, of the attorneys to their clients as to
8 the results or development of such negotiations.
9 We never obtained them.

10 And in this context, it is said that EDM
11 presented the application before it was acquired by
12 Thunderbird. If, I reiterate, it did acquire it,
13 but that's a point I'll return to later on. And
14 Mr. Crosby said a moment ago during his final
15 arguments that we should look at the application in
16 an integral manner. And I agree with him. Let's
17 look integrally at what this application says.

18 The complainant, in its briefs, has
19 referred time and time again to the supposed
20 details that it provided as to the elements that
21 would enable the Secretariat to identify the type

1 of machine, and it's reiterated time and time again
2 the make and model, make and model as so often
3 mentioned, and the request says the video game
4 machines of skill are Bestco Model MTL and so
5 forth, and MTL 19 UBL, and SCI model 17 UR. That
6 was what was said.

7 Now, comparing that with the application
8 that Mr. Luis de Velasco helped prepare and in
9 response to questions that I put to him and that
10 the President put to him, and with all due respect
11 to Mr. Ruiz de Velasco, but he did not have the
12 least idea of what MTL or 19 UBL or 17 UR meant or
13 referred to in our initial presentation.

14 Mr. Becker was able to state exactly what
15 it meant, and certainly it doesn't mean anything.
16 It doesn't say anything. For example, one of them
17 is apparently a model with a 17-inch monitor and
18 which has a vertical position. That's all that
19 this means, or an upright position.

20 What was not said was that these were
21 poker games, but was not presented. Poker games,

1 however you wish to call them. It was very
2 difficult for Mr. McDonald to have to accept
3 finally that these were games very similar to poker
4 that are nothing else--nothing other than poker and
5 instead of using a normal deck of cards, using
6 different symbols. What Mr. Rose referred to as
7 the dwarf family games. Poker, at the end of the
8 day, poker in one of its forms.

9 What was not said was that they were
10 machines that were being used on Indian
11 Reservations where in one way or another, the games
12 were, perhaps at times, in a controversial ambit,
13 but where gaming with betting was allowed, we've
14 already referred to that, and the reasons why the
15 claimant exited, and that sort of thing. That is
16 what was not said.

17 Now, as regards the operations of the
18 machine, what was said, as we saw with the
19 questions from Professor Walde a moment ago, it was
20 said, and it was said repeatedly, that the video
21 machines for skill games that are commercially

1 operated by my client do not entail any chance or
2 betting, but rather the skill and ability and
3 dexterity and skill of operator, and that's at
4 paragraph three.

5 The next page, third complete paragraph,
6 the nature of the machines, speaking in more
7 general terms about the nature of the machines, is
8 not that of games of chance or games of betting.

9 Next paragraph, it is clear that it is the
10 dexterity and skill of the person that produces the
11 effect on the machine and not chance or luck or
12 betting.

13 And to conclude, it is noted that the
14 concepts of chance or betting do not intervene.
15 That is what was said, and that is what was said
16 repeatedly.

17 And in response to the questions that I
18 put to Mr. Luis de Velasco, an attorney who is a
19 partner of what the claimant has called the largest
20 law firm in the world, this is what he reported as
21 an attorney to the claimants--as the claimant's

1 attorney to Gobernacion. That is to say, neither
2 chance or betting were involved.

3 What was not said was that these games
4 are, in effect, as confirmed by Mr. Atallah,
5 through his testimony, these games in effect
6 involved just something of skill, to use the
7 precise terms that he prepared in the corporate
8 documents for the company, some skill. And to put
9 it in the terms of Professor Walde, when he asked
10 about the spectrum of skill, we are not talking
11 about 90 percent or 80 percent or 70 percent skill.
12 And Mr. Atallah went to the other end of the
13 spectrum. We are not even talking about 50/50, to
14 put it in colloquial terms. Some skill denotes
15 very little skill. 10 percent? Perhaps
16 20 percent? Mr. McDonald himself had a hard time
17 specifying exactly what percentage.

18 But certainly they're not games that are
19 predominantly, not in Mr. Atallah's mind, games of
20 skill. And not only are they not this, that is not
21 even what Gobernacion was told in the application.

1 As to betting, what Gobernacion was told
2 time and again, the objective of the game is to
3 obtain an optimal combination of signs that would
4 award a ticket--that's the term used--with points
5 redeemable for goods or services. That's the
6 greatest level of detail that the application
7 reached for beyond that. And moreover, it refers
8 merely to a prize in the abstract. And that's
9 what was said.

10 What wasn't said was what the President of
11 a company engaged in the manufacture of such
12 machines, and the sale and marketing of such
13 machines, marketing more generally because you
14 recall that he would commercially trade machines or
15 engage in the sale of machines with SCI and the
16 commercial operation of such machines. In the
17 words of the President of this company, what was
18 not said was that one of the fundamental aspects of
19 the game is that they receive money as a bet, and
20 they pay out money as the outcome of that bet.

21 And I reiterate. We are not talking about

1 games that you would find in a fair where one
2 always pays a given sum of money in order to be
3 able to play, and one always has the right to a
4 prize. Perhaps depending on the skill of the
5 player, it might be a better prize, but always a
6 prize, and we are not talking about Teddy bears,
7 larger or smaller. What we are talking about
8 actually is cash, and one might obtain more or one
9 might lose a given sum as the result of a bet.
10 That was what was not said.

11 Also was not said was that these were the
12 exact same type of machines as those operated by
13 Mr. Guardia, and that this had led to a significant
14 legal altercation with Gobernacion.

15 PRESIDENT VAN DEN BERG: Let me ask a
16 question there, Mr. Perezcano.

17 MR. PEREZCANO: Yes, Mr. President.

18 PRESIDENT VAN DEN BERG: If you look to
19 the letter, and I look to the Spanish original, it
20 says at the bottom, (reading) It is my client's
21 intent to install about 2,000 more machines in some

1 other places of the Republic, with the identical
2 operation and nature as the mechanic described in
3 the preceding points.

4 Do I understand this correctly to be that
5 they make any reference there are already machines
6 operating?

7 MR. PEREZCANO: Your understanding is
8 correct, and I will now refer in greater detail to
9 that point.

10 PRESIDENT VAN DEN BERG: Also, the
11 previous paragraph, if you read, the very last
12 words of that paragraph, it's actually paragraph
13 three of the letter, like several ones already
14 operating in several parts of the country.

15 MR. PEREZCANO: Yes, that you understand
16 it as Gobernacion understood it, and as Mr. Ruiz
17 de Velasco, the company's lawyer understood it.

18 If you allow me, I'd like to conclude with
19 what was not said about Guardia, and then I will go
20 back to this point, which I would like to go into
21 in a bit more detail.

1 But a moment ago you asked, Mr. President,
2 and rightfully so, where is the evidence in the
3 record of this case that Gobernacion knew that
4 these were the machines of the same type of machine
5 as those operated by Mr. Guardia, and certainly
6 that evidence is not to be found. Such evidence
7 has not been presented. Nor has evidence been
8 presented that Gobernacion was asked--well, first,
9 one of the machines from Mr. Girault's office in
10 Mexico City was not taken to Gobernacion, nor was
11 Gobernacion asked to go to Mr. Girault's offices to
12 observe those machines, or to inspect those
13 machines.

14 And on this point, to continue with the
15 section that you had cited just now in relation to
16 another point, at the bottom of the first page
17 where the application says the following. But it
18 is the intent of my client to install approximately
19 2,000 more machines in other parts of the Republic
20 that operate identically and are of the same
21 identical nature as the mechanics described, but

1 what was not said was as those that are operated by
2 Mr. Guardia.

3 PRESIDENT VAN DEN BERG: But the paragraph
4 paragraph that says like different ones that
5 already operate in different parts of the country.
6 I might add that also in the beginning of your
7 opening statement--your closing statement, excuse
8 me, you said, well, it is undisputed between the
9 parties that Guardia operated identical machines.

10 Now, to take that last point first, as of
11 when was it between the parties known that the
12 machines were identical?

13 MR. PEREZCANO: Not between the parties to
14 this proceeding, but between EDM and Gobernacion,
15 it's very likely shortly before the first shutdown,
16 when it was learned that such establishments, such
17 facilities were being operated very likely early
18 2001.

19 Now, I would like to specify something in
20 this regard, Mr. President. We should not
21 assume--well, if we grant that these are skill

1 machines, that these are the only skill machines.
2 There are what in English are called arcades.
3 There are fairs in Mexico City, in Mexico
4 generally, at movie theaters. There are special
5 establishments with such machines that have video
6 game machines, pinball machines. We generally call
7 these last chispas in Mexico. It's common to find
8 such facilities, even in pharmacies, throughout
9 Mexico for some historic reason. Pharmacies are
10 famous for housing such games.

11 In many parts of Mexico, such facilities
12 operate and they have been operating for a long
13 time. This was not indicating--it was very poor if
14 what they wanted to refer to were machines such as
15 those that we now know about in much more detail
16 through this proceeding. Mr. President, they were
17 not what we called chispas.

18 PRESIDENT VAN DEN BERG: The chispa, apart
19 from dispensing aspirin from operating those
20 machines, they also give tickets. Or do they also
21 give tickets?

1 MR. PEREZCANO: Well, I can speak on the
2 basis of my personal experience, Mr. President.
3 There are some where you pay a coin, and you have
4 the right to play a game, and there is no prize, no
5 ticket is issued, nothing. You have the right to
6 play and to play for points and perhaps--well, you
7 have the right to play three balls, and when you
8 lose the third one, the game is over. There is no
9 other prize, other than the fun one has playing it.

10 There are others where you play against
11 another player, and the first one wins and the game
12 is over. And there are others where you might win
13 a Teddy bear, that's common in fairs, and then you
14 pay a ticket, and you're given it right then and
15 there, or you are given a ticket that you could go
16 turn in to redeem that you could redeem for a Teddy
17 bear.

18 They're not the kinds of games in which
19 you obtain a ticket which you could then go redeem
20 for cash. They're not even those that Carlos Gomez
21 described for Amazing World, where he clarified

1 yesterday or the day before that they have
2 establishments for children and adolescents, and
3 where the prizes are toys and electronics devices.
4 That is what was not said, Mr. President. And by
5 the way, these are some of the things that
6 Mr. Gomez did specify in the case of Amazing World.

7 And the Government of Mexico--

8 PRESIDENT VAN DEN BERG: Professor Walde
9 will ask a question, and I wonder if it is an
10 opportune moment.

11 MR. PEREZCANO: Whatever the Tribunal
12 considers it an appropriate time. Shall I
13 continue?

14 ARBITRATOR WALDE: There seem to be key
15 issues, the knowledge of the Director of Juegos y
16 Sorteros. Would you not assume that since they
17 have been litigating with Guardia for six months or
18 longer, that they actually would be very sensitive.
19 They would have understood this idea that the
20 question, the challenge of a slot machine
21 camouflaging as it is alleged as a skill machine,

1 would they not even have been familiar with some of
2 the names of them? Because if I litigate
3 something, as we do here, we develop a tremendous
4 amount of sensitivity to the issues.

5 So, can one not infer a full familiarity
6 of the direction de Juegos y Sorteros in August
7 2000 with the machines because they have been
8 dealing with them as one of the hosts, as I
9 understand Mr. Alcantara, one of the most sensitive
10 issues in the case they have really been trying to
11 get rid of this man Guardia, and they didn't
12 manage?

13 MR. PEREZCANO: All of the following
14 answers to your question, Professor, first these
15 machines are not described even mentioning the
16 types of games or the games specifically that they
17 involved. No--there is no definition of video
18 poker in one of its forms. It's not said
19 what--that it's the Fantasy Five or Red White &
20 Blue Sevens.

21 In any event, this is what one--nothing is

1 said about what one perceives when one approaches
2 the machine. The make and model are not generally
3 perceived when you're at the back panel, which
4 they're on the back panel out of sight.

5 Nor could one assume, as Mr. Ruiz de
6 Velasco tried to convey or say, even though he's
7 the attorney for a firm devoted--dedicated to this
8 that he doesn't know what MTL 19 UBL means, that
9 being the description of the machine, and it
10 doesn't provide any information in this respect.
11 One need not assume.

12 And one more thing, one need not forget
13 that Thunderbird itself assembled machines for
14 diversion, but one mustn't assume that Gobernacion
15 would have any reason to have this knowledge, first
16 because as Mr. Alcantara said, it's a relatively
17 recent phenomenon. The Guardia and EDM cases may
18 well be the first ones. Guardia, on two occasions,
19 one at the race track and one outside the race
20 track in the year 2000. And EDM was also in the
21 year 2000.

1 Second, Gobernacion is not equivalent to
2 the Nevada Gaming Commission where precisely
3 because gaming is allowed, according to what
4 Mr. McDonald told us, there are technical, very
5 detailed technical specifications with pages and
6 pages of requirements, but that's precisely because
7 the game is permitted. In this case, if we are
8 talking about a pinball machine, that falls outside
9 of the jurisdiction of Gobernacion, and one must
10 not assume that therefore being a game that
11 Gobernacion would be not familiar with the
12 manufacturers of pinball machines, the models, and
13 names of pinball machines.

14 But inversely as well. If they're not
15 skill machines, then they're machines that are
16 prohibited. Gobernacion doesn't authorize them.
17 It doesn't analyze these machines. It doesn't
18 review the makes and models precisely because it
19 doesn't issue such permits.

20 So, one mustn't assume that the
21 Gobernacion and the Nevada Gaming Commission are

1 analogous bodies in terms of the type of
2 information that they handle.

3 ARBITRATOR WALDE: If I could go on this
4 issue which was here so controversial, would you
5 not expect a government regulator, even if it is
6 not as competent and as experienced as the Nevada
7 Gaming Commission, would you not expect such a
8 regulator which has just been experienced a most
9 difficult and for itself very frustrating as we
10 have heard battle with Guardia when a request comes
11 to say, wait a moment, we want to get more
12 information, we want to understand it better, we
13 want to have an expert who tells us things we don't
14 understand.

15 Now, if you look later at the Gomez, what
16 is Amazing World application, you see it did come
17 with something. He had a similar solicitud, and
18 then they said no, no, that's not enough. You have
19 to tell us more. If you look at regulatory
20 activities in other fields, I assume there must be
21 in Mexico as everywhere else, there must be

1 regulatory approvals for dangerous machines, planes
2 and I know in Germany it is cars you have to go
3 every two years. Well, they don't accept just not
4 your own qualification, which is a legal
5 qualification. They will have their own
6 qualification, and then they will apply that
7 qualification to the facts. If they haven't got
8 the expertise, they will subcontract it.

9 So, why would this not be really the
10 normal modus operandi of the direction de Juegos?
11 MR. PEREZCANO: Two things, Professor
12 Walde. First, Mr. Gomez provided Gobernacion's
13 response, but not the consultation put to it, and I
14 believe that not providing the consultation was
15 deliberate. If one looks at the official letter of
16 15 August, where reference is made only in the
17 first paragraph to--in a few lines to the machines
18 described, it doesn't--the official letter doesn't
19 repeat, and the 14 December 2000, official letter
20 for Amazing World is no different. It has an
21 introductory paragraph that makes general reference

1 to the application.

2 And if you compare the first paragraph of
3 the 15 August official letter with the level of
4 detail of the first paragraph of that with the
5 three pages of the request or the solicitud, it's
6 clear it has many more elements that Gobernacion
7 does not reflect in its response, and the
8 Government of Mexico argues that it was deliberate,
9 not to have presented the request for application
10 which has more detail.

11 Now, what it does indicate the official
12 letter is that Mr. Gomez, with more knowledge than
13 Mr. Ruiz de Velasco about the operation of the
14 amazing world machines, identified them as machines
15 that receive bills, and what Gobernacion says in
16 that official letter is that there appears to be
17 some confusion, because you identify them as
18 machines that receive bills, and at the same time
19 you say that they only give prizes, radios, and
20 what have you, and so we want more information.
21 That's not the type of information that was

1 provided to Gobernacion in the solicitud of
2 August 3rd.

3 And third, the answer itself, which I will
4 go back to with a bit more detail, Gobernacion, in
5 response to a vague petition, what it said was if
6 the machines--and Mr. Alcantara was very clear in
7 this respect--if the machines operate as you
8 describe it here, then they don't fall within our
9 jurisdiction. But he warns that if not, they are,
10 and moreover, they are prohibited.

11 And I note that the elements of chance and
12 betting should not be involved. Gobernacion issued
13 a prudent answer in which it protected its
14 position, and it wasn't up to Gobernacion to show
15 the claimant based on its solicitud that its
16 machines, which it wasn't familiar with, that it
17 did not show it, were skill machines. It was up to
18 the claimant to have shown Gobernacion fully as
19 apparently it ordered by Mr. Mitchell, that in
20 effect, they were not games of chance or games of
21 betting.

1 ARBITRATOR WALDE: Were you resting your
2 case, if I can summarize is, in this respect is to
3 say Gobernacion was not properly informed, and it
4 should have been properly informed. That is one
5 topic of the discussion.

6 Now, can I assume that if one assumes the
7 they were properly informed, which is not your
8 point, your point is they were not, would, in your
9 understanding of Mexican law, would then this
10 letter have created a legal comfort, a legitimate
11 expectation, if it had been?

12 MR. PEREZCANO: Professor Walde, two
13 things. First, if they didn't know what kind of
14 machines they were, then they could not have
15 created either rights, nor should they even have
16 given a level of minimum certainty.

17 Secondly, from the point of view of
18 Mexican law, and I'm sure that this also applies in
19 the case of laws in other countries, and that's why
20 I'm speculating a little bit, the authorities
21 assume good faith on the part of the private

1 person. The authorities never assume that the
2 private person is acting in bad faith or is
3 omitting information or is being less than clear in
4 his presentation. When it has enough information
5 that might generate a doubt, such as Amazing World,
6 then it will request additional information.

7 But Gobernacion did have no reason, plus
8 it had the legal obligation of assuming that the
9 description was correct, and that what EDM was
10 saying in its application was true under each of
11 its points. And even so, it gave a prudent reply
12 conditions to that being the case.

13 A third point, if the company's lawyer who
14 stated that had he known with greater detail how
15 the games would operate, the lawyer said had he
16 known, he would probably have changed his opinion.
17 The meaning of that--and this is a very important
18 point--is that Gobernacion was right, and probably
19 today, after having more information Mr. Ruiz de
20 Velasco based on his experience during the course
21 of this week, would agree with Gobernacion.

1 ARBITRATOR WALDE: But my question is,
2 it's a kind of funny a questions on Mexican law
3 which is part of the legitimate--terms of how
4 legitimate expectations are formed. If we assumed
5 that they would have informed properly and they
6 would have also played in good faith, and which are
7 both two assumptions you are disputing, would this,
8 in your understanding of Mexican law, create a
9 legitimate expectation? In terms of the
10 interpretation of the law, I mean, there are legal
11 principles that government can give a certain
12 interpretation of the law, and then it does have to
13 respect investment expectations which we are
14 thrusting in that particular interpretation.

15 Is this also a principle of Mexican law or
16 is it perhaps an unclear statement, and we can't
17 make a judgment on this?

18 MR. PEREZCANO: The answer of Gobernacion
19 does not create in any way expectations or rights
20 based on Mexican law, and not even based on
21 international law, I would say, or based on the

1 standards included in NAFTA. It is an opinion that
2 if the machines are properly described, then
3 Gobernacion has no jurisdiction, and if it has no
4 jurisdiction, it would not have been able to create
5 any right, nor any expectation.

6 The other side of the coin is that if they
7 were not properly described, as we now know they
8 weren't, then there was no chance of creating the
9 right or the expectation because they were
10 forbidden.

11 ARBITRATOR WALDE: How would you translate
12 for me the word criterio?

13 MR. PEREZCANO: I will try to translate it
14 as criterion.

15 ARBITRATOR WALDE: Translation attempts, I
16 have tried dictionaries and did a consultation with
17 my Latin American lawyer friends, and it comes out
18 like a formal opinion, a legal opinion. Would you
19 agree with this, or is it--I assume there is not a
20 dictionary of Mexican legal terminology, but what
21 it does seem it is more than just a view. It is

1 something more formal. That is my own amateurish
2 and certainly not conclusive attempt at getting a
3 translation.

4 MR. PEREZCANO: As such, the term
5 criterio, as you using it, which I would not
6 translate as criterion, when used with that meaning
7 must be properly regulated. For instance, in
8 fiscal matters, there is a specific procedure for
9 taxpayers to request an early decision from the
10 Secretariat of Finance and Public Credit. There is
11 a whole procedure that is regulated that can be
12 followed, and the answer from the Secretariat does
13 have legal effect. In this case, even that was not
14 tried. First, there is no comparable procedure. A
15 consultation of a general nature was made, and an
16 answer, since the officials have to provide
17 answers, based in the manner and way in which the
18 question was asked. And the answer is not
19 categorical. It's clearly conditioned to EDM
20 having properly described the machines.

21 Let me put it even in the way that is

1 closer to what we are looking at. The NAFTA
2 treaty, Chapter 5, whether it comes to customs
3 procedures, establishes that early resolutions
4 should be able to be obtained in order to import
5 certain items, and to know before exporting either
6 to another country to know what the customs
7 classification is, what the tariff is going to be,
8 whether this is an original good, et cetera. There
9 is a comparable system in the case of the national
10 law on games and lotteries, and this consultation
11 mechanism isn't that.

12 PRESIDENT VAN DEN BERG: Mr. Perezcano,
13 simply on the question of what criterio may mean
14 legally, may I ask you to go back to the letter of
15 the 3d of August, and I represent to you that you
16 find four times the opinion, and one time the word
17 criterio. If you go to the second--in the second
18 paragraph, an opinion is asked like the last
19 paragraph of the letter. It is not the idiom asked
20 the Gobernacion.

21 And if you turn to the second page, you

1 see in the first full paragraph, in the same
2 paragraph (speaking in Spanish).

3 Now, is this the result of some very
4 sophisticated drafting or just to avoid the word
5 "opinion" two times?

6 MR. PEREZCANO: Well, I can only opine
7 about what I know of the application. The closest
8 somebody was to drafting this was yesterday when
9 Mr. De Velasco was here. In my opinion, it doesn't
10 have any special legal meaning, and these are
11 interchangeable words.

12 PRESIDENT VAN DEN BERG: Thank you.

13 MR. PEREZCANO: To conclude with what was
14 said and was not said in the application, Members
15 of the Tribunal, what was also said, and to go back
16 to your question, Mr. President, not once, but
17 repeatedly, what was said was that the activity
18 carried out by my customer in paragraph two that
19 carries out consists in the commercial operation of
20 these types of machines. In the next paragraph,
21 rather in paragraph number two, he describes the

1 establishment that is already in existence known as
2 La Mina de Oro. It's not a place they're renting,
3 not something that they're going to refurbish.
4 It's Not a place where they're trying to locate
5 their equipment. It's an existing place that has
6 existed. It has a specific address. It has a
7 specific name.

8 The next paragraph explains that these are
9 machines that are commercially operated by my
10 client. Paragraph four is extremely clear, crystal
11 clear. The video machines of skill games that were
12 currently operating, there can be no doubt here.
13 Maybe some time has gone by since Mr. Ruiz de
14 Velasco had looked at this document. But when I
15 showed it to Mr. Ruiz de Velasco, he said that by
16 that date the facility was already in operation,
17 and his testimony did not leave any room for doubt.

18 So, the facilities were open, they were
19 operating as is described or was described by
20 claimant at that time, and I agree with Mr. Crosby,
21 the document says what it says, and the testimony

1 of Mr. Ruiz de Velasco who participated in drafting
2 this document, in the preparation and handling of
3 this document corroborated that during the hearing.

4 And this is also an important item with
5 regard to the supposed or alleged certainty where
6 the claimant says that it went ahead with its
7 investment. From this document, it's clear that he
8 was already operating, that he already made the
9 investment with or without an answer. This is
10 August 3. By then, time to find a place to make an
11 investment, to find a site to pay rent. All of
12 that happened. Mina D'Oro is in operation. It's a
13 facility that's operating and it's ready for these
14 kinds of games, et cetera, et cetera.

15 And Mr. Ruiz de Velasco, when confronted
16 with the document, counters the arguments or
17 rejects the arguments and statements of other
18 witnesses that were made in this proceeding ex post
19 facto.

20 Mr. President, the Government of Mexico
21 maintains that EDM failed to report to Gobernacion

1 fully because it knew what the answer would have
2 been had it said these are the machines, these are
3 the types of machines that Mr. Guardia is operating
4 like those. The Government of Mexico maintains
5 that the omission was deliberate. It kept out all
6 the details that now we've had a chance to become
7 acquainted with throughout this proceeding, and
8 that, Mr. President, is what was said and was not
9 said in the application.

10 PRESIDENT VAN DEN BERG: Would this be a
11 natural moment for a short break? Or you would
12 like to finish and hand over to one of your
13 colleagues?

14 MR. PEREZCANO: Mr. President, I still
15 have a lot to say. If you want to, we could have a
16 recess.

17 PRESIDENT VAN DEN BERG: It might A, the
18 interpreters, the Court Reporter, but C, also
19 yourself.

20 (Brief recess.)

21 PRESIDENT VAN DEN BERG: Mr. Perezcano,

1 please proceed with your closing argument.

2 MR. PEREZCANO: Thank you very much,
3 Mr. President.

4 A short while ago, Mr. Crosby and the
5 Members of the Tribunal referred to what
6 Gobernacion understood, and let's see what
7 Gobernacion understood. What Gobernacion
8 understood based on the information provided by EDM
9 in its application, and what it understood is
10 rather simple and does not differ, as I will point
11 out in a minute, it does not differ from what
12 Mr. Ruiz de Velasco, the Baker & McKenzie lawyer of
13 claimant, understood from the application and from
14 the reply. He understood, as you can see from the
15 first paragraph, fourth line from bottom to top, it
16 understood that Thunderbird carries out the
17 operation of machines. It understood that it was
18 open and operating. It understood that they do not
19 operate under the concept, nor with the elements of
20 chance and gambling. That's what the Secretariat
21 understood.

1 And furthermore, it carries out a rather
2 detailed analysis of the law. If the Tribunal
3 knows the law, you may realize that there are only
4 13 or 14 Articles in it, and it reviews the key
5 provisions of the law, and it points out that
6 having understood that as confirmed by Mr. Ruiz
7 de Velasco, and that's what EDM stated, in other
8 words, having understood that there are no elements
9 of chance and betting, it explains the base strict
10 prohibition, clear-cut prohibition, forceful
11 prohibition set forth in law against games of
12 chance and games of betting.

13 It states, as Mr. Alcantara said, and I
14 mentioned this already, when I answered Professor
15 Walde, it stated that it had no jurisdiction if the
16 machines had been properly described.

17 But it also stated that it did have
18 jurisdiction if they had not been properly
19 described, and in that case, those machines were
20 forbidden.

21 It also pointed out that those machines

1 were not the so-called slot machines, coin
2 machines, where in a different context and with a
3 different system of payoffs, Amazing World,
4 Mr. Gomez representing Amazing World, described as,
5 I think he used the word tragafichas, in other
6 words, a note-swallowing machine.

7 And there is also a clear warning to avoid
8 components such as chance and betting in these
9 machines. This is a clear warning. Maybe not
10 necessarily anticipating that that might be the
11 case in the case of Mr. Guardia, but certainly
12 saying watch out, because if we fall into the other
13 assumption, then the machines are forbidden.

14 Professor Walde, in questions to
15 Mr. Crosby, stated--and I agree with him--that one
16 can only trust or rely, to use the word "rely" in
17 English, on something contained in the letter. I
18 think what Professor Walde says, and I will
19 paraphrase what he said in English, something based
20 on the letter that we relied on. But I agree, it
21 was said repeatedly that chance and betting did not

1 come into play. It was very categorical. There
2 was a description of the payoffs for the obtention
3 of goods and services, and Professor Walde stated,
4 and I understand this would, of course, refer to
5 the word preponderant or predominant, but even as
6 Dr. Walde said, maybe when you get to a very fine
7 level of detail, it might be possible to establish
8 a certain or view a certain contradiction in the
9 letter from Gobernacion.

10 I must say that I agreed that in general,
11 there is no contradiction, but there is no
12 contradiction either when it comes to the details.

13 Now, what did Baker & McKenzie understand,
14 based on the application from Mr. Ruiz de Velasco,
15 and based on the answer he got? It understood in
16 accordance with its opinion of August 25 that in
17 accordance with what it had expressed, and which
18 was confirmed this week, that there would not at
19 all--well, in response to the question by the
20 President, he was very clear. Although the word
21 predominant appears, just to give an example

1 although the Mexican Government does not agree with
2 that view, that it was possible to obtain
3 110 percent of what was requested.

4 Despite the use of the word "predominant,"
5 what Mr. Ruiz de Velasco was understood was exactly
6 what he had asked for; he understood that chance
7 and betting would not be included. And it's not
8 Gobernacion, and please understand this. It's
9 Mr. Ruiz de Velasco who defined the slot machines.
10 Gobernacion refers to slot machines, and Mr. Ruiz
11 de Velasco tells the company that the slot machines
12 considered to be machines of chance or betting.

13 You will recall that Mr. Ruiz de Velasco
14 said that he's a careful lawyer, and he wanted to
15 be perfectly clear. Those machines are forbidden.

16 He also warned his client, and he said
17 furthermore, in accordance with the letter from
18 Gobernacion, which stresses the interpretation, EDM
19 can operate, and then he gives his warning, as long
20 as the machines do not become in any manner
21 whatsoever as gaming or betting machines.

1 With all due respect, I've tried to find
2 the way to translate into Spanish all of the
3 negatives that appear in this sentence to reflect
4 the warning of Mr. Ruiz de Velasco to his client,
5 and I will just quote his English. In any manner
6 whatsoever, machines of chance or betting.

7 So, Mr. Ruiz de Velasco did not even say
8 predominantly chance or betting. Despite what was
9 said by Gobernacion, Mr. Ruiz de Velasco was even
10 more categorical. It was even clear and even more
11 cautious in his word of warning to his customer.

12 And as we learned this week, Mr. Ruiz de
13 Velasco did not have all of the information. And
14 had he had the information, he said possibly he
15 would have changed his answer because that means
16 that there would be those elements of chance and
17 betting coming into play. Probably, excuse me, not
18 possibly, but probably he would have changed his
19 view.

20 And this comes from the lawyer--

21 PRESIDENT VAN DEN BERG: I think you were

1 in the middle of still describing Mr. De Velasco's
2 opinion in relation to the 15 August letter.
3 Please finish this, and I think then Professor
4 Walde can ask you a question.

5 MR. PEREZCANO: Thank you. Yes, I was
6 saying that this comes from the lawyer who was
7 involved in the preparation, presentation, of the
8 document, and it was expressly requested to provide
9 his--the view as a Mexican lawyer on the letter
10 issued by Mexican official.

11 ARBITRATOR WALDE: If one looks at the
12 procurio letter, there is a lot of to and from, but
13 what stands out is this word preponderant. If I
14 look at it from the uses, the "etrasee" side, is it
15 not so that the user can read in the end the letter
16 saying if there is predominantly, which I interpret
17 to be 50.000001 and more skill, then I can operate,
18 but if it is not, if it is less than 50 percent,
19 then I cannot operate, which then would get us to
20 that quite difficult issue what machines or what
21 perception of machines is actually preponderant.

1 Would you agree with me? I mean, there is
2 so many notes and here and this, but that is one
3 criterion that seems to stand out.

4 MR. PEREZCANO: No, Professor Walde, I
5 would not agree with you for several reasons.
6 Firstly, as was pointed out by Mr. Alcantara
7 yesterday, first, it's a condition.

8 Secondly, that refers only to the skill
9 element. It does not refer to the betting.

10 Thirdly, this is a view requested by a
11 customer where the executives are foreigners.
12 Certainly, people who are not familiar with Mexican
13 administrative laws and processes, where the
14 customer asks his lawyers to request an opinion
15 from Gobernacion. The customers' lawyers, the
16 Mexican lawyers, experts in Mexican law, then
17 prepare the note and ask for an opinion.
18 Gobernacion issues the opinion, and the main lawyer
19 that interprets that opinion issued within the
20 context of Mexican law.

21 And the Mexican lawyer had no doubt, and I

1 would differ with you, and I believe Mr. Ruiz de
2 Velasco would also differ in that what really
3 sticks out is the word predominant, but he didn't
4 think that it stood out.

5 ARBITRATOR WALDE: You give most weight to
6 Mr. De Velasco, who had the role, as I see it and
7 correct me if you think this is a different view.
8 He seemed to be partly involved, but he was at the
9 same time--there was a second line of advice which
10 was by lawyers, but perhaps more in a promoter
11 role, as I would see it. And if I remember his
12 testimony, he said, well, I didn't know there were
13 other people, that was what I was told, but my role
14 was limited.

15 Is it right that one sees him, he is part
16 of the Mexican advisory team, they were not talking
17 to each other, as far as I could see it? And that
18 my second observation--no compound questions. It
19 would not be compound, but it would be just a
20 consecutive, but I will not try it.

21 MR. PEREZCANO: Mr. Walde, Mr. Ruiz de

1 Velasco, according to information in the record and
2 to the request from claimant, Baker & McKenzie were
3 the lawyers of Thunderbird in Mexico. He was
4 requested to express a view, and we have the view
5 of Mr. Ruiz de Velasco presented by claimant to
6 support what EDM and Thunderbird understood on the
7 basis of the Gobernacion letter.

8 Thirdly, there is no proof or evidence of
9 this specific role played by Messrs. Aspe and
10 Arroyo, nor of what they said, nor of what their
11 level of involvement, and the Tribunal should not
12 speculate on that. It seems to me that the
13 claimant's lawyer was Mr. Ruiz de Velasco, and the
14 law office was that of Baker & McKenzie and no one
15 else.

16 ARBITRATOR WALDE: Mr. De Velasco, can one
17 not also think that his understanding of the issues
18 which was actually quite limited both in the year
19 2001, and actually even yesterday? It's easy now
20 with hindsight, one understands the issues better,
21 and you can't use hindsight to say he should have

1 known all of these as well as we understand the
2 issues now, but--

3 MR. PEREZCANO: Professor Walde, it's a
4 company that's involved in betting. Mr. Ruiz de
5 Velasco is a lawyer of that company. He's a member
6 of that team. Well, he is a member of the team,
7 and according to Mr. Mitchell, he gave instructions
8 on how the application should be drafted, what it
9 should be--what it should contain, and probably
10 what it did not contain. And if Mr. Ruiz de
11 Velasco did not know that, why do we assume or how
12 can one assume that the Gobernacion officials
13 should know that?

14 Mr. Mitchell testified, and these are the
15 first quotations we gave you on page one. We were
16 advised by Baker & McKenzie with certainty that
17 skill machines of the type that we were going to
18 operate were allowable in Mexico.

19 That's Mr. Mitchell's testimony. And this
20 is what Mr. Mitchell said to use his own words, and
21 that quote you will be able to find on page three

1 of the document we have given you.

2 ARBITRATOR WALDE: If I can read.

3 "QUESTION: Baker & McKenzie lawyers
4 would have received those instructions to
5 Mr. Mitchell?"

6 I assume you want to sigh you
7 translate from Mr. Mitchell. Then it
8 says: "Let me recall that those who were
9 working on the application were
10 Messrs. Arroyo and Aspe, and we helped
11 with the drafting, we helped but we didn't
12 draft it ourselves."

13 Am I right here in reading this from
14 your--

15 MR. PEREZCANO: Yes, that's a
16 transcription, and that's what the transcription
17 says, Mr. Walde.

18 Professor Walde, the government officials
19 cannot try to speculate. They've got to act on the
20 basis of letters they get of the information they
21 goat. They cannot speculate what might happen in

1 relationships between private individuals and their
2 lawyers, what they say and what instructions they
3 impart. First, there is no evidence, and the
4 claimant hasn't even suggested that the opinion or
5 view of Gobernacion was based on conversations
6 between Aspe and Arroyo and government officials.
7 There is no dispute as to the fact that Gobernacion
8 based itself on what was said in writing by EDM in
9 its August 3 application.

10 PRESIDENT VAN DEN BERG: Mr. Perezcano,
11 may I come back to what you said a few moments ago
12 in response to a question of Professor Walde.

13 MR. PEREZCANO: Yes, sir.

14 PRESIDENT VAN DEN BERG: It talks about
15 preponderantly, and you answered Professor Walde.
16 You said, well, my interpretation is that if it is
17 more than 50 percent, then it is allowed; if less
18 than 50 percent then it is not allowed. Okay, you
19 can have an idea about it, and you answered I don't
20 agree. You say--then you gave three arguments and
21 what I want to come back to is your second

1 argument. You say well, look to the word
2 preponderant refers only to the skill element and
3 not to the betting. Did I understand you correctly
4 or it was just the reverse?

5 MR. PEREZCANO: Mr. President, what the
6 document says where the predominant operating
7 factor is chance and betting and not skill as you
8 have stated. That's what the document says.

9 PRESIDENT VAN DEN BERG: Yes, exactly, but
10 I believed you were stating just the opposite, and
11 most likely unintentionally because you said
12 predominantly refers to skill and not to betting,
13 but just the opposite of what the document says,
14 isn't it?

15 MR. PEREZCANO: If I said it that way, I
16 should correct that. What the document says is for
17 the predominant operating factors chance and
18 betting and not ability and skill as you have
19 stated.

20 PRESIDENT VAN DEN BERG: If you take a
21 look through this paragraph while we are at it,

1 because the question is this deals with
2 predominantly aspects of betting and chance or
3 chance and betting, I should say. But does it
4 address also the question predominantly, now the
5 reverse, predominantly skilled? That's the reason
6 why also we pick up this question. It says one
7 thing, but does it also say the other thing.

8 MR. PEREZCANO: You might interpret it as
9 predominantly ability and skill and not betting.

10 PRESIDENT VAN DEN BERG: So, you would say
11 you can interpret this?

12 MR. PEREZCANO: Yes, sir.

13 PRESIDENT VAN DEN BERG: Thank you.

14 MR. PEREZCANO: And certainly, if I might
15 add, even the claimant didn't think that we have
16 gotten there. Mr. Atallah said that this only
17 involved a certain amount of ability and skill. I
18 was far away from a 50/50 line, if that had been
19 the proper line, according to the Government of
20 Mexico, but it was a lot more than 50/50.

21 Mr. President, I would like to now yield

1 to Mr. Becker, and I will come back to talk about
2 some other topics a little later.

3 MR. BECKER: I'm going to try to quickly
4 review what we have seen about the nature of the
5 machines this week. We are going to refer back to
6 the presentation I made during the opening on the
7 first day, and compare it to what we have seen the
8 last few days.

9 On the first day I showed you a close-up
10 photograph of a dollar acceptor on one of the
11 machines. Later Mr. Mitchell confirmed that the
12 machines did indeed have dollar acceptors and
13 dispensed tickets with credits that could be
14 exchanged for money. He agreed it was a
15 fundamental aspect of the equipment. That's on
16 page 303 of the transcript.

17 Indeed, as we later heard, that's what
18 Club 21 had, and the idea was to emulate Club 21.

19 With all respect, I think our continuing
20 discussion this week on the precise level of skill
21 that might be involved in the defining a skill game

1 is a bit misplaced. The games involved betting and
2 winning money, and without a specific exemption in
3 the law or a specific permit, games of betting are
4 prohibited in Mexico, just as they are in the
5 United States.

6 I would also like to add, and I'm going to
7 come back to this in a minute, we have not found a
8 single jurisdiction in which the types of games we
9 have been discussing here, video poker, or these
10 button stop VGT reel games, we haven't found a
11 single jurisdiction in which they're not considered
12 gambling games. And I think that's very telling.
13 Like I said, I will come back to that in a moment.

14 Now, Mr. Perezcano already discussed a bit
15 the issue of the model numbers that were included
16 in the EDM solicitud, the SCI 17-inch UR and the
17 Bestco MTL 19U8L.

18 Mr. Crosby today persisted in arguing
19 today that those are actual model numbers, but you
20 saw I took you through the documentation. The SCI
21 17-inch UR described a 17-inch upright video game,

1 which tells you nothing useful or distinctive about
2 the game. The Bestco MTL 19U8L was simply a random
3 combination of abbreviations and numbers from the
4 Bestco invoice, which amounted to gibberish and
5 omitted the actual name of the machine that Bestco
6 uses which is the 7,100 Fantasy Five.

7 When asked by the Tribunal, Mr. McDonald,
8 whose very business is to distribute these types of
9 machines, and who submitted written testimony to
10 both Gobernacion and this Tribunal on the
11 functionality of the machines, claimed he wasn't
12 familiar with Bestco's model numbers so he couldn't
13 comment on the MTL designation. And as we've
14 already diagnosed, Mr. Ruiz de Velasco, the
15 attorney who submitted the solicitud admitted he
16 had no idea what the model numbers meant. That's
17 on pages 583 to 585 of the transcript.

18 I would like to add that SCI is simply the
19 initials of Support Consultants, Inc., which as far
20 as we can tell doesn't have a Web site and doesn't
21 seem to have a catalog since they haven't submitted

1 anything in these proceedings, and based on
2 Mr. McDonald's witness statement and the attachment
3 to it, it appears that SCI's only customer is
4 Thunderbird. So, I'd submit to you that SCI is not
5 a household name.

6 Now, on the first day, I also noted that
7 Mexico's position was that all the machines were
8 obtained from the United States and that they are
9 either identical or closely similar to machines
10 that had been found to be gambling games under U.S.
11 law in various jurisdictions.

12 In fact, we included as an exhibit to our
13 statement of defense a copy of a ruling of a U.S.
14 national Indian Gaming Commission on the Bestco
15 Fantasy Five machine, the very same game that was
16 at the EDM facility, and the U.S. federal authority
17 found that it was clearly a gambling game and not a
18 game of skill.

19 Now, Mr. McDonald had previously testified
20 that the machines supplied by SCI, Bestco, and
21 Summit were especially made for Mexico based on the

1 August 15th, 2000 letter, and that's at Exhibit
2 C-HH, paragraph 10.

3 When asked this week about the purported
4 parameters for the software of the games or the
5 functionality of them that he was given my
6 Thunderbird, Mr. McDonald only said that he was
7 told to supplied a game that was predominantly
8 skill. That's all he said, it's on page 532.

9 In response to a further question from the
10 Tribunal, he added that he was specifically told to
11 supply five- and eight-line spinning reel games
12 with stop buttons of the type that Thunderbird said
13 it had seen in a facility in Juarez. That's at
14 page 535. These are exactly the button stop video
15 gaming terminals that Thunderbird itself describes
16 in its annual information report as computerized
17 slot machines.

18 As you also heard, Mr. McDonald said that,
19 quote, roughly half, unquote, of the machines he
20 told to EDM were refurbished machines and that of
21 those, quote, some could have come from

1 Thunderbird, unquote. That's on page 542.

2 The first, he said he didn't know who had
3 prepared his own company's manual. That's at page
4 516. He eventually acknowledged that the SCI
5 operating manual, with the name Mina D'Oro on the
6 cover was just a photocopy of an older Thunderbird
7 manual on which the cover page had been changed to
8 show SCI's name instead of Thunderbird's. We
9 reviewed with him the fact that on some pages the
10 word poker had been whited out of the SCI manual,
11 although everything else was identical on those
12 pages. He claimed he had no idea who had done that
13 or why. That's on pages 519 and 520.

14 We also reviewed with you the fact that
15 the Bestco machines had been purchased in June
16 2000, almost two months before the August 3rd
17 solitud was even submitted. Those machines
18 cannot conceivably have been custom-made to conform
19 to the August 15th letter.

20 Now, I would like to hope that at this
21 point you have no doubt that the Mina D'Oro game

1 demonstrated by Mr. McDonald is video poker. He
2 confirmed the demonstration game, had a random
3 number generator to deal the first set of carts,
4 and I say C-A-R-T-S, and the subsequent set of
5 symbols generated after the player decided to hold
6 any cards. That's at page 510.

7 Mr. McDonald agreed that the payout odds
8 on his game were the same as the payout odds listed
9 in the SCI/Thunderbird manuals for video poker.
10 That's at page 542. The only difference he could
11 identify was that the demonstration game did not
12 use images of playing cards, but rather images of
13 mining carts.

14 Mr. Atallah also volunteered that EDM had
15 a, quote, poker theme-type game. That's at pages
16 216 and 217.

17 Now, on cross-examination, Mr. Crosby
18 asked Professor Rose to confirm that it was obvious
19 from the photographs of the machines that we had
20 from Nuevo Laredo that the players played against
21 the machine and not against each other, and

1 therefore, that the games were banked games,
2 meaning that the customers were playing against the
3 house and not each other, and therefore, that the
4 house had a direct interest in the outcome of each
5 play. That's at pages 746 and 747.

6 Professor Rose agreed. He explained that
7 this is the type of gambling that takes place in
8 casinos.

9 Now, when asked whether games with similar
10 software programs were in use in the United States,
11 Mr. McDonald testified that he personally had been
12 involved in providing such games to tribal casinos
13 in several U.S. states, but then he also admitted
14 that those machines were regulated as Class III
15 gambling devices under the national Indian Game and
16 Regulatory Act. That's at page 542.

17 By the way, I noted on the first day that
18 EDM and Mr. Perezcano has been emphasizing that the
19 EDM solicitud did not disclose at all that one of
20 the proposed games would be video poker. On pages
21 490 to 491, Mr. McDonald testified that 30 to

1 40 percent of the EDM machines were like the one he
2 demonstrated to you; that is, they were video poker
3 games.

4 On the other hand, that means that 60 to
5 70 percent of the games used by EDM were spinning
6 reel games. If you did the stop buttons or the
7 touch screens stop feature. Yet Thunderbird didn't
8 bring a demonstration of the spinning reel game for
9 you to see.

10 On the first day, I showed you a manual
11 for the Bestco Fantasy Five spinning reel game that
12 expressly described how the operator, not the
13 player, but the operator, could adjust the payout
14 percentage of the game played. Professor Rose
15 commented on the photographs of the reel games at
16 EDM, confirming they looked just like typical slot
17 machines. That's on page 731.

18 I also showed you pictures of the Very
19 Cherry Bonus, the Red White and Blue Sevens, and
20 the Wizards game that were at EDM and which
21 Thunderbird described in its own annual information

1 report as button stop VGTs; that is, computerized
2 slot machines.

3 We'd submit to you that based on the
4 evidence in the record, there is just no doubt that
5 these games were slot machines designed and used
6 for gambling.

7 Now, Mexico has shown, and I alluded to
8 this at the beginning, we have shown that a number
9 of jurisdictions in the U.S., both at the federal
10 and at the state level, that these games called
11 video poker and button stop VGTs are regulated as
12 gambling games, even in states such as North
13 Carolina, where there is an exception for games
14 that have some skill. They're prohibited because
15 you can win money, and that's gambling.

16 The claimant has not identified a single
17 jurisdiction where these games are not treated as
18 gambling games, and we don't think that one exists.
19 They've argued in various places that these games
20 were, quote-unquote, legal in some places, but
21 every time they did that, it turned out they were

1 referring to casinos that were licensed to have
2 gambling, such as on an Indian Reservation. Mexico
3 doesn't allow casinos.

4 Now, I want to highlight, we picked North
5 Carolina as a sample state for this reason only
6 because the claimant identified North Carolina as a
7 law that they thought was similar to the law of
8 Mexico. And that's why we focused on it. We could
9 look at other states; in our statement of defense
10 we discuss the fact that in California, the courts
11 ruled that even Indian tribes couldn't operate
12 casinos under their constitution. It was illegal,
13 and the Governor couldn't authorize it, and it was
14 only in the year 2000 that the voters of California
15 agreed to amend their constitution to allow
16 casinos, and that's what allowed the casinos to
17 continue to be allowed in California on the Indian
18 reservations only.

19 But prohibitions on gaming and gambling
20 are not unusual, and I don't think it requires a
21 lot of nuanced parsing through language. I mean,

1 gambling is gambling, and prohibitions on gambling
2 can be absolute. There is nothing unusual about
3 that.

4 I'm next going to deal with the Netcomm
5 report. As you know, EDM presented the Netcomm
6 report to Gobernacion as a, quote, expert, unquote,
7 report of PGR. That's the acronym for the Mexican
8 Ministry of Justice. It also described it to you
9 as the PGR report and claimed it was an independent
10 report with which Thunderbird had no involvement,
11 and therefore Gobernacion should have given it a
12 lot of weight.

13 On the first day of the hearing,
14 Mr. Crosby said, "we," referring to his client, had
15 nothing to do with that report. Unfortunately for
16 Thunderbird, buried in exhibits submitted with its
17 statement of claim was a copy of a draft version of
18 the report with Mr. Atallah's handwriting. At page
19 174 of the transcript, he acknowledged that he had
20 seen a draft of the Netcomm report before it was
21 finalized and commented on it. Among other things,

1 his notes indicate that large sections of the
2 report, including its conclusions were, quote, from
3 Kevin, unquote, meaning Kevin McDonald.

4 PRESIDENT VAN DEN BERG: I understood also
5 argument by Mr. Crosby that the version with the
6 handwriting on it was also submitted to the
7 Gobernacion as part of the package. Now, I tried
8 to check Exhibit C-69-A where it is, but I couldn't
9 find the version with the handwriting on it.
10 Perhaps I have missed something. Perhaps I could
11 ask at this point Mr. Crosby on this one since you
12 made a reference to this.

13 MR. CROSBY: It's in Exhibit 69.

14 PRESIDENT VAN DEN BERG: Do you represent
15 to the Tribunal that the version with the
16 handwriting on it of Mr. Atallah that had been
17 submitted to SEGOB at the time, the famous booklet?

18 MR. CROSBY: I'm not equivocating, I
19 wasn't there. So, to be precise, the bundle was
20 copied as Exhibit 69 was the exact bundle that was
21 produced to Guadalupe Vargas at the hearing.

1 PRESIDENT VAN DEN BERG: But is it that
2 your submission that the version with the
3 handwriting on it, that that was also submitted to
4 the Gobernacion on the 10th of July of 2001?

5 MR. CROSBY: I believe that's the case
6 based upon the evidence in the record. I wasn't
7 there, but that's the evidence in the record.

8 PRESIDENT VAN DEN BERG: That's what the
9 claimant has submitted as an Exhibit 69.

10 MR. CROSBY: Yes.

11 PRESIDENT VAN DEN BERG: But is it indeed,
12 your submission that that copy was actually the
13 copy that was submitted to the Gobernacion?

14 MR. CROSBY: Yes, based upon the evidence
15 in the record.

16 I'm not being funny here.

17 PRESIDENT VAN DEN BERG: No, no, I'm not
18 being funny, but I'm a bit surprised that you
19 submit to Gobernacion a document which has
20 handwritten comments on it. Or is that known
21 procedure in Mexico?

1 MR. CROSBY: I don't know if it's a known
2 procedure in Mexico, but regulatory activity often
3 takes comments from the parties being regulated. I
4 have seen that numerous times.

5 MR. BECKER: Could I comment on this for a
6 second?

7 PRESIDENT VAN DEN BERG: Okay, but I
8 simply--it's your case that the document with the
9 handwriting has been submitted to the Gobernacion?

10 MR. CROSBY: Yes, the evidence says that.

11 PRESIDENT VAN DEN BERG: All right.

12 MR. CROSBY: Again, I'm not being fishy
13 here.

14 PRESIDENT VAN DEN BERG: That's not the
15 point. The point is you say the evidence says
16 that. Let's put it this way. The copy that has
17 been submitted by you as Exhibit 69 is, indeed, a
18 copy which contains the handwritten notation.

19 MR. CROSBY: Yes.

20 PRESIDENT VAN DEN BERG: The next question
21 is has that also been submitted, that package, to

1 the Gobernacion?

2 MR. CROSBY: Yes, the evidence in the
3 record from Mr. Atallah in his declaration is that
4 69 is the bundle of document and submissions
5 provided to Gobernacion.

6 PRESIDENT VAN DEN BERG: All right, thank
7 you.

8 MR. PEREZCANO: I comment in this regard,
9 Mr. President. The evidence in the file and that
10 are in the file of Gobernacion in connection with
11 the documents presented to it is Annex R-47, which
12 is the certificate of the hearing of July 10th,
13 describes what was presented. We reviewed this
14 with Mr. Ruiz de Velasco on page two, number 25,
15 reference is made to the documents presented by
16 Ruiz de Velasco to Gobernacion. Here it says
17 opinion of the PGR, and the opinion has 26 pages.
18 It makes no reference to a draft.

19 And here a description is made one by one
20 of each one of the documents that was contained in
21 the book prepared and entitled, according to page

1 two, and I'm looking at the latter section of the
2 paragraph, it says report--well, it's a very long
3 paragraph, but if you look at number two, page
4 25--numbered 25? What number? Number 25. It says
5 document of 10th July of this year signed by
6 Mr. Ruiz de Velasco, who purports to be or says he
7 is the representative of the legal entity above
8 mentioned. And he shows as an annex a document
9 entitled Report for the Gobernacion General
10 Direction of Government, et cetera, and this is the
11 report of the PGR that has 26 pages.

12 And this is the report by Netcomm. Here
13 it's just making reference to it.

14 There is no draft of the opinion with
15 comments, handwritten comments. That piece of
16 evidence is not part of the documents received by
17 Gobernacion on that date. This is a document
18 signed by Mr. Ruiz de Velasco.

19 In the administrative decision of July 10,
20 reference is made to each one of the pieces of
21 evidence, and those pieces of evidence are

1 assessed, and there is no reference at Gobernacion
2 of a draft of whatever number of pages. What was
3 presented was the final product.

4 So, I differ from the opinion presented by
5 Mr. Crosby, and I will actually remit to the
6 documents--to what the documents say.

7 MR. BECKER: Let's step back for a second.

8 MR. CROSBY: I would like to comment here.

9 PRESIDENT VAN DEN BERG: You will get a
10 chance, Mr. Crosby. Now it's the respondent
11 finishes and then you can.

12 MR. BECKER: Mr. McDonald submitted his
13 own affidavit to Gobernacion that was also included
14 in that package. As we reviewed, both in our
15 statement of rejoinder and during the hearing this
16 week, Gobernacion put the McDonald affidavit and
17 the Netcomm report side by side, actually in its
18 decision, and showed on the key conclusions that
19 the two documents were word for word identical with
20 a couple of incidental differences that were
21 immaterial.

1 We have--just to avoid confusion, there
2 was the signed document, the signed Netcomm report
3 filed in the package. What we were reviewing with
4 Mr. Atallah this week was an unsigned document that
5 wasn't even on Netcomm letterhead that had running
6 down the column in the margins, his markings that
7 said from Kevin, and brackets around various
8 paragraphs that are repeated in the Netcomm report.
9 We think that's fairly compelling evidence that
10 Thunderbird had access to the draft before it was
11 completed, that either it or Kevin McDonald,
12 through it were able to make comments and drafting
13 changes in the Netcomm report which Netcomm then
14 adopted. And we think that's inconsistent with
15 saying that they had nothing to do with the report,
16 that it was totally independent.

17 PRESIDENT VAN DEN BERG: The question
18 here, because I didn't check it, the Netcomm report
19 as quoted in the resolution, that part, is
20 different from the draft as submitted as 69, the
21 text of it?

1 MR. BECKER: It's the same page.

2 PRESIDENT VAN DEN BERG: Yes, but where
3 you have a comment on it there is a draft, and you
4 would then expect that you're commenting.

5 MR. BECKER: When your comment is from
6 Kevin.

7 PRESIDENT VAN DEN BERG: Okay, but that is
8 not the point. Your previous draft, but--

9 MR. BECKER: This suggested that it said
10 this is the stuff that Kevin wrote.

11 PRESIDENT VAN DEN BERG: Okay. That's
12 your point, okay.

13 MR. CROSBY: I have calmed down a little
14 bit, but if the implication here is that we've
15 filled with evidence, I take affront to it.

16 MR. BECKER: Not in this proceeding.

17 PRESIDENT VAN DEN BERG: No, no, no,
18 absolutely not. The whole point is there can be a
19 mixup in the submission that you have submitted
20 here and it can be--

21 MR. CROSBY: Or, alternatively, it could

1 have been in the submission as well to comment on
2 the evidence.

3 PRESIDENT VAN DEN BERG: There is--this is
4 not the way I understood the allegation of
5 propriety of evidence being submitted. It can be a
6 mixup, so that's why I wondered because you said
7 wait a moment, it can't be because I submitted
8 this, and the other side said no, no, wait a
9 moment.

10 MR. CROSBY: Agreed. The evidence is what
11 it is, and you can draw whatever concludes you
12 want.

13 MR. BECKER: That's we are asking. And
14 again I would note that Gobernacion--

15 MR. CROSBY: That's what I'm asking, too,
16 Mr. Becker.

17 MR. BECKER: Thank you, Mr. Crosby.

18 Gobernacion put the two documents
19 together, and they said these are word for word
20 identical, and it included that it could not give
21 probative value to the Netcomm report on that

1 basis. I don't think that's unusual.

2 Now, even putting aside that the
3 department does not appear to be independent, let's
4 look at its contents. Note that Netcomm is not a
5 game testing laboratory, that the report contains
6 no explanation of Netcomm's background or expertise
7 in this type of matter. Professor Rose testified
8 he's never heard of Netcomm. That's at page 785
9 and 86. Just as important, the report shows that
10 they simply took off the back of the machine and
11 looked at the printed circuit boards. You got the
12 same view of the printed circuit board of the
13 demonstration machine that Mr. McDonald showed you
14 on Tuesday.

15 As Professor Rose agreed or testified, you
16 can't tell anything about a machine's operation by
17 just looking at its electronic components. That's
18 at pages 782 and 83. We think the Netcomm report
19 was and remains useless. We think it has no
20 probative value whatever.

21 Now, at the same time that the Netcomm

1 report was submitted by Gobernacion to Gobernacion
2 by EDM, it also included in that package an
3 affidavit from Mr. Atallah, saying that the
4 machines would be legal in North Carolina, in his
5 opinion, based on his research. But I took him
6 through the North Carolina statute, and we saw that
7 it expressly prohibits video poker and
8 Eight-Liners, and even more, that it prohibits all
9 games at which you can win money, regardless of the
10 level of skill. That wasn't mentioned in the
11 affidavit that was submitted to Gobernacion about
12 North Carolina law.

13 Now that we have reviewed the facts of the
14 machine, I want to examine how this Tribunal should
15 treat them as relevant. And this relates
16 specifically to one of the questions the Tribunal
17 has posed to us, specifically question six, which
18 is, quote, Is the functionality of the machines
19 technically or otherwise operated by the EDM
20 Companies relevant in the present case, unquote?

21 To answer this question, we must start

1 with the applicable law for this Tribunal, which is
2 NAFTA Chapter 11. The Tribunal does not have the
3 same jurisdiction as some other types of
4 international tribunals. It is not authorized to
5 resolve disputes arising under domestic law. It
6 can only apply international law standards in
7 determining whether Mexico has breached any of its
8 Chapter 11 obligations.

9 Accordingly, this Tribunal cannot make a
10 ruling on whether the machines are gambling devices
11 or whether they are legal or illegal under Mexican
12 law. It simply lacks that jurisdiction.

13 Nonetheless, understanding the nature of
14 the machines can be useful to the Tribunal in
15 evaluating whether Mexico has dealt with EDM in a
16 manner consistent with the international legal
17 standards derived from Chapter 11. Thus, in
18 determining whether or not Mexico may have failed
19 to accord the international customary law of
20 minimum standard of treatment to EDM, that Tribunal
21 may feel it needs to decide whether Gobernacion's

1 actions in ruling that the machines were gambling
2 devices were so arbitrary as to violate
3 international law norms.

4 In the "Gannon" versus Estonia case, at
5 paragraph 267, the Tribunal explained the
6 international minimum standard as follows, and I
7 quote, While the content of this standard is not
8 clear, the Tribunal understands it to require an
9 international minimum standard that is separate
10 from domestic law, but that is, indeed, a minimum
11 standard. Acts that would violate this minimum
12 standard would include acts showing a willful
13 neglect of duty and insufficiency of action falling
14 far below international standards or even
15 subjective bad faith, unquote.

16 It would not be enough for this Tribunal
17 to disagree with Gobernacion on whether the
18 machines were skill machines or gambling equipment.
19 The Tribunal would have to find that a decision to
20 classify those machines as gambling equipment was
21 so arbitrary, so outrageous that it fell below the

1 international minimum standard. Mr. Weiler
2 described it as a result that is, quote, shocking,
3 unquote.

4 To the contrary, we think the evidence
5 shows that Gobernacion's final ruling on the
6 machines was completely consistent with the
7 treatment of these types of machines in other
8 countries, including the United States, the country
9 from which Thunderbird obtained and recycled them,
10 as well as with the treatment of similar machines
11 used by others in Mexico.

12 In fact, it would have been surprising if
13 Gobernacion reached the conclusion that these were
14 not gambling machines. Gobernacion's treatment of
15 the machines and of their operators comes nowhere
16 close to violating the international minimum
17 standard.

18 Now, listening to discussion the last few
19 days and particularly this afternoon, I just wanted
20 to highlight something which is, we are dealing
21 here with gambling. We are not talking about

1 opening a restaurant or opening a shoe factory. We
2 are dealing with gambling, which is regulated,
3 prohibited under criminal statutes, as well as
4 administrative statutes, in both the United States
5 and Mexico. It's serious business, and we have
6 included in our Exhibit R-10 a few samples of
7 articles about sample enforcement activities in
8 United States where people who are selling these
9 types of machines, these button skill-stop machines
10 were arrested. Police came, handcuffed them, took
11 them away, and they were prosecuted and thrown in
12 jail. This is not some sort of civil--it's not a
13 civil contract. This is serious business we are
14 talking about.

15 And there is certainly plenty of illegal
16 gambling that goes on in the United States as well,
17 even though it has serious criminal statutes for
18 it. People will always get away with it.
19 Sometimes people commit crimes, get off on
20 technicalities or get injunctions for a while, but
21 I just wanted to remind the Tribunal that we are

1 not dealing with a regular run of the mill type of
2 commercial activity here. As Professor Rose
3 mentioned the other day, we are talking about an
4 issue that deals with moral standards, and many
5 jurisdictions have different views on what those
6 moral standards should be, but unlicensed gambling
7 generally is not permitted anywhere.

8 And we think that the fact that the
9 machines were gambling equipment that was illegal
10 under Mexico law is also going to be relevant to
11 your consideration whether Thunderbird could have
12 had any kind of property right in having EDM
13 allowed to operate them in violation of domestic
14 law. And clearly we think the answer to that
15 question is no. Thank you. With that, I will turn
16 it back over to Mr. Perezcano.

17 MR. PEREZCANO: Thank you, Mr. President.
18 I'm going to try to make this brief. As Mr. Becker
19 has provided the explanation, I would like to refer
20 to the administrative procedure--well, in fact, to
21 the events that occurred and gave rise to the

1 administrative procedure.

2 EDM having said what it said in its
3 application, Gobernacion having answered what it
4 answered, Attorney Ruiz de Velasco having given the
5 opinion that he gave, it was to be expected, as I
6 said, at the outset of my presentation, that
7 Gobernacion would shut down the establishments, and
8 this is also anticipated by Ruiz de Velasco in his
9 August 25 opinion. In fact, this is what happened
10 in February of 2001. The Matamoros facility was
11 shut down.

12 Earlier today, Mr. Crosby referred to
13 Attorney Montano's participation. His
14 participation in this hearing and his testimony
15 regarding changes in government and apparently
16 changes in opinion from one administration to the
17 next. And I merely would like to remind the
18 Tribunal that Mr. Montano was not even aware that
19 Gobernacion had acted in the exact same fashion,
20 even before the elections were held in Mexico.
21 This has nothing to do with the change in

1 administration, nor, as we will see in just a
2 moment, does it have anything to do with
3 Mr. Guadalupe Vargas.

4 Mr. Montano said is that promises were
5 made that were not kept, and that, therefore, he
6 had some very frustrating months. Nonetheless, I
7 briefly reviewed with him what happened in those
8 months subsequent to the shutdown, and I would say
9 it's entirely to the contrary. Indeed, they hired
10 Mr. Montano to improve the relations or to carry on
11 the relations with the government, and they
12 obtained various things. Meetings even at the very
13 highest level with the present day, and at that
14 time Secretary of Gobernacion with the
15 Director-General of Government, the
16 Director-General for Legal Affairs, several
17 meetings.

18 Now, if the promises were that they would
19 meet with them, they were kept, and it wasn't just
20 one or two but several meetings that were held.

21 As a result of those meetings, there was

1 an agreement. EDM would withdraw its amparo, would
2 abandon it, and Gobernacion would remove the seals
3 and both--well, EDM would subject itself to an
4 administrative proceeding carried out by
5 Gobernacion. If that's what was promised, then
6 that promise was kept.

7 In effect, the administrative proceeding
8 went forward, and much has been said about what
9 happened at the 10 July hearing. One mustn't lose
10 sight, and I go back to the opinion by Jose Maria
11 Serna, which is submitted by Mexico in its
12 statement of defense. The administrative
13 proceeding is not exhausted in the hearing, and
14 indeed, one must put the hearing in proper context.

15 The hearing was a hearing to receive and
16 admit evidence and to go through some of it. The
17 act of the administrative proceeding that I
18 referred to a moment ago--and I take this
19 opportunity of having referred to this document to
20 reiterate to Mr. Crosby that it was not our intent,
21 and to repeat that we never suggested that in this

1 proceeding there had been any manipulation of
2 evidence. We were simply referring to what was
3 submitted and what was not submitted in that
4 administrative procedure.

5 PRESIDENT VAN DEN BERG: Mr. Crosby.

6 MR. CROSBY: I'm sorry. I overreacted.

7 MR. PEREZCANO: And if there was any
8 misunderstanding, then I also offer apology,
9 respectful apology on behalf of the Government.

10 And the administrative hearing, and this
11 too was important, was attended by EDM with four
12 attorneys. The lead attorney, Mr. Ruiz de Velasco,
13 Mr. Girault, both of whom are mentioned in the act,
14 Mr. Montano told us that he too is an attorney by
15 profession, though he does not practice, and
16 Mr. Carlos Gomez, who was also present throughout
17 this week. Four attorneys. They were all there,
18 as was admitted--as he admitted, as Mr. Ruiz de
19 Velasco admitted after it was rapidly reviewed with
20 him, they submitted all of the evidence they
21 wanted, and I'm not going to refer anymore to the

1 Netcomm report.

2 All of the evidence that Thunderbird
3 wanted to submit in writing--I'm sorry, not
4 Thunderbird, EDM, was submitted, and all but one,
5 the official letter of Gobernacion, and one was
6 rejected after Mr. Ruiz de Velasco expressly
7 requested it.

8 Each of the evidence--items of evidence is
9 individually listed, and there is an account of
10 what happened.

11 Once the documentary evidence was received
12 and the expert and witness testimony was taken, EDM
13 was given an opportunity to make its arguments. It
14 had a full opportunity to do so.

15 And the only arguments that it had to make
16 at that time, the two attorneys expressly
17 indicated, and the other two who accompanied them,
18 had to do with whether two items of evidence would
19 be or would not be admitted. There were no other
20 arguments. There were no arguments about the
21 manner in which the hearing was conducted. And

1 Mr. Alcantara was here yesterday for a lengthy
2 period, and he was not asked a single question
3 about how the hearing unfolded. Not a single
4 question.

5 It appears that the evidence is clear and
6 convincing that that hearing was conducted in an
7 entirely proper fashion. Had there been any
8 irregularity or inconsistency, it would have been
9 reflected at least in the act, and certainly in the
10 amparos and in the proceedings that arose that came
11 up later. In none of the proceedings brought
12 against the administrative ruling is a single
13 reference made to the manner in which the
14 administrative hearing was conducted. The only
15 references made by either party are that it
16 occurred. Nothing more.

17 And we have gone beyond the point of
18 whether Umberto Aguilar was present. Mr. Alcantara
19 already said he wasn't there. Formerly he was
20 there, formerly since he has the authorization, he
21 formally chaired the hearing, and the

1 Administrative Act says so. It says in the first
2 lines, Mr. Marco Umberto Aguilar Coronado,
3 Director-General of Government for the Secretariat
4 of Gobernacion, who acted together with Jose
5 Guadalupe Vargas and Alberto Manuel Alcantara, and
6 then further on it says that the attendance of
7 Messrs. Luis Marcos Ruiz de Velasco and Mauricio
8 Girault Esteva.

9 Apparently, they read the act and signed
10 it at each page, and apparently they didn't see
11 anything inconsistent, irregular, and much less
12 arbitrary or unfair, as was suggested by Mr. Weiler
13 earlier this morning.

14 And the argument was limited to two items
15 of evidence.

16 The case wasn't resolved on 10 July. I
17 insist, the administrative proceeding is not
18 exhausted in the hearing. In his testimony,
19 Mr. Carlos Gomez indicates that it took 89 days,
20 the maximum period for Gobernacion to resolve the
21 matter is 90 days, and it was resolved at day 89.

1 So, it considered the matter for the longest time
2 allowed, issuing its ruling within due time. It
3 was a procedure that took 89 to 90 days.

4 And as we pointed out, Gobernacion makes
5 an extensive consideration of each of the items of
6 evidence. It assigns an evidentiary value.

7 Mr. Ruiz de Velasco admitted that they considered
8 all of the evidence presented. It weighed them as
9 they deemed they should, it being the authority to
10 do that. And after very detailed reasoning, it
11 reached the conclusion that the machines they were
12 operating were machines that involved chance and
13 betting which, therefore, are prohibited.

14 Mr. Ruiz de Velasco said that, well, he
15 did not agree with the ruling, and certainly they
16 filed the respective appeals, but he admitted that
17 it was a reasoned decision in which each and every
18 item of evidence submitted was considered,
19 including that which had initially been set aside
20 by Gobernacion.

21 And this is what led to the closing, as

1 was to be expected, of the establishments. First,
2 Matamoros and Nuevo Laredo and subsequently
3 Reynosa, which had a short time earlier begun its
4 operations. The appeals were filed. I won't get
5 into detail about them, except to say that
6 Mr. Watson's opinion that they had won some amparos
7 in the first instance and that they had been then
8 overturned by the appellate court was clearly
9 wrong. Mr. Ruiz de Velasco confirmed that EDM did
10 not win a single amparo judgment either in the
11 first instance or on appeal, and as the results
12 were uniform and consistent by different courts
13 constituted by different persons, and issued in
14 different points of Mexico. EDM gradually
15 abandoned the appeals or motions that it had
16 brought.

17 Now, whether this had anything to do with
18 contacts that Gobernacion officials had had, the
19 person who they accuse of having met for more than
20 13 hours with the judge was present yesterday. The
21 claimant did not ask a single question of that

1 witness about that.

2 And with this, I would like to move on to
3 briefly address the specific claims made under the
4 treaty.

5 PRESIDENT VAN DEN BERG: Can we take a
6 short break?

7 MR. PEREZCANO: Yes, Mr. President.

8 (Brief recess.)

9 PRESIDENT VAN DEN BERG: One which I
10 understand from the secretary of the Tribunal, that
11 the waivers which we asked for earlier today, I
12 understand they have been filed together with the
13 particularized statement of claim.

14 MR. PEREZCANO: Yes, sir, it's the one we
15 have in our record, and we already made the
16 arguments in that regard.

17 PRESIDENT VAN DEN BERG: As stated in
18 issue four, where you say the date is
19 not--basically it's too late?

20 MR. PEREZCANO: That's right, and the
21 matter has been dealt with.

1 PRESIDENT VAN DEN BERG: Please proceed.

2 MR. PEREZCANO: Thank you.

3 As regards the claims of violations of
4 NAFTA, first, national treatment. It's important
5 to understand that the element that needs to be
6 compared is not EDM and other operators. What the
7 law forbids are games involving chance and betting.
8 And when there have been operations involving games
9 of that nature, the Secretariat of Gobernacion has
10 had acted in the same way. So, there is no doubt
11 that Gobernacion has acted with the same rigor and
12 uniform manner in all cases, including the cases of
13 Mr. Guardia's facilities, Reflejos, and all the
14 other ones.

15 It's a phenomenon where clandestinely--and
16 then people advise Gobernacion about these
17 activities, these places often times don't advise
18 Gobernacion that they have started operating, and
19 Gobernacion, with its resources, has been closing
20 facilities as it discovers that these places start
21 working, start operating.

1 And Mr. Ruiz de Velasco stated or
2 confirmed answering questions from Judge Portal
3 that the activities of Gobernacion have nothing to
4 do with the nationality of claimant. And while
5 some operators in certain few cases have been able
6 to obtain a temporary suspension, first, that is an
7 act of our national courts. It is not a different
8 way of behaving by Gobernacion. It's something
9 done by the courts, which, as was confirmed earlier
10 this afternoon as to why the performance of the
11 courts is not part of this claim. It's not been
12 argued that the behavior of the courts have led to
13 any violation of the treaty.

14 Now, the courts have also applied the same
15 treatment in practically all case, even in the case
16 of Mr. Guardia's facilities. When they've all been
17 given the same treatment with the exception
18 confirmed by Mr. Alcantara yesterday of one of the
19 facilities. Now, two are closed, and one, if it is
20 operating, is operating not only in violation of
21 law but in order of closure, and they don't have or

1 it does not have legal authority to operate.

2 Having heard testimony on Mr. Guardia, I
3 would say parenthetically that would not be
4 strange, but the courts have accorded equal
5 treatment, and the Tribunal should consider that
6 the courts of one country should be looked at in
7 the general context of a country's legal system.
8 It's clear--and it happens in every country in the
9 world--that the courts act in different ways. They
10 issue resolutions. They solve disputes. It's a
11 lengthy process where jurisprudence evolves through
12 the various systems, and you cannot look at cases
13 in isolation from the juridical and legal system
14 and from the administration-of-justice viewpoints.

15 And you must recall what Professor Rose
16 said. Mr. Alcantara's testimony. First, it's a
17 relatively recent phenomenon where we are getting
18 the first cases--the first cases are getting to the
19 tribunals now, and the process takes time, and it
20 takes time for uniform standardized jurisprudence
21 to develop. And we are not at a point--well, let

1 me insist that this is not part of the claim, but
2 against existing jurisprudence against what courts
3 have been deciding, one cannot say that a specific
4 claimant has been dealt with differently. First of
5 all, that's not the argument; and secondly, we must
6 look at the Mexican legal system and administration
7 of justice in its broadest context.

8 So, it's incorrect to take an isolated
9 measure in the case of a claimant, as Mr. Walde
10 said, it's not enough for the claimant to say this
11 is the action taken, but Mr. Guadalupe Vargas's
12 action who apparently threw the book that was given
13 to him that was one action, regardless of whether
14 it is an extra or not, but you have to look at that
15 action in its proper context.

16 That action has much broader context where
17 you have to take into account the individual
18 circumstances pertaining to the facts which might
19 include, as you were saying whether the person had
20 a bad day or did not have a bad day, but also
21 resources that were available, one has to see

1 whether those resources were used, were brought to
2 bear, what actions were taken at the time, what was
3 said at the hearing, the scope of the arguments
4 presented by the two lawyers that have been
5 recorded but there were four who were present
6 during the administrative hearing, what they said
7 during the judicial proceedings, what would have
8 been result of all of that.

9 So, regardless of how an action is
10 identified, the context, the facts and the legal
11 background have to be taken into account.

12 As to Article 1105, and very respectfully,
13 the Government of Mexico is surprised that there
14 are those who still talk about detrimental
15 reliance, that that argument is still being bandied
16 around. I will not go back and cover the earlier
17 arguments. We saw how EDM approached Gobernacion.
18 We saw what their presentation was. We saw what
19 the response they got was, what the opinion of the
20 lawyers of EDM was.

21 And let me insist, if the EDM lawyer said

1 that he probably would--he would have changed his
2 view, that means that Gobernacion was right.
3 Gobernacion did have all the elements that EDM
4 wished to provide, not before, not on August 3rd,
5 but subsequently. It had all the elements that EDM
6 made available to it to consider whether or not
7 whether these were games of skill. EDM submitted
8 the information. The information was received by
9 Gobernacion. It analyzed everything, and it
10 expressed a reasoned opinion. And its conclusion,
11 after having looked at all of the elements, its
12 conclusion was that the condition that was
13 mentioned in the letter of August I have 15 was not
14 being met. EDM had not properly described the
15 games and the machines in the August 3 application,
16 and that is the determination that was reached by
17 Gobernacion.

18 The work of this court, as Mr. Becker
19 suggested a short while ago, leads me to repeat the
20 following. The work of this Tribunal is not to
21 determine whether or not these games are games of

1 skill. And even less so to determine whether
2 pursuant to Mexican law the games are forbidden or
3 not.

4 The role of this Tribunal is also not a
5 matter of determining whether its view--its
6 criterion coincides with that of Gobernacion and
7 whether it should replace its view and base its
8 view on Gobernacion. The work of the Tribunal
9 consists of deciding whether the performance of
10 Gobernacion, when it issued the letter of
11 August 15, based on the description provided by EDM
12 on August 3rd, and having closed the EDM
13 facilities, first the Nuevo Leon facility, having
14 met on multiple occasions with the highest levels
15 of representatives of EDM and Thunderbird, having
16 withdrawn the closing seals, having carried out
17 this administrative procedure, having received all
18 of the evidence, having considered it during the
19 period set forth in the law, the maximum amount of
20 time available per the law, and having concluded
21 that these are forbidden games; and consequently

1 having closed the facilities, whether that set of
2 activities are equivalent to arbitrary treatment
3 under international law. And we are talking about
4 customary international law.

5 Mexico maintains that we weren't even
6 close to the minimum treatment standard. Mexico
7 maintains that it was perfectly reasonable and
8 foreseeable, even in the eyes of the claimant's
9 lawyers, that Gobernacion would reach the
10 conclusion it reached. And the Tribunal should
11 also consider whether Gobernacion acted pursuant to
12 the minimum standards of international law, given
13 the context of the facts of this case, including
14 the availability of means of defense and access to
15 Mexican courts.

16 Therefore, it's not only the actions but
17 also the legal remedies available. The remedies
18 that were used and exhausted in certain cases, but
19 also given up in other cases. And as I said in my
20 opening argument, it's not a matter of exhausting
21 local remedies, but not having had access to

1 available legal remedies and having had access to
2 them and having them lost, or whether having had
3 access to them and giving up on them may impede the
4 existence of an international violation.

5 It's not a matter of procedure, and I'm
6 talking about the exhaustion of local remedies.
7 It's a matter of substance. The rights that are
8 being claimed, the rights in question are created
9 by the municipal system. And if there are
10 available legal remedies and they're not used or
11 given up on, then it's likely that those rights do
12 not get established.

13 Gobernacion also submitted to Mexican
14 courts access by EDM to courts which never stopped,
15 impeded, and that's not been alleged. Gobernacion
16 carried out the decisions of the courts. And going
17 back to the Azinian case, the court in the Azinian
18 case stated that one thing is to review the actions
19 of the administrative authorities and another one
20 to review that of the judicial authorities.

21 In that context, we must also consider or

1 realize that EDM at no point objected to the
2 supposedly arbitrary conduct supposedly below
3 international standards conduct that it objects to
4 here in the courts. Those arguments were not put
5 forth in the national tribunals and did not in the
6 case of Gobernacion.

7 PRESIDENT VAN DEN BERG: Do you plead this
8 point as a point of estoppel? I admit it's late in
9 the day.

10 MR. PEREZCANO: I would like to have a
11 chance to think about that and include it in our
12 written pleadings after the hearing.

13 PRESIDENT VAN DEN BERG: If you do that, I
14 think the other side should have a chance, then, to
15 respond to it, but perhaps we can solve that in a
16 manner that a response can be made in the response
17 to the submissions by the two governments.
18 Otherwise, we get too many submissions. Still, we
19 are seeking a level playing field. Is that
20 acceptable to you?

21 THE WITNESS: That's fine.

1 MR. PEREZCANO: No objection.

2 In the context of the work of this court
3 and of analyzing whether the performance of
4 Gobernacion, which is not limited to a single
5 action, whether it was or was not arbitrary
6 pursuant to the national standards, let me recall
7 here what the International Court of Justice said
8 in the ELSI court, and I will record it in English.
9 (Reading) The arbitrariness is not so much
10 something opposed to a rule of law as opposed to
11 something that is opposed to the rule of law,
12 further disregard of due process of law, an act
13 which shocks or at least surprises the sense of
14 judicial propriety, end of quote.

15 That something else is not as Mr. Weiler
16 said today, is not what surprises you as
17 arbitrators individually. According to the
18 International Court of Justice, it is an act that
19 surprises a sense of judicial propriety. Other
20 cases where this issue has been analyzed more
21 recently give us ideas about what this something

1 more is, to go back to the Tribunal's questions
2 today. The Tribunal in the Myers case said 1105,
3 of course, only when it is shown that an investor
4 has been treated in such an unjust or arbitrary
5 manner that the treatment arises to a level that is
6 unacceptable from the international perspective.
7 That determination must be made in the high level
8 of deference that international law generally
9 extends to the right of domestic authorities to
10 regulate matters within their own borders.

11 The ADF Tribunal said the following,
12 (reading) are idiosyncratic or aberrant and
13 arbitrary, grossly unfair or unreasonable or
14 inequitable, ultra vires, grossly unfair or
15 inequitable under the customary international law
16 standard treatment embodied in Article 1105(1), but
17 something more than simple illegality or act of
18 authority in legality or lack of authority under
19 domestic law of a state is necessary to render an
20 act or omission consistent with customary
21 international law requirements of Article 1105.

1 And there are other cases. We have
2 referred to them in our pleadings and the specific
3 references that are contained there, so this is the
4 idea of something more that is needed.

5 To conclude with Article 1110, a claim
6 that seems to have been abandoned, let me simply
7 say that claimant itself has pointed out that it's
8 not an expropriation and does not deserve
9 compensation for the acts of an authority in
10 stopping the development of an illegal activity.
11 In this case, Gobernacion determined in fact that
12 the activity was an illegal activity.

13 Mr. President, we got two more items to
14 deal with, and I would like--the Government of
15 Mexico would like to briefly talk about exceptions
16 of incompetence that we have brought up that we
17 were going to mention in our closing arguments.
18 I'm aware of the time. It is, and if the Tribunal
19 does not object, very briefly, we would like to
20 yield to Mr. Sanjay Mullick.

21 PRESIDENT VAN DEN BERG: On one condition,

1 that you could open the door because the World Bank
2 has a program, daylight savings program, although
3 you won't see any daylight here, but daylight
4 saving program on the air conditioning.

5 MR. PEREZCANO: Yes, Mr. President, and I
6 will say we are going to be brief.

7 PRESIDENT VAN DEN BERG: That's not the
8 implication of my observation, but as long as we
9 can breathe, then you can go on.

10 MR. MULLICK: Mr. President, Members, what
11 you have been handed is a packet that contains
12 record documents or exhibits that rely exclusively
13 on record documents, and you will see the C and R
14 numbers at the top right. The claimant has a copy,
15 the interpreters also have a copy.

16 What I would like to do, as Mr. Perezcano
17 says, is briefly review the evidence on the record
18 regarding whether Thunderbird owns and controls
19 EDM. And what I have done on slide two is
20 summarize their claims based on their pleadings,
21 although some of them have changed since then.

1 There have been some concessions, and I will get
2 into that, but there are two main points:
3 Acquisition, and then ownership and control.

4 With respect to acquisition, the claim is
5 that Thunderbird, through two of its subsidiaries,
6 Juegos de Mexico and International Thunderbird
7 Brazil, acquired EDM, and that one of those
8 subsidiaries then transferred its shares of EDM to
9 Thunderbird directly.

10 With respect to ownership and control, the
11 claims have been that Thunderbird's ownership in
12 the EDMs has been significant, is significant, and
13 that it exercised complete control at all times.

14 I only got three EDMs on this chart. The
15 claimant has presented you with a few more. Our
16 view is because the others did not ever open or
17 operate, that they should not be subject to
18 consideration at all. I added there the
19 percentages that Thunderbird has claimed was its
20 ownership percentage in each of the EDM entities.

21 If you could turn to slide three, this is

1 an excerpt of the share purchase agreement that was
2 exercised with the prior owners of EDM on August
3 10th, 2000. And if you look at the first text box,
4 you will see the name "Juegos de Mexico." If you
5 look in the second text box, "Juegos," which is the
6 comprador, or the purchaser, it states (speaking in
7 Spanish), the purchaser acquires from the seller.
8 If you move down a couple of lines, (speaking in
9 Spanish).

10 So, what this document says is that Juegos
11 de Mexico bought 100 percent of what was then EDM.
12 There is no mention in this document of
13 International Thunderbird Brazil.

14 So, if you can follow me to slide four,
15 what the evidence demonstrates--and I should note
16 that we have asked several times for evidence that
17 Juegos de Mexico was a subsidiary of Thunderbird as
18 well as the other two entities. We haven't
19 received any record evidence that is the case,
20 shareholders, et cetera.

21 In addition to that, if Juegos de Mexico

1 is not connected and Brazil is not even involved,
2 our view is that there is no evidence of an
3 acquisition by Thunderbird of EDM. In fact, this
4 week, although Mr. Mitchell, as CEO, stated that
5 this investment was of such great importance that
6 it was worth the \$300,000 success fee because it
7 could result in millions of dollars of business for
8 the company, when Mr. Mowatt put to him the
9 question, do you recognize who JDMI is, he said no.
10 And when he was asked specifically whether it was a
11 corporate entity controlled at any time by
12 Thunderbird, he said he was not sure.

13 Now, jurisdiction cannot be presumed, so,
14 if the claimant cannot even demonstrate it acquired
15 an entity to begin with, it certainly hasn't
16 demonstrated that it owns and controls it.

17 But let's assume, as you turn to slide
18 five, if you could follow me, that it did acquire
19 EDM, and let's analyze, then, the next claims
20 regarding ownership and control. This is again
21 what Thunderbird claims its equity interests in the

1 entities were, and what I would like to do is look
2 at the evidence in this regard.

3 Slide six is a more detailed analysis of
4 the documents that back up the--

5 ARBITRATOR WALDE: Slide six is R-37?

6 MR. MULLICK: It's R-37. The numbers are
7 quite blurred. It's a detailed chart, several
8 documents listed, and a lot of squares at the top.

9 If you look at the documents for ITGC,
10 there are all kinds of different numbers for just
11 what the ownership percentage in EDM-Matamoros was.
12 And really, the official document, which is the
13 book of shareholders, is 25 percent, not
14 36 percent. And as you can see on the top left,
15 both Mr. Watson and Mr. Girault, independent of
16 Thunderbird, each have about 12 and a half percent,
17 which is basically equivalent to what Thunderbird
18 had.

19 Instead of quibbling over the exact
20 percentages, the point we make and made it in
21 detail in our rejoinder is the documents are all

1 over the board in terms of who owned what and when.
2 Specifically, you will that certain shareholders in
3 certain documents don't appear in others.

4 So, what the evidence demonstrates is a
5 conflict in terms of what their ownership interest
6 was.

7 I'm sorry, if you could follow me to slide
8 seven. But in any event, there is no majority
9 ownership of any of the entities. That's clear.
10 And what I was alluding to earlier is that
11 Thunderbird has now conceded that it really didn't
12 have any majority ownership and legal control.

13 Now, I guess the question is despite not
14 having majority ownership, was this level of
15 ownership, even assuming Thunderbird's numbers are
16 correct, was that sufficient to control the EDMs?
17 And if you could follow me to slide eight, and I
18 will quickly jump to slide nine, let's take a look
19 at what the documents say, the subscription
20 agreement for EDM-Matamoros. Specifically at page
21 12 which is here excerpted as slide nine, has an

1 on-point definition of what it means to control the
2 company, and what it says is that control of the
3 company is based on equity ownership, and it's
4 equity ownership of the combined Class A and B
5 quotas, and then it takes us to Exhibit A.

6 So, what this tells us is, okay, how do we
7 know whether a certain entity controls this
8 company? We have to look at how much stock
9 ownership they have, and we have to put their
10 equity ownership in the context of the overall
11 stock ownership of the company.

12 Exhibit A, which is slide 10, has a long
13 list of different corporate actions. And if you
14 look at the arrow in the left margin, all of these
15 matters must be approved by 60 percent of the
16 voting interests.

17 If you follow me down to items H through
18 J, these are classic control and management
19 actions: Modifying financial statements, modifying
20 the business plan, appointing and removing
21 auditors. These all required 60 percent voting

1 interest in order to take these actions.

2 The list continues, and if you're ready to
3 move to slide 11, you will see the list continue,
4 and then the punch line is anything other than this
5 actually requires more, 65 percent of the actual
6 voting interest.

7 Now, this is one detailed illustration,
8 but on slide 12, I have tried here to sort of
9 quickly synthesize all of the different documents
10 regarding the three different entities, but a quick
11 glance reveals that it's essentially similar. You
12 see the number 60 a lot, you see the number 65 a
13 lot, the bylaws, the subscription agreement, et
14 cetera. You will notice in some of the first items
15 there is E-P. That's simply the page numbers of
16 the electronic file because the hard copy may not
17 have an actual page number.

18 I will note that Thunderbird additionally
19 argued that so-called management agreements were
20 also a way by which it exercised control. I will
21 just quickly note that if you look at those

1 agreements at the pages that are cited, they
2 actually expressly state that they are not to be
3 interpreted as creating any sort of agency
4 relationship, et cetera.

5 So, to summarize this point on slide 13,
6 what the evidence demonstrates is that Thunderbird
7 did not have legal control over any of these three
8 EDMs, based on the documents of these entities
9 themselves. In fact, the numbers are far short of
10 what will be required. But again, I will repeat
11 that Thunderbird conceded no legal control,
12 although we certainly pleaded this in our statement
13 of defense and rejoinder, we believe that legal
14 control is the appropriate test.

15 They argue, instead, that control in fact
16 is what counts. And just for the sake of providing
17 a complete rebuttal, we could take a look at that.
18 Mr. Atallah had testified earlier this week at page
19 220 that Thunderbird controlled the EDMs in sort of
20 practice because they had the right, Thunderbird,
21 to appoint the majority of the board of managers.

1 Let's look at the board of managers
2 provision again for the EDM-Matamoros--out of the
3 EDM-Matamoros subscription agreement, and in the
4 boxes you will see, if you could follow me there,
5 that the holders of Class B quotas have the right
6 to designate two members to the board, and the
7 Class A holders have the right to designate one.
8 And in the lower text box, persons or entities
9 referred to as the founding members will be in the
10 position to control the board.

11 Now, was Thunderbird the only Class B
12 quota member? If you turn to the next slide, which
13 is 16, you will see that the document itself states
14 that the founding members consist only of
15 Thunderbird but also independently and separately
16 Mr. Peter Watson, Mr. Mauricio Girault. And in the
17 lower text box, you will actually see that
18 Thunderbird or the--the document, sorry, holds out
19 these gentlemen as being key executives on the
20 management team of the company, and again they are
21 separately and independently mentioned.

1 So, what this tells us is that Thunderbird
2 alone was not a Class B shareholder. Thunderbird
3 alone could not name members to the board of
4 managers, board of directors.

5 Now, the name Peter Watson at this point,
6 it isn't surprising that we know he's actively
7 involved. We have seen that he was involved really
8 at every step of the way. But I will take you to
9 slide 17 because I think what is interesting is
10 that it turns out that Mauricio Girault was
11 actively involved in management and operations.
12 This is a fax he sent to Mr. Mitchell in October of
13 2001. And if you follow me to page 18, we could
14 look a little bit about what it says. But it leads
15 off in capital letters, (reading) I want to share
16 my opinion about what's happening at EDM-Matamoros.

17 If you look down, for example, at
18 paragraph two, he indicates that Steve, who I
19 believe is Sawin, has a strategy which Mr. Girault
20 likes and he goes on to say, under the hole punch
21 mark, (reading) In my opinion, we have too many

1 employees, and we pay extra time, double and
2 triple. And then he says--which is very detailed
3 financial knowledge--last week, we were 27 percent
4 over the payroll. Then he concludes by saying, We
5 can make money on certain amount of revenue, but we
6 have to control expenses.

7 Now, this is a gentleman that was
8 represented as being a passive investor in the EDM
9 entities, but this is a clear example of his active
10 involvement in management and operations.

11 Now, we know, as a legal matter under the
12 document, that both Mr. Watson and Mr. Girault,
13 separate and independent of Thunderbird as Class B
14 holders, had the authority to be involved in voting
15 on the board of managers, and we have here an
16 example of Mr. Girault expressing dissatisfaction
17 with the way EDM is being run.

18 So, just to wrap everything up on slide
19 19, if we look back at the claims that Thunderbird
20 made and evaluate them, with respect to the
21 acquisition, there is no evidence that Juegos de

1 Mexico was a subsidiary of Thunderbird. There is
2 no evidence that International Thunderbird Brazil
3 acquired EDM. With respect to ownership and
4 control, 51 to 65 percent ownership was required to
5 control corporate matters. And in addition to
6 Thunderbird, there were other shareholders that
7 were actively involved in the management. So, in
8 all counts, we believe that the answer to the
9 question of whether Thunderbird owed and controlled
10 EDM is no.

11 Thanks.

12 PRESIDENT VAN DEN BERG: Professor Walde
13 has a question.

14 ARBITRATOR WALDE: I will ask my chairman
15 if in view of the air conditioning and the hour it
16 is still--lack of air conditions, I said if I have
17 the energy, yes.

18 Could you tell me who was controlling EDM?
19 Or was it a kind of rudderless ship, which is like
20 a galactic ship, everybody on board kind of
21 disappeared and it was going through the world

1 without a leader? I assume the assumption I'm
2 making is someone is usually in charge who I could
3 envisage the idea of a leaderless, uncontrolled
4 entity.

5 MR. MULLICK: I think it's evident in the
6 documents that we looked at, the subscription
7 agreement talks about the founding members in
8 conjunction essentially are in charge of this
9 entity. Thunderbird, Watson and Girault, they are
10 all sort of held out in conjunction as founding
11 members, and they all have this Class B status,
12 which is management shareholder status.

13 So, really all of these in combination are
14 controlling media.

15 ARBITRATOR WALDE: Does this form of
16 investment, is that not a modern form of venture
17 financing where you get a number of investors
18 together, one of them or even outside managers, the
19 operations, and the other ones, depending on their
20 share of commitment and interest of an involved--we
21 did hear that one of the investors was so important

1 to Mr. Mitchell that he would consult them, which I
2 would do if I were in venture financing, very
3 important funding, I would pay a lot of attention
4 to them.

5 MR. MULLICK: Professor Walde, I don't
6 think this is the case sort of partnership, limited
7 partnership type of thing where you have passive
8 investors. In this corporate entity, it's quite
9 clear that certain powers are given to certain
10 member of class holders and, it's clear who those
11 individuals were. That's how the company decided
12 to set itself up. That's how it gave out power and
13 authority, and it gave it out in separate entities
14 to Thunderbird and separately to Mr. Girault, Mr.
15 Watson, et cetera.

16 ARBITRATOR WALDE: If you read Article
17 1117 of the NAFTA, you will see there is the idea
18 of ownership and then there is the separate idea of
19 control, which presumes there are forms of control
20 which are nonownership, and then the control is
21 again divided into two parts. One is direct, which

1 I presume to mean controlled by legal means, by use
2 of contracts or corporate forms; and the other one
3 is indirect, which I presume to be meant in 1117 a
4 de facto control.

5 Now, the way I would see in a funding,
6 joint venture financing, the way I understand it is
7 used in Silicon Valley or other cases which I'm
8 familiar for building up small companies, that
9 there is a number of investors who will provide
10 money, take a role, then somebody who may actually
11 be an investor is significant, will exercise the
12 day-to-day management on behalf of the others, but
13 the others will be semi-active because if I put a
14 lot of money into venture, I would want to know
15 more about it, and we have seen a case here
16 yesterday of a significant investor so to say
17 wanting to know what is happening.

18 So, I would interpret this not really as a
19 company but as a joint venture finance. Yes,
20 venture finance.

21 MR. MULLICK: When we look at 1117,

1 "control" means legal control, and I think again
2 what you're describing sounds more like a limited
3 partnership situation where you have general
4 partner and maybe some limited partners.

5 The idea of showing the Girault fax was to
6 highlight, in fact, the difference between a true
7 passive investor that you said might have concerns
8 over very big ticket items like the fact an entity
9 in a NAFTA claim, et cetera, and someone whose
10 involvement is way beyond that is really hands on,
11 day to day. Going back to Mr. Girault's fax, he
12 has detailed financial knowledge of overhead paid
13 in the last week. He's talking to the manager on
14 the floor saying, what's your strategy, how are we
15 going to do this? He's commenting there's another
16 entity being better run, he's wondering why. He's
17 not showing up every once in a while. He is very
18 actively involved, he shows very detailed knowledge
19 of what was going on, and he was not Thunderbird.

20 ARBITRATOR WALDE: So, how do you
21 interpret the term "indirect control" as contrasted

1 with direct control in 1117, Section 1?

2 MR. MULLICK: I think it goes more to
3 whether you are the corporate entity directly, for
4 lack of a better term, on top of the entity that
5 you're talking about or whether there are some in
6 between. And I think if we look maybe even at the
7 last slide, it's an example of what indirect
8 control might have been, if what Thunderbird
9 claimed is correct.

10 Maybe it could have, as International
11 Thunderbird, exercised control indirectly over EDM
12 through its subsidiaries or through these other
13 entities. However, in this case, there is no
14 linkage even there to establish that.

15 ARBITRATOR WALDE: So, you interpret
16 indirect control as corporate pyramiding rather
17 than effective control?

18 MR. MULLICK: I think that's fair, but the
19 purpose of the presentation in our pleadings was to
20 show that really on all accounts, whether it's
21 control legally or control in fact, the evidence is

1 not there that Thunderbird controlled EDM.

2 PRESIDENT VAN DEN BERG: Mr. Portal has a
3 question.

4 ARBITRATOR PORTAL-ARIOSA: I believe that
5 this question of legal control is very limited,
6 either contractual or through ownership, but in
7 exploring the possibility of factual control, would
8 it be foreseeable to have an influence in the basic
9 outcome of the performance of a company through
10 expertise, technology, exclusivity of supply,
11 experience, or prestige? Do you think that this is
12 something that could happen?

13 MR. MULLICK: Senor Portal, that's not the
14 issue here. The question of 1117 is whether you
15 legally control an entity, and I don't think you
16 can make a claim because you have expertise that
17 would result in certain changes to the company that
18 you could then on that behalf file a claim on
19 behalf of the entity.

20 ARBITRATOR PORTAL-ARIOSA: No, my question
21 was not directed to these specific sets of facts

1 and specific interpretation you are giving to the
2 wording of 1117. It was just an exploration of
3 feasibility of the concept of factual control and
4 out there are plenty of companies that operate in
5 different ways, and that was basically my interest
6 to find out if it was conceivable.

7 MR. MULLICK: Sure, I understand.

8 ARBITRATOR WALDE: You have put forward a
9 very specific interpretation of Article--of the
10 concept of indirect control in Article 1117. It's
11 the first time I'm directly confronted with this
12 issue for Article 1117. It would be useful if both
13 parties would give arguments and look at what the
14 President says. Can I defer you, if the President
15 does not tell me this is improper, that there has
16 been two weeks ago an article published in the
17 Journal of World Investment on concept of control
18 of international treaties and that might help you
19 to look, and you will see if your interpretation of
20 1117, which is a very imaginative one, which I
21 understand as a former corporate lawyer, the

1 pyramiding concept, if this is actually what is
2 meant or if, rather, the concept of de facto
3 control as my colleague was kind of discussing it.
4 Effective control can be, as I think the U.S.
5 company law, it's the ability to take a significant
6 influence. It can be exercised in many ways.

7 PRESIDENT VAN DEN BERG: I have a question
8 at this point in time. Could you please go to
9 slide 16, and the second box that you highlighted,
10 there it says Thunderbird, through its key
11 executives and management team, including Messrs.
12 Watson and Girault, will manage all aspects of
13 development and ongoing operation of the company.

14 Now, I put a neutral word, indicate
15 control.

16 MR. MULLICK: Mr. President, I think
17 what's important to do there--and I think this is
18 perhaps why legal control is important, and maybe
19 we shouldn't get on the slipperier slope of control
20 of fact is because it is true Mr. Watson in some
21 other capacity had a role with Thunderbird, but the

1 issue here is what was his role with respect to
2 EDM. If we look at the slide--I don't have the
3 number in front of me--I can get to it--his role
4 with EDM on slide six, if you would like to
5 look--it's not necessary--was that he was a Class B
6 shareholder with 12.5 percent equity interest,
7 separate from ITGC.

8 PRESIDENT VAN DEN BERG: But you can leave
9 out the part of the sentence that comes after the
10 comma. If he said Thunderbird will manage all
11 aspects of the development and ongoing operation,
12 you could read the sentence in that way. How it's
13 to be achieved is a different matter. They have
14 the two gentlemen for that, the key executives, but
15 the sentence, short and sweet, says Thunderbird
16 will manage all aspects of development in the
17 ongoing operation of the company.

18 MR. MULLICK: I appreciate that,
19 Mr. President. That is, of course, more of a
20 narrative description of what the entity is
21 describing that it's going to do, how it's going to

1 work, but I think we have to tie back again to what
2 the document itself says on a different page, which
3 is on slide nine, the reference to page 12, where
4 it defines control.

5 And then in that case it doesn't say
6 Thunderbird this, Thunderbird that. It says you
7 have a Class A quota holder, you have a Class B
8 quota holder. This is the list of matters, and
9 this is the voting interest you must have to effect
10 these matters, and in no case did Thunderbird have
11 anything close to that voting interest.

12 PRESIDENT VAN DEN BERG: But one thing is
13 you can have vote interest, but you could also have
14 management arrangements which are to the effect
15 that one is actually calling the shots, if I may
16 use the colloquial expression.

17 MR. MULLICK: Sure, sure, but even there,
18 to take the next step, it is true that you had sort
19 of nonmanagement tier shareholders and you had
20 management tier shareholders. There again it
21 wasn't just Thunderbird. Thunderbird couldn't say

1 these are the board of managers, that's it. It
2 wasn't like that. That's not the way the quotas
3 were allotted. That isn't the way they were
4 authorized.

5 PRESIDENT VAN DEN BERG: May I ask you
6 about slide 18. I was looking at what Mr. Girault,
7 who sends an anxious E-mail or fax to EDM, but
8 could you help me. Where can I find in this E-mail
9 that he gives an instruction? It says look, I have
10 looked at this, you are paying 25 percent too much,
11 and simply I instruct you now to cut back
12 25 percent of the payroll.

13 Isn't there a difference between giving
14 instruction and on the one hand and the other hand
15 being an anxious, concerned, shareholder?

16 MR. MULLICK: I think what might be
17 helpful is to step back and see what's happening
18 here is Mr. Girault is sending a communication to
19 Mr. Mitchell, and the bottom of slide 18 he's
20 copying Mr. Watson, copying the General Counsel.
21 This is really consistent with what we talked about

1 earlier in terms of how the entity was controlled
2 through this combined founding members.

3 These are essentially the founding
4 members, along with the General Counsel, and what
5 Mr. Girault is doing--I'm not saying he alone could
6 do something. What we are saying is he and
7 Mr. Watson, along with Mr.--along with Thunderbird
8 all as the Class B management shareholders could do
9 these things.

10 And yes, he's not giving an instruction,
11 but the implication is quite clear that things have
12 to change.

13 PRESIDENT VAN DEN BERG: I see many
14 shareholders saying that to large companies.

15 ARBITRATOR WALDE: My last question. You
16 have gone extensively through the corporate reports
17 of Thunderbird. Now, what you submitted, what you
18 selected from those reports, doesn't it give the
19 impression that Thunderbird sort of runs the
20 operation, is concerned, is worried, has money
21 problems, wants more money? Whatever you have come

1 up with, but it does give--I mean, it does give the
2 impression that Thunderbird is running the show.
3 The only way, if it wouldn't be, would be that
4 Thunderbird was pretending in these corporate
5 reports that it was in charge, but wasn't really in
6 charge; is that what you actually are suggesting?

7 MR. MULLICK: Thunderbird certainly had an
8 active and important role in the EDMs; that is the
9 case. But again the question is legally based on
10 the documents, based on the definition of control,
11 based on the equity ownership interests, could they
12 alone exercise sort of a dominating influence over
13 the direction of the company, and they couldn't.
14 They had to consult with the independent entities
15 of Mr. Watson and Mr. Girault, all these Class B
16 shareholders.

17 PRESIDENT VAN DEN BERG: Thank you.

18 MR. MULLICK: Thank you, Mr. President.

19 MR. PEREZCANO: Mr. President, given the
20 time, I am here in the hands of the Tribunal. We
21 have to deal with the matter of damages. We can

1 briefly refer to damages here or we could submit it
2 in our further submissions that we are going to
3 present. Given the hour and the patience of
4 everyone present here, I am in the hands of the
5 Tribunal.

6 PRESIDENT VAN DEN BERG: You should feel
7 free to present orally your position, but if you
8 think that you can deal with it in an adequate way
9 in your written submission, then, of course, we do
10 not need to have further oral argument on this
11 point.

12 MR. PEREZCANO: We will do it in writing,
13 Mr. President.

14 And having said that, I just wanted to use
15 one minute at the end of every hearing. It's
16 always difficult to say this, but I would like to
17 thank the Tribunal, I would like to thank the
18 patience of the Tribunal. I would like to thank
19 the secretary, the secretary's assistant. I would
20 like to thank the stenographer and the
21 interpreters, of course. And my colleague,

1 Mr. Crosby and also Mr. Atallah and Mr. Weiler,
2 thank you very much.

3 PRESIDENT VAN DEN BERG: Thank you. We
4 are not yet there for the closing.

5 MR. PEREZCANO: Yes, but it might be a bit
6 difficult later, but I wanted to anticipate it.

7 PRESIDENT VAN DEN BERG: We are coming to
8 the conclusion of the hearing. There are still a
9 number of outstanding items that have been noted
10 earlier. There are still the Supreme Court
11 documents and the appeals, the two appeals pending
12 in that matter on the part of the respondent.
13 There were questions of the Tribunal at five to
14 four this afternoon, so there you could check on
15 the record which the questions were.

16 I assume that the transcript will be
17 corrected in consultation between the parties, and
18 that the Spanish transcript will be established 10
19 days or seven days?

20 MR. CROSBY: I don't recall. It's set
21 forth in the order.

1 PRESIDENT VAN DEN BERG: After the Spanish
2 language transcript is finalized, we will have the
3 posthearing briefs on both sides, also the date is
4 set in the order, and then we have the government's
5 expressing their views on the submission on the
6 1128. Then we have the reply by both sides
7 regarding the submissions of the governments.
8 There is one small item in the posthearing brief by
9 the respondent as to estoppel, and your side, Mr.
10 Crosby, the claimant can then reply to the estoppel
11 and reply to the government's submission.

12 Now, the closure of the proceedings
13 pursuant to Article 29 of the UNCITRAL rules will
14 take place after we have received your final
15 submission being the reply to the government
16 submissions, but we will issue their informal order
17 formalizing the closure of the proceedings.

18 Now, the Arbitral Tribunal would also like
19 to thank very much David for his esteemed court
20 reporting not only in a very accurate way but also
21 in a cheerful way.

1 And also the interpreters, I would like to
2 thank them for the very high standard of
3 interpretation and for staying for such a long
4 time.

5 And we would like to thank the secretary
6 and associate who are both, in combination, have
7 done a lot of work behind the scenes.

8 And above all, we would like to thank, as
9 the Tribunal, both sides for the high degree of
10 professionalism that has been presented on both
11 sides, but also the courtesy that both parties,
12 counsel on both sides displayed towards each other,
13 which is highly appreciated by the Tribunal.

14 That having said, I have to remind you
15 that Article 30 of the UNCITRAL rules reads as
16 follows--and it's captioned Waiver of
17 Rules--(reading) A party who knows that any
18 provision of, or requirement under, these rules has
19 not been complied with and yet proceeds with the
20 arbitration, will promptly state his objection to
21 such noncompliance, shall be deemed to have waived.

1 This is old language, but it should be "its" right
2 to object.

3 You are aware of the particular provision
4 Article 15 of the UNCITRAL rules which says that
5 subject to these rules, the Arbitral Tribunal may
6 conduct the arbitration in such manner as it
7 considers appropriate, provided that--and this is
8 now the important portion--that the parties are
9 treated with equality and that at any stage of the
10 proceedings each party is given a full opportunity
11 for presenting its case.

12 The question of the Tribunal as to each
13 side, has the Tribunal complied, in particular with
14 Article 15, Paragraph 1, of the Article UNCITRAL
15 rules until this moment?

16 MR. WEILER: Yes.

17 PRESIDENT VAN DEN BERG: Mr. Perezcano?

18 MR. PEREZCANO: We have no objection in
19 this regard, Mr. President.

20 PRESIDENT VAN DEN BERG: That would also
21 be a yes?

1 MR. PEREZCANO: Yes.

2 PRESIDENT VAN DEN BERG: Thank you.

3 Then the last question of the parties,
4 when do we get the award? We are working hard,
5 obviously, on the award, and we hope to be able to
6 issue it as soon as we can after the last
7 submission of the parties has been received. We
8 have to be mindful that the award has to be issued
9 in two languages in this case, but that can delay
10 matters somehow, but we will do our best to get the
11 award quickly as we can.

12 Now, I ask Mr. Crosby, are there any
13 further matters regarding procedure?

14 MR. CROSBY: None.

15 PRESIDENT VAN DEN BERG: Mr. Perezcano?

16 MR. PEREZCANO: No, Mr. President.

17 PRESIDENT VAN DEN BERG: Okay. Also
18 nothing further from the Tribunal. I close the
19 hearing, and thank you very much, and I wish you
20 all a safe trip home.

21 (Whereupon, at 8:06 p.m., the hearing was

1 adjourned.)

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1 CERTIFICATE OF REPORTER

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I, David A. Kasdan, RDR-CRR, Court

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Reporter, do hereby testify that the foregoing

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proceedings were stenographically recorded by me

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and thereafter reduced to typewritten form by

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computer-assisted transcription under my direction

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and supervision; and that the foregoing transcript

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is a true record and accurate record of the

10

proceedings.

11

I further certify that I am neither

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counsel for, related to, nor employed by any of the

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parties to this action in this proceeding, nor

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financially or otherwise interested in the outcome

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of this litigation.

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