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Via Fax and Overnight Mail

Mr. Gonzalo Flores

International Centre for the Settlement of Investment Disputes

1818 H Street N.W.

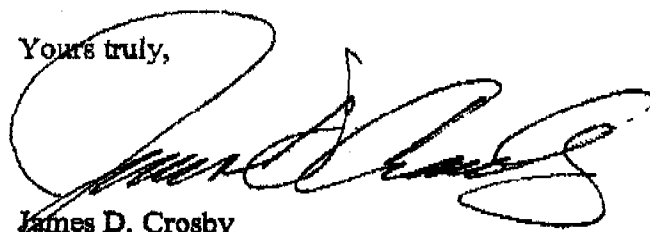
Washington, D.C. 20433

Re: International Thunderbird Gaming Corporation v. Government of United Mexican States

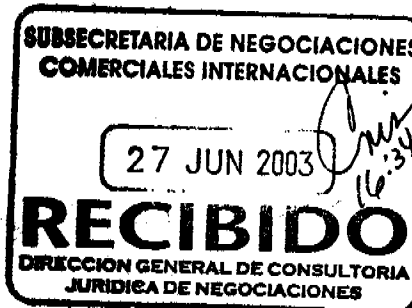
Dear Mr. Flores:

Attached please find "Investor's Motion To Obtain An Interim Measure Under NAFTA Article 1134" and supporting declaration of Albert Atallah for immediate submission to the Tribunal. Should you have any questions, do not hesitate to contact me. I look forward to the Tribunal's action on this motion.

Yours truly,


James D. Crosby

- cc: Hugo Perezcano Diaz (Via fax and e-mail)
- Albert Atallah (Via fax and e-mail)
- Todd Weiler (Via fax and e-mail)



**UNDER THE UNCITRAL RULES AND THE
NORTH AMERICAN FREE TRADE AGREEMENT**

**INVESTOR'S MOTION TO OBTAIN AN INTERIM ORDER
UNDER NAFTA ARTICLE 1134**

BETWEEN:

INTERNATIONAL THUNDERBIRD GAMING CORPORATION

Claimant / Investor

AND

GOVERNMENT OF MEXICO ("MEXICO")

Respondent / Party

I. Facts

1. In its first document request, the Government of Mexico ("Mexico") has asked the Investor to provide it with a number of documents which are currently under the care and control of Mexican government officials. These documents, along with other evidence of relevance to this Claim, have been in Mexican custody since the facilities controlled by the Investor in Mexico were forcibly closed by Mexico.
2. Despite numerous requests, the Investor has been refused access to any of these facilities by Mexico. The Investor has been unable to ascertain the condition of any of the evidence that was contained within these facilities at the time of their closure.
3. The evidence that should be found in these facilities includes:
 - i. Approximately 280 video gaming machines;
 - ii. Equipment used in maintenance and upkeep of each facility and all gaming machines;
 - iii. Corporate documents, regulatory documents (such as licenses) and operational records; and
 - iv. Approximately US\$141,000.00 in cash.
4. If the Investor was granted custody of the video gaming machines in satisfactory condition, it would be able to utilize these machines in its other gaming operations outside of Mexico.
5. The Investor is greatly concerned that the property contained within its facilities may not be made available as evidence for these proceedings. Moreover, the Investor is very concerned that – absent an order from this tribunal protecting this property – it is in jeopardy of being damaged or destroyed.

Law

6. Article 1134 provides:

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

7. Article 1135 provides:

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest;
- (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

8. Article 26 of the UNCITRAL Rules provides:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

9. NAFTA Article 1134 provides this Tribunal with the authority to issue an order safeguarding the property of the Investor and its Investments currently under the control of Mexico. Moreover, this Tribunal may issue an order requiring Mexico to provide the Investor with access to this property in order for the Investor to evaluate whether it should be used as evidence in these proceedings. Finally, this Tribunal may issue an order requiring Mexico to provide a full accounting of what property remains in each facility and what may have happened to any property removed from any of these sites.

10. The Investor admits that this Tribunal does not have the authority under NAFTA Article 1134 to order restitution of this property to the Investor. This is because the restitution of property is a power reserved to the Tribunal, under NAFTA Article 1135, to exercise in its final award.

11. The Investor admits that if Mexico nonetheless restored possession of the gaming machines which it currently controls to the Investor or its respective Investment enterprises, Mexico would be fulfilling part of its duty to mitigate the damages which have flowed from its internationally tortious acts. Similarly, the investor admits that Mexico could mitigate a portion of the damages owing in this case if it were to restore

possession of the cash on hand in each facility as of the time each was seized to the Investor or its respective investment enterprises.

12. Article 26:1 of the UNCITRAL Rules is unequivocal. It vests this Tribunal with authority to issue an order for the preservation of goods which are the subject matter of a dispute. The Investor claims that its facilities were illegally closed; that its business equipment was wrongly confiscated; and that the cash on-hand at its facilities has not been returned. Mexico has given every indication that it plans to dispute all of these claims. Moreover, by virtue of its document requests, Mexico has admitted that the documents which were on-site when Thunderbird's facilities were forcibly closed are of relevance to this dispute. Accordingly, all of the property contained within the premises of Thunderbird's investment enterprises fall directly within the scope of Article 26:1.
13. Hunter and Redfern note that the term "necessary in respect of the subject matter in dispute" empowers a tribunal to ensure that physical evidence is preserved and to ensure that appropriate orders are made for the safekeeping of property.¹ In this case, what would be most appropriate would be for Mexico to grant immediate access to the Investor at each of the facilities to gather whatever evidence is necessary to put on its case, in addition to assisting Mexico in satisfying its document requests.
14. In addition, since it is apparent from its documentary request that counsel for Mexico was unaware that Mexico was already in custody of a considerable amount of Thunderbird's property, including documentary records, it is imperative that this tribunal order that the necessary steps be taken to ensure their integrity as evidence in these proceedings. The most appropriate way in which the documents, cash and equipment on-site can be preserved is for Mexico to provide a full accounting of them and their whereabouts, and to place them in the custody of an independent third party until a final award is issued. Alternatively, Mexico should be ordered to provide a full accounting as well as access to the documents and property immediately upon a request from either the Investor or the Tribunal.
15. Interim measures of this nature have been awarded by arbitral tribunals hearing mixed claims in the past. For example, Professor Schreuer notes that the Tribunal in *AGIP v. Congo* ordered a government that had taken control of the investor's facilities to furnish the investor with a complete list of all documents present on-site and to make all of the documents available for presentation to the Tribunal as required.² And in *Vacuum Salt v. Ghana*, the Tribunal issued an interim award (based upon an undertaking) requiring the government to provide the investor with access to its documents held in the custody of that government.
16. The urgent nature of this motion is demonstrated by the fact that counsel for Mexico was apparently unaware that Mexico has had care and control of the property contained within these facilities for over a year. If Mexico had secure control of the Investor's

¹ Martin Hunter and Alan Redfern, *Law and Practice of International Commercial Arbitration*, 3rd ed. (Sweet & Maxwell, London: 1999) at 352.

² Christoph Schreuer, *The ICSID: A Commentary* (Cambridge: 2000) at 752 and 767-768.

property since its seizure, it is only logical to assume that a request would not be made of the Investor to supply it to Mexico. Thus Mexico's documentary request raises the possibility that something may have happened to the Investor's property since Mexico seized possession of it. Because Mexico has refused the Investor's repeated requests to be granted access to its facilities and property, it is incumbent upon this Tribunal to order Mexico to grant such access as soon as possible.

Relief Requested

17. The Investor respectfully requests that the Tribunal make an order directing Mexico and its agents as follows:
- i. Not to destroy, alter, damage, move or otherwise render unavailable or unusable any documents or records which were located at any of the Investor's facilities at Matamoros, Nuevo Laredo, or Reynoso as of the dates of their closure;
 - ii. To provide a full and complete accounting of its custody of all of the documents and records which were located at any of the Investor's facilities at Matamoros, Nuevo Laredo, or Reynoso as of the dates of their closure;
 - iii. To provide a full and complete accounting of its custody of all of the cash which was located at any of the Investor's facilities at Matamoros, Nuevo Laredo, or Reynoso as of the dates of their closure;
 - iv. To provide a full and complete accounting of its custody of all of the equipment which was located at any of the Investor's facilities at Matamoros, Nuevo Laredo, or Reynoso as of the dates of their closure; and
 - v. To provide both the Investor and the Tribunal with immediate and unrestricted access to each of the Investor's facilities at Matamoros, Nuevo Laredo, or Reynoso, as well as access to any of the Investor or Investments' documents, records or property no longer held by Mexico at these sites.
 - vi. Such access should include the ability to make copies of any such records or documents, or to otherwise document or record the condition or amount of such equipment through manual or electronic means.

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**Declaration of Albert Atallah in Support of Motion for
Interim Measures of Protection Under NAFTA article 1134.**

I, Albert Atallah, do hereby declare and state:

1. I am general counsel for International Thunderbird Gaming Corporation ("Thunderbird"), the claimant in the above-referenced NAFTA proceedings.

2. I have personal knowledge of the facts stated in this declaration. If called upon, I could and would testify to the truth of these matters.

3. As outlined in Thunderbird's statement of claim presently before the Tribunal, in late 2001 and early 2002, respondent The United Mexican States ("Mexico") closed three Thunderbird-owned and controlled video skill gaming facilities located in Mexico. Those facilities are commonly known as Matamoros, Nuevo Laredo, and Reynoso and were operated by Entertainments de Mexico, S. de R.L. de C.V., Entretenimientos de Mexico-Laredo, S. de R.L. de C.V. Entretenimientos de Mexico-Reynosa, S. de R.L. de C.V., respectively (the "Mexican entities"). Thunderbird owns a significant interest in, and in all respects actively and legally controls, these Mexican entities and the associated video skill gaming operations. The closure of those facilities, and the facts and circumstances surrounding those closures, provide the basis for Thunderbird's present claim against Mexico.

4. The Nuevo Laredo and Matamoros locations were closed by Mexico on October 11, 2001. In early January, 2002, Mexico closed the Reynoso facility. At the time of the closures, Mexican authorities physically sealed each location and precluded entry by representatives of Thunderbird or its Mexican entities. Since that time, neither Thunderbird nor its Mexican entities have been granted access to any of the three locations.

5. At the time of the closures, each of the three locations contained property owned by Thunderbird and/or its Mexican entities, including, but not limited to, approximately 280 video skill gaming machines. At the time of the closures, the approximate collective replacement value of those machines was \$1,400,000 [calculated at \$5,000 fair market replacement value per machine]. Further, the fair market replacement value is a very conservative estimate of the actual value of those machines. The value of the machines if in use at other locations is substantially greater than an estimated replacement value. If available for use in other Thunderbird gaming operations in Latin America, each of these machines would generate an estimated \$US75.00 per day or, collectively, an approximate \$US600,000 per month. To my knowledge, these Thunderbird machines have not been maintained since the closure and sealing of the locations. The present condition of these machines is unknown.

6. Also located at the now-closed and sealed locations is a variety of property, plant and equipment used by Thunderbird and/or its Mexican entities to operate the video skill gaming facilities. The value of the property, plant and equipment at the three locations at the time of their closure was an estimated \$US2,500,000. To my knowledge, none of the property, plant and equipment located in the three locations has been maintained since the closures. The present condition of these items is unknown. It is also unknown what happened to the perishable and non-perishable supplies located at the three locations.

7. Also located at the three locations at the time of their closure were business records pertaining to the three facilities and to Thunderbird's controlled Mexican entities. Documents still located at the three include corporate documents, registries, minutes and other operational records pertaining to Entertainmens de Mexico, S. de R.L. de C.V., Entretenimientos de Mexico-Laredo, S.

de R.L. de C.V. Entrenimientos de Mexico-Reynosa, S. de R.L. de C.V., documents related to the establishment and operation of the three locations, financial records, permits, licenses, equipment leases, documents reflecting revenues by machine and establishment, documents relating to the operation and maintenance of the video skill gaming machines then in use those locations, and a variety of other significant and important records. To my knowledge, those records have not been maintained since closure of the three facilities. The present condition of these records is unknown.

8. Also located at three locations at the time of their closure was a significant amount of cash. Based upon my knowledge of the operation of these casinos and my regular review of operational and revenue reports for the three facilities, I estimate that the following amounts of cash were located in the vaults of the three locations at the time of the closures: \$US60,000 at Matamoros; \$US20,000 at Reynosa; \$US40,000 at Nuevo Laredo. In addition to the cash located in vaults, there was also cash located in the video skill gaming machines themselves. That cash was typically removed from the machines and transferred to the vaults after-hours. At the times of closure by Mexico, that cash would still have been located in the machines. I estimate that approximately \$US21,000 would have been located in the machines at the time of closures [calculated at a daily average revenue of \$US75.00 per machine.]. The present whereabouts of this estimated \$US141,000 in cash is unknown. I am informed that the approximate \$US40,000 located at Nuevo Laredo at the time of closure was physically confiscated by Mexican authorities at gunpoint. I am further informed that a "receipt" for the funds was purportedly provided by those authorities but that receipt was left at, and is sealed within, the closed Nuevo Laredo facility.

9. Representatives of Thunderbird and its Mexican entities have made numerous formal and informal requests for access to any and all of the three facilities. Those requests have been

repeatedly denied. The condition of the property, plant and equipment is unknown. The cash on site at the time of the closures has never been accounted for. Further, Thunderbird has no knowledge of any efforts made by the Mexican government to secure the three facilities and to protect the property and monies of Thunderbird and its Mexican entities.

10. A significant portion of the documents and records still located at the three locations is or may be evidence in the present proceedings. That evidence is unavailable to Thunderbird and/or its three Mexican entities and is under the control of the Mexican government. Documents and records still sealed at the three facilities clearly fell within the categories of documents sought by Mexico in it's first request for documents in these proceedings and Thunderbird was accordingly unable to fully respond. Despite repeated requests, Mexico has refused to allow access to the three locations for retrieval of Thunderbird's property and documents. Absent a reversal of position by Mexico and allowed access to the three facilities to retrieve property and records or issuance of protective measures by the Tribunal, this evidence will not be available to the claimant for use in these proceedings.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 26th day of June, 2003 at San Diego, California.



Albert Atallah