

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 I

Monday, April 26, 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 9:15 a.m. before:

ALBERT JAN VAN DEN BERG, President of the
Tribunal

THOMAS WALDE, Arbitrator

AGUSTIN PORTAL-ARIOSA, Arbitrator

APPEARANCES:

On behalf of the Claimant:

JAMES D. CROSBY, ESQ.
13400 Sabre Springs Parkway
Suite 160
San Diego, California 92128
(858) 486-0085
crosby@crosbyattorney.com

PROFESSOR TODD WEILER
University of Windsor Law School
401 Sunset Avenue
Windsor, Ontario
N9B 3P4
Canada
(416) 575-4574

On behalf of the Respondent:

HUGO PEREZCANO DIAZ
ALEJANDRA TREVINO
Direccion General de Consultoria
Juridica de Negociaciones
Subsecretaria de Negociaciones
Comerciales Internacionales
Secretaria de Economia
Alfonso Reyes No. 30, Piso 17
Colonia Condesa
Mexico, D.F. C.P. 06140
(52-55) 5729-9134 or 73

APPEARANCES: (Continued)

On behalf of the Respondent:

STEPHAN E. BECKER, ESQ.
 SANJAY MULLICK, ESQ.
 Shaw Pittman, L.L.P.
 2300 N Street, N.W.
 Washington, D.C. 20037-1128
 (202) 663-8277

CHRISTOPHER J. THOMAS, Q.C.
 J. CAMERON MOWATT
 Thomas & Partners
 Suite 226
 2211 West 4th Avenue
 Vancouver, British Columbia
 Canada V6K 4S2
 (604) 689-0582

On behalf of the United States:

DAVID McNEILL, ESQ.
 Attorney-Adviser
 U.S. Department of State
 Office of the Legal Adviser
 Suite 203, South Building
 2430 E Street, N.W.
 Washington, D.C. 20037
 (202) 776-8323

On behalf of Canada:

ROLAND LEGAULT
 Trade Law Bureau
 Lester B. Pearson Building
 125 Sussex Drive
 Ottawa, Ontario
 K1A 0G2
 (613) 992-3201

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P R O C E E D I N G S

1
2 PRESIDENT VAN DEN BERG: I welcome all of
3 you for the hearing in International Thunderbird
4 Gaming Corporation versus the United Mexican
5 States. I don't think I need to introduce the
6 Tribunal, except that Sara Wazen, an associate of
7 my firm, is here to help me out, also, in this
8 case.

9 I don't suggest that we go over
10 introducing both sides because it will be a very
11 lengthy process, and I think most of the players
12 around here will know each other.

13 There are a number of, still, preliminary
14 things we would like to go over with. The first
15 thing is, I would like to ascertain whether Order
16 Number 8 has been received by both sides, which was
17 sent on Saturday, and as a matter of urgency for
18 exceptionally, it was sent directly by myself.
19 Mr. Crosby.

20 MR. CROSBY: Yes, we have received the
21 order, and thank you for getting it to us quickly.

1 PRESIDENT VAN DEN BERG: Mr. Perezcano?

2 MR. PEREZCANO: Yes, sir, we got it.

3 PRESIDENT VAN DEN BERG: Thank you. And
4 also, both sides received the revised timetable,
5 which is Revision 2(a), for internal reasons,
6 indicated that way. Mr. Crosby?

7 MR. CROSBY: Yes, we have.

8 MR. PEREZCANO: Yes.

9 PRESIDENT VAN DEN BERG: Let me ask you to
10 go to Order Number 7, because there are a couple of
11 small matters which are still outstanding. We go to
12 Item 15, Mr. Crosby, on your side. You mentioned
13 that certain investors wish to attend the hearing.

14 MR. CROSBY: We have one investor,
15 Mr. Tino Minaldo who may appear, but we're not
16 quite sure yet. He's not here today. He may be
17 here for later sessions.

18 PRESIDENT VAN DEN BERG: And identify him
19 timely also to counsel for respondents?

20 MR. CROSBY: I will, Mr. President.

21 PRESIDENT VAN DEN BERG: Incidentally,

1 those persons welcome. I also understand that the
2 representatives of the Governments of Canada and
3 the United States are here. Could you please
4 identify your names for the record.

5 MR. MCNEILL: Mark McNeill from the U.S.
6 State Department on behalf of the United States.

7 MR. LEGAULT: Roland Legault for the
8 International Trade Department for the Government
9 of Canada.

10 PRESIDENT VAN DEN BERG: Thank you.
11 Welcome. And incidentally, you have also the
12 copies of the orders?

13 MR. MCNEILL: I do not have Order Number
14 8.

15 PRESIDENT VAN DEN BERG: That can be given
16 to you during--ah, it's already being given to you
17 at this point in time.

18 But we are discussing our Order Number 7
19 at this point in time. We go one order back.

20 May we again go to Item 16, the matter of
21 Order Number 7, the demonstrative exhibits.

1 Has that been cleared between the parties?

2 MR. CROSBY: We don't have a need to
3 present, and I don't know that respondent does. We
4 have not heard of any.

5 MR. PEREZCANO: We have in our oral
6 arguments Mr. Baker. Mr. Baker will be presenting
7 a PowerPoint presentation with documents out of our
8 files. We don't exactly know right now, but we
9 might be using some in the final arguments. For
10 the time being, we have nothing else except that
11 PowerPoint presentation, and that was already in
12 the file.

13 PRESIDENT VAN DEN BERG: And at the
14 appropriate time you will share it with Mr. Crosby?

15 MR. PEREZCANO: Yes, of course.

16 PRESIDENT VAN DEN BERG: 18, we
17 have--sorry, we have still 17, the demonstration of
18 the machines. We have also issued--covered that
19 by, I think by Order Number 8, but Mr. McDonald,
20 who will give the demonstration, but when will it
21 be take place?

1 MR. CROSBY: Mr. McDonald is coming into
2 town tonight. He'll be available to make the
3 demonstration tomorrow morning. I've indicated to
4 counsel that the machine will be available for
5 their review and we'll run it for them tonight, if
6 they so wish, or we can do it in the morning as
7 well.

8 MR. PEREZCANO: We'll reach an agreement
9 with Mr. Crosby about that.

10 PRESIDENT VAN DEN BERG: I find it
11 important that you first see together how it runs
12 so there are no surprises on the other side.

13 MR. CROSBY: Absolutely.

14 PRESIDENT VAN DEN BERG: Thank you. All
15 right.

16 Then we have 18, the list of issues, happy
17 news for the Tribunal, and perhaps I wonder whether
18 it's happy news for the parties. The tentative
19 list of issues is ready and ready for distribution.
20 I suggest to you that after both sides have made
21 their oral presentation this morning, otherwise,

1 they will be distracting for both sides.

2 The Tribunal would like to emphasize that
3 it is a tentative list. It's a draft, and we are
4 fully open to comment on both sides for whatever we
5 have missed or whatever is too much, whatever we
6 have stated wrongly. Please let us know, and if
7 possible, could the parties let us know tomorrow in
8 the course of the day. If they need more time, by
9 all means?

10 MR. CROSBY: Yes, we will.

11 MR. PEREZCANO: Yes, sir.

12 PRESIDENT VAN DEN BERG: All right. Then
13 we have Item 22, the list of the dramatis personae,
14 if we may use a Latin expression, "the key
15 players." Have the parties agreed on that list?
16 Because I haven't seen that one, but I may have
17 missed it.

18 MR. CROSBY: Mr. President, we presented
19 our list to respondent, I think, Thursday or Friday
20 morning by E-mail. I received one back, I think,
21 yesterday, but we haven't come to agreement on the

1 list. I have to tell you, I had to look it up.

2 PRESIDENT VAN DEN BERG: All right. But
3 the other solution is simply everybody, both sides,
4 share their list with the other side and simply
5 consolidate the list.

6 MR. CROSBY: That would be fine.

7 PRESIDENT VAN DEN BERG: There is nothing
8 to agree on anything there. Simply put the names
9 on there.

10 MR. CROSBY: That's fine with us.

11 PRESIDENT VAN DEN BERG: That can be done
12 in alphabetical order, please.

13 MR. PEREZCANO: Yes, sir.

14 PRESIDENT VAN DEN BERG: Thank you. Then
15 23, the chronology, is any progress made in that
16 respect?

17 MR. CROSBY: I think We are in the exact
18 same position with respect to the chronology as we
19 are with the list of players.

20 PRESIDENT VAN DEN BERG: May I make also
21 that the same suggestion? It's easy to simply

1 consolidate your--both lines of main events.

2 MR. CROSBY: That would be fine.

3 MR. PEREZCANO: We'll try.

4 PRESIDENT VAN DEN BERG: 24, that was
5 specifically for the claimant, Corporate Structures
6 chart. I received something, but that's from the
7 respondent, if I understood it correctly. But if
8 you bear with me one moment, please. Yes.

9 MR. CROSBY: I believe we provided an
10 organizational chart in Excel format. I think it
11 was multiple pages.

12 PRESIDENT VAN DEN BERG: I'm showing for
13 the record, which was received on the 22nd of
14 April, 2004, which is in the organizational chart
15 of--as of December 31, 2001.

16 Mr. Perezcano, you have received this one
17 as well?

18 MR. PEREZCANO: Yes, sir, we've received
19 it, and we probably will have some comments about
20 it that we will include in our arguments.

21 PRESIDENT VAN DEN BERG: Okay. Would it

1 be possible for the claimant to make a printout,
2 which is on one page, shrink it to fit one page? I
3 tried to do it, but I miserably failed.

4 MR. CROSBY: We could try tonight.

5 PRESIDENT VAN DEN BERG: Okay. Thank you
6 very much.

7 MR. CROSBY: I would note that the
8 structure of that is that the order requested
9 organizational information on not only Thunderbird,
10 but also the EDMs, and we tried to present it in
11 that fashion, and there are six EDMs, so it's
12 rather lengthy.

13 PRESIDENT VAN DEN BERG: I understand, but
14 also what is not directly visible are the various
15 agreements tying one with the other. But perhaps I
16 missed it. I think as I recall.

17 MR. ATALLAH: I think as I recall,
18 Mr. President, they're footnoted against the chart.
19 There may have been problems when you printed them
20 out, but they appear on the screen. I couldn't
21 figure out why.

1 MR. CROSBY: Mr. President, what we can do
2 is we'll take a look at it. If during the break, I
3 could take a look at what you have, and we'll put
4 together a printout form that is more readable.

5 PRESIDENT VAN DEN BERG: The footnotes,
6 perhaps I should take the double off in the pop-up
7 screen.

8 MR. CROSBY: We will fix it for you.

9 PRESIDENT VAN DEN BERG: Okay. Thank you
10 very much.

11 And then the other one, I think this is
12 the late 2000 to date of NAFTA arbitration claim,
13 also received on the 22nd of April. It starts with
14 Entertainmens de Mexico--I think this was from the
15 respondent you received this, or is this from the
16 claimant? Because I have to be--it was in the same
17 E-mail.

18 MR. ATALLAH: Yes, that's a part of--there
19 were several tabs to that exhibit, and I believe
20 those particular tabs that you just held up should
21 be the ones that cite the exhibits.

1 PRESIDENT VAN DEN BERG: Thank you.

2 MR. CROSBY: In any event, Mr. President,
3 we'll try to clean that up so you have a better
4 printed copy of the entire submission.

5 PRESIDENT VAN DEN BERG: I would very much
6 appreciate it.

7 Thank you. The Tribunal has no further
8 procedural administrative points, but maybe the
9 parties have them?

10 MR. CROSBY: Mr. President, we have
11 possibly a slight modification in the order of
12 witnesses. We intended to call Ambassador Montano
13 for some short testimony. He is on a very tight
14 schedule, and he needs to get back to Mexico City
15 this afternoon. I'm assuming, just for the
16 purposes of this discussion, that the morning is
17 going to be taken up by the opening statements. If
18 we have some time, we could put on Mr. Atallah this
19 morning, but I would request leave to put on
20 Ambassador Montano right after the break for
21 limited testimony, and he has to be out of here and

1 on a plane at 3:00, so I would request leave to do
2 that.

3 And then we intend to proceed on at that
4 point with Jack Mitchell, Peter Watson, Albert
5 Atallah, which are the main witnesses that
6 respondent sought to cross-examine, and I know
7 that's somewhat of a modification, but we had to
8 switch things around because of travel plans.

9 PRESIDENT VAN DEN BERG: If I understand
10 you correctly, you are suggesting to put Ambassador
11 Montano prior to Mr. Atallah?

12 MR. CROSBY: Yes.

13 PRESIDENT VAN DEN BERG: Is that
14 acceptable to the respondent?

15 MR. PEREZCANO: Mr. Chairman, we
16 understand that Mr. Montano may have travel
17 problems, however we are quite willing to be
18 accommodating to his needs so that he won't be
19 delayed. However, the objective of having
20 Mr. Atallah testify first would be that he's going
21 to be present during the entire hearing, but we

1 would not object, given the specifics if
2 Mr. Montano went ahead of Mr. Atallah, but
3 otherwise we should then hear Mr. Atallah and then
4 follow the order.

5 PRESIDENT VAN DEN BERG: During the
6 testimony of Ambassador Montano, Mr. Atallah is
7 present?

8 MR. PEREZCANO: No, we wouldn't have any
9 problem with that.

10 MR. CROSBY: Mr. President, Ambassador
11 Montano's testimony we believe is going to be very
12 short, too.

13 PRESIDENT VAN DEN BERG: So is his
14 statement. Thank you.

15 Is there anything else, Mr. Crosby, on
16 your side?

17 MR. CROSBY: No, Mr. President.

18 PRESIDENT VAN DEN BERG: Mr. Perezcano?

19 MR. PEREZCANO: Yes. We have with us
20 today--thank you very much, Mr. Chairman. We have
21 with us today, Mr. Alberto Alcantara, who is a

1 witness proposed by the Government of Mexico, but
2 he also represents Gobernacion, and we would also
3 like to request permission from the Tribunal for
4 Mr. Alcantara to be present, just as Mr. Atallah
5 will be present while the initial presentations are
6 made, arguments are made, after which he could be
7 excluded until it's his turn to testify.

8 MR. CROSBY: We have no objections.

9 PRESIDENT VAN DEN BERG: Okay.

10 MR. PEREZCANO: Thank you very much to
11 Mr. Crosby and to the Tribunal.

12 PRESIDENT VAN DEN BERG: Anything else,
13 Mr. Perezcano?

14 MR. PEREZCANO: Nothing more. That's all.

15 PRESIDENT VAN DEN BERG: Okay. Then I
16 think I can invite the claimant to proceed with the
17 opening statement. Mr. Crosby, please.

18 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

19 MR. CROSBY: Mr. President, and Members of
20 the Tribunal and Counsel, I think it's important at
21 the start of what we hope to be a rather brief

1 opening statement to lay out what we believe to be
2 the role of the Tribunal in these proceedings.

3 Thunderbird believes that the role of the
4 Tribunal, respectfully, Thunderbird believes that
5 the role of the Tribunal in these proceedings is
6 not to independently determine whether the EDM
7 machines are, in fact, legal or illegal under
8 Mexican law; and, in our view, it is not also the
9 Tribunal's proper role to simply defer to Mexico in
10 its determination on that point. To argue that
11 point is to remove the focus from the appropriate
12 role of the Tribunal, in our view.

13 We believe that the Tribunal's role is to
14 decide, based upon the evidence, not the argument,
15 but the evidence before it, whether Mexico breached
16 its NAFTA obligations in the manner in which it
17 treated Thunderbird's investments. The focus is
18 not on Thunderbird's conduct, nor on the conduct of
19 the EDM businesses. The focus is not on the
20 machines, nor on the nuances of their operation.
21 The focus is properly on the actions of Mexico in

1 respect to our investments. And despite lengthy
2 and sometimes caustic and divisive briefing in this
3 case, I believe that this is a point that the
4 parties agree on, and I would recite from Mexico's
5 statement of defense at paragraph 94, quote, Mexico
6 respectfully considers it inappropriate for the
7 Tribunal itself to be given the task of carrying
8 out an analysis to determine whether the games
9 operated by EDM constitute under Mexican law, legal
10 games of ability or skill or prohibited games of
11 chance or gambling games.

12 And again at the statement of rejoinder,
13 paragraph five, quote, It is not the Tribunal's
14 role to make its own independent judgment on
15 whether the machines were prohibited gambling
16 equipment under Ley Federal de Juegos y
17 Sorteros--and I apologize if I mangle some of the
18 Spanish words throughout these proceedings.
19 Rather, the Tribunal must decide whether Mexico's
20 treatment of the EDM entities is consistent with
21 its Chapter 11 section obligations.

1 So, we believe the appropriate focus of
2 these proceedings and of the Tribunal's scrutiny is
3 on the actions of Mexico and its treatment of the
4 EDM entities, and I believe that the parties are on
5 agreement on that framing of the role of the
6 Tribunal.

7 I'd like to comment briefly on the
8 evidence as a whole, and make some comments on what
9 we believe is rather apparent from the evidence as
10 a whole.

11 We believe that the critical elements of
12 Thunderbird's claim are largely undisputed and, if
13 disputed, are largely uncontradicted by evidence,
14 and we would invite the scrutiny of the Tribunal,
15 the close scrutiny of the Tribunal, the arguments
16 made by Mexico, and the evidence offered in support
17 of that, those arguments, and we would invite that
18 same close scrutiny of our arguments.

19 We believe that, on the evidence before
20 the Tribunal, it's largely uncontradicted. The
21 August 3 solitud, the issuance of the August 15th

1 letter, the opening of the three facilities, the
2 efforts to open the other three facilities, the
3 formation of the six EDM entities, the initial
4 closer of Nuevo Laredo by Mr. Guadalupe Vargas, the
5 opening of Nuevo Laredo per the agreement with
6 Mexico, the July 10 hearing, and there is some
7 dispute about what happened there, but that's
8 largely uncontradicted as well; the issuance of the
9 October 10 order, and the final closures of the EDM
10 entities. We believe that these critical elements
11 of our claim are largely undisputed and
12 uncontradicted.

13 Thunderbird has presented numerous--I
14 mean, there are voluminous witness statements from
15 essentially all of the parties involved; all the
16 principal players on our side of the case have
17 presented testimony to this Tribunal. We have
18 provided complete documentation of our financial
19 transactions as they related to the EDM entities,
20 not only in summary form, but also in source form.
21 I'm sure that the Tribunal has seen the production

1 that we made in support of the submission. It's
2 essentially all of our documentation on the
3 financial aspects of these entities.

4 In contrast, Mexico presents witness
5 testimony from essentially one participant, one
6 percipient witness to the events at the time.
7 That's Mr. Alcantara, and that testimony in both of
8 his witness statements is general in nature and
9 really distinct to a few issues.

10 What we believe is rather glaring, and I
11 think in large part is what this whole issue is
12 about or this whole argument is about is the
13 inability of the absence of any witness testimony
14 or direct testimony from any of the principal
15 players on Mexico's side. There is no testimony
16 from any of the individuals involved in the EDM
17 entities and Mexico's treatment of the EDM entities
18 either from the prior Mexican administration or the
19 present Mexican administration. There is no
20 witness statement and no testimony from
21 Mr. Antunano, the signatory to the August 15th

1 letter. There is no witness testimony from Mr.
2 Orozco Aceves, the government official over whom's
3 signature and over whom's authority the August 15th
4 letter was issued and signed. There is no witness
5 testimony from Mr. Guadalupe Vargas, the principal
6 protagonist on the other side of this case, and the
7 individual who took the actions to shut down our
8 facilities.

9 There is no witness statement from
10 Mr. Aguilar Coronado, the signatory to the October
11 10 order which caused the final seizure and closure
12 of our facilities.

13 There is no witness statement or testimony
14 from Cabeza de Vaca. There is no witness statement
15 or testimony from Mr. La Bastida. We view this as
16 a glaring lack of evidence, and in our view, in the
17 absence of that evidence, substantial portions of
18 Mexico's case are simply argument in the absence of
19 supporting evidence, and this absence of testimony
20 and this absence of evidence is particularly
21 telling in the arguments surrounding the

1 August 15th letter.

2 Mexico spends a lot of time and a lot of
3 paper in their various pleadings asserting that
4 Thunderbird and the EDM entities did not provide
5 Mexico and the officials in the previous
6 administration complete documentation, that they
7 didn't provide manuals, that they didn't provide a
8 variety of things. The implication, and in some
9 places in their briefs the argument, is that the
10 officials in the previous administration,
11 Mr. Orozco Aceves and Mr. Antunano were misled or
12 that they did not understand what the EDM entities
13 intended to do, and that they did not understand
14 exactly how the skill machines worked at the time
15 they issued the August 15th letter. That is an
16 undercurrent of Mexico's defense on the entire
17 detrimental reliance case.

18 But there is not one shred of evidence
19 offered on that issue, offered directly on that
20 issue, much less any witness statements from the
21 government officials who created, drafted,

1 negotiated, issued that letter. There is no
2 evidence whatsoever, and again I invite the
3 Tribunal's scrutiny of the evidence. There is no
4 evidence whatsoever that Mexico was misled or
5 misunderstood exactly what Thunderbird and the EDM
6 entities intended to do.

7 There is no evidence that Mexico required
8 more information that my clients didn't provide to
9 them. There is no evidence--there is absolutely no
10 evidence--that Mexico did not know exactly what we
11 were doing and exactly how our skill machines
12 worked. And that is a glaring lack of evidence in
13 their case, and their case on the detrimental
14 reliance portion of this is largely dancing around
15 that and trying to raise implications about what
16 these officials knew or understood, but there is
17 not one shred of evidence that indicates their
18 intent or their understanding at the time they
19 issued the August 15th letter.

20 In our view, this is a gaping and fatal
21 hole in Mexico's evidentiary defense on the

1 detrimental reliance case.

2 We have four main theories. First is
3 breach of 1105, minimum standard of treatment based
4 upon the legal theory of detrimental reliance, and
5 this is very simply stated. The previous Mexican
6 administration told us we could proceed with our
7 business activity or, more precisely, they told us
8 that our proposed business activity would not be
9 prohibited by Mexican law.

10 In reliance upon that--and that is in the
11 August 15th letter--in reliance upon that letter
12 and those assurances, we proceeded with our
13 investment activity. We created six EDM entities.
14 We opened three facilities, which were worth tens
15 of millions of dollars, and were highly successful.

16 In early 2001, upon a new administration
17 and the appointment of Guadalupe Vargas as the
18 Director of Juegos y Sorteros, the new
19 administration essentially reneged on the
20 assurances that they had been provided to us. In
21 our view--in our view, this is a very simple case

1 on the 1105 detrimental reliance--very, very
2 simple, and in our view, a more clear case of
3 detrimental reliance would be difficult to
4 establish.

5 And really, unless the Tribunal is willing
6 to simply throw out the notion that detrimental
7 reliance is an appropriate legal basis for imposing
8 liability for an 1105 treaty breach, unless they
9 were willing to throw out that notion that that's
10 an appropriate theory, we view this case as a
11 damage case on the detrimental reliance case. We
12 view it that strong.

13 The facts: 1999 into mid-2000,
14 Thunderbird was pursuing the development of skill
15 machine operations in Mexico, and the backdrop
16 within which they were doing this is operators open
17 and operating at the time. Guardia was open in
18 Ciudad Juarez, we understood and we still
19 understood that he had been successful in
20 litigation with the Mexican Government and that he
21 was open legally at the time. We still believe

1 that to be the case. But he was open and operating
2 the same types of machines that we intended to
3 operate.

4 At the suggestion of--well, we
5 initially--our initial course of action was simply
6 to open these facilities, and in reality, that
7 would have been a reasonable course of action in
8 light of the fact that there were other domestic
9 operators open and operating at the time the same
10 thing we were doing, and we had been advised that
11 that would be an appropriate course by Aspe,
12 Arroyo, Ivy and Ong, and those individuals are laid
13 out in the briefings on both sides.

14 But at the suggestion of our lawyers from
15 Mexico City, Baker & McKenzie, primarily Mr. David
16 Velasco, we decided to change course. And in our
17 view, active and more reasonable and with more
18 transparency. We opted to approach the
19 administration, tell them what we were going to do,
20 and seek their input on exactly what we intended to
21 do. In our view, there is nothing more reasonable

1 than that.

2 In July of 2000, we learned that
3 Gobernacion was willing to issue a formal letter
4 addressing the operation of skill machines.

5 On August 3, 2000, we presented the
6 solicitud through the EDM which either was
7 controlled by us at the time or in the process of
8 being controlled very shortly. In that August 3
9 solicitud we set forth the make and model number
10 and kinds of machines we intended to operate. We
11 set forth very precisely the manner of their
12 operation. In fact, we described exactly how they
13 worked. We described them as video games of skill
14 and ability, and that moniker is very important
15 when you consider Nelson Rose's testimony because
16 he refers to the notion of video games. We
17 described that to Mexico from the very beginning,
18 and we also informed the Mexican Government that we
19 intended to operate 2000 machines across various
20 locations in Mexico, and that letter is very clear
21 in what we wanted. In the preamble in the first

1 paragraph or two, we told the Mexican Government
2 specifically that we were seeking certainty as to
3 the legality and propriety of our business
4 operations because we wanted to rely upon what they
5 were going to tell us. There's lots of discussion
6 about reliance in this case. That's very good
7 evidence that we intended to rely upon the
8 government. We told them that we intended to rely
9 upon them.

10 We received back the August 15, 2000,
11 opinion letter, issued by--this is undisputed--the
12 highest authorities in the Mexican Government with
13 authority over those matters. That August 15,
14 2000, opinion letter said the video games of skill
15 and ability, which we described and which we sought
16 to operate, were not prohibited by Mexican law.

17 But it went further. It went further. If
18 all that was--if that was all it was going to do,
19 it could have done one sentence saying: The
20 machines that you seek to operate are not
21 prohibited.

1 But it went further. And the letter
2 attempted to define exactly the operation of skill
3 machines in Mexico, and that is Exhibit 17, and it
4 stated as follows: Quote, In this light, it is
5 important to clarify that, if the machines that
6 your representative exploits operate in the form
7 and conditions stated by you, this government
8 entity is not able to prohibit its use. That's the
9 first thing that this letter did, a direct response
10 to our request.

11 Then it goes on. In the understanding
12 that the use of machines known as coin swallows,
13 token swallows, or slot machines, which they
14 identified, paraphrasing, which they identified as
15 potentially prohibited machines, and then they
16 describe how you tell if you're working with coin
17 swallows, token swallows, or slot machines.
18 They define them. They say that those machines are
19 those in which the principal factor of operation is
20 luck or gambling and not the user's ability of
21 skillfulness, and then it proceeds on to indicate

1 that those types of machines, as defined there,
2 could be prohibited under Mexican law.

3 So, the letter did two things, from our
4 point of view. Said that we could do what we
5 proposed to do, or said that Mexico could not
6 prohibit us from what we proposed to do. And it
7 further defined a standard by which we could
8 operate skill machines. And I would just point out
9 that that standard set forth in that August 15
10 letter is consistent with, and if not largely
11 identical to, the declaration of Mr. Maida,
12 Mr. Lozano, and Mr. McDonald, provided to Guadalupe
13 Vargas at the July 10 hearing. It's consistent
14 with what Mr. Carson says, what Mr. Watson say in
15 their declarations provided in these proceedings.
16 It's absolutely consistent with what our
17 understanding was at the time that we were
18 proceeding with these investments. So, that was
19 deemed to be the standard under which we would
20 operate our facilities.

21 Now, Mexico spends a lots of time trying

1 to knock down what we believe to be this clear case
2 of detrimental reliance. The first argument is--

3 PRESIDENT VAN DEN BERG: So it's clear on
4 the record, you just said two minutes ago that it
5 was Exhibit 17--yes, Exhibit 17. It was the letter
6 of 15 August, Exhibit 18.

7 MR. CROSBY: My mistake.

8 PRESIDENT VAN DEN BERG: I say it for the
9 record because otherwise it would be confusing on
10 the record.

11 MR. CROSBY: Mexico's arguments to try to
12 deal with the detrimental reliance case. Their
13 first argument is that--and I dealt with this
14 briefly--their first argument is that the prior
15 administration didn't understand what they were
16 doing, or that they were misled, and that therefore
17 this document, this letter is not worthy of
18 reliance, and they raised the implication, raised
19 that argument again by saying we didn't provide
20 adequate information.

21 And again, I'd point out that there is no

1 evidence that they sought information that we
2 didn't provide. No evidence that they were
3 misunderstood. No evidence that they were misled
4 in any respect, and no evidence to indicate that
5 they did not completely understand what they were
6 doing.

7 The only evidence that they could bring in
8 of that is these fellows, these guys, to testify
9 what they understood when they wrote this letter,
10 and those fellows, those prior government officials
11 are not in this room, and they won't be a part of
12 these proceedings.

13 Now, conversely, there is evidence in the
14 record to suggest that Gobernacion understood
15 exactly what it was doing. The first piece of
16 evidence to indicate that is set forth--and I don't
17 have the paragraph references, but in the
18 declaration of Mr. Watson, and I believe also in
19 the declaration of Mr. Velasco, where they indicate
20 that Gobernacion had been litigating with Guardia
21 over the operation of the skill machines

1 immediately prior to the time that they issued this
2 letter, and that litigation involved the use of
3 statisticians, experts, technicians. And that was
4 the same entity in the Mexican Government that was
5 issuing the letter to us. They had been litigating
6 with Guardia over the exact nature and operation of
7 these machines. So, from that perspective, we
8 believe they know exactly what they were talking
9 about.

10 The second piece of evidence indicates
11 their understanding is the lack of any apparent
12 requests for any additional information. Now,
13 Mexico uses that to argue that we misled them, but
14 I think the better implication or interpretation of
15 their--of no apparent evidence that they came back
16 to us and asked for more evidence or more
17 information is that they knew what they were doing.
18 They knew exactly what they were doing, and we
19 offered evidence in contrast to a solicitud made by
20 Carlos Gomez made a couple of months later where he
21 made a somewhat vague request for input on the

1 operation of skill machines, and they came back to
2 him and said we need the make, we need the model
3 number, we need to know how they operate. So in
4 our view, that that's an indication that when we
5 provided that type of information, the government
6 didn't need anything else from us.

7 The third piece of evidence in the record
8 indicates that Gobernacion knew exactly what it was
9 doing is the August 15th letter itself, and what I
10 tried to point out earlier is not only was it a
11 statement that they couldn't prohibit our use or
12 our business activities or wouldn't prohibit our
13 business activities, it was also an attempt to
14 define the standards by which skill machines could
15 operate in Mexico. And the fact they came back
16 with a refining of the standard indicates knowledge
17 on their part of what they were intending to do,
18 and again, I would refer you to that portion of the
19 paragraph that I read into the record earlier.

20 Another piece of evidence in the record is
21 Mr. Watson's subsequent discussions with

1 Mr. La Bastida, where he acknowledged that
2 Gobernacion was aware of the letter and felt it was
3 appropriate. Now, that conversation is in dispute.
4 It's been challenged in rejoinder, and Mr. Watson
5 will testify to the nature of this discussions with
6 Mr. La Bastida.

7 And then finally, and I think this is
8 probably the best evidence that Thunderbird and EDM
9 and Gobernacion were in complete agreement and
10 understanding as to what the EDMs entities were
11 doing and were going to do, is six months of
12 unfettered operation at Matamoros. They operated
13 without a hitch. We operated in an open and
14 obvious fashion. We got health permits and liquor
15 permits, and we had taxpayer registrations. We had
16 workman's insurance. We were entertaining
17 officials, we were entertaining local government
18 officials. This six months of unfettered operation
19 of the facility at Matamoros, until the new
20 administration and the installation of Guadalupe
21 Vargas as the new Director of Juegos y Sorteros, we

1 believe, is the best evidence that Thunderbird and
2 the government were on the same page exactly as to
3 what they could and could not do.

4 Next argument. Mexico next argues that
5 Thunderbird did not, in fact, rely upon the
6 August 15th letter. They point to our business
7 partners and our lawyers and a variety of other
8 people as those which we relied upon in pursuing
9 our business activities in Mexico. The responsive
10 evidence in the record is, number one, the letter
11 again. We very clearly indicated to the government
12 that we were seeking certainty as to our proposed
13 business activities and requested their input.

14 Also, there are multiple uncontradicted
15 witness statements from essentially all of our
16 witnesses who testified to their reliance that
17 Thunderbird placed upon the August 15th letter.

18 And then third, and I think this is
19 probably the simplest argument but the one that
20 Mexico has not chose to respond to in any respect:
21 In our view, simply the fact that we decided to

1 approach Mexico, simply the fact that we decided to
2 make an approach to the government, that fact alone
3 establishes reliance. That fact alone establishes
4 reliance.

5 The argument is that we were going to do
6 this anyways. Whether we approached them or not,
7 we were relying upon other people, and we were
8 going to do this anyways, but the point that we
9 made the decision to approach the government to
10 seek their assurances, we had cast our lot and cast
11 our fate with the determination of the government
12 in response to our letter. We had much to lose.
13 We had made some preliminary efforts to invest. We
14 were ready to open Matamoros immediately. We had
15 much to lose in approaching the government. If
16 they had come back and said, your machines are
17 prohibited by law, we are out of luck because the
18 only way we could then proceed with our business
19 activity is by proceeding in open defiance of the
20 government, in open defiance of an edict from the
21 government saying you can't do this. And that is

1 something that we would not have done, and, in
2 practical terms, it is not something that we could
3 not have done because we would not have been able
4 to secure investment money if the investor had been
5 told that we were proceeding in Mexico in open
6 defiance of what they told us we could not do.

7 So, even if we relied upon others in our
8 initial foray into the potential of a Mexican skill
9 game operation, once we made that decision to
10 approach the government, we cast our fate with the
11 government, and we had to rely upon what they told
12 us. There was no other alternative.

13 I think that that's the strongest argument
14 in the favor of reliance, and I think it hasn't
15 been contradicted, and, frankly, in my view, it
16 cannot be contradicted.

17 Mexico next argues that Thunderbird was
18 not reasonable in its reliance upon the August 15th
19 letter issued by the previous administration. And
20 they tried to make this argument in a couple of
21 different ways, and they tried to make it late in

1 the game through Mr. Nelson Rose's declaration.
2 And I think I tried to think simply, but I believe,
3 and we believe that that argument is simply absurd,
4 on its face. What could be more reasonable than
5 approaching the government, the host government in
6 the country within which we seek to undertake
7 business activities ahead of time and ask them if
8 we can do what we want to do?

9 This argument that we were not reasonable,
10 again the foundation for that is the implication
11 that the government officials we were dealing with
12 through our lawyers and the government officials
13 that issued the August 15th letter didn't know what
14 they were talking about and were misled with
15 respect to what they were telling us.

16 But, frankly, it's just absurd to note
17 that and to argue that we could not approach this
18 government and the highest officials in this
19 government and seek assurances from them and then
20 rely upon those assurances reasonably to proceed
21 with our business activity. What else could we do?

1 Now, to this day, to this day, to this
2 very minute, Mexico has not produced one shred of
3 evidence to show that Thunderbird and its EDMs did
4 not understand and believe that they were operating
5 in accordance with the August 15th letter and did
6 not, in fact, operate in accordance with the
7 August 15th letter. And I think it's important to
8 know in terms of time frame that in reality, the
9 time for Mexico to offer that type of evidence, and
10 we assert they haven't offered it until today, but
11 in our view, the time for Mexico to have come up
12 with that kind of evidence, to come up with some
13 indication that we are acting in contradiction to
14 what the government told us we could do was three
15 years ago--three years ago--at the time of our
16 meetings, at the time of the closures, and at the
17 time of the July 10 hearing before Guadalupe
18 Vargas. There is nothing in the evidence to
19 indicate that they ever brought forward the type of
20 evidence to indicate that we weren't exactly
21 complying and intended to comply with the

1 August 15th letter.

2 In fact, the only evidence before this
3 Tribunal and the only evidence that's ever been
4 presented of anybody from the Mexican side of this
5 case, actually looking at these machines and trying
6 to determine how they operate, the actual machines
7 that were in these facilities is the PGR report.

8 And understand that this is a report.
9 This is not our report. This is a report requested
10 by the PGR in Mexico. They chose the person to
11 come in and do the report. We had nothing to do
12 with the preparation of this report. And in that
13 report, the technicians, the computer technicians
14 who looked at these machines, analyzed them, looked
15 at how they run, tore them apart, came to the
16 conclusion that they were skill machines, came to
17 the conclusion that they were skill machines.

18 And this evidence was presented to
19 Guadalupe Vargas at the time of the July 10 hearing
20 and completely rejected. It's the only evidence of
21 anybody from Mexico's side of the case ever

1 actually looking at our machines to determine how
2 they operate and to see if they fall within the
3 parameters of the August 15th letter. There is
4 still no evidence that anybody has done that, other
5 than the PGR report.

6 Our next argument, next theory of
7 liability is a breach of Article 1105, minimum
8 standard of treatment, based upon a lack of
9 procedural fairness and an arbitrariness of result.
10 And this focuses on the actions of Guadalupe Vargas
11 in the closure, in the July 10 hearing, and in the
12 subsequent order issued by Mr. Aguilar Coronado.

13 And understand that, respectfully, we seek
14 the Tribunal to understand that these are separate
15 theories of liability. If this hearing and
16 Mr. Guadalupe Vargas had acted in the utmost
17 recognition of fairness and procedural due process,
18 we'd still have the detrimental reliance case.
19 It's our view that the Mexican Government was
20 entitled to come in six months, eight months, two
21 years later and change the standard and decide that

1 we could no longer operate anymore. But, they had
2 to compensate us for our investment if they chose
3 to do so, because that would be a breach of their
4 NAFTA obligations under 1105.

5 So even if this hearing were conducted in
6 the utmost concern to due process, we would still
7 have the argument based upon detrimental reliance
8 and vice versa.

9 The evidence with respect to Mr. Guadalupe
10 Vargas' actions, you know, it's kind of disputed by
11 implication. We provided multiple witness
12 statements of the parties who were there, including
13 Mr. Watson, Mr. McDonald, Jorge Montano, and Carlos
14 Gomez as to exactly what happened, and I'm sure
15 you're aware of what we believe to be--what
16 actually happened at that hearing.

17 First of all, Mr. Vargas was the same
18 individual who had shut down our entity before
19 based upon a visual inspection of the machines. To
20 this date, there's no evidence to indicate he had
21 any technical knowledge or any understanding of the

1 operations of these machines. He walked into Nuevo
2 Laredo, looked at these machines, and said what I
3 see before me are slot machines and shut the place
4 down.

5 We presented some evidence during the
6 period of time between that shutdown and the July
7 10 hearing when he was also making statements
8 outside--statements to government officials
9 indicating these are slot machines and nothing
10 else.

11 This is the same individual that we were
12 required to proceed in front of on the July 10
13 hearing. So, in our view, he was prosecutor,
14 judge, and jury, and went into this hearing with a
15 predetermined bias against our position.

16 And we believe that the actions at that
17 hearing exemplified that predetermined, prejudgment
18 of our position. We presented considerable
19 evidence, considerable evidence that was consistent
20 with the August 15th letter. Mr. Guadalupe Vargas
21 grabbed the evidence, threw it on the side of the

1 table and said: "This is just a thesis, nothing
2 else. These are slot machines," and it proceeded
3 on from there, and we've provided witness testimony
4 as to exactly what happened.

5 Now, Mexico has, in large part, not
6 contradicted that. They have presented the
7 declaration of Mr. Alcantara, who says everything
8 was fine at hearing, but nobody takes on the
9 essential allegations and assertions by made our
10 witness as to what happened at that hearing.

11 Now, in reality, Mexico's response to this
12 is to--their response to this basically is to
13 withdraw into the perceived safety of their legal
14 system, and they do so, and that's best exemplified
15 by a quote set forth in paragraph 235 of their
16 statement of defense, where they say as follows,
17 and this was focusing on the minimum standard of
18 treatment and the actions of Guadalupe Vargas and
19 administrative officials. They say as follows,
20 quote, Even if the administrative procedure
21 commenced by SEGOB was definite in the way by

1 Thunderbird, which is not admitted, this would have
2 been sufficient to demonstrate that justice had
3 been denied to EDM. So, they concede that if this
4 action, this administrative hearing occurred, as we
5 indicated, they believe that that would have been
6 sufficient to demonstrate that justice had been
7 denied to us at that hearing.

8 Then they go to say, "Having the same
9 structure for different legal systems recognizes
10 that there could have been mistake, including
11 violations in the government decision-making chain
12 in which Thunderbird was involved. Nevertheless,
13 the judicial system itself proves the means to
14 correct them through challenge or review of actions
15 through administrative and/or judicial channels."

16 And that pretty clearly encapsulates their
17 defense to this portion of the case. That is to
18 retract periods of time after the hearing and say,
19 our judicial system is there to clean up this mess.

20 Now, Mr. Weiler will speak to this notion
21 of exhaustion of remedies and deference to the

1 legal system, but I would just like to point out,
2 from my view, that, in my view, this presents them
3 with an absolute defense to a NAFTA treaty
4 violation case under these circumstances, under
5 most circumstances. Because they say that we can
6 be treated poorly. We can be treated in violation
7 of international standards due process. Even in
8 violation of their own standards of due process.
9 But, our judicial system will clean up the mess.

10 But then they admit that there are
11 different results in different courts under the
12 same facts in their judicial system, and then they
13 argue that we must presume that the administration
14 of justice in Mexico is fair and appropriate. And
15 maybe that is. Maybe that isn't an appropriate
16 presumption, I don't know, and it's not--we're not
17 in a position to really challenge that, but you
18 see, if you take these three factors together, that
19 all we have to do is provide a judicial system that
20 can clean up the mess that our officials did;
21 number two, we acknowledge that under identical

1 facts, our judicial system can come up with
2 different results, as any judicial system would,
3 but you still have to presume the administration of
4 justice in our system is fair. That provides an
5 absolute defense to them in any NAFTA claim based
6 upon the inappropriate conduct of their
7 administrative officials.

8 You always clean up the mess with the
9 legal system, we provide you with the legal system,
10 it may have disparate results, but presume it's
11 fair.

12 So I think, in practical reality, that
13 provides an absolute defense to any claim of this
14 sort, and again, Mr. Weiler will speak more to the
15 legal aspects of that.

16 Finally--well, not finally, but our third
17 argument is the breach of the 1102 national
18 treatment standards. And we assert that without
19 justification, Mexico has accorded less favorable
20 treatment to Thunderbird and its EDM investments
21 than it has accorded to domestic investors

1 operating in like circumstances. And again, we
2 view this as very simple as well. The reality is,
3 and to this day the reality is that we were
4 operating skill machine facilities. We were seized
5 and closed. There are domestic operators,
6 principally Mr. Guardia and another entity I will
7 speak to in a second, they are open and operating
8 today, and they have been for years, running these
9 types of machines.

10 So we have undertaken the analysis from
11 national treatment. The analysis is that you look
12 at your business activity, and then you define a
13 group of comparators. In this case, those
14 comparators are investors undertaking the operation
15 of skill game facilities, and that group includes
16 Cesta Punta de Portes, which is Mr. Guardia's
17 undertaking in Mexico City and in Ciudad Juarez.
18 He's operating skill machines to this day, and in
19 Mexico City he's been operating them for four or
20 five years.

21 The other participants in that group of

1 comparators are the entity that runs the Reflejos
2 operations, and we've identified three of those,
3 and again, that operation is Operacion y
4 Distribucion Total. Excuse my language. They're
5 operating three of those locations. They're open
6 today, and there's much dispute and much vagueness
7 in the record about whether they're open and why
8 they're open, and what they're doing, but they are
9 open today. We've provided that evidence, and
10 Mr. Gomez will provide some additional updated
11 information on exactly who is open and operating
12 today.

13 What you also have to do is determine
14 those comparators, in our view, that are not part
15 of the group, and those comparators that are not
16 part of the group, and if you look at pages 39
17 through 41 of their statement or rejoinder, there
18 is a nice demonstration of the various entities
19 under consideration, and what you do not include
20 under the group is the Makro Centro facilities, the
21 five Makro Centro facilities because they were

1 operating traditional slot machines, and there is
2 no dispute about that, and Mr. Watson will address
3 that in his brief testimony as well.

4 The other comparator is to be included in
5 the group, and I'm sorry for the gyration here, but
6 there is another entity, which is the Bella Vista
7 entity in Nuevo Leon, which today is operating 500
8 skill machines in a location that was essentially
9 identical to the location that we intended to open
10 in Monterey. They are open today and operating
11 with 500 machines in a gigantic facility.

12 So, the comparators are those that are
13 running skills machines. Not included in the
14 comparators are the Makro Centro facilities that
15 are running traditional slot machines.

16 So, you have the group of comparators.
17 The analysis then goes to the treatment being
18 accorded those comparators. In this case, it's
19 easy. We are closed, they're open.

20 The next portion of the analysis is to
21 look for a justification. Why are they open and we

1 are closed? And their argument is that Thunderbird
2 is not in like circumstances with the domestic
3 investors, operating skill machines, because it did
4 not secure judicial relief from the Mexican courts
5 allowing its EDMs to operate.

6 Now, again, Mr. Weiler will address the
7 legal merits of that argument, but I would like to
8 point out and hopefully we will have an opportunity
9 to point out, that the evidence does not support
10 that. The evidence does not--before this Tribunal
11 does not support the notion that these entities are
12 all operating under those conditions that they
13 established to be the like circumstances, and
14 hopefully we will be able to point that out in some
15 cross-examination.

16 Finally, our fourth theory is
17 expropriation under 1110, and I will address this
18 briefly because the same facts that provide for
19 liability under the other Articles and asserted
20 breaches, treaty breaches under the other Articles
21 are the same that justify a finding of

1 expropriation under 1110. So, we believe the
2 expropriation is largely a matter of legal
3 wrangling over the use of the various sections, and
4 at that point I turn it over to Mr. Weiler who will
5 address that topic, the issue of exhaustion of
6 local remedies, and the issue of the appropriate
7 deference to be given to the Mexican court system.
8 Thank you.

9 PRESIDENT VAN DEN BERG: Mr. Weiler.

10 MR. WEILER: Briefly, yes, I will touch
11 upon three topics.

12 Briefly, I will discuss three topics. I
13 will discuss Article 1110 and then I'll move to
14 1105 and finish with 1102, though I won't be
15 covering exactly the same ground or much of the
16 same ground as my colleague, so there won't be much
17 repetition. I expect about 15 minutes, and then we
18 could have our break, hopefully.

19 To start, expropriation, the bottom line
20 is that our expropriation claim is based upon the
21 exact same theory of liability as is our

1 detrimental reliance claim under the minimal
2 standard of treatment. Detrimental reliance is a
3 classical ground of recovery in international
4 investment law. Based upon the principle of good
5 faith, detrimental reliance is part of that bundle
6 of wrongs that Tribunals often mention when
7 discussing the content of the customary
8 international law minimum standard of treatment.

9 Mexico admits that basically in this case,
10 reasonable reliance is the key to establishing
11 liability under Article 1110, and in this manner
12 they have really admitted that for this case,
13 Articles 1110 and 1105 perfectly overlap for our
14 claim.

15 Now, they won't overlap in every case, but
16 they do overlap in this one. For example, Article
17 1105 will cover cases where you have less than a
18 complete taking. And expropriations, of course,
19 can occur in the absence of unfair and inequitable
20 treatment.

21 But, as much as customary international

1 law requires compensation for expropriation, as
2 many scholars and tribunals have concluded over the
3 years, the MST, the minimum standard of treatment,
4 that's found in Article 1105 and in customary
5 international law similarly requires it.
6 Accordingly, full, fair, and effective compensation
7 for expropriation would still be a NAFTA
8 requirement, even if Article 1110 disappeared
9 tomorrow.

10 Now, Mexico says the claims for
11 expropriation can only be brought by an investor on
12 its own behalf under Article 1116, but Article 1117
13 contains no such specific exclusion. And to read
14 Articles 1117 and 1105 in a way that would preclude
15 recovery for expropriations would be contrary to
16 the objectives of the NAFTA, and I think it would
17 be useful for a moment just to turn to those
18 objectives and briefly underline them. They can be
19 found in Article 102 of the NAFTA. I won't read
20 all of them. I will exclude a few of them that
21 involve trade issues.

1 Article 102 reads that the objectives of
2 this agreement as elaborated more specifically
3 through its principles and rules, including
4 national treatment, most-favored-nation treatment,
5 and transparency are to promote conditions of fair
6 competition in the free trade area, to increase
7 substantially investment opportunities in the
8 territories of the parties, and to create effective
9 procedures for the implementation and application
10 of this agreement for its joint administration and
11 for the resolution of disputes. So it's very clear
12 what kind of objectives we're talking about, and
13 what the nature of the interpretation of any
14 provision should be.

15 Now, given that there is no question as to
16 whether or not the EDM's businesses have been
17 permanently and irrevocably taken in this case, the
18 only question that remains is whether the EDM's
19 expectations to run such businesses rested upon
20 rights that were legitimately acquired and
21 reasonably maintained during the relevant time.

1 I will move to Article 1105.

2 Now in defending the Article 1105 claim
3 submitted by Thunderbird, Mexico adopts a very
4 familiar position that it and other NAFTA parties
5 have taken, albeit unsuccessfully, in past cases.
6 Mexico argues for the imposition of an implicit
7 exhaustion of local remedies rule. It says that
8 Article 1105 requires it to maintain a basic
9 justice system and no more. It says that no matter
10 what its officials may have done, so long as it
11 maintains access to that justice system, there can
12 be no international wrong.

13 Now, while it may be applauded for its
14 persistence, particularly in the face of numerous
15 NAFTA and BIT decisions to the contrary, that's
16 just not what Article 1105 says. As modified by
17 the July 2001 FTC statement, Article 1105 requires
18 treatment in accordance with the customary
19 international law minimum standard of treatment.
20 The Mondev, the Loewen, the ADF Tribunals all
21 finding after that statement, they all tell us that

1 the content of the minimum standard will vary from
2 case to case, and that the content of the standard
3 can be found through recourse to traditional
4 sources of international law, including doctrine
5 that can be found in the work of scholars and
6 international tribunals.

7 Now, for this case we have developed three
8 theories of liability under 1105, based upon those
9 international law sources: Detrimental reliance,
10 evidence of manifest arbitrariness and results, and
11 serious defects in procedural fairness. Now, any
12 one of these theories, as my colleague mentioned,
13 any of these theories constitutes a breach of the
14 minimum standard under both Article 1105 and
15 customary international law.

16 Now, in response, Mexico first challenges
17 or ignores the overwhelming evidence of detrimental
18 reliance; second, it contemptuously dismisses the
19 local law and manifest arbitrariness; and third, it
20 says that any procedural fairness problems
21 experienced by Thunderbird at the hands of

1 Guadalupe Vargas could and should have been
2 remedied by resort to its own court system.

3 Now, the basic problem with Mexico's
4 defense to this third point is that there is
5 absolutely no basis upon which to construe
6 Article 1105 as applying only to the outcome of a
7 domestic court system. Articles 1101 and 1117 tell
8 us that the chapter applies to government measures,
9 quote-unquote, not just the final outcome of
10 judicial proceedings, and it might be useful for a
11 moment to look at Article 201, the definition of
12 measure, which states that measure includes any
13 law, regulation, procedure, requirement, or
14 practice.

15 That doesn't sound like the outcome of a
16 judicial proceeding to me. It could include that,
17 but it sounds like a little bit more than that.

18 Now, as a matter of fact, the Loewen
19 Tribunal concluded that the outcome of a judicial
20 proceeding can be construed as a measure, but it
21 never gave any hint in either its preliminary award

1 or its final award or I guess it's not
2 technically--well, there is some debate whether
3 it's the final award. Their final award, it never
4 gave any hint that it saw Article 1105 as somehow
5 being limited to the outcome of a NAFTA party's
6 court system.

7 In essence, Mexico's argument turns the
8 option which you can find in Article 1-1-2-1, 1121,
9 the option to seek extraordinary relief locally
10 while pursuing your damages internationally, it
11 turns that option into a mandatory precondition for
12 recovery. Such an interpretation flies in the face
13 of the NAFTA's plain meaning and of its objectives.

14 On that I will now turn to Article 1102.
15 The Tribunals in Pope, Mexican Trucking,
16 Feldman, and Myers all basically adopted the same
17 approach to national treatment of
18 nondiscrimination. You define a suitable class of
19 comparators. You determine whether the claimant
20 has received less favorable treatment in result
21 than any other one of that class, and then, if you

1 have so far found that, indeed, that is the case,
2 you decide whether there is a valid policy
3 justification for any difference, if found.

4 Now, while Mexico makes some noise about
5 the general applicability of this test, the crux of
6 Mexico's argument appears to rest on the third
7 prong, justification. This is the part of the test
8 where we basically wait for the respondent to
9 explain why the de facto difference in treatment
10 proved by claimant has a reasonable explanation, a
11 reasonable, nondiscriminatory, nonarbitrary, fair
12 explanation. It's the part of the test that Mexico
13 chose not to answer in Feldman and was punished for
14 it. It's the part of the test that saved the day
15 for Canada in the Pope and Talbot case. It's the
16 parts of test that shows us it's okay to teach--I'm
17 sorry--to treat, two widget makers differently if
18 the process one uses destroys the environment and
19 the process that the other one uses doesn't. You
20 can close the one that's destroying the
21 environment. That's okay. The difference in

1 treatment is explained.

2 Now, a majority of the Feldman Tribunal
3 took Mexico to task for failing to explain why the
4 investor in that case didn't receive tax rebates
5 that his competitors did during the relevant
6 period. Even though in retrospect it seems that
7 none of them might have been deserving of the
8 rebate.

9 Mexico was also faulted by that same
10 majority of the Tribunal for failing to explain
11 significant differences in enforcement among these
12 competitors. In this case, Mexico has done a
13 little more to explain the difference in treatment,
14 but not much more. In short, Mexico says that
15 because the EDMs chose not to exhaust their local
16 judicial remedies, they aren't in like
17 circumstances anymore with those skill game
18 operators who are still open today. It says that
19 everybody is treated the same in Mexico, and that
20 everyone could expect to eventually be in the same
21 position as Thunderbird, i.e., closed, once the

1 dust settles and the courts put things right.

2 Forget for a moment that Mexico has simply
3 failed to leave the kind of evidence necessary to
4 support that kind of conclusion. The theory itself
5 does not justify why the EDM's businesses were
6 closed three years ago and the others remain open
7 today.

8 Now, if the justification is uniformity
9 and enforcement, the evidence on the record
10 demonstrates extremely uneven enforcement as
11 between locals and Thunderbird, not unlike the
12 Feldman case. If the justification is that
13 Thunderbird should have just hired better local
14 lawyers, which is really no justification at all, I
15 would remind the Tribunal that foreigners are
16 supposed to be protected against having to know the
17 secret tricks of a local legal system, especially
18 those who ask the government for direction before
19 establishing and expending their investments.

20 What Mexico really appears to be saying is
21 that all it needs to do to satisfy its obligations

1 under Article 1102 is basically all it needs to do
2 to satisfy its obligations under Article 1105; that
3 is, provide foreigners with access to a basic legal
4 system, a basic court system. With all due
5 respect, that cannot be right.

6 Nowhere in the NAFTA does it say that a
7 claimant must seek local relief in local courts in
8 order to assert a valid claim under any provision,
9 much less Articles 1105 or 1102 or, for that
10 matter, 1110.

11 If Mexico's arguments worked under any of
12 these provisions, it would be effectively absolved
13 of all responsibility for anything that its
14 officials may do, so long as foreigners are provided
15 with pro forma access to a court system which
16 Mexico says international tribunals must show
17 considerable deference to. In conclusion, in order
18 to avoid liability for what is essentially a garden
19 variety case of detrimental reliance and
20 discriminatory treatment, Mexico urges this
21 Tribunal to become the very first to limit the

1 availability of any Chapter 11 relief to those
2 wrongs which have been preprocessed through a local
3 court system. While Mexico might be congratulated
4 for its ingenuity in attempting to resurrect the
5 exhaustion rule for what could charitably be
6 described as inhospitable treaty text, it should
7 not be rewarded. Thunderbird has established a
8 very strong prima facie case it has been
9 wronged, and it has suffered damages as a result,
10 and the evidence speaks for itself. Thank you.

11 MR. CROSBY: Mr. President, we think that
12 the issues are very well briefed on both sides, and
13 that concludes our opening statement.

14 PRESIDENT VAN DEN BERG: Thank you.
15 Adjournment for 10 minutes.

16 (Brief recess.)

17 PRESIDENT VAN DEN BERG: Mr. Perezcano,
18 you are also going to give a PowerPoint
19 presentation I see?

20 MR. PEREZCANO: Yes, Mr. Chairman.

21 PRESIDENT VAN DEN BERG: Do you intend to

1 hand out a copy of it?

2 MR. PEREZCANO: Yes, we can make it
3 available, of course. We just don't have a copy
4 right now on us, but we can make it available to
5 the other party.

6 MR. CROSBY: I just know we didn't see
7 this before now, but that's fine.

8 PRESIDENT VAN DEN BERG: Yes, that's okay.
9 It's a presentation based upon a PowerPoint
10 presentation. Usually you have it, then we can
11 make notes on it.

12 MR. CROSBY: We don't have any objections.

13 MR. BECKER: It's all exhibits on the
14 record.

15 PRESIDENT VAN DEN BERG: Only exhibits on
16 the record.

17 MR. BECKER: Yes. There's no
18 demonstrative evidence.

19 PRESIDENT VAN DEN BERG: No multimedia,
20 fancy things?

21 MR. CROSBY: No little guys walking

1 around.

2 MR. BECKER: No ELMOs.

3 PRESIDENT VAN DEN BERG: Mr. Crosby, can
4 we proceed?

5 MR. CROSBY: Yes.

6 PRESIDENT VAN DEN BERG: Mr. Perezcano?

7 MR. PEREZCANO: Yes, I'm ready,

8 Mr. President.

9 PRESIDENT VAN DEN BERG: We will proceed
10 with the opening statement.

11 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

12 MR. PEREZCANO: Thank you, Mr. Chairman,
13 Arbitrators, good morning.

14 The Tribunal has to bear in mind that this
15 international dispute mostly refers to the conduct
16 of Gobernacion in the application of a piece of
17 legislation that prohibits gambling. We understand
18 that gambling is such where a player risks an
19 amount of money to gain a larger amount of money.
20 This is a game of chance, and also a game of
21 betting.

1 Now, the Federal law of gaming and
2 sweepstakes prohibits these kind of behavior. The
3 parties also understand that the betting and the
4 chance, these two elements, if they intervene in a
5 game, then this game is prohibited. The
6 Gobernacion gave notice of this from the beginning
7 to EDM.

8 It is also unquestionable that the
9 Gobernacion determined in the specific case of EDM
10 that the games that it operated were, indeed, games
11 of chance and games with--and gambling games.
12 Gobernacion made this same determination in all of
13 the cases and underscore the word "all," where
14 Gobernacion has knowledge of locations or places
15 where machines of this nature were operating.
16 We're willing to come back to this point later.

17 This international arbitration cannot
18 replace local resources. This Tribunal does not
19 have the jurisdiction of national tribunals and
20 cannot act as an appellate tribunal to the
21 decisions of the administrative decisions or the

1 judicial decisions of municipal courts, and it
2 cannot replace its criterion for the criterion of
3 administrative authorities when they enforce the
4 law at the relevant time. This is an international
5 tribunal whose jurisdiction stems from the North
6 American Free Trade Agreement, and the agreement is
7 based on its own rules and international customary
8 law.

9 The claim related to the behavior of
10 Gobernacion. Even if the claimant could state that
11 this is the case in the national sphere, this does
12 not imply a violation of Chapter 11 of NAFTA.
13 Claimant has to prove that three of the provisions
14 of the treaty were violated. The obligation to
15 afford national treatment, 1102; the obligation
16 under minimal treatment under international
17 customary law, 1105; and expropriation contained
18 under Article 1110. The evidence shows--and we are
19 going to see this with more detail throughout the
20 hearing--that claimant has not satisfied or
21 complied with this burden of showing these

1 violations.

2 I wanted to refer, firstly, to the
3 national treatment obligation. The Tribunal may
4 reject this claim very easily. The evidence shows
5 that Gobernacion has closed--has closed all, and I
6 want to repeat, all--the facilities where skill
7 machines are operating, all of those that
8 Gobernacion has had knowledge of. Actions of the
9 administrative authority have been consistent and
10 uniform in all cases. Individuals have challenged
11 before the national courts the acts of Gobernacion,
12 and only in some cases some of these individuals
13 have obtained a temporary suspension of the closing
14 orders while the judicial proceedings are pending.
15 Now, Gobernacion has resisted the decision
16 of the courts and has legally fought against them
17 in all cases. Gobernacion in all cases has
18 challenged, legally challenged, the decisions of
19 the courts that have granted this temporary
20 suspension. Sometimes they've done it successfully
21 and, in a small number of cases, unsuccessfully.

1 The Tribunal must remember that EDM itself
2 and the three entities of EDM had access to the
3 Mexican courts, and the Mexican courts found
4 against EDM both in connection with the temporary
5 suspension that they requested and were not
6 awarded, and the claims themselves presented by EDM
7 to challenge the acts of the Gobernacion.

8 In several cases, it lost in the trial
9 courts. One of the cases was brought up to the
10 appellate tribunal, and the appellate tribunal
11 actually confirmed the lower court's decision, and
12 the three EDM entities decided to leave the
13 resources--or, rather, leave the remedies that they
14 had started.

15 Now, it should be noted that Mexican
16 tribunals have not determined that the operation of
17 these kinds of machines is legal under Mexico law.
18 The Tribunal will appreciate that Mexico's
19 arguments are not, as Mr. Weiler said this morning;
20 they are actually much more subtle. In some cases,
21 we have courts that have jurisdiction in different

1 cases that are made up of different judges.
2 Sometimes they are single judge courts, and in
3 appellate courts, and sometimes there are multiple
4 judge courts.

5 These tribunals have decided generally in
6 a uniform manner, in a consistent manner; they have
7 decided to temporarily suspend the orders of
8 Gobernacion, and that is what separates Thunderbird
9 from those claimants that are subject to judicial
10 proceedings and were awarded the temporary
11 suspension.

12 Now, Gobernacion is an authority that
13 enforces the law, and it has fought against these
14 decisions, and Gobernacion has adopted a uniform
15 and consistent conduct, so much so that the
16 Tribunal may reject the claim in connection with a
17 violation of Article 1102.

18 Let's move on to expropriation. The
19 Tribunal can also easily reject the claim for
20 expropriation. Claimant itself has recognized--and
21 I'm quoting from the reply--Mexico is right when it

1 suggests that it is not required to pay an
2 indemnification for the legal business, and this is
3 page 65 of the reply. Gobernacion actually
4 inspected EDM's facilities. It looked at the
5 machines in operation, received documentary,
6 expert, and witness testimony under an
7 administrative proceeding that took place for a
8 period of time, and that was not only just one
9 administrative hearing. It valued each one of
10 these pieces of evidence. It assessed each one of
11 these pieces of evidence, and in a well grounded
12 decision determined that the games operated by EDM
13 were, in fact, games that were prohibited under the
14 federal law of gaming and sweepstakes, because
15 these were games of chance and games of betting.

16 Gobernacion determined that this was an
17 illegal business. Clearly, Gobernacion had
18 forewarned EDM in connection with the prohibitions
19 set forth in the law, and had forewarned EDM,
20 saying that the law will close all facilities where
21 illicit games are being operated. So, Gobernacion

1 closed the three EDM facilities, as it has in the
2 past closed all other facilities, including
3 Reflejos and Mr. "Wardice's" Guardia's, although
4 some of them may be under a temporary court
5 suspension, but pending the judicial proceedings.

6 Looking at the official letter of
7 August 15, 2002, of Gobernacion, it is obvious that
8 this is not a permit to operate skill machines.
9 This is not a permit to operate games that are
10 games of chance and games of betting. Claimant
11 itself on page 41 of the reply admits so. The
12 official letter of August 15 is not an approval or
13 is not just a license given by the Gobernacion.

14 The official letter of August 15th is a
15 clear warning for EDM not to operate games of
16 chance and games of betting. Mexican law
17 determines whether there is a right to operate
18 these kinds of games. The law grants Gobernacion
19 the jurisdiction to regulate these matters and also
20 to enforce the law. Gobernacion has done it in
21 every single case, and no Mexican court has

1 reversed any of the determinations made by
2 Gobernacion in this regard.

3 Lastly, I wanted to refer to the minimum
4 treatment, minimum standard of treatment, that is.
5 Claimant claims that the acts by Gobernacion
6 violate the minimum standard of treatment required
7 by international customary law. There is a
8 footnote, footnote number 25, on page 48 of the
9 reply. Claimant admits in this case the measures
10 in question stem from decisions of the officers of
11 Gobernacion and not the Mexican tribunals, end of
12 quote. And this was confirmed by Mr. Crosby and
13 Mr. Weiler this morning.

14 Claimant presents a series of claims that
15 are confusing and that relate to a number of
16 isolated events, and claimant focuses on the
17 administrative hearing of July 10, 2001. Mexico
18 disputes the characterization of facts made by
19 respondent.

20 The Tribunal, as said before, has to
21 appreciate that the acts of Gobernacion do not end

1 with the administrative hearing. This was an
2 administrative hearing that was commenced by EDM
3 after an agreement with Gobernacion, an agreement
4 whereby the closing was lifted for one of the
5 facilities. This was in the month of February
6 2001, and the agreement by EDM not to commence
7 amparo proceedings. So, the proceeding was started
8 by a request submitted by EDM.

9 Gobernacion declared that the proceedings
10 were open. It called a hearing, and the Tribunal
11 has to appreciate that this proceeding is clearly
12 regulated by a specific law on the matter, which is
13 the federal law of administrative proceedings. The
14 expert witness's opinion presented by Gobernacion,
15 by Dr. Serna, referred to this proceeding in
16 detail. Claimant has completely ignored the expert
17 opinion of Dr. Serna and has not called Dr. Serna
18 to appear before this Tribunal in this hearing.

19 I would like to categorically reject the
20 characterization made by Dr. Crosby this morning,
21 saying that the administrative proceedings were not

1 carried out in order--this order, if you will, or
2 disarray that the Mexican courts could have cleaned
3 up. That is not what happens in Mexico, and that
4 is not the way we have characterized the facts.
5 This is an administrative proceeding which is
6 perfectly regulated and conducted in accordance
7 with the law.

8 The purpose of the proceeding was for EDM
9 to provide Gobernacion with all evidence and
10 arguments that would allow Gobernacion to assess
11 the nature of the games that EDM was operating.
12 EDM presented documentary evidence, expert witness
13 evidence, witnesses' testimonies, and also
14 presented--EDM presented a number of arguments.
15 Gobernacion admitted all EDM evidence and weighed
16 the evidence one by one. It hurt EDM, and it
17 passed a resolution, a well granted resolution
18 where it considered every single one of these piece
19 of evidence and arguments by EDM.

20 And the fact is that claimant--

21 PRESIDENT VAN DEN BERG: May I ask you a

1 question at this point. Because this morning I
2 heard Mr. Crosby saying that Mr. Varga acted both
3 as prosecutor and judge at the same time; is that
4 correct, that you characterized him in that way?

5 MR. CROSBY: That was my characterization.

6 PRESIDENT VAN DEN BERG: What is your
7 response, Mr. Perezcano, to that characterization?

8 MR. PEREZCANO: That's not correct,
9 Mr. Chairman. Mr. Vargas, in fact, for a large
10 part of the period was Director for Games and
11 Lottery of Gobernacion. Mr. Vargas intervened
12 directly only when it came to the closing of the
13 first establishment in February of 2001, and then
14 he was present during the administrative hearing.

15 Nevertheless, Mr. Vargas, neither led the
16 administrative hearing, nor did he take the
17 administrative decision of October 10 of 2001. He
18 did participate in the process, but the
19 administrative proceeding evolved over a number of
20 stages, and it involved a number of officials of
21 Gobernacion, including the Director of Games and

1 Lotteries, but also the lawyers of Gobernacion and
2 other staff from Gobernacion who have a purview in
3 the field of games and lotteries, and the
4 administrative decision was taken by the
5 Director-General of the Secretariat. So, it's
6 incorrect to say what the claimant says about the
7 role of Mr. Vargas.

8 PRESIDENT VAN DEN BERG: Could you please
9 help me: Where in the evidence do I find who
10 actually had the seat as I have exactly at this
11 hearing, at that hearing?

12 MR. PEREZCANO: You will find it in the
13 resolution, the administrative resolution, of
14 Gobernacion, dated October 10, 2001. You will find
15 it also in the minutes at the conclusion of the
16 hearing, which reflect what happened during the
17 course of the hearing. Officially, the Chair of
18 the hearing was the Director-General of the
19 Gobernacion, although, in fact, he was not present
20 during the hearing. But given the purview and the
21 competence he has as Director-General for

1 government, he was formally the Chairman during our
2 hearing, and the actual Chairman of the hearing was
3 Licencio Alberto Alcantara. The administrative
4 resolution was signed by the Director-General for
5 government. Witness statement by Mr. Alcantara
6 also refers to it.

7 So, I insist the administrative resolution
8 was well-founded, it's detailed, and it speaks for
9 itself. Mr. Crosby, probably thinking in his
10 experience as a litigator in U.S. courts and given
11 his practice, points out that the respondent did
12 not submit as witnesses a number of people who have
13 been involved, and maybe he would like to bring to
14 an international tribunal a litigation practice
15 that is properly a practice used in U.S. courts.
16 However, the Court has before it a large amount of
17 documentary evidence, and the documents speak for
18 themselves. And when documents are clear, it's not
19 necessary to bring in additional witnesses about
20 the events that have been described and covered in
21 those documents.

1 I would like to ask the Tribunal to
2 carefully read the administrative resolution of
3 October 10, because it speaks for itself.

4 Once again, Mexico's argument is not what
5 it was described as by Mr. Weiler this morning, and
6 with great respect for the other parties' lawyers,
7 I would like to say that Mexico's arguments are a
8 great deal more subtle, and they're expressed very
9 clearly in our pleadings, and we will come back to
10 these during the course of the hearing.

11 But Mexico has not stated that in an
12 international proceeding based on Chapter 11 of the
13 Free Trade Agreement, only acts resulting from a
14 judicial process can be reviewed; in other words,
15 that only measures coming out of the judicial
16 branch can be challenged through a proceeding based
17 on Chapter 11. That is not Mexico's argument.

18 What Mexico however is stating is that if
19 there are available means of defense, if there's
20 access to the courts, there might--an international
21 violation may not correspond to what the claimant

1 is arguing in this case.

2 And let me illustrate what I'm saying.
3 We've heard a great deal about the administrative
4 audience of July 10, 2001, but EDM did not consider
5 that Gobernacion would have led that hearing in an
6 inadequate or improper way or that there might have
7 been any deficiencies or inappropriate behavior on
8 the part of the officials of Gobernacion during
9 that hearing.

10 At the conclusion of the administrative
11 proceeding and after the closure of the
12 establishments, EDM challenged the acts of
13 Gobernacion in the Mexican courts, different
14 Mexican courts, located in different places, made
15 up of different lawyers--sorry, judges. In none of
16 those proceedings did EDM indicate that they had
17 been hurt by the way the administrative hearing had
18 been carried out. There is a lack of any
19 references to the administrative hearing of the
20 year 2001. Furthermore, during the hearing itself
21 by 10 July 2001, where EDM had a chance to present

1 arguments during that very hearing, EDM did not at
2 all refer to any deficiency, any inappropriate
3 behavior, in the way the audience--sorry, the
4 hearing was carried out.

5 And it did have a chance, pursuant to
6 existing law, to submit additional written
7 arguments after the conclusion of the hearing.
8 Yet, EDM did not submit any arguments that, in some
9 way, the hearing had been conducted in an
10 inappropriate fashion, or that there was behavior
11 which years later it claims took place now before
12 this Tribunal.

13 The Tribunal should understand that the
14 arguments of the Mexican argument are a great deal
15 more subtle than as they were characterized by
16 claimant, but even if the charges of claimant today
17 were true, which the Government of Mexico of course
18 does not concede, even though claimant could show
19 that the acts of Gobernacion went against Mexican
20 legislation, went against due process in Mexico,
21 that would not suffice to establish a violation of

1 Article 1105.

2 Mexico has referred the Tribunal to a
3 decision of a chamber of the International Court of
4 Justice in the ELSI case where the Mayor of the
5 City of Palermo seized a factory, and that action
6 was then reviewed by Italian courts. And those
7 courts determined that the Mayor had acted over and
8 beyond his authority. He committed ultra vires
9 acts in seizing that factory, and that action on
10 the part of the Mayor, pursuant to Italian law, was
11 deemed to be illegal.

12 And yet, the International Court of
13 Justice determined that even though the actions of
14 the Mayor of Palermo had been carried out pursuant
15 to Italian law, there had not been a violation or
16 any arbitrary action under international law.

17 And let me insist that EDM had legal
18 remedies available to it. They presented them to
19 Mexican tribunals in one case after there was a
20 judgment against at the first level, in the appeal
21 they lost; in other cases courts decided against

1 EDM. And in the light of all of these results, EDM
2 opted for desisting in the case of all of these
3 court cases.

4 In addition, Thunderbird here is not
5 complaining about the actions of Mexican courts.
6 Several courts established under NAFTA have
7 determined that they lack competence when it comes
8 to resolving problems of violation of municipal
9 laws and to act as appeals courts when it comes to
10 decisions taken by national courts. For instance,
11 in the Azinian case, the courts stated the
12 following, and I quote: The possibility of
13 considering a state international responsible for
14 judicial decisions does not, however, provide the
15 claimant with the right to request an international
16 review of the judicial domestic decisions, as if
17 the international tribunal getting the case were
18 fully competent as an appeals court. That is not
19 generally the case, and it is not the case under
20 the NAFTA agreement.

21 What needs to be shown is that the

1 decision of the court is an infraction of the
2 treatment.

3 I conclude my quote, paragraph 99 of the
4 award in the ELSI and Azinian case. In the Mondev
5 case, the court stated the following, and I quote,
6 the local constabulary and another to second-guess
7 the recent decisions of the highest courts of the
8 state. Under NAFTA, parties have the option to
9 seek local remedies. If they do so and lose on the
10 merits, it is not the function of the NAFTA
11 Tribunals to act as courts of appeal. I conclude
12 the quotation from paragraph 126 of the award in
13 the Mondev case.

14 The Mondev court also referred with some
15 details to the Azinian court decision. In the ADF
16 case, the court referred to the behavior of
17 administrative officials, and I quote, the investor
18 submitted thirdly that the AFHWA, this is the
19 authority, the administrative authority in that
20 case, and I continue with my quote, that ultra
21 vires, and in this regard of the terms of the 1992

1 STAA--I interrupt my reading--there is a reference
2 to a law, but I will continue with the quote. Here
3 the Tribunal is bound to observe the investor has
4 not established a prima facie case for holding that
5 as a matter of U.S. administrative law, the FHWA
6 had acted without or in excess of its authority
7 under the 1982 STAA.

8 More important, for present purposes,
9 however, is that even had the investor made out a
10 prima facie case, the prima facie base for its
11 claim, the Tribunal has no authority to review the
12 legal validity and standing of the U.S. measures
13 here in question under U.S. internal administrative
14 law. We do not sit as a court with appellate
15 jurisdiction with respect to the U.S. measures, or
16 with jurisdiction. Our jurisdiction is confined by
17 NAFTA Article 1131, paragraph one, to sustain the
18 consistency of the U.S. measures with relevant
19 provisions of NAFTA Chapter 11 and applicable rules
20 of international law.

21 The Tribunal would emphasize to you, that

1 even if the U.S. measures were somehow shown or
2 admitted to be ultra vires under internal law of
3 the United States, that, by itself, does not
4 necessarily render the measures grossly unfair or
5 inequitable under the customary international law
6 standard of treatment embodied in Article 1105,
7 paragraph one.

8 An unauthorized or ultra vires act of a
9 governmental entity, of course, remains in
10 international law the act of a state which the
11 acting entity is part if that entity acted in its
12 official capacity, but something more than simple
13 illegality or lack of authority under domestic law
14 of a state is necessary to render an act or measure
15 inconsistent with customary international law
16 requirements of Article 1105, paragraph one, even
17 under the investor's view of that Article, that
18 something more has not been shown by the investor.
19 I conclude my quotation, which is paragraph 190 in
20 the ADF court award.

21 In the Loewen and Feldman cases, the

1 courts also referred to their competence under the
2 treaty, and I would like to refer the Tribunal to
3 those additional cases as well.

4 The claim from the claimant or the claims
5 from the claimant in the best of cases have to do
6 with issues that having to deal with the
7 application of Mexican law and the behavior of
8 Gobernacion where, in addition, Mexican courts have
9 solved and decided in favor of Gobernacion. So
10 therefore, the claim should also be rejected.

11 Mr. Chairman, with your permission, I
12 would like to yield to my colleague, Ms. Alejandra
13 Trevino for her to refer in greater detail to the
14 background to Thunderbird operations, even in the
15 Mexican market, the request of 3 August and the
16 official letter of August 15 from Gobernacion.
17 Thank you very much.

18 MS. TREVINO: Thank you very much.

19 Before describing the various facts in
20 this case during the hearing, it's important for
21 the Tribunal not to lose sight of the type of

1 company that Thunderbird is, the nature of its
2 business, and the business activities it's been
3 involved in and continues to be involved in. The
4 activities of Thunderbird are pertinent to this
5 dispute because it sets forth a context within
6 which it acted in Mexico, and the kinds of
7 activities it carried out commercially, and which
8 are the subject of this dispute.

9 Thunderbird is in one specific business,
10 and that is the betting business, betting,
11 gambling. There is relevance that proves this or
12 shows this. First, the name of claimant is very
13 illustrative to this effect: International
14 Thunderbird Gaming Corporation. According to
15 Black's Law Dictionary gaming means refers to the
16 act and defines gambling as placing bets. The
17 Webster Dictionary of Law on this hands defines it
18 in the following fashion, and I quote, "There is
19 something of value for the chance of winning a
20 prize."

21 In Spanish, "gaming" means quite a word

1 which the Spanish Royal Academy Dictionary defines
2 as the action or effect of gaming. The action has
3 several meanings in Spanish, including taking part
4 in one of a game that has had rules not for fun,
5 but in order simply or solely to gain money.
6 That's the type of gaming that Thunderbird operates
7 commercially. It's the kind of business it's been
8 devoted to through its history.

9 As we will see a little later, claimant
10 started with gaming operations in Indian
11 Reservations of the United States. At the present
12 time, it owns several casinos and gambling
13 facilities in Latin America.

14 Second, in its corporate documents and
15 documents for its investing public, Thunderbird
16 describes itself as a company that operates even in
17 Mexico gaming facilities. For instance, in the
18 annual report of 1996, which is a document Exhibit
19 R-16 in the reply, it's mentioned that Thunderbird,
20 in addition to its activities in the Indian
21 reservation casinos, worked on manufacturing and

1 selling gaming video terminals known in English as
2 video gaming terminals, and that it also sold and
3 distributed a large number of devices for casinos.

4 In a different document, the Annual Report
5 2000, which is part of Exhibit R-56, page two
6 states that Thunderbird is a company that, on the
7 development and operation of casinos in the rapidly
8 growing markets of South, Central America, and
9 Mexico, end of quote.

10 The word--the document states that
11 Thunderbird is working on the operation and
12 development of casinos.

13 Thirdly, for obvious reasons, its partners
14 and business associates are in the same kind of
15 activity. For instance, Mr. Bibion is a casino
16 designer who, together with Mr. Oien, proposed to
17 Thunderbird to build gaming facilities in Mexico.
18 Mr. Watson, who had previously already been in the
19 Mexican market as representative of Makro Centro
20 establishments, which were closed by Gobernacion
21 because they were operating slot machines.

1 Fourth, Thunderbird got involved in Mexico
2 because it felt there were potential opportunities
3 to establish game facilities in Mexico. This is a
4 quotation from the claimant exhibit page three,
5 lines 19 and 20.

6 Thunderbird first explored the possibility
7 of acquiring a horse racing and booking
8 establishment in Tamaulipas and Nuevo Laredo.
9 Finally, Thunderbird decided to open gambling
10 facilities with slot machines even though they knew
11 that identical operations by Mr. Guardia had led to
12 the closing of his establishments by Gobernacion
13 and had caused what claimant describes as a serious
14 legal dispute.

15 Thunderbird clearly is in a specific type
16 of business, gambling with betting, and it tried to
17 develop that business in Mexico. It's not
18 believable that Thunderbird came to Mexico in order
19 to develop a new line of business. Even in the
20 corporate documents, it makes no distinction
21 between activities it carries out in other places

1 with those or from those that carries out in
2 Mexico.

3 With all of the opening of its facilities
4 in Matamoros and Laredo and Reynosa, Thunderbird
5 decided to get into a business that is clearly
6 forbidden in Mexico. The federal law on betting
7 and lotteries establishes a prohibition that covers
8 the entire country of games of chance and games of
9 betting, games of chance and games involving
10 betting.

11 The law establishes some limited
12 exceptions or waivers to this prohibition.
13 However, these are cases that are specifically
14 regulated and for which it's necessary to have a
15 permit from Gobernacion.

16 It's important to stress that claimant
17 before opening its facilities in Mexico knew that
18 Gobernacion, one, was opposed to the operation of
19 that kind of a business because it felt that they
20 were illegal; two, had closed establishments where
21 there were machines that were identical or very

1 similar; and three, had been opposing attempts by
2 private investors, even litigating vigorously
3 against them.

4 It's obvious that Thunderbird knew the
5 risk that Gobernacion might close the facilities of
6 Entertainmens de Mexico.

7 Now, keeping this in mind, let's move on
8 to the facts. The Tribunal knows the facts of this
9 claim in great detail. Nevertheless, it's timely,
10 I think, to review four key elements. One, the
11 request of 3 August 2000, from Entertainmens to
12 Gobernacion; two, the response from Gobernacion to
13 that request in a letter dated 15 August 2000;
14 three, the administrative proceedings started
15 against Entertainmens de Mexico by Gobernacion to
16 determine the legality of the issues by
17 Entertainmens that led to the closing of its
18 facilities; and four, the defense mechanisms
19 available to Entertainmens de Mexico.

20 There are elements, factors and actors
21 that are part of these events that will be dealt

1 with during the course of this week. I'm not going
2 to use my time to again cover facts that are very
3 well-known, but I believe it's important for the
4 Tribunal, during the course of this hearing, to
5 keep in mind certain aspects having to do with
6 these four key aspects or factors that I mentioned,
7 and they are the following:

8 One, Entertainmens, in its application of
9 August 3 of the year 2000, stated categorically
10 that it operated video machines for skill games
11 that did not include either chance or betting.

12 Two, Entertainmens provided Gobernacion
13 with a superficial description of how these
14 machines operated, and failed to provide
15 information of the true nature of these machines
16 that would explain to Gobernacion the type of
17 gaming involved. For instance, it did not advise
18 Gobernacion that the machines have a slot that you
19 can put in U.S. dollars to get them to operate, and
20 that the points that you can win could be exchanged
21 for cash awards. It also did not provide

1 Gobernacion with manuals or operating instructions,
2 nor did it provide a machine to show how these
3 machines worked or even photographs of these
4 machines.

5 Three, Gobernacion responded to the
6 application from Entertainmens, and in its response
7 it indicated clearly that if the machines to be
8 operated by Entertainmens operated in the way
9 described in its application, in other words,
10 without elements of chance and betting coming into
11 play, then those machines were outside
12 Gobernacion's jurisdiction, and therefore, as
13 indicated in the letter of 15 August 2000, not only
14 is it not a license, but it's not even something
15 that might be considered as an approval or an okay
16 for the activities to be carried out by
17 Entertainmens. To the contrary, it's a clear
18 warning of those types of activities that it could
19 not carry out.

20 Fourth, Gobernacion clearly informed
21 Entertainmens that if any chance or betting were to

1 be involved, then these would be prohibited
2 activities. Indeed, it used about a page and a
3 half of the 15 August official note to explain
4 legal framework prohibiting games of chance and
5 games of betting.

6 Fifth, Gobernacion warned EDM about the
7 legal consequences that could arise if, in
8 actuality, these were machines known as slot
9 machines, or "tragamonedas" or "tragafichas" in
10 Spanish.

11 Six, Gobernacion conducted an
12 administrative proceeding, the purpose being for
13 EDM to provide that information that would enable
14 Gobernacion to make a determination as to the
15 legality or illegality of the machines in question.
16 As Mr. Jose Maria Serna indicates in his legal
17 opinion, which is attached at Annex 54 to the
18 response brief or the counter memorial, in an
19 administrative proceeding, the authority has the
20 obligation to receive, evaluate, study, and rule on
21 the evidence presented by the private party and

1 thus arrive at a determination. This is what
2 Gobernacion did in this case.

3 Seven, the claimant has recurred to a
4 series of witness statements to try to discredit
5 the administrative procedure in its entirety. In
6 particular, to discredit the administrative hearing
7 that was held 10 July 2001. In this arbitration
8 proceeding, Thunderbird has emphasized a number of
9 supposed situations and omissions and conduct of
10 the government in relation to the administrative
11 proceeding. Nonetheless, the record from that
12 proceeding shows the opposite.

13 Eight, Entertainments, or EDM, had access
14 to means of defense before the respective domestic
15 courts. It filed a motion for nullity against the
16 administrative ruling and several amparo
17 proceedings for the shutdown of each of the
18 establishments. Mr. Perezcano has already
19 mentioned the outcome of those proceedings. All
20 that remains to be noted is that one cannot
21 attribute to the Government of Mexico the fact that

1 the procedural strategies of EDM did not prevail.

2 These are the facts around which this
3 claim resolves. As I indicated, there are several
4 factors related to the facts that are important.
5 One of these is precisely the controverted point as
6 to the nature and origin of the machines that were
7 used at the EDM facilities, and to address this
8 point I would give the floor to my colleague,
9 Mr. Becker.

10 MR. BECKER: Mr. President, I do have
11 photocopies of the files I'm about to show on the
12 PowerPoint presentation. We could hand those up.

13 Mr. President, I'm going to be reviewing
14 several exhibits that are in the record that relate
15 to the nature and source of the machines used at
16 the EDM facilities. We think it's especially
17 important to review this information now because
18 we're not going to see an actual sample machine at
19 the hearing.

20 The evidence I'm going to review right now
21 relates to several factual issues which I will ask

1 the Tribunal to keep in mind.

2 First, as Ms. Trevino just explained,
3 EDM's solicitud on August 3rd to Gobernacion stated
4 that it was seeking an opinion on games that
5 involved no chance and no betting. Also, the
6 solicitud did not mention video poker in any
7 manner.

8 Second, the claimant, through Mr. McDonald
9 and on page 10 of its reply represented that EDM's
10 machines were especially made for the Mexican
11 market and specifically designed based on the
12 August 15, 2000, Gobernacion letter. Mexico says
13 that they were previously used machines from the
14 United States, identical or closely similar to
15 machines that had been held to be gambling games by
16 the U.S. courts and the U.S. Indian Gaming
17 Commission.

18 Third, on page 35 of the reply, the
19 claimant says that the operating manuals found at
20 EDM-Nuevo Laredo and submitted into the record were
21 not actually for the machines used at the facility.

1 It just says they're old Thunderbird manuals.

2 And then fourth and finally, the
3 claimant--and Mr. Crosby repeated this this
4 morning--says that EDM's August 3rd solicitud
5 identified specific models of the machines,
6 suggesting it would do so in a manner that would
7 make them easily recognizable to Gobernacion.

8 Mexico says the solicitud did not contain
9 actual model numbers nor any detailed information
10 about the machines.

11 I'm going to start here, this is Exhibit
12 R-0017. It's the International Thunderbird Gaming
13 Corporation annual information form for the year
14 1996 published in May 1997. Thunderbird, on the
15 first page, provides a glossary of the terms it
16 uses in the report. We note, first of all, that it
17 defines VGT, or Video Gaming Terminal, as a
18 computerized slot machine that incorporates a video
19 terminal screen, a central processing unit, memory
20 and computer software to determine the frequency
21 and amount of payout of prizes.

1 It also defines a button control VGT as a
2 VGT machine that allows operation of the machines'
3 functions by pressing various buttons located on
4 the machine.

5 On page three, the company explains its
6 business in the late 1990s. It consists of
7 essentially three activities: The assembly and
8 sale of VGTs, defined earlier; the purchase and
9 resale of other gaming products; and the
10 installation of VGTs on a revenue-sharing basis in
11 casinos located primarily in Native American Indian
12 lands in North America. In other words, tribal
13 casinos.

14 On the next page, page four, we highlight
15 several things. We highlight this point, that the
16 company indicates that it acquired during that year
17 Thunderbird Greeley, and you will see in the third
18 line it says, Thunderbird Greeley was purchased to
19 complement Thunderbird Carolina's line of touch
20 screen VGTs with a line of button control VGTs that
21 are assembled in a plant in Greeley, Colorado.

1 Page eight, again the company explains
2 market for its products. It says that major VGT
3 and slot machine suppliers, such as International
4 Game Technology and Alliance Gaming Corporation
5 dominate the traditionally large managers of Nevada
6 and New Jersey; that is, Las Vegas and Atlantic
7 City. Consequently the company's target market for
8 outright sales of VGTs includes all the fringe and
9 developing locations, including Canada, various
10 other parts of the United States and South America.

11 Turning back to page seven, which is the
12 next slide, there are several items on this page I
13 want to highlight. First of all, again, highlights
14 the company assembles and distributes button
15 control and touch screen VGTs--these are the
16 computerized slot machine--for gambling purposes
17 and button controlled VGTs for amusement purposes.
18 Then it explains the difference between the
19 gambling machines and the amusement machines.

20 Machines sold for gambling allowed for
21 coins or cash ticket, which may be reimbursed at

1 the casino's ticket or cash office to be dispensed
2 as prizes. In contrast, machines sold for
3 amusement dispense credit that allows additional
4 play or tickets may be reimbursed for non cash
5 prices. The gaming industry machines are generally
6 higher quality than machines sold for amusement
7 using higher quality parts and selling at a higher
8 price. The gaming machines are encased in a metal
9 cabinet as opposed to a wooden cabinet for
10 amusement.

11 Then the company goes on to explain what
12 types of machines it's been making. These are
13 button-controlled VGTs sold by the company for the
14 gaming industry, and you will see we've highlighted
15 here the company made games called Very Cherry
16 Bonus, Red White & Blue Sevens, and the Wizard
17 series of button-controlled VGTs.

18 The next slide comes from a series of
19 photographs presented in Exhibit R-001. These are
20 photographs taken at EDM-Nuevo Laredo. I will ask
21 you to look at the top of the machine where you'll

1 see it's the Very Cherry Bonus machine, with the
2 same name as one of the machines that Thunderbird
3 indicated in its annual report that it was
4 producing.

5 The next slide shows the picture of the
6 Red White & Blue Sevens machine. Again, that's one
7 of the machines that I just highlighted in its
8 annual report. Here is a better picture, showing
9 the name more clearly. By the way, you will see at
10 top the odds table printed for the machine.

11 Next, we have again the third type of
12 machine we highlighted, which is the Wizard line of
13 machines. Here we have the machine called Wizards.
14 You will note in the right-hand side of the page in
15 very small letters there is a word that we figured
16 to blow up. It has Thunderbird's name on the front
17 of it.

18 You may not be able to see it clearly on
19 the screen, but this comes from claimant's exhibit
20 C-87, page 42 of the PDF files, and this shows an
21 inventory of the machines at the EDM-Reynosa

1 facility. If you look down the left-hand column,
2 you will see shown in a number of places the number
3 of Very Cherry Bonus, Red White & Blue Sevens
4 running down that column. Same thing on the next
5 page, lot of Very Cherry Bonus and Red White & Blue
6 searches. You will recall these machines described
7 by Thunderbird in its annual report as
8 button-controlled VGTs made for the gaming
9 industry; i.e., the gambling industry.

10 The following photographs show some other
11 of the machines that were found at EDM-Nuevo
12 Laredo. Here is a machine called Plum Crazy, again
13 with the odds displayed on the top of the machine.
14 Forgive my Spanish as well, (speaking in Spanish),
15 translating to Hot Wheels, showing the odds table.

16 This is an important photograph. This
17 shows the actual button controls, the button
18 control of VGTs. First of all, you will note that
19 the three yellow buttons or green buttons on the
20 right displayed Stop One, Stop Two, and Stop Three,
21 but the two buttons on the right have alternative

1 functions. At the top of the one on the right you
2 will see it says "Max Bet." That's for betting the
3 maximum amount of credits that you are allowed. If
4 you don't want to bet the maximum amount, you push
5 the Bet one button, the next one over.

6 You will also note that the yellow button
7 on the left also serves a dual function. You hit
8 it to spin. You also hit it for all stop, so
9 that's the button you push. If you don't want to
10 push the reels individually, you just hit one
11 button that tells the machine to stop the wheels.

12 Finally, you will see the red button on
13 the lower left, and unfortunately you can't see it
14 very well on the screen, it shows up better on the
15 screen behind you. But you will see that red
16 button on the lower left says "Cash Out." That's
17 the button you push to print out a ticket or
18 exchange for money or get your money out. We will
19 note that you should note in accordance with
20 Thunderbird's own description of the differences
21 between a gaming machine and an amusement machine,

1 it said that machines that printed out tickets or
2 gave out money in exchange for playing were
3 gambling equipment, and this again, these machines
4 had cashout buttons. That's what they were for.

5 The next slide, just wanted to highlight
6 the word "tragamonedas, translates literally to
7 money swallower or dollar swallower. We believe
8 this photograph speaks for itself.

9 This photograph shows--you have to look
10 carefully, but you will see that there originally
11 was another name plate on the side of the machine.
12 You will see three empty holes, and we believe this
13 illustrates that SCI took off the original name
14 plate and screwed in its own name plate and model
15 number, in other words, to take off the original
16 manufacturer's name.

17 These are several more photographs,
18 several more photographs showing the general layout
19 of the Nuevo Laredo facility. You will see row
20 upon row of the machines.

21 This photograph is a photograph of what's

1 known as the cage which shows the place where
2 people come to exchange money, get dollars to put
3 into the machines, and bring their winning tickets
4 that are printed out of the machines if they win.

5 These following are three photographs
6 from--I'm sorry, marked it incorrectly on the
7 slide. These are from Claimant's Exhibit C-30, and
8 these were several photographs that they took of
9 the machines in Matamoros when they were turned on,
10 and the photographs are a bit out of focus, but if
11 you look at the machines on the left-hand side, you
12 can make out the image of the reels.

13 Same thing on this picture, you see on the
14 left-hand side, you see the reels with the numbers
15 similar to what you would find on a traditional
16 slot machine.

17 Same thing in this photograph, except the
18 machines, what you see at the best are the ones on
19 the right-hand side.

20 All right. Going back to--this is another
21 Thunderbird annual information report for the year

1 2000, published in May 2001. It's Respondent's
2 Exhibit 20. You may want to highlight on page 12
3 that Thunderbird reports that it had a settlement
4 with a California Indian tribe. The company
5 announced it has completed the negotiation and
6 settlement of a lawsuit against a California tribe.
7 The terms of the settlement include a payment by
8 the tribe of \$500,000 and delivery of 4004 gaming
9 machines to Thunderbird.

10 This is the same year they're opening in
11 Mexico.

12 Next, we are going to turn to the four
13 manuals that were found on the premises at
14 EDM-Nuevo Laredo. One of the things we wanted to
15 do, as I pointed out at the beginning, was that the
16 claimant has suggested that these manuals were not
17 actually for the machines installed at the EDM
18 locations, even though we found them there on the
19 premises. This is the cover of a manual with the
20 support consultant's name on it. That's SCI. I
21 just wanted to highlight that on the cover it says

1 4205 Game Board Series, eight-line skill/Mina D'Oro
2 skill games. Recalled that the name of the
3 facility in Mexico was called Mina D'Oro. We would
4 submit to you that this demonstrates this manual
5 was indeed intended for use at that facility.

6 Another manual we found at the facility,
7 and this was with a dark cover, but can you see at
8 the top it's a Thunderbird manual.

9 Now, notwithstanding the fact that the SCI
10 manual states that it's specifically for the Mina
11 D'Oro facility, and this other manual seems to be
12 an old Thunderbird manual, we've done a comparison
13 of the two manuals, and I have a couple of samples
14 here. If you look here, this is page two of both
15 manuals--of the manuals. The SCI is on the left,
16 the Thunderbird's on the right, and you will see
17 that not only are the words the same, the format,
18 everything about them is identical.

19 Another sample is here on page 10, with
20 the game play instructions absolutely identical.
21 We submit it's obvious that SCI simply took the old

1 Thunderbird manual, made a copy of it, and put its
2 own name on the cover.

3 I would also like you to note on this page
4 that this manual refers to the Red White & Blue
5 Sevens, and the Very Cherry Bonus games. And as we
6 reviewed before, those are games that are described
7 in Thunderbird's own annual report as being
8 button-controlled VGTs that they manufactured.

9 PRESIDENT VAN DEN BERG: Professor Walde
10 has a question.

11 ARBITRATOR WALDE: I'm trying to
12 understand how these machines work. Am I right
13 that there is a hardware, so to say like here are
14 computers, and then inside the software, like in my
15 computer you put in a disk or something, and then
16 sort of to say it works differently with my
17 computer; is that right?

18 MR. BECKER: Mr. Walde--

19 ARBITRATOR WALDE: Is my analogy with the
20 computer right?

21 MR. BECKER: I don't think it's quite

1 right. My understanding, our understanding, based
2 upon reviewing the manuals very carefully and other
3 information that's available, is that you have
4 a--the heart of the machine is this printed circuit
5 board. In the case of the Thunderbird machines,
6 this 4205 board.

7 ARBITRATOR WALDE: The circuit board, the
8 motherboard?

9 MR. BECKER: Right. And that there are
10 certain chips that are put on it that also contain
11 programming, but it's basically hard wired. What
12 the manuals indicate is that you can--the machines
13 are designed in a way that you can go in and flip
14 what they call dip switches on the printed circuit
15 board to, as we will review later, affect things
16 like what the level of payout is, whether you can
17 double up in betting, to change the denominations
18 of the--the maximum denominations of money it will
19 accept.

20 So, I think it's not quite like a computer
21 that you just put in a floppy disk with a program

1 in it.

2 ARBITRATOR WALDE: I remember dips from
3 the 1980s.

4 MR. BECKER: Yes.

5 All right. Next, we are going to go on.
6 This is another manual, and you will see at the
7 bottom right it has the Summit Limited name on it,
8 although it's copyrighted to a company called
9 Dynamo Limited. You also see at the top it says
10 Mexico Multi-Action, progressive with display.
11 Again, obviously it meant--sorry.

12 PRESIDENT VAN DEN BERG: You just--you if
13 go one back, yes, then we have next page. Fantasy
14 Five Game Manual.

15 MR. BECKER: I will come back to that
16 other page.

17 PRESIDENT VAN DEN BERG: My point is where
18 you had the next one which you wanted to present to
19 us.

20 MR. BECKER: It's a little out of order.

21 PRESIDENT VAN DEN BERG: It's the R-0012,

1 yes, a couple of pages before that.

2 MR. BECKER: Yes, just after.

3 The only purpose--point I wanted to make
4 in connection with this slide is simply that it is
5 labeled as a Mexico Multi-Action game by Summit.
6 Therefore, it was intended, clearly was intended
7 for use in Mexico in these facilities.

8 In fact, I did want to move on to the
9 Fantasy Five Game Manual. This is Exhibit R-15.
10 You may recall that part of the claim--part of the
11 evidence in the case is that the claimant purchased
12 Bestco Fantasy Five machines for use in the EDM
13 facilities. This is the manual. Although it says
14 Intuitive Corporation on the bottom, I will show
15 you in a couple of pages that it's actually a
16 Bestco copyright on it.

17 If you turn to the next page, the next
18 slide, which is page 14 of the manual, I wanted to
19 highlight the fact that this machine allows for
20 adjustments in the speed of the reels that are
21 displayed. It says the factory default setting for

1 this value is normal. There are four reel speeds
2 available: Normal, fast, very fast, and use doors.
3 Use doors has doors that open and close over the
4 reels to reveal the results of the reels are not
5 shown spinning in this mode. So, you can see that
6 the operator is allowed to make adjustments in how
7 fast the reels are spinning or whether or not the
8 user can actually see them at all.

9 The next slide is from page 13 of the
10 manual. We wanted to highlight here, or first of
11 all just to point out that there is the Bestco
12 copyright on it. This does relate to the Bestco
13 machines, but further this is the--this describes
14 the method for setting a predetermined outcome for
15 playing the game. It's the base pay rate. The
16 base pay rate is the percentage of points to be
17 awarded the player. If set to 75 percent, the
18 player would win, on the average, 75 points for
19 every hundred points played. Actual credit-in
20 credit-out ratio is difficult to guess, but the
21 game will regulate itself to this setting. The

1 higher the number, the longer the player will play.
2 The default value is set to 75 percent. This can
3 be changed to a value within the range of 50 to 95
4 percent. We submit to you that this is a feature
5 that you would normally expect to find on a slot
6 machine because, again, the operator can determine
7 the ratio of successful plays, regardless of the
8 skill of the player.

9 I would also highlight that the future of
10 this set predetermined outcomes or predetermined
11 ratios doesn't vary depending on whether you've set
12 the speed of the reels for normal, fast, faster, or
13 not seeing them at all. It's just a general
14 feature of the machine.

15 On my next slide, I go back to the support
16 consultants, the SCI, manual, instruction manual.
17 And.

18 And the next page, which is a slide, which
19 is page 10 of the manual, you wanted to
20 highlight--this goes back to the Red White & Blue
21 Sevens game--and I wanted to highlight here on the

1 general game play instruction. It says, number
2 one, insert bills into the bill acceptor. It can
3 be set up to set up denominations from \$1 to \$100
4 bills.

5 Two, press bet one or max bet to enter the
6 number of credits you wish to wager.

7 Number three, press spin to start the
8 game.

9 And then on number four, to play another
10 game, you have two options: Either press Spin to
11 rebet and wager the same number of credits as in
12 the previous game, or press Bet One or Max Bet to
13 wager a different amount.

14 And finally, number five, if you wish to
15 stop playing the game but you still have credits
16 remaining, press Payout and the machine will either
17 print out a ticket showing the value of the
18 remaining credits or dispense coins if it is a
19 hopper machine. You may redeem the cash ticket.

20 All right. Next slide, we go back to the
21 Thunderbird manual, I showed you the cover earlier.

1 Following slide. This is page 12 of the
2 manual. It's a listing of the video poker games
3 that are available to be played on the machine. It
4 includes Jacks Are Better, 4th of July, Joker
5 Poker, Duces Wild, and Flush Fever. I will just
6 read quickly under Jacks Are Better. It's a
7 standard draw poker-type of game. The player is
8 dealt five cards. He may keep the cards or discard
9 to receive new cards. If the double up feature is
10 turned on, he's then given the option to double his
11 winnings. He may continue to try to double until
12 he loses or decides to take his winnings.

13 I will move to the next slide. This is
14 another document, it comes from Claimant's Exhibit
15 C-87, page five of the PDF file. It's an invoice
16 for the purchase by EDM of machines for use in
17 Matamoros, from SCI Support Consultant, Inc. I
18 wanted to highlight, first of all, that the date on
19 the invoice is August 4th, 2000. That's before the
20 Gobernacion ruling was issued.

21 I also wanted to highlight that on this

1 invoice, it identifies the make is SCI. It says
2 the model is 17-inch U/R, and we wanted to explore
3 what that came from.

4 This is a document, a straight bill of
5 lading, as it's entitled, which comes from the
6 Claimant's Exhibit C-G, page 33. What you will see
7 here on the left-hand column that this bill of
8 lading identifies the model number as a 17-inch
9 upright video game. We believe this indicates that
10 17-inch U/R means 17-inch upright.

11 Now, you will see there on the column over
12 to the right that that could include any one of a
13 number of different games, and we would submit to
14 you that describing a machine as a 17-inch upright
15 video game is not a model number, and it's not
16 descriptive of anything other than the size of the
17 computer monitor that's used to display the game.

18 Similarly, on our next slide, this is the
19 purchase invoice from Bestco of the Fantasy Five
20 game. It comes from Claimant's Exhibit C-87, page
21 nine of the electronic PDF file.

1 First of all, you will see that the
2 invoice indicates that the machines were shipped on
3 June 30th, 2000, almost two months before the
4 Gobernacion letter was issued on August 15, and
5 well before the solicitud was even submitted.

6 The other thing we wanted to highlight on
7 this invoice is Bestco's own description of the
8 games. You will see there at the top line that I
9 have blown up, the game is a 7100 Fantasy Five.
10 And then there is some additional information. It
11 says this is a metal machine. You may recall that
12 Thunderbird's description of the difference between
13 gambling games and amusement games indicated that
14 gambling games are metal and amusement games are
15 wooden.

16 But anyway, this is a metal game, and it
17 abbreviates metal to MTL.

18 On the second line, on the itemization, it
19 identifies--has the number 19-inch, presumably
20 meaning a 19-inch monitor. And then on the
21 following two lines there is a reference to a

1 harness with an eight-line metal STY, and a button
2 with an eight-line set. That apparently was
3 translated by EDM into a purported model number
4 that it described to Gobernacion as MTL 19U8L. MTL
5 here up on the top line, metal; 19 on the second
6 line; 8L, probably an abbreviation for 8 line; U,
7 we don't know, perhaps means upright. But again,
8 we would suggest to you this is not a model number,
9 but it's gibberish, and Bestco itself calls it
10 Fantasy Five. All right.

11 By the way, Mr. President, I'm close to
12 finishing up. All right.

13 This is an exhibit that comes from
14 Respondent's Exhibit 122, page one. It's a copy of
15 an E-mail sent from Wendy Reeve to Don Bradley, but
16 copy to Mr. Sawin, Mr. Atallah and among others,
17 Mr. Mitchell and Mr. Watson. The subject is the
18 Matamoros cage bank. And you will see in the first
19 line, today Deb cc and Dave approved that we can
20 raise the cage bank in Matamoros to \$35,000 as
21 requested.

1 If you turn to the next slide, this is the
2 document again that comes from Claimant's Exhibit
3 C-42, it's page 206 of the electronic PDF file.
4 The name of the document is International
5 Thunderbird Gaming Corporation, internal control
6 minimum standards and procedures for La Mina de Oro
7 and Reynosa.

8 If you turn to the next slide, this is the
9 next page, page 207 of that exhibit, again it
10 contains a glossary. Here is the bank, the bank
11 role, is the inventory of currency, coins and/or
12 tokens in the establishment, including the vault,
13 the cage, the vault change booths, used to make
14 change, pay winning tickets, and pay video lottery
15 machine jackpots.

16 Then we see defined payoff, the amount
17 paid out on a winning wager. Again, we submit this
18 is evidence that what they were doing in the
19 facility, they had \$35,000 in the cage available to
20 pay out winnings, make change, and that this is
21 consistent with the activity, with activities of a

1 casino.

2 Mr. President, that will conclude my
3 review of the evidence and the nature of the
4 machines. I'm going to turn the presentation back
5 over to Mr. Perezcano.

6 PRESIDENT VAN DEN BERG: Thank you very
7 much. Mr. Perezcano.

8 MR. PEREZCANO: Thank you, Mr. Chairman.
9 The Government of Mexico has also put forth two
10 exceptions, and I'm going to just say that we want
11 to reiterate the nature of these exceptions or
12 defenses and the arguments that we have presented
13 in this regard. We are going to come back to them
14 in our closing argument.

15 Throughout the week, and while the hearing
16 progresses, the Members of the Tribunal have to
17 bear in mind the nature of the company that wanted
18 to do business here, the nature of the business
19 carried out, the business that it carries
20 generally, and the business that it wanted to carry
21 out in Mexico, the manner in which it characterized

1 the operation--the operations of the machines to
2 the Gobernacion, and the response of Gobernacion on
3 the basis of the characterization by the claimant
4 without any description or characterization, and
5 also the idea that these games, betting games, and
6 games of chance, which is, of course, clear, and
7 has to remain clear throughout the hearing, these
8 games, I was saying, are prohibited by Mexican law.

9 The carrying out of these operations would
10 be against the law, whether by Thunderbird or by
11 any other company. This is the end of our opening
12 statements. Thank you for your attention.

13 PRESIDENT VAN DEN BERG: Thank you,
14 Mr. Perezcano.

15 ARBITRATOR WALDE: I trust to get the gist
16 of your presentation, I'm not sure if I should
17 summarize it, but perhaps you can just summarize
18 the gist of the details, but am I also right that
19 you're suggesting that Thunderbird took these
20 machines, used machines they got from California
21 and then brought them over to Mexico?

1 MR. BECKER: That's right.

2 ARBITRATOR WALDE: Somewhere both clearly.

3 MR. BECKER: I'm sorry.

4 PRESIDENT VAN DEN BERG: Somewhere both
5 for \$180,000.

6 MR. BECKER: Exactly.

7 PRESIDENT VAN DEN BERG: So you're saying
8 there is a mixture of used machines?

9 MR. BECKER: Thunderbird, there is a
10 mixture of machines they bought Bestco, which again
11 they represent are custom designed for use in
12 Mexico after the Gobernacion letter. I showed you
13 an invoice, a purchase invoice from Bestco, showing
14 that the machines were actually shipped on
15 June 20th, 2000, and what we had here was a
16 standard Bestco manual. But the point of the
17 presentation was to show, first of all, that
18 Thunderbird's own descriptions of the machines
19 referred to them as gambling devices. Customers
20 insert money into the machines in an effort to win
21 money, they are wagering, and we think this is no

1 material difference between a VGT, a button
2 controlled VGT, and a video lottery terminal and a
3 slot machine. They're all used for gambling.

4 PRESIDENT VAN DEN BERG: All right. I
5 think that we can adjourn for lunch. I'm looking
6 for the interpreters. Would it be possible to
7 resume at quarter past one?

8 THE INTERPRETER: Yes, sir, we can.

9 PRESIDENT VAN DEN BERG: Is both sides
10 fine, quarter past one?

11 MR. PEREZCANO: Yes, Mr. Chairman.

12 MR. CROSBY: May I raise the issue again
13 of the short testimony of Mr. Montano. He has to
14 go back to Mexico City. I understand that that's
15 an inconvenience to the Tribunal. I raised this
16 with Hugo, and I request leave that we can present
17 Mr. Montano right away after the break, and then
18 proceed into Mr. Atallah's testimony.

19 PRESIDENT VAN DEN BERG: I thought it was
20 already settled this morning. I wanted to
21 accommodate him if we can.

1 MR. PEREZCANO: We have no objections in
2 that regard.

3 PRESIDENT VAN DEN BERG: Thank you.

4 MR. PEREZCANO: Just a procedural matter,
5 Mr. Chairman, the documents that are related to the
6 witnesses, I don't know if the Tribunal wants us to
7 prepare binders with the documents for the
8 Tribunal, for the other party, and for the witness,
9 or whether Tribunal has any indication in this
10 regard?

11 PRESIDENT VAN DEN BERG: You have
12 documents you are going to show to the witness,
13 that you prepared the copies, because then we can
14 specifically note on these copies here, but always
15 on the condition that the other side also gets the
16 same set. And the same of course applies to you,
17 Mr. Crosby.

18 MR. CROSBY: Mr. President, we're going to
19 make minimal references to documents. I will speak
20 frankly. We have not created copies for everybody
21 because everybody has got the books. I was

1 intending to put the book in front of the witness
2 and have them refer to it.

3 PRESIDENT VAN DEN BERG: But it is useful,
4 if you could make--if you could make copies of the
5 documents you are going to use, additionally there
6 has not been anticipated at the pretrial
7 conference, I'm fully aware of that, but I saw a
8 big copying machine outside, so it will not be too
9 much work.

10 MR. CROSBY: We will do it.

11 PRESIDENT VAN DEN BERG: Then I wish you
12 good lunch but also good reading time because Sara
13 will to you the tentative list of issues.

14 (Whereupon, at 12:11 p.m., the hearing
15 was adjourned until 1:15 p.m., the same day.)

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1 AFTERNOON SESSION

2 JORGE MONTANO, CLAIMANT'S WITNESS, AFFIRMED

3 PRESIDENT VAN DEN BERG: Ambassador
4 Montano, do you testify in the English or in
5 Spanish language?

6 THE WITNESS: I'm going to testify in
7 Spanish.

8 PRESIDENT VAN DEN BERG: You don't mind
9 that I do the introduction in English?

10 THE WITNESS: No, sir.

11 PRESIDENT VAN DEN BERG: Could you state
12 your full name for the record.

13 THE WITNESS: Jorge Montano Martinez.

14 PRESIDENT VAN DEN BERG: State your place
15 and date of birth.

16 THE WITNESS: I was born in Mexico on
17 August 16, 1965.

18 PRESIDENT VAN DEN BERG: Would you please,
19 if you don't have it, your written statement.

20 Would you please go to page two.

21 MR. CROSBY: Mr. President, he doesn't

1 have his witness statement.

2 PRESIDENT VAN DEN BERG: Could you please
3 show it to him.

4 Would you please confirm for the Arbitral
5 Tribunal that the witness statement dated 7 August
6 2003 is, indeed, your witness statement, and more
7 particular that is on page two, your signature?

8 THE WITNESS: Yes, that's my signature.

9 PRESIDENT VAN DEN BERG: You testify in
10 the Spanish language. If any question is asked in
11 another language, and it is unclear, please do seek
12 a clarification of the question. Otherwise, the
13 Tribunal will assume that you have fully understood
14 the question and you answered correspondingly to
15 the question.

16 Now, you also appreciate that appearing
17 before a court or an Arbitral Tribunal as a witness
18 is a very serious business, and the Tribunal
19 expects to you tell the truth, the whole truth, and
20 nothing but the truth, and also to give the
21 following declaration. And if you could please

1 repeat, read your declaration which is in front of
2 you.

3 THE WITNESS: I solemnly declare on my
4 honor and conscience that I will tell the truth,
5 the whole truth, and nothing but the truth.

6 PRESIDENT VAN DEN BERG: Thank you. You
7 Ambassador Montano, you are familiar with the
8 manner in which examination of witnesses is being
9 conducted in this case?

10 THE WITNESS: Yes.

11 PRESIDENT VAN DEN BERG: So I don't need
12 to explain to you? Mr. Crosby. would you please
13 with the direct examination.

14 DIRECT EXAMINATION

15 BY MR. CROSBY:

16 Q. Ambassador Montano, did you become
17 involved with International Thunderbird Gaming
18 Corporation with respect to the operation of their
19 EDM skill machine facilities in Mexico?

20 A. Yes. Yes, I participated.

21 Q. And what was the nature of your

1 involvement with Thunderbird in that respect?

2 A. As a result of an invitation, extended to
3 me by very honorable people, very honorable group
4 of people in Mexico. I was invited to participate
5 in a matter that affected Thunderbird. Therefore,
6 I became a consultant and an advisor for the
7 company in an external capacity in connection with
8 the relations between the company and the
9 government.

10 Q. Why did you choose to get involved with
11 this company and their executives?

12 A. Two main reasons. The first, the
13 honorable nature of the people that extended the
14 invitation to me, people who are the servant of all
15 my respect, they're Mexican businessmen, they're
16 linked to the company.

17 And secondly, because when I became aware
18 of the matter, I thought it was important to
19 provide consulting services for them, and to help
20 them, and to guide them in connection with the
21 matter in which they had to get linked with the

1 business culture in my country.

2 Q. As a result of your involvement with
3 Thunderbird in Mexico, did you reach any
4 conclusions as to their business practices,
5 particularly with respect to their dealings with
6 the Mexican Government?

7 A. My impression during the time that I dealt
8 with Thunderbird's executives was a very good one.

9 Not only that, but I recommended that in
10 their investments in the country, they should
11 identify partners in each region of the country
12 where they thought about going.

13 I offered to introduce them to people that
14 could become associated with them in cities like
15 Monterey, Vera Cruz, Ciudad Juarez, and Chihuahua.
16 Not only did I introduce these people to other
17 people, to honorable business people in those
18 cities, but these business people were willing to
19 establish business relationships with Thunderbird's
20 executives that were very careful. These
21 executives, they underscored that they respected

1 Mexican law at the Federal level, at the state
2 level, and at the municipal level.

3 In connection with municipal relations, I
4 made recommendations in this regard. I told them
5 that they had to abide by the rules, and that also
6 I want to underscore the fact that the lawyers from
7 Baker & McKenzie were doing things very carefully,
8 and I urged them to establish a relationship with
9 municipalities. Those municipalities were going to
10 receive a part of their profits for purposes that
11 would be specifically documented there. The money
12 would be applied to Social Security programs,
13 assistance to children and things of that nature.

14 Q. Did you assist Thunderbird in its contacts
15 and dealings with the Mexican Government over the
16 closure of their skill-machine facilities?

17 A. When they initially approached me, I think
18 it was mid-February 2001. They approached me, and
19 they said that one of their facilities had been
20 violently closed in the City of Territes, and it
21 was inexplicable how they or, rather, why the

1 closing took place. The facility had been closed
2 already, so what I did was to try and build bridges
3 amongst the parties, amongst them, and the highest
4 authorities at the federal level. I was assuming
5 that this had been an act performed by the
6 authorities without any grounds. I thought that
7 this was a matter that had been dealt with at a
8 local level and not at a federal level. That was
9 not connected with the federal level officials.

10 Q. As a result of your efforts on behalf of
11 Thunderbird, did you reach any conclusions about
12 the nature of the treatment being accorded to
13 Thunderbird concerning the closure of its entities?

14 A. I think that the months that I spent
15 dealing with this matter, well, during that period
16 of time I noticed a number of groundless and
17 inexplicable problems, and--however, we had a very
18 cordial relation with the government.

19 Now, however, we thought that there was a
20 double standard or a double agenda because we were
21 told one thing and something totally different was

1 done. Promises were not kept, so these months were
2 very frustrating specifically because of my own
3 professional background, and because as a
4 professional I have always tried to attract foreign
5 business people and not to, in fact, scare them
6 away. So, I thought that what was going on in this
7 administration, which was prone to change and prone
8 to promote in business, I thought that there was a
9 double discourse, a double speech that did not
10 coincide with all this.

11 Q. Thank you.

12 Did you attend a hearing before
13 Mr. Guadalupe Vargas, with representatives of
14 Thunderbird, concerning the closure of the
15 EDM-Nuevo Laredo entity?

16 A. That hearing took place as a result of a
17 friendly demarches with Mr. Umberto Coronado, who
18 very generously opened his doors, the doors of his
19 office to listen to us on a number of occasions,
20 and it is he who suggested and said that this
21 hearing should take place, and that Thunderbird

1 officials should provide expert testimony, and that
2 this hearing would take place on a specific date,
3 and the Thunderbird people brought their experts
4 from various parts of the United States.

5 The day of the hearing, Mr. Aguilara was
6 not present, and we followed the instructions of
7 Mr. Guadalupe Vargas. I had not met him before
8 that day, and Mr. Vargas from the very start, had
9 an attitude that was the exact opposite of what we
10 experienced before. He was extremely aggressive.
11 His attitude was arrogant. In the light of the
12 evidence that was being submitted to him at the
13 very beginning, he looked at the model of the
14 machine. He immediately established a prejudiced
15 view. He said these are the machines that swallow
16 up dollars.

17 So, it was very disappointing for me, a
18 hearing that had been prepared well in advance,
19 that cost a lot of money, all of a sudden was not
20 having the results, the impact of the sense of what
21 we were trying to achieve.

1 MR. CROSBY: Thank you. I have no further
2 questions.

3 PRESIDENT VAN DEN BERG: Thank you.

4 Mr. Perezcano, who on your team will
5 conduct the cross-examination?

6 MR. PEREZCANO: I will, if I can have five
7 minutes. That's all I need, five minutes to go
8 over my notes. Thank you.

9 PRESIDENT VAN DEN BERG: Very well.

10 (Brief recess.)

11 PRESIDENT VAN DEN BERG: Mr. Perezcano,
12 please proceed.

13 MR. PEREZCANO: Thank you very much,
14 Mr. Chairman. I'm going to be sitting here to be
15 able to face the witness a little more directly.

16 CROSS-EXAMINATION

17 BY MR. PEREZCANO:

18 Q. My name is Hugo Perezcano. Mr. Montano, I
19 would like to ask you a few questions about the
20 testimony you presented.

21 Mr. Montano, you were hired, were you not,

1 by Thunderbird early in 2001?

2 A. Yes, sir.

3 Q. And this happened after the closing of the
4 Matamoros and Nuevo Laredo facility in 2001?

5 A. Yes.

6 Q. So, you were not present, you were not
7 working yet for Thunderbird when the closing
8 occurred?

9 A. No, no, I wasn't working for them. It was
10 when they were closed that I started working for
11 them.

12 Q. So, you don't know whether the
13 closing--you don't know directly whether the
14 closing was violent or not violent?

15 A. No, directly I don't have. I never
16 implied that.

17 Q. Thank you.

18 You said a short while ago that before the
19 hearing of July 10 you did not name--know
20 Mr. Guadalupe Vargas; isn't that right?

21 A. Yes, it is right.

1 Q. Did you see him after the hearing?

2 A. No, not as far as I recall.

3 Q. As parts of your activities, Mr. Montano,
4 you said that you helped the company in its
5 relations with the government; is that true?

6 A. Yes, it is true.

7 Q. That involved organizing meetings with
8 government officials; right?

9 A. Yes, at different levels.

10 Q. And as part of your work, you organized
11 several meetings with different officials of
12 Gobernacion?

13 A. Not only Gobernacion, but we saw the
14 mayors of several cities. We saw the governors of
15 a couple of states. It was more far reaching than
16 Gobernacion.

17 Q. And as part of these efforts, EDM and
18 Gobernacion reached the agreement that the closing
19 seals would be lifted; isn't that right?

20 A. Yes, that's right.

21 Q. And also an agreement that EDM as a result

1 of that would--this is from the amparo judgments
2 that it had initiated?

3 A. Yes, that's right.

4 Q. So, both carried out their share of the
5 agreement?

6 A. That's true.

7 Q. And also as part of the agreement there
8 would be an administrative proceeding started;
9 isn't that right?

10 A. Yes.

11 Q. That administrative proceeding, did that
12 take place?

13 A. Well, the administrative proceeding went
14 through two stages. The first stage during--first
15 was a request by Gobernacion that all necessary
16 evidence be handed over. That's what I referred to
17 before. That's when the experts from various
18 places came over, provided by Thunderbird, and the
19 idea was that this would be a hearing with Mexican
20 experts that as well, for there to be an exchange
21 of views, the dispute between the types of machines

1 being used.

2 The second part which we were supposed to
3 be going through happened when the final closing
4 took place.

5 Q. As a conclusion of the administrative
6 procedure, Gobernacion issued an administrative
7 ruling? I'm asking.

8 A. Yes, that's right.

9 Q. Did you have a chance to read that
10 administrative ruling?

11 A. The administrative ruling was sent over.
12 I could only read it when they were telling us that
13 they were proceeding with the final closing.

14 MR. PEREZCANO: Thank you, Mr. Chairman.
15 I have no further questions.

16 PRESIDENT VAN DEN BERG: Thank you,
17 Mr. Perezcano. Mr. Crosby, do you have any
18 redirect questions with the matters having arisen
19 out of the cross-examination?

20 MR. CROSBY: No, Mr. President.

21 PRESIDENT VAN DEN BERG: Thank you. There

1 are a few questions from the Tribunal. I think
2 Mr. Augustin Portal-Arriosa will ask you a few
3 questions.

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR PORTAL-ARIOSA: Thank you. I
6 only have one question. Did you ever meet or see
7 these machines during the process? Did you ever
8 see how they operate?

9 THE WITNESS: Yes, sir. I went to two of
10 the venues in Nuevo Laredo and Matamoros. I became
11 acquainted with the machines. I saw the social
12 environment that existed in these facilities. In
13 other words, the facilities were well integrated
14 with society, with the type of people attending,
15 and I saw the machines in operation at the sites,
16 and I saw them operating when they were taken to
17 the hearing, organized by Gobernacion.

18 ARBITRATOR PORTAL-ARIOSA: Another
19 question is: Did you see whether the machines took
20 in cash and whether there were payoffs or prizes
21 awarded?

1 THE WITNESS: What I saw or what I did, in
2 fact, see and make sure of was that there would be
3 some action by the player that could lead to
4 varying results. That was the important part for
5 me, to make sure that this was not what is normally
6 known as slot machines, but that there was, in
7 fact, a relationship between the machine and the
8 player based on that person's skill to run the
9 machine, to use the machine.

10 They worked with 25-cent coins, U.S.
11 cents, that is.

12 ARBITRATOR PORTAL-ARIOSIA: Thank you.

13 ARBITRATOR WALDE: You are a diplomat.

14 Have you got a background as a lawyer?

15 THE WITNESS: I'm a lawyer, and I'm also a
16 professional diplomat. I'm now on leave from the
17 Mexican Foreign Service.

18 ARBITRATOR WALDE: Were you acquainted or
19 an investor with Thunderbird?

20 THE WITNESS: I'm only a consultant.

21 ARBITRATOR WALDE: In your statement, it's

1 number eight I'm referring to. You said I was
2 convinced they were the victims of the first
3 strange in democratic terms in Mexico in 71 years.

4 Are you suggesting that the dispute has
5 arisen out of a change of government, and does this
6 change of government have to do with something with
7 the change of policy? Is that what you're
8 suggesting here?

9 THE WITNESS: Yes, I'm suggesting quite
10 clearly that the document issued by Gobernacion in
11 August the previous year, and the person who had
12 signed it was still working for the new
13 administration, but the new person could not
14 explain why would a new document operate in this
15 way. I'm talking about the Director for Government
16 Mr. Orozco did not understand why one his
17 subordinates but with whom there was no
18 relationship had decided to close these facilities.

19 So, I think there was a contradiction
20 between what had been said by Gobernacion on the
21 one administration and what the Gobernacion people

1 were saying under a different administration.

2 ARBITRATOR WALDE: What was their
3 explanation for that change?

4 THE WITNESS: Well, I believe that there
5 was a difference in viewpoints on the part of the
6 new officials, and those new viewpoints was not
7 based on fact, and they did not know what the
8 previous administration had done.

9 ARBITRATOR WALDE: Number 19, in fact I
10 can read it to you in English. You said the owner
11 Jose Marin Guardia, obviously has the benefit of
12 friendship or other alternatives with Mr. Vargas.
13 I assume Mr. Guadalupe Vargas.

14 Have you got any evidence? Because what
15 you suggest is that Guadalupe may have been
16 particular, as you have described it difficult
17 because of his relationship with Mr. Guardia? Is
18 there any evidence you're having or is it just a
19 kind of presumption?

20 THE WITNESS: What happens is that when
21 you compare the same types of devices, and if

1 they're used by other people, then there is not an
2 identical criterion for all, and that's why I
3 suggested, and the expression may not be this one,
4 but under equal conditions the treatment was not
5 the same.

6 PRESIDENT VAN DEN BERG: To follow up on
7 that question, Ambassador Montano, in paragraph 19,
8 do you know it as a matter of fact, that there is
9 what you state, friendship or other alternative
10 relation with Mr. Vargas? Or is that an assumption
11 you make?

12 THE WITNESS: I have no proof. I have no
13 document to prove it. It's just an assumption, an
14 assumption that comes from a great deal of
15 journalistic information, but that's all I have.

16 PRESIDENT VAN DEN BERG: Mr. Crosby, do
17 you wish to make follow-up questions?

18 MR. CROSBY: No, Mr. President.

19 PRESIDENT VAN DEN BERG: Mr. Perezcano?

20 MR. PEREZCANO: Yes.

21 (Pause.)

1 MR. PEREZCANO: Thank you.

2 RE-CROSS-EXAMINATION

3 BY MR. PEREZCANO:

4 Q. Mr. Montano, you know that Mr. Guardia's
5 or did you know that Mr. Guardia's operations had
6 been closed before the elections took place in
7 Mexico, before July of the year 2000, and that
8 Mr. Guardia was having an amparo judgment fighting
9 against the order of closure by Gobernacion?

10 A. No, I didn't know that.

11 MR. PEREZCANO: C-97, Mr. Chairman, C-97
12 where he says I had information from the media of
13 the possible relationship between Mr. Vargas and
14 Mr. Guardia. I have a document which is C-97,
15 Exhibit C-97.

16 BY MR. PEREZCANO:

17 Q. Just the first page. Is this the type of
18 information that you had been reading?

19 (Document handed to the witness.)

20 Q. Could you read the headline, sir.

21 THE INTERPRETER: The interpreter didn't

1 hear.

2 BY MR. PEREZCANO:

3 Q. That's the headline, and that's the
4 statement to read it, Mr. Guardia.

5 A. Yes, it's a quotation of something
6 Mr. Guardia said.

7 Q. Now, is that the type of information you
8 had available and on which you based the comment or
9 the assumptions you just made?

10 A. I believe that this was published in
11 August 18, 2003, when the situation that we are now
12 discussing today was taking place. Something
13 similar was happening. Mr. Guardia managed to get
14 his facilities reopened, and that's the information
15 I was referring to. I didn't see them open. I had
16 no information. It was just what the press was
17 saying.

18 Q. But it was not in 2003?

19 A. 2001.

20 Q. Very well. Thank you very much.

21 MR. PEREZCANO: Mr. Chairman, I have no

1 further questions.

2 PRESIDENT VAN DEN BERG: Thank you.

3 Mr. Montano, you are excused as a witness. Thank
4 you for appearing here as a witness.

5 (Witness steps down.)

6 ALBERT ATALLAH, CLAIMANT'S WITNESS, AFFIRMED

7 PRESIDENT VAN DEN BERG: Mr. Crosby, your
8 side ready?

9 MR. CROSBY: Yes.

10 PRESIDENT VAN DEN BERG: Mr. Perezcano?

11 MR. PEREZCANO: Yes, thank you very much.

12 PRESIDENT VAN DEN BERG: Mr. Atallah,
13 could you please state your full name for the
14 record.

15 THE WITNESS: Albert middle initial W,
16 Atallah.

17 PRESIDENT VAN DEN BERG: You appear as a
18 witness called by the claimant; also you have
19 further details. Could you please give your place
20 and date of birth.

21 THE WITNESS: Sure. I'm a witness

1 appearing on behalf of International Thunderbird
2 Gaming Corporation. I was born on April 9, 1956,
3 in Baghdad, Iraq.

4 PRESIDENT VAN DEN BERG: And you are a
5 resident of which country?

6 THE WITNESS: I'm a U.S. citizen. I was
7 only three years old when we left Baghdad.

8 PRESIDENT VAN DEN BERG: Good. Thank you.
9 You testify in the English language, so there will
10 be nothing difficult for you in understanding the
11 questions as they are put to you in English?

12 THE WITNESS: That's correct.

13 PRESIDENT VAN DEN BERG: If it's put in a
14 different language or if you have a question that
15 is unclear, we request you to seek a clarification
16 of the question. Barring that, we assume that you
17 fully understood the question?

18 THE WITNESS: Yes.

19 PRESIDENT VAN DEN BERG: I don't need to
20 explain the process. You're a lawyer--to you how
21 the process works.

1 THE WITNESS: Yes.

2 PRESIDENT VAN DEN BERG: But the thing
3 what we would like you to do is, because you will
4 be aware that it is very serious business to appear
5 as a witness before a court or Arbitral Tribunal,
6 you make a declaration I think which is in front of
7 you.

8 THE WITNESS: Absolutely. Thank you.

9 (Document handed to the witness.)

10 THE WITNESS: Do I raise my right hand?

11 PRESIDENT VAN DEN BERG: It's not
12 necessary.

13 THE WITNESS: I solemnly declare upon my
14 honor and conscience that I shall speak the truth,
15 the whole truth, and nothing but the truth.

16 PRESIDENT VAN DEN BERG: Thank you,
17 Mr. Atallah. Mr. Crosby, please proceed with the
18 direct examination.

19 DIRECT EXAMINATION

20 BY MR. CROSBY:

21 Q. Mr. Atallah, are you employed by

1 International Thunderbird Gaming Corporation?

2 A. Actually, the subsidiary of International
3 Thunderbird Gaming Corporation, a Colorado
4 corporation by the name of Thunderbird Greeley is
5 officially my employer under U.S. law. I am
6 General Counsel to the parent company,
7 International Thunderbird Gaming Corporation, yes.

8 Q. And how long have you served in that
9 capacity?

10 A. Since 19--since June of 1997.

11 Q. Okay. I have really a very specific
12 question for you because you have given rather
13 detailed testimony so far. I've set before you a
14 portion of the rejoinder, and at paragraphs 56 and
15 57 of the rejoinder filed by Mexico, Mexico calls
16 into question your credibility concerning
17 Thunderbird's decision to withdraw from the
18 California gaming market.

19 Can you explain to the Tribunal exactly
20 what happened with respect to Thunderbird's
21 withdrawal from that market, and include in your

1 answer the nature and extent of Thunderbird's
2 communications with the Attorney Generals.

3 A. Sure. Just by way of background, and this
4 is important to understand my role as well as Jack
5 Mitchell's role in International Thunderbird Gaming
6 Corporation at that time, a couple of years before
7 that time, we were both attorneys practicing in a
8 small firm in San Diego, California. Thunderbird
9 happened to be the client of the firm, and over a
10 course of three--two years, Jack Mitchell mainly
11 was involved in negotiating revenue share
12 agreements with California tribes, negotiating,
13 preparing legal documents for International
14 Thunderbird Gaming Corporation.

15 Eventually in, I believe, April of 1997,
16 International Thunderbird Gaming Corporation
17 convinced Jack to become its President and CEO. He
18 left the law firm, and I basically rode his coat
19 tail into the company as General Counsel.

20 So, he and I were completely engaged in
21 what was really a very, very fluid situation in

1 California. In terms of what was happening then
2 with respect to this Indian gaming business, in
3 particular we were familiar with many court cases
4 that were occurring both at the state and federal
5 level. Basically, these court cases were
6 challenging the Indian tribal rights to operate
7 these video gaming terminals, which we referred to
8 this morning as VGTs, or VLTs. The tribes were
9 taking a very, very hard line position that the
10 states did not--the state did not have rights to
11 shut them down due to their sovereignty, just as
12 they consider themselves sovereign just as the
13 State of California was sovereign, and the United
14 States Government.

15 And there were very, very technical
16 arguments going back and forth between basically
17 Governor Wilson back then of the State of
18 California, who was on a mission to shut tribal
19 gaming down. At the same time, it's my opinion
20 that he could not--he could not seem to muster the
21 support of the Federal Government to help him.

1 But ultimately throughout all this,
2 Thunderbird, in getting to the point of your
3 question, Mr. Crosby, Thunderbird was caught in the
4 middle of a very, very fluid situation.

5 I believe sometime during 1997, perhaps
6 early 1998, this issue of whether the tribes had
7 abided by the federal law to operate their
8 businesses, which was really known as--commonly
9 known as the Indian Gaming and Regulatory Act, it's
10 IGRA, under the federal law basically the argument
11 was that the tribes, at least, believed they could
12 do the type of gaming under that law that basically
13 the State of California was engaged in gaming.
14 They analogized their operations that were, in
15 their opinion, similar to the State of California
16 lottery, to the point of, I believe, in one
17 particular case convincing a court that their
18 machines, which we supplied, were no different than
19 a patron going into a 7-Eleven store and buying a
20 lottery ticket. That is the type of discourse that
21 was going on.

1 In our case, it got to a point where Jack
2 Mitchell, the President and CEO of our company, met
3 with, I believe, four U.S. Attorneys on this issue
4 of should Thunderbird continue in business in
5 California. And following his meeting, he actually
6 and I spoke about these meetings we had with the
7 U.S. Attorneys in the Southern District, I believe,
8 Eastern District, Central district, and Northern
9 District of California. Certain of the U.S.
10 Attorneys were taking a different position than
11 others. For example, the Southern District, the
12 U.S. Attorney there who was, I believe, Alan Berson
13 (phonetic), had a standstill agreement put in
14 place, whereby the particular tribes in the
15 Southern District, which included four or five who
16 were operating machines of the type that we are
17 talking about, were told, so long as you don't grow
18 your business, meaning add machines, we are going
19 to wait and see if you can eventually do what they
20 believe you should do, which was sit down with
21 Governor Wilson and agree on a compact, and that

1 was the key issue in Governor Wilson's mind back
2 then. Which was, you are operating these machines
3 outside the scope of IGRA, which basically said you
4 should enter into compacts with the Governor.

5 So, that's the kind of thing that was
6 happening. Jack and I decided to we should get
7 outside counsel to assist us in determining whether
8 we should continue business in California, and our
9 outside firm basically said, based on what Jack was
10 advised by these U.S. Attorneys, which was, more or
11 less, listen, you know, you're a public company.
12 We urge you, we encourage you to stop doing
13 business with tribes who do not enter into these
14 compacts with the Governor Wilson.

15 So, in that sense, we certainly felt the
16 pressure that we could proceed. We were
17 extremely--we were caught in the middle of a
18 quagmire. We had tribes who relied on us quite a
19 bit and who were going to be basically hurt by us
20 pulling the rug from under them. Although our
21 business was very, very prosperous. At that time

1 we were cash flowing close to between a million and
2 million and a half dollars per month from these
3 revenue share agreements.

4 We had to consider the impact of drawing
5 out of California not only our company, the
6 potential bankruptcy situation that it could lead
7 us to, but also in a way supporting the tribes who
8 believed they were sovereign nations and believed
9 that they could operate the way they were.

10 And ultimately, the decision was made by
11 Jack to pull out of California. We just didn't
12 think that--we didn't think it was worth the risk
13 of potential criminal prosecution of our company,
14 to be blunt about it.

15 And it was a huge decision for us to make
16 because we believe we were the only company that
17 was targeted in that fashion. And I believe it was
18 because we were a public company. We probably had
19 more machines in California at that time than any
20 other vendor. I believe at that time there were a
21 total of 25,000 machines, and I think we had 6,000

1 spread among five locations, and they were all
2 based on this revenue share concept, where we would
3 place these machines on Indian Reservations and
4 enter into three- to five-year agreements and take
5 between 15 percent and 20 percent of what's termed
6 net win, meaning what's left in the machine every
7 day after the player has played, and that's the
8 cash flow I'm speaking to, that million and a half
9 that we were earning at that time.

10 Q. What kind of financial ramifications were
11 there to Thunderbird's decision to withdraw from
12 the California market?

13 A. Well, at that time we were just looking
14 into what we were calling retooling our company.
15 We did not want to be subject to the fluidity, I
16 would say, of the California situation. We wanted
17 more, we wanted more definitiveness in our future
18 operations.

19 So, we began to look at Guatemala as a
20 place to do business, and also Panama. At the same
21 time, we needed to, because we were basically going

1 from a million to a million and a half of revenue
2 per month to zero, we had to figure out a way of
3 putting off our creditors who had loaned money to
4 our company, so that we could build these machines
5 and place them on reservations.

6 So, we had a lot of those issues of just
7 trying to, you know, hopefully transition out of
8 California and into these operations in Latin
9 America, and save our company. We are a public
10 company. It's very widely known, if you
11 investigate our company, that all of our financials
12 are posted publicly, and not only publicly through
13 the particular regulatory agency in Canada, but
14 also on our Web page. And one can see that during
15 that transition period we were under incredible
16 pleasure to pay our bills and at the same time
17 create a new revenue source, but we made it.

18 Q. Were the machines that you supplied to the
19 California tribes ever seized and removed from the
20 reservations?

21 A. To my knowledge, and it's quite ironic, as

1 I stated, we were the only company to pull out.
2 Yet every tribal location that we were involved in
3 certainly continued in business, and ultimately is
4 in business today as a direct result of us
5 assisting those tribes in the beginning.

6 I do not believe--I'm not sure exactly
7 whether any of the machines were seized in the
8 sense--I do know that none were ever removed from
9 any of these locations. There were actions taken
10 by the state and Federal Governments, but it was
11 more like what U.S. Attorney Berson did, which was
12 putting pressure on tribes and then having them do
13 standstill agreements.

14 Q. Were any machines supplied to the
15 California tribes ever used in Mexico?

16 A. No.

17 MR. CROSBY: No further questions.

18 PRESIDENT VAN DEN BERG: Thank you,
19 Mr. Crosby. Mr. Perezcano, who on your team is
20 doing the cross-examination?

21 MR. PEREZCANO: Mr. Becker will.

1 MR. BECKER: Thank you, Mr. President.
2 Pursuant to the suggestion you made before lunch,
3 we have copies of the documents that we--that they
4 put to Mr. Atallah. We also made copies of his
5 witness state your full names and we put them in
6 binder, and I will give one to the witness, and we
7 made one for each of the Tribunal member and
8 Mr. Crosby.

9 The way this is organized is we got his
10 witness statements in the affidavit and A, B, and
11 C, and there are documents in the numbered exhibits
12 that we may or may not get to.

13 CROSS-EXAMINATION

14 BY MR. BECKER:

15 Q. Mr. Atallah, I'm going to ask you to turn
16 to the tab with Number 1 on it, and look at it's
17 the first page, and I'm particularly going to ask
18 you to focus on the handwriting in the margins.

19 These appear to be notes that you were
20 taking to indicate the translation of the various
21 Spanish paragraphs. These are your notes; is that

1 correct?

2 A. That's correct.

3 Q. Okay. And--

4 MR. BECKER: Sorry, Mr. Chairman. It's
5 number one.

6 PRESIDENT VAN DEN BERG: Thank you.

7 BY MR. BECKER:

8 Q. All right. So, Mr. Atallah just confirmed
9 these are his notes in the margins.

10 Mr. Atallah, do you recognize this
11 document? I will help you out, it's an unsigned
12 version of the Netcomm report; do you recognize it?

13 A. If this is what I would refer to as the
14 PRG report, yes.

15 Q. Yes, it is. Thank you.

16 Would you please turn to page 12 of the
17 document. It's numbered on the bottom in the lower
18 right-hand corner.

19 PRESIDENT VAN DEN BERG: The question I
20 had was, which exhibit number was this?

21 MR. BECKER: It's Exhibit C-69, pages 102

1 to 115. It's claimant's exhibit, starting page 102
2 of the PDF file.

3 PRESIDENT VAN DEN BERG: Okay.

4 BY MR. BECKER:

5 Q. All right. Would you please look at your
6 handwriting on the upper left side. Do you see
7 there where it says "from Kevin"? The upper left
8 side of page 12.

9 A. Yes.

10 Q. Okay. Is Kevin, Kevin McDonald?

11 A. That would be that reference, yes.

12 Q. Okay. So, you're indicating that the
13 paragraph's from Kevin McDonald.

14 A. I'm not sure--I'm not sure. I wish I had
15 the English version here.

16 Q. Well, we don't have one, but let me just
17 continue. We will come back to that.

18 You see on the bottom right-hand margin of
19 the page, it also says Kevin, and there is a
20 bracket around this paragraph here?

21 A. Yes.

1 Q. Then will you turn to the following page,
2 please. And we see running down along the
3 right-hand margin it says Kevin with a bracket
4 around the paragraph, Kevin, an other bracket
5 around that paragraph, all the way down the page.
6 Do you see that, sir?

7 A. Yes.

8 Q. Okay. Would you turn back, please, to
9 page 12. And you have a handwritten note here on
10 the left-hand side in the middle. I wonder, I
11 would ask you to read it out loud, please.

12 A. (Reading) Possibly rephrase. I'm not sure
13 what the next line. I see the word are. No
14 components within the machine, in parentheses,
15 mechanical, electrical, or otherwise, that could
16 affect the result of the game through chance or
17 probability.

18 Q. So, just to recap here, it says your note
19 is possibly rephrase this to say, no components
20 with the machine that could affect the result of
21 the game through chance or possibility; is that

1 right?

2 A. I'm not sure if I'm saying possibly
3 rephrase this. Again, if I had the English
4 version, I might understand that maybe. I'm just
5 trying to explain what this paragraph is.

6 Q. All right. Mr. Atallah, you have a draft
7 unsigned cup of the Netcomm report. You have notes
8 on it, indicating that sections of it are from
9 Kevin, and you seem to have a suggestion here
10 saying possibly rephrase this paragraph.

11 Were you involved--doesn't this indicate
12 that you were involved in making comments to
13 Netcomm before they finalized the report?

14 A. One can lead to that conclusion.

15 Q. And that would be consistent, would it?
16 You, of course, have read the Gobernacion's
17 October 10, 2001 ruling?

18 A. Yes. Again, I believe I read the English
19 version of it.

20 Q. And it's extensively quoted in our
21 filings? You've seen that I'm sure.

1 A. This PGR report?
2 Q. Well, the--
3 A. The entire order and report?
4 Q. Sure.
5 A. Well, sections of it, yes.
6 Q. So, you are familiar with the fact that
7 Gobernacion in its administrative ruling actually
8 put this report and Kevin McDonald's witness
9 statements side by side to show that they were
10 identical?
11 A. I'm not aware of that.
12 Q. All right. That's in our reply.
13 PRESIDENT VAN DEN BERG: You mean
14 rejoinder?
15 MR. BECKER: I'm sorry, the rejoinder.
16 Excuse me, sir.
17 BY MR. BECKER:
18 Q. Mr. Atallah, this morning, Mr. Crosby,
19 during his opening argument talked about the
20 Netcomm report which you referred to as the PGR
21 report. He said this is not our report. This is a

1 report requested by the PGR in Mexico. That's the
2 Mexican Justice Department. They chose the person
3 to come in and do the report. We had nothing to do
4 with the preparation of this report.
5 You were sitting next to him, and you
6 heard him say that, didn't you?
7 A. Yes.
8 Q. That's not right, is it?
9 A. It appears from this document, if this is
10 a draft--I have seen this draft.
11 Q. Okay. Thank you.
12 You saw the draft and commented on it; is
13 that right?
14 A. Yes.
15 Q. Okay, thank you.
16 Okay. Please turn to Tab 2, number two in
17 the binder. This comes from Exhibit R-019, page
18 one.
19 This is a letter sent from you to D. Scott
20 Carruthers (ph) dated November 20th, 2001; is that
21 right?

1 A. Yes.

2 Q. It's a letter sent by you on behalf of
3 Thunderbird in response to a lawsuit filed by A-1
4 Financial; is that right?

5 A. That's correct.

6 Q. Would you read the second paragraph of
7 letter out loud, please.

8 A. I welcome the opportunity for you to
9 litigate this matter in any court that you choose.
10 I hope that your client has been forthright with
11 you. Rest assured that we intend to file a
12 cross-complaint against your client and seek not
13 only the payment that have been made to them to
14 this date, but also damages arising from fraud,
15 intentional misrepresentation, interference with
16 contractual relations, and a whole slew of other
17 related claims.

18 Q. And would you please read the first
19 sentence of the next paragraph.

20 A. Thunderbird and its investor group
21 invested well over \$6 million in cash and \$2

1 million in capital equipment based upon the
2 representation made by your client concerning the
3 viability of this business.

4 Q. So, clearly, at the time you viewed this
5 as A-1's fault, didn't you?

6 A. No, this was in response to, I believe, a
7 claim or a lawsuit that they had filed, and I was
8 posing, I would say--I'm not a litigator, but I was
9 posing the possibility of some defenses to their
10 lawsuit.

11 Q. So you're saying this was puffery or you
12 really didn't mean this.

13 I'm saying you're saying that this was
14 puffery or posturing. You didn't mean this?

15 A. No, I meant every word.

16 Q. So, you meant it when you said Thunderbird
17 relied on invested based on the representations
18 made by A-1 Financial?

19 A. Yes, in the context of their claim and
20 lawsuit, I was posing some defenses. They were
21 coming after our company for damages, and I was

1 setting the stage basically to tell them that their
2 claim is not meritorious, and we were prepared to
3 defend it.

4 Q. Okay. Let's turn to Tab 3. This is this
5 is Exhibit R-009, pages one and two, and this is
6 the letter sent by you to Doug Oien and Ivy Ong of
7 A-1 Financial on January 16, 2001. I guess this is
8 about 11 months earlier than the other letter we
9 just reviewed, and the re: line describes it as
10 offer of settlement and notice of right to
11 arbitrate.

12 To save time, I will read the first
13 paragraph under the heading background. It says,
14 "JDMI maintains that A-1 Financial breached the
15 revenue share and consulting agreement by failing
16 to fulfill its commitments under the agreement. As
17 we have already tried to make clear, this venture
18 is far different, far more complex, and far more
19 difficult than what A-1 represented it to be."

20 That's what you wrote, isn't that right?

21 A. That's correct.

1 Q. All right. So, what you seem to be saying
2 here is that Oien and Ong led you to believe that
3 doing business in Mexico was going to be relatively
4 easy, and it didn't turn out that way; is that
5 right?

6 A. Well, again, this is taken--this statement
7 taken--should be take in context of our
8 relationship with these two individuals. When they
9 were involved in introducing us to this new
10 business venture in Mexico, we were considering a
11 possibility at least that we would open our
12 facilities and basically anticipate that the
13 Government of Mexico would try to shut us down, and
14 we would file the appropriate amparo.

15 This was sort of--this was basically their
16 recommendation. And after a lot of consideration,
17 hiring Baker & McKenzie, et cetera, et cetera, I
18 believe it's in the record, we ultimately made a
19 decision to go to the government with that
20 solitud.

21 The agreement that we entered into with

1 A-1, particularly these two individuals, indicated
2 that part of their responsibility was going to be
3 to assist us, you know, in the business in general
4 and securing permits, et cetera, et cetera.

5 And again, based on where we were heading
6 with these two individuals, we made a decision
7 fairly early on just after, I believe after
8 Matamoros was opened, that these two individuals
9 were not really abiding by what they said they
10 would in the agreement.

11 Q. I see. Okay. Let's turn to Tab 4. This
12 is going a full year later. This is Thunderbird's
13 annual report for the year 2001 published on
14 May 12th, 2002. It's Exhibit R-26.

15 As the company's General Counsel you
16 obviously would have had an important role in
17 putting this together, wouldn't you?

18 A. Yes.

19 Q. Okay. This is a description of a lawsuit
20 that starts on page 16 and carries over to the top
21 of page 17. The lawsuit is identified as A-1

1 Financial versus International Thunderbird Gaming
2 Corporation, page 16 as paginated within the
3 document. It says D at the bottom of the page, and
4 it continues on to the top of the next page.

5 The first full sentence on page 17, again,
6 I will read it again. It says Thunderbird and its
7 investment group invested well over 6 million in
8 cash and 2 million in capital equipment, based upon
9 the representation made by A-1 Financial concerning
10 the viability of business in Mexico.

11 Do you see that?

12 A. Yes.

13 Q. Then it says, based upon that
14 representation, Thunderbird opened three locations
15 and is currently battling the Government of Mexico
16 in their attempt to shut the entire operation down.

17 Do you see that as well?

18 A. Yes.

19 Q. Now, you're aware that the Ontario
20 Securities Act required that statements be
21 published in annual reports be truthful, just like

1 U.S. securities law, don't you?

2 A. Yes.

3 Q. So, those two sentences I just read were
4 truthful, were they not?

5 A. Absolutely.

6 Q. Absolutely. Thunderbird relied on A-1
7 Financial in making its investments in Mexico?

8 A. Yes, but not completely relied on. They
9 relied on it.

10 Q. Okay. All right. Now, I want to turn to
11 your first witness statement behind tab eight.

12 That's the first Tab A. That's the first tab in
13 the notebook.

14 A. Yes.

15 Q. I'm going to ask you to go to paragraph
16 30, which is on page five of the witness statement.

17 It's up at the top. And I'm looking at the very
18 last sentence of paragraph 30, which says, with the
19 exception of Watson and Jareau, whose participation
20 is detailed in the declaration of Watson, all the
21 investors in EDM-Matamoros were, quote, passive,

1 unquote, having no control over management or
2 operations.

3 To the best of your knowledge, that was a
4 correct statement, was it not?

5 A. It's correct.

6 Q. All right. And the declaration of
7 Mr. Watson to which you refer here is his witness
8 statement submitted with the statement of claim,
9 isn't it?

10 A. I'm familiar with, I think, two witness
11 statements he submitted.

12 Q. This is your first witness statement
13 submitted with the particularized statement of
14 claim, and it's saying with the exception of Watson
15 and Jareau, whose participation is detailed in the
16 declaration of Watson. He had not filed the reply
17 at that time; right?

18 A. I would be referring to the only one
19 that's been filed by then.

20 Q. Right.

21 A. Sure.

1 Q. And that's declaration of Mr. Watson
2 described a number of activities in which he
3 engaged to help start up and manage the EDM
4 facilities; isn't that right?

5 A. Yes.

6 Q. In fact, he signed a number of documents
7 as the manager of some of the EDM Companies, didn't
8 he?

9 A. Yes, he was our authorized representative.
10 Thunderbird paid him.

11 Q. All right. And then you say the same
12 thing in paragraph 33 of your witness statement in
13 relation to EDM-Nuevo Laredo, don't you? If you
14 look at the last sentence. It's identical?

15 A. Yes.

16 Q. Yes.

17 And then again the same thing in paragraph
18 36 of the next page about his participation in
19 EDM-Reynosa.

20 A. Yes.

21 Q. Thank you.

1 Have you seen--you have reviewed
2 Mr. Watson's witness statement submitted in support
3 of Thunderbird's reply document, haven't you?

4 A. Yes.

5 MR. CROSBY: Mr. President, perhaps if
6 he's going to ask the witness questions about a
7 document, that he doesn't have in front of him--

8 MR. BECKER: It is in front of him. I'm
9 about to turn to Tab 5.

10 MR. CROSBY: Thank you. My apologies.

11 BY MR. BECKER:

12 Q. Tab 5, please, where you will see
13 Mr. Watson's statement to the reply.

14 A. Yes.

15 Q. I'm going to read paragraph five of the
16 statement, it's the last paragraph at bottom. It
17 states, (reading) I completely understood, then, as
18 I do now that I was and now am a passive investor
19 in the Mexican skill game operations.

20 Do you see that?

21 A. Yes.

1 Q. So, he says here he's a passive investor,
2 but that's not what he said in his first statement,
3 is it?

4 A. No, he described his involvement in the
5 operations.

6 Q. And you said in your first statement that
7 he was not a passive investor; isn't that right?

8 A. That's correct.

9 Q. Okay, thank you.

10 Now I want to turn back to your witness
11 statement behind Tab A, and I'm going to ask you to
12 turn to paragraph 53.

13 A. All right.

14 Q. Paragraph 53, it's at the bottom of page
15 eight, it states as follows: "We were confident
16 about the eventual outcome for our business
17 following the July 10, 2001, meeting, especially in
18 light of the fact that Gobernacion had already
19 approved the skill machine activities. We believe
20 the outcome could only be favorable, so we
21 continued on our path to open additional

1 facilities."

2 So, that's your testimony; is that
3 correct?

4 A. That's correct.

5 Q. All right. And the Reynosa facility was
6 opened just a few weeks later in August of 2001; is
7 that right?

8 A. That's right.

9 Q. So, you and your colleagues felt the
10 Gobernacion hearing had gone so well that you went
11 ahead and moved ahead with opening Reynosa before
12 knowing Gobernacion's decision; is that right?

13 A. As I stated here, we were confident of the
14 outcome, and I don't think I--I didn't even--wasn't
15 even given a chance to go into the room July 10,
16 so--

17 Q. But certainly your colleagues who came out
18 of the meeting must have given you a detailed
19 description of what happened?

20 A. On the eventual outcome of that process is
21 what I'm saying.

1 Q. But not what happened at the hearing?

2 A. Absolutely not. From what they told me at
3 the hearing, do you want me to talk about that?

4 Q. I'm just saying you were there--my
5 understanding is you were there present at the
6 meeting, but you were outside, you didn't come?

7 A. That's correct. I wasn't allowed to.

8 Q. And you're saying when your colleagues
9 came out of the meetings, they didn't tell you what
10 had happened during the hearing, and you went ahead
11 and made the decision to open Reynosa and they
12 didn't say anything?

13 A. Well, they told me exactly what happened
14 at the hearing.

15 Q. Okay.

16 A. Do you want me to tell you--

17 Q. That's fine, thank you.

18 A. Okay.

19 Q. Now, I want to ask you to turn to
20 paragraph 12 of your second witness statement which
21 is behind Tab B, and I'm going to go to paragraph

1 12. At the very end of that paragraph, you say
2 that the machines placed with the Indian
3 reservations in California were video lottery
4 terminals; is that right?

5 A. That's correct.

6 Q. Okay. And then you go on to say that you
7 say these VLTs were also distinct--I'm sorry. So,
8 the second to last sentence says these gaming
9 machines were commonly known as video lottery
10 terminals and were quite distinct from the skill
11 games that involved the subject claim.

12 Is that right?

13 A. That's correct.

14 Q. Okay. So, you're saying the machines that
15 were on the premises of EDM were not video lottery
16 terminals or VLTs?

17 A. I'm saying they're skill games.

18 Q. But they're not VLTs?

19 A. No.

20 Q. No? Okay.

21 A. Not the way I understand VLT's.

1 Q. Okay. I want to ask you to turn to Tab 6.
2 This comes from Exhibit C-46, page 206 of the
3 electronic PDF file. Tab numbered 6. It's
4 entitled International Thunderbird Gaming
5 Corporation Internal Control Minimum Standards and
6 Procedures, La Mina de Oro and Reynosa, and it's
7 dated June 21, 2001.

8 Have you seen this document before?

9 A. Yes.

10 Q. All right. Here on the first page--I will
11 direct your attention to the very first page and
12 the Table of Contents where you will see there's an
13 entire Section 2 devoted to video lottery
14 terminals.

15 Do you see that?

16 A. Yes.

17 Q. All right. So, am I correct that the
18 Thunderbird personnel who prepared this document
19 believed that the machines being used in Mexico
20 were VLTs?

21 A. I didn't draft this. I'm not sure.

1 Q. All right. Well, let me look more
2 carefully. Let's go to page three of the
3 document. You will see Section 2, video lottery
4 terminals, and then it talks about how you get
5 access to a VLT, how promotional payouts and awards
6 are handled, equipment control, and I see VLT, VLT
7 everywhere. If you look at the bottom of page one,
8 two, three, bottom of page four, please.

9 A. Starting from the first page?

10 Q. Yes.

11 A. Okay.

12 Q. All right. And then you will see there is
13 a number five two-thirds of the way down the bottom
14 at the bottom that's entitled Eproms?

15 A. Yes.

16 Q. And it says at least annually procedures
17 are performed to ensure the integrity of sample of
18 slot machine game program Eproms by personnel
19 independent of the slot department or outside
20 vendors.

21 Then the next sentence says the master

1 game program number per percentage and the pay
2 table are verified to the par sheet when initially
3 received from the manufacturer.

4 Do you see that?

5 A. Yes.

6 Q. All right. Looking over these couple
7 pages of this long description of video lottery
8 terminals and checking the performance of the slot
9 machine game program Eproms, wouldn't you agree
10 this describes VLTs?

11 A. My view of this is, I believe whoever
12 prepared this was working with a document that was
13 probably in our system in relation to our operation
14 in Guatemala. It looks familiar in that sense, the
15 use of that terminology.

16 Q. So, they used procedures for VLTs in
17 Guatemala and used them in Mexico?

18 A. I'm not really sure. This may have gone
19 through a final, final approval, but I'm not sure
20 of whether this is like the final one.

21 Q. It's submitted as an exhibit to

1 Thunderbird's statement.

2 All right. Let's move on. I'm going to
3 go back again to your first statement behind Tab A
4 on paragraphs 22 and 23. And paragraph 22, you
5 state that you personally circulated investment
6 documentation, including the August 2000
7 Gobernacion document to third party investors. And
8 that you discussed the letter with them; is that
9 correct?

10 A. Yes.

11 Q. All right. I want to ask you to please
12 turn to Tab 9 in the documents. You see the first
13 page? This is nine from Exhibit C-42 submitted by
14 Thunderbird. It's the description and investment
15 representation agreement for EDM-Reynosa dated
16 June 22nd, 2001; is that right?

17 A. Yes.

18 Q. So, this was a document used to solicit
19 investment in EDM-Reynosa; right?

20 A. Yes.

21 Q. Okay. Please turn to page 10 of this

1 document. The pagination is at the bottom in the
2 center. I'm looking at the second paragraph from
3 the bottom, and I will read it quickly. It says
4 the company has been advised by Baker & McKenzie's
5 special Mexican counsel to Thunderbird, EDM, and
6 the companies, that the entitlement states the
7 operation of, quote, skill machines, unquote, by
8 EDM is not prohibited in Mexico. Further, the
9 entitlement also confirmed that so long as EDM
10 operates skill machines, as described to the
11 government by EDM, the government will not
12 challenge EDM's operations. Based on this letter,
13 although no specific entitlement was granted to the
14 company either directly or indirectly by approving
15 EDM's franchise system, the company believes that
16 its operations of the business as contemplated will
17 also be permitted in Mexico.

18 Now, the next paragraph goes on to say
19 there can be no assurance that the Mexican
20 government will continue to view EDMs or the
21 company's operations as permitted skill machines

1 and not a game of chance. Were the company's
2 operations to be challenged by the Mexican
3 Government and the company works to subsequently
4 defend any such action, the company would incur
5 significant legal and other expenses, et cetera,
6 et cetera.

7 So, do you see that there, sir?

8 A. Yes.

9 Q. Okay. So, your subscription agreement
10 contemplated that there might be litigation with
11 the Mexican Government; is that right?

12 A. Yes, in this very litigious world, the
13 very intent of this is to make sure that our
14 investors are well informed.

15 Q. All right. And the agreement says that no
16 specific entitlement was granted to the company
17 either directly or indirectly, doesn't it?

18 A. Yes.

19 Q. Okay. Now, turning to the top of the next
20 page, page 11, you will see that it says one of the
21 companies' affiliates known as EDM-Laredo

1 experienced litigation with respect to its skill
2 machine operation. The circumstances and results
3 of that litigation process are outlined in
4 Exhibit I.

5 Do you see that?

6 A. What page?

7 Q. Top of page 11. We are still in the same
8 tab, we're still in Tab 9: We were on page 10, and
9 we just turned the page to the top of page 11,
10 where it says--you see where it says that?

11 A. Yes.

12 Q. Okay, thank you.

13 Now, behind Tab 10 we actually have the
14 Exhibit I to which this paragraph refers, if you
15 could turn to Tab 10, you will see the title of the
16 document is Exhibit I Litigation Process.

17 Do you see that?

18 A. Under 10?

19 Q. Tab 10, very first page.

20 Okay. That's not the proper copy.

21 I just to want take a minute now, there's

1 a few pages of document here, let's flip through
2 them. The first page appears to be an English
3 translation of the Gobernacion administrative
4 determination unsealing the Nuevo Laredo facility.

5 Do you recognize that document? Just that
6 one document first, please.

7 A. Yes.

8 Q. It's referring to--

9 A. You're asking if this is the English
10 translation.

11 Q. That's what I'm saying. It's what it
12 appears to be. It seems to be talking about--

13 A. Yes.

14 Q. Okay. Thank you. If you look at page two
15 it says first, it says lift the order for closing
16 of building.

17 A. Yes.

18 Q. Okay. Then, the following page, page
19 three, the top again, I must assume this is a
20 translation of the original Spanish, but it says
21 Documenting Seals Removal is the title; is that

1 right?

2 A. Yes.

3 Q. And then the next page there is some--it
4 looks like some notes identifying--referring to
5 some documents with photographs about moving--and
6 refers to removing the seals and documenting the
7 act; is that right?

8 A. That's correct.

9 Q. And then the next page, again this appears
10 to be an English translation of the document up at
11 the upper right. It refers to an amparo, and it
12 seems to be a draft of some sort of amparo document
13 that would have been signed by Peter Watson; is
14 that right?

15 A. Yes.

16 Q. Okay. And then finally, I don't know what
17 this document is. It says questions to be asked to
18 witnesses as evidence for the file, referring to
19 the apparently the same case number as this amparo
20 document.

21 Do you see that?

1 A. Yes.

2 Q. Okay. Now, this description agreement is
3 dated June 22nd, 2001, which is about two weeks
4 before the July 10, 2001 hearing with Gobernacion
5 at which EDM is going to present its--was going to
6 present its arguments in evidence on why the
7 machine should be considered legal, isn't it?

8 A. Yes.

9 Q. All right. In fact, EDM itself formally
10 requested the hearing in March 2001, and
11 Gobernacion's letter formally agreeing to the
12 hearing was dated June 21st; isn't that right?

13 A. I'm assuming what you're saying is
14 correct.

15 Q. Let's turn to, please, Tab 13. This is
16 Exhibit R-49, and it's a document in Spanish, but
17 if you'll turn to the last page of it, you will see
18 there is a--the cover letter enclosing the oficio
19 sent by Mr. Aguilar Coronado to Luis de la Velasco
20 as the representative of EDM transmitting the
21 oficio, states that if you look back at the top of

1 page two, you will see it's responding to a letter
2 presented by Mr. Velasco on March 23nd.

3 Do you see that?

4 A. Yes.

5 Q. Okay. And then down in the under acuerdo
6 in the paragraph segundo, you will see in the
7 middle that it's referring to--it's basically
8 stating that a hearing will be stated at
9 Gobernacion on July 10, 2001.

10 Do you see the date there? Again, the
11 middle of the paragraph segundo.

12 A. Just so you know, I don't know Spanish,
13 but, yes, I see the date. I vowed I would learn
14 this year.

15 Q. I will instruct you that it goes on to say
16 that the legal representative of EDM shall be
17 called to testify and to submit evidence regarding
18 the operation of the machines.

19 A. Yes.

20 Q. And if Mr. Crosby wants to correct my
21 translation, he's welcome to do so.

1 MR. CROSBY: If I could.

2 BY MR. BECKER:

3 Q. All right. So, once again, the
4 subscription agreement is dated June 22nd, 2001.
5 EDM has requested, formally requested the
6 opportunity for the Gobernacion hearing back in
7 March of that year. Gobernacion has formally
8 issued its response scheduling the hearing for July
9 10th as of the day before the subscription hearing.
10 But I don't see it mentioned in the subscription
11 agreement, do you?

12 A. If you haven't seen it, then I assume it's
13 not in there. I could review it.

14 Q. You are welcome to, if you want to. We
15 only have excerpts here. But if you want to go
16 back and review the full agreement, it's a several
17 hundred page document with lots of exhibits
18 attached to it. We included the text of the
19 agreement and the exhibit that's referred to in
20 that paragraph referring to the litigation.

21 A. So, I prepared this subscription

1 agreement. I assume June 20, 2001.

2 Q. I'm sorry?

3 A. Your question is in relation to dates?

4 Q. Yes.

5 A. That's dated June 20, 2001.

6 Q. Actually, if you look at Tab 9, which is
7 the Reynosa agreement that we were looking at, it's
8 dated June 22nd?

9 A. June 22nd, 2001.

10 Q. Right.

11 A. And in this document, I don't refer to the
12 documents that you just--

13 Q. You don't refer--my point is you're not
14 referring to the fact that EDM has a hearing
15 scheduled in about two weeks with Gobernacion where
16 it's going to present its evidence on why the
17 machine should be ruled legal; isn't that right?

18 A. If it's not in here, absolutely.

19 Q. All right. But you didn't think that a
20 potential investors would find it relevant that
21 that hearing was about to take place?

1 A. I can tell you that in this case this
2 investor happens to be Tino Minaldo, who is chief
3 operating officer and general counsel to MRG
4 Entertainment, and he was probably more thorough in
5 terms of his due diligence as to whether he should
6 get his boss to invest in this than anyone that I
7 met, and I was keeping him fully informed of what
8 was happening.

9 Q. So, you're saying you informed him of what
10 was going on. You just didn't put it into the
11 subscription agreement?

12 A. That's correct.

13 Q. I see.

14 A. I mean, in terms of the--in terms of, you
15 know, the process that we have been involved in, it
16 was a fluid situation from the time we were
17 reopened in Laredo all the way through October 10,
18 when we received the order. I wasn't engaged in
19 every aspect of that process. I was relying on
20 Luis Velasco, Mexico counsel, and our team there in
21 terms of how that was going.

1 Q. Did you have anything in writing that
2 shows that you informed the investors that this
3 proceeding was about to take place? I mean, people
4 other than Peter Watson who were directly involved.

5 A. I would have to go back. If there was
6 anything material in terms of our overall approach
7 here, I would think, if it was determined material,
8 we would have press released it.

9 Q. So, you're saying there is a press
10 release?

11 A. I'm not sure. I would have to rely our
12 press releases.

13 Q. We certainly haven't found anything in the
14 record that would indicate--

15 A. That would--the process?

16 Q. Yes.

17 A. I know that we press released the fact
18 that we were closed in Laredo, and I think we press
19 released the fact that we reopened Laredo, and we
20 certainly press released that we were ultimately
21 shut down again. In between there, if it's in any

1 public documents, I would have to go back and
2 review.

3 Q. All right. Thank you.

4 MR. BECKER: Mr. President, could I take a
5 pause for just one minute?

6 (Pause.)

7 BY MR. BECKER:

8 Q. Just a few more questions, Mr. Atallah.

9 A. Sure.

10 Q. Let's go back to the--I want to go back to
11 the Reynosa subscription agreement, Tab 9, and back
12 to page 10, and this is the section that starts
13 relying fund entitlement granted to EDM, and the
14 first full paragraph there, it states in the second
15 sentence, "If the game requires some degree of
16 skill by the user, generally, it will not be deemed
17 a prohibited slot machine in Mexico."

18 Do you see that?

19 A. Yes.

20 Q. All right. That's the understanding of
21 Mexican law you repeated in your first witness

1 statement, isn't it, that requires some--

2 A. I believe I used the word some, yes.

3 Q. All right. I want to take a look at the
4 August 25th, Baker & McKenzie letter. This is at
5 Tab 14. It's Exhibit R-112, again dated
6 August 25th, year 2000, and this is their letter
7 sort of opining on the meaning of the Gobernacion
8 letter. Let's go to the last paragraph on page
9 one, where it says, "Furthermore, under the
10 official letter, the Ministry of Interior
11 emphasizes that EDM can operate the video skill
12 machines as long as they do not become in any
13 manner whatsoever as gaming or betting machines."
14 So, it says the games cannot become in any
15 manner whatsoever gaming or betting machines; is
16 that right?

17 A. That's what this letter says, yes.

18 Q. Okay. And you believed that the EDM
19 machines did not involve betting in any manner?

20 A. Yes.

21 Q. Okay. Because the customers didn't put

1 money in and win money back?

2 A. I simply--I'm not professing that I'm an
3 expert in gambling, but I directed my attention to
4 what I thought was the definition of a skill game.
5 Nothing more, really.

6 Q. All right. Well, let's look at the
7 definition. Let's turn to Tab 15. This is the
8 Baker & McKenzie translation of the Gobernacion
9 letter. I'm sorry, this is one of the claimant's
10 exhibits. I don't happen to have the exhibit
11 number handy.

12 PRESIDENT VAN DEN BERG: C-18. Thank you.

13 MR. BECKER: Thank you, Mr. President.

14 BY MR. BECKER:

15 Q. I'm looking at this, and it says--excuse
16 me, I lost my place.

17 PRESIDENT VAN DEN BERG: I could tell you
18 this, one thing missing in the translation on this
19 letter, which is the date. And it's 15 August.

20 Shown to be--

21 MR. BECKER: Okay. I'm looking at the

1 second page at the first full paragraph where it
2 states: "In this light it is important that
3 clarify that if the machines that your
4 representative exploits operates in the form and
5 conditions by you, this governmental entity is not
6 able to prohibit its use in the understanding that
7 the use of the machines known as coin swallowers or
8 token swallowers or slot machines in which the
9 principal factor of operation is luck or gambling
10 and not the user's ability or skillfulness as you
11 stated," et cetera, et cetera.

12 It talks about the predominant--the
13 principal factor of operation being chance in the
14 placing of bets is illegal.

15 Again, the obverse of this, of course,
16 would be to be a skill machine, the skill would
17 have to be the predominant factor in operation,
18 wouldn't it?

19 A. Yes.

20 MR. CROSBY: Your Honor, I object to that
21 question. That mischaracterizes the letter. It

1 says principal.

2 PRESIDENT VAN DEN BERG: Could you please
3 read the full paragraph for the record, first and
4 also for the witness.

5 MR. BECKER: In this light it is important
6 to clarify that if the machines that your
7 representative exploits form in the form and
8 condition stated by you, this governmental entity
9 is not able to prohibit its use in the
10 understanding that the use of machines known as
11 coin swallowers, token swallowers or slot machines
12 in which the principal factor of operation is luck
13 or gambling and not the user's ability or
14 skillfulness as you stated could constitute any of
15 the hypothesis described under the Federal law of
16 games and sweepstakes with the corresponding legal
17 consequences that may be derived therefrom under
18 Article 8 of such law.

19 What I'm focusing on is the clause in
20 which they state in which the principal factor of
21 operation is luck or gambling as being prohibited.

1 BY MR. BECKER:

2 Q. You understand that?

3 A. Yes.

4 Q. Okay. And what I'm suggesting to you and
5 trying to see if you agree, is basically what this
6 is saying is that to be lawful, a game would have
7 to require--the principal factor in the game would
8 have to be skill in order to meet this test; do you
9 agree?

10 A. I agree.

11 PRESIDENT VAN DEN BERG: By response to
12 the points raised by Mr. Crosby, the English
13 translation the principal factor, but the Spanish
14 original says, "el factor pregunte." I'm here
15 under the supervision of all Spanish-speaking
16 persons predominantly or preponderantly.

17 MR. BECKER: I'm using claimant's
18 translation, because this is what they relied on,
19 but I acknowledge that the correct translation
20 would be predominant.

21 BY MR. BECKER:

1 Q. But again, to repeat my point, is your
2 understanding of this that for game to meet this
3 test, the skill would have to be the predominant
4 factor in its operation?

5 A. Yes.

6 Q. Okay. Some degree of skill is not the
7 same as the predominant--prominently skilled, is
8 it?

9 A. I agree.

10 Q. Okay. Thank you.

11 MR. BECKER: Thank you, Mr. President.
12 That's all we have right now.

13 PRESIDENT VAN DEN BERG: Thank you.

14 Mr. Crosby, redirect?

15 MR. CROSBY: Just a few questions,
16 Mr. President.

17 REDIRECT EXAMINATION

18 BY MR. CROSBY:

19 Q. Mr. Atallah, I'd like you to take a look
20 at your first declaration again. Your first
21 declaration, paragraph 53.

1 A. Do you know what tab that is?
2 Q. Tab A, excuse me.
3 A. Paragraph?
4 Q. 53.
5 A. Okay.
6 Q. Now, I will ask the question Mr. Becker
7 didn't ask you: What did the participants in the
8 Guadalupe Vargas meeting tell you when they came
9 out?
10 A. We actually met within minutes after
11 the--after several of our people were in this July
12 10 meeting particularly Jorge Montano, Ambassador
13 Jorge Montano, Luis Velasco, Peter Watson, Kevin
14 McDonald, Carlos Lozano. I believe those were the
15 principal people, and the consensus was, while we
16 prepared what we all believed to be a very thorough
17 document including exhibits, that when they finally
18 began this meeting, they were all surprised how
19 little attention was paid to our submittal. They
20 described it as follows: I believe Guadalupe
21 Vargas was at that meeting, along with Attorney

1 Alcantara, and a transcriber or assistant, and
2 literally what they saw was after introducing this
3 book that we spent a lot of time preparing and
4 making sure that we had everything that we thought
5 would support our case before the hearing officer,
6 Guadalupe Vargas, I was told, looked at the cover,
7 threw it aside, and said, "I don't care what any of
8 this is. These are money swallowers, slot
9 machines, but proceed in terms of taking in what
10 you have."

11 And what I understood happened during the
12 entire rest of the proceeding was the transcriber
13 bringing in basically what we presented into a
14 Spanish document that they prepared, a transcript,
15 I would think, is what I was told, and there was
16 one interruption basically of that process, which
17 was our expert, Carlos Lozano, doing the
18 demonstration of the machine, which was what I
19 would call a briefcase style of exactly what we
20 were operating in these facilities.

21 And I was also told that, I'm not sure who

1 among the Mexican delegation was asking the
2 questions, but Carlos Lozano was asked a couple of
3 questions, and I think at that point what I was
4 told was the meeting ended abruptly, and everybody
5 was asked to leave.

6 Q. And what is the basis of you then saying
7 at that time, "we were confident about the eventual
8 outcome of our business" following that meeting?

9 A. Based upon particularly Luis Velasco's
10 opinion, I was advised that he believed that this
11 was just a process along the lines of hopefully
12 succeeding in--basically succeeding at an
13 administrative level to convince this new
14 administration that it should pay attention to what
15 the old administration had offered to us.

16 Q. Okay. And speaking to Luis de Velasco's
17 opinion, I would like you to take a look at Tab 14,
18 and Mr. Becker in his cross-examination emphasized
19 the third full paragraph on page one, but I would
20 like you to focus on the first full paragraph on
21 page two and the specific opinion provided to you

1 by Mr. De Velasco and I would ask you to read that
2 into the record.

3 A. Based upon the foregoing we're of the
4 opinion that EDM is allowed to operate in Mexico
5 the video game skill machines as long as EDM
6 complies with the administrative requirements set
7 forth by the state and municipal laws and
8 regulations in Mexico.

9 Q. Was it your understanding and belief that
10 that statement by Mr. De Velasco was consistent
11 with your understanding in the August 15th letter?

12 A. Yes.

13 MR. CROSBY: No further questions.

14 PRESIDENT VAN DEN BERG: You have the
15 possibility of follow-up questions, but that's only
16 for matters raised by the Tribunal. Unless you
17 would make to make a specific application?

18 MR. BECKER: I didn't realize you were
19 about to ask questions.

20 PRESIDENT VAN DEN BERG: Or do you want
21 to--okay. First of all, he will ask you.

1 QUESTIONS FROM THE TRIBUNAL

2 ARBITRATOR WALDE: Mr. Atallah, would you
3 describe yourself rather as a general commercial
4 lawyer or a specialist on gambling law? Gaming
5 law, gambling. You've worked for several years in
6 that industry.

7 THE WITNESS: Yes, my background is tax
8 law. I was really involved in Thunderbird more so
9 from the standpoint of making sure that our
10 corporate structure was properly maintained,
11 abiding by regulatory compliance issues, to the
12 extent I picked up knowledge in gaming. It's been
13 just through being involved on an oversight basis.

14 ARBITRATOR WALDE: This discussion of this
15 distinction between skill, luck, and animals in
16 between is a trust in Mexico, or have you also
17 encountered it in your U.S. practice?

18 THE WITNESS: Only in relation to cases
19 that have I have reviewed and matters that I have
20 reviewed in two particular states: North Carolina
21 and Oklahoma.

1 ARBITRATOR WALDE: I mean, you said
2 something has to be predominantly one or
3 predominantly the other. Can they actually also be
4 something which is--predominantly I would assume
5 means 90 percent or 80 or 70 or something, and the
6 nonpredominant part, if you take hundred, is in 25
7 or 10 or whatever. Can there be something that is
8 50/50?

9 THE WITNESS: My distinction, in my view,
10 is if you're going to look at a slot machine or a
11 skill game, my distinction is in a slot machine the
12 player has one move, which is the player starts the
13 machine, and the machine takes over at that point,
14 randomly selects a choice, and stops without the
15 player doing another thing.

16 The spectrum that you speak of, I believe,
17 is there, depending on whether you're talking
18 about, at least in the U.S. jurisdictions, my
19 opinion of what's a classic skill game is a
20 poker-themed-type game, which allows the player to
21 interact not only in terms of understanding what's

1 before that player, also thinking through how many
2 cards are left in a particular suit, and the
3 number. We had that type of variation of game in
4 Mexico.

5 So, I would say that type of game
6 requires, in my opinion, a different type of skill
7 than one where there is a flow of symbols that
8 require hand eye coordination, and, you know,
9 depending on how good you are. I mean, if you're
10 Ted Williams in his prime with 20/50 vision, it
11 depends on the player, as far as how quickly that
12 player can line up, you know, the symbols.
13 Different type of skill, but...

14 ARBITRATOR WALDE: My last question, this
15 report by the "Procuterier" General, is it the
16 right word, am I using it--did you have an
17 influence on the writing of it?

18 THE WITNESS: This exhibit appears to have
19 been a draft that it looks like it was presented to
20 me. I'm just not sure whether my notes were
21 interpreting what it had already been said or--I'm

1 just not sure. I'm really sorry.

2 PRESIDENT VAN DEN BERG: Thank you.
3 Mr. Portal would like to ask you some questions.

4 THE WITNESS: Sure.

5 ARBITRATOR PORTAL-ARIOSA: This relates to
6 paragraphs 28, 29, and 30 of your declaration.

7 THE WITNESS: Exhibit A?

8 ARBITRATOR PORTAL-ARIOSA: That would be
9 in Tab A, yes. 28, 29, and 30.

10 I would like your clarification because on
11 paragraph 28 you said that you had maintained
12 majority ownership, but then in paragraph 29 you
13 said that under that specific agreement it was
14 granted the control over the business irrespective
15 of the equity. And then in paragraph 30, then you
16 said that you had a significant ownership interest.
17 But it also says there that pursuant to the
18 agreements, Thunderbird maintained and exercised
19 complete control of the entity and over its
20 operations.

21 So, I would like to have a clearer picture

1 of how did you maintain control of the entity, the
2 operations or the businesses. Is there a
3 difference in these concepts?

4 THE WITNESS: I believe the point of that
5 part of my declaration was to establish that it
6 wasn't so much to establish an ownership type of
7 concept. It was more to establish that
8 Thunderbird, as a principal investor in these
9 establishments, including Matamoros, had basically
10 people in place, including Jack Mitchell, President
11 of our company, in positions of authority. And
12 certainly from a factual, practical standpoint, had
13 the control over all operating-type business
14 decisions on day-to-day basis, hiring employees and
15 firing employees, hiring lawyers, establishing who
16 among our employees would manage these facilities.

17 At no point did any of these investors who
18 I referred to as passive investors, neither wish or
19 wanted to take on that role.

20 ARBITRATOR PORTAL-ARIOSA: But it still is
21 not clear the difference between control over the

1 entity or the business or the operations. I think
2 those are three different sets of...

3 THE WITNESS: Control over the entities in
4 the sense that our documentation established that
5 in each case Thunderbird had the right to appoint
6 the majority managers who would make decisions on a
7 day-to-day basis. It's in the documentation
8 itself. Control of the entities in that sense.
9 Control of the business establishments themselves,
10 it was through the authority granted to Thunderbird
11 employees to conduct the day-to-day affairs of the
12 company from that practical level on the ground in
13 Mexico.

14 PRESIDENT VAN DEN BERG: Mr. Crosby, any
15 follow-up questions?

16 MR. CROSBY: Just one.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. CROSBY:

19 Q. Over the whole course of events in the
20 operation and closure of the EDM entities and
21 through the filing of this NAFTA claim, did any of

1 the shareholders of any of these EDM entities ever
2 make any effort to exert any control over the
3 entity of Thunderbird or the EDMs?

4 A. No. All they asked for was for me
5 basically to keep them informed on this process.

6 MR. CROSBY: Thank you. No further
7 questions.

8 PRESIDENT VAN DEN BERG: Mr. Becker?

9 MR. BECKER: Mr. President, I have one
10 follow-up question. This arises out of
11 Mr. Atallah's response to Professor Walde.

12 RE-CROSS-EXAMINATION

13 BY MR. BECKER:

14 Q. You responded to his question about skills
15 games and using by video poker as an example of a
16 skill game, and you also discussed your research on
17 North Carolina law, I guess, which you represented
18 you believe was similar to Mexican law.

19 As you know, though, video poker machines
20 are illegal in North Carolina; isn't that right?

21 A. I don't have an opinion on that. What I

1 stated was I'm familiar with certain definitions
2 that were, I believe, in those two states, North
3 Carolina and Oklahoma.

4 Q. All right. Mr. Atallah, would you please
5 turn to Tab 7 of the binder. This is North
6 Carolina statute--I'm sorry, this is in the record
7 at Exhibit R-005, page 10. And you will see here
8 there is a Section 14 - 306.1, types of machines
9 and devices prohibited by law under North Carolina
10 law. You will see in Subsection A there is a ban
11 on new machines saying it shall be unlawful for any
12 person to operate, allow to be operated, place into
13 operation, or keep in that person's possession, and
14 it goes on to say, any video gaming machine as
15 defined in subsection C. There is a couple of
16 exceptions here for games that were in operation
17 before June 30th, 2000--June 30th, 2000, and then
18 there is a prohibition even on those for having
19 three existing video games at one location. But
20 I'm going down to the definition of the prohibited
21 video games if you'll follow with me, C, it says:

1 As used in this section, a video gaming machine
2 means a slot machine as defined in this other
3 section, and other forms of electrical, mechanical,
4 or computer games such as by way of illustration,
5 one, a video poker game or any other kind of video
6 playing card game. It also mentions a keno game,
7 over on the next page, a number six, an eight-Liner
8 game.

9 So, you see that the law expressly
10 prohibits these games, doesn't it?

11 A. I'm not sure if this is current. I know
12 that--I believe my testimony was that I believe
13 there is some definition of skill games in North
14 Carolina, and in Oklahoma, and the Tribunal asked
15 the question of my opinion of what is skill and
16 what's not.

17 Q. Let's go to the definition of the skill
18 game. That's in Tab 8. This is Section 14-306 of
19 the North Carolina criminal law, deals with slot
20 machines, or device defined, and this first long
21 paragraph, subparagraph, is actually quoted in our

1 statement of defense, but I want to focus in on
2 subparagraph D at the bottom of the page which
3 contains an exemption to the general prohibition,
4 and it says this definition does not include coin
5 operated machines, video games, pinball machines
6 and other computer, electronic, or mechanical
7 devices that are operated and placed for amusement
8 that involve the use of skill, or dexterity to
9 solve problems or tasks or to make bearing scores
10 or tallies.

11 Is that what you were referring to?

12 A. Generally, yes.

13 Q. Okay. Would you turn the page, please.
14 Because Subsection B here is the exception to the
15 prohibition on slot machines, but then it says the
16 skill games that it defines here are exempted only
17 if as they say in the top of the next page, either,
18 one, they do not admit, display, issue, display,
19 print out, or otherwise record any receipt, paper,
20 coupon, token, or other form of record which is
21 capable of being redeemed, exchanged or

1 re-purchased for cash, cash equivalent, or prizes
2 or word free replays, or number two, in actual
3 operation, again this what they must not do, I'm
4 sorry. The first condition is one they must not
5 do. The other element of it is an actual operation
6 that can limit to eight the number of accumulated
7 credits or replays that may be played at one time
8 and which may award free replays or paper coupons
9 that may be exchanged for prizes or merchandise
10 with an value not exceeding \$10, but may not be
11 exchanged or converted to money.

12 You see that, Mr. Atallah?

13 A. Yes, I see that.

14 Q. So, this exemption basically says, well, a
15 lot of skill games, but only if they do not print a
16 ticket that can be exchanged for money; isn't that
17 right?

18 A. That's what it says.

19 Q. And it doesn't matter how much skill is
20 involved, if a printed ticket can be exchanged for
21 money, it's an illegal gambling device. It's a

1 slot machine; isn't that right?

2 A. North Carolina law.

3 MR. BECKER: Thank you, sir.

4 MR. CROSBY: One question?

5 PRESIDENT VAN DEN BERG: One question, but
6 then I have to also ask Mr. Becker to ask a
7 question, if you cannot resist temptation. Please
8 go ahead, Mr. Crosby.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. CROSBY:

11 Q. When Thunderbird made its decision to
12 enter into the Mexico gaming market and its
13 decision to approach the Mexican Government for
14 assurances, were you relying upon North Carolina
15 law?

16 A. No.

17 Q. Okay. Were you--when Thunderbird made its
18 decision to proceed with the operation of the EDM
19 entities in Mexico, were you relying upon North
20 Carolina law?

21 A. No.

1 MR. CROSBY: Thank you.

2 PRESIDENT VAN DEN BERG: Mr. Becker, your
3 follow-up question on that one?

4 MR. BECKER: I do have one follow-up
5 question.

6 FURTHER RECROSS-EXAMINATION

7 BY MR. BECKER:

8 Q. Mr. Atallah, in connection with the July
9 10, 2001 hearing at Gobernacion, you submitted an
10 affidavit to Gobernacion, did you not, representing
11 that North Carolina law--I'm sorry, representing
12 that these machines would not be considered
13 gambling equipment under North Carolina law, didn't
14 you?

15 A. I believe so, yes. In the affidavit in
16 the--

17 Q. In the Gobernacion proceeding?

18 A. For the July 10?

19 Q. For the July 10 hearing.

20 A. Yes. Yes.

21 Q. Thank you.

1 PRESIDENT VAN DEN BERG: Thank you. I
2 think you are excused for testifying as a witness.

3 (Witness steps down.)

4 PRESIDENT VAN DEN BERG: I think we should
5 have a break for 10 minutes, and we will then
6 resume with the testimony, Mr. Crosby.

7 MR. CROSBY: We will be calling Mr.--we
8 were going to try to change things around a bit. I
9 spoke to Hugo about it, and he didn't have a
10 problem with it. We are going to call
11 Mr. Mitchell. What we are trying to do is call the
12 principal witnesses that they wanted to examine,
13 cross-examine, and get them before the Tribunal.

14 PRESIDENT VAN DEN BERG: Okay, thank you.
15 (Brief recess.)

16 PRESIDENT VAN DEN BERG: Mr. Crosby, your
17 side ready?

18 MR. CROSBY: Yes.

19 PRESIDENT VAN DEN BERG: Mr. Perezcano?

20 MR. PEREZCANO: Yes, sir.

21 PRESIDENT VAN DEN BERG: Welcome,

1 Mr. Mitchell. You appear as a witness called by
2 the claimant.

3 JACK MITCHELL, CLAIMANT'S WITNESS, AFFIRMED

4 PRESIDENT VAN DEN BERG: Would you state
5 your full name for the record.

6 THE WITNESS: Jack R. Mitchell.

7 PRESIDENT VAN DEN BERG: Date and place of
8 birth.

9 THE WITNESS: 24 February, 1956, Globe,
10 Arizona, United States of America.

11 PRESIDENT VAN DEN BERG: You are a United
12 States citizen?

13 THE WITNESS: Yes, sir.

14 PRESIDENT VAN DEN BERG: Would you please
15 take your witness statement in front of you and
16 turn to the last page.

17 THE WITNESS: Yes, I see it.

18 PRESIDENT VAN DEN BERG: It's--there are
19 three pages and at the last page you see that it's
20 dated 14 August 2003. Would you please confirm for
21 the record--

1 MR. CROSBY: Mr. President, if I might
2 interrupt. I don't think he has it in front of
3 him. My apologies.

4 PRESIDENT VAN DEN BERG: Please confirm
5 that this is, indeed, your witness statement.

6 THE WITNESS: Yes, it is.

7 PRESIDENT VAN DEN BERG: And that is your
8 signature?

9 THE WITNESS: Yes, it is.

10 PRESIDENT VAN DEN BERG: Thank you. Are
11 you familiar with the procedure in which witnesses
12 are examined in this proceeding?

13 THE WITNESS: No, this is my first
14 exposure to a proceeding of this type.

15 PRESIDENT VAN DEN BERG: You never
16 appeared as a witness in court or before an
17 arbitrable Tribunal?

18 THE WITNESS: In court, yes.

19 PRESIDENT VAN DEN BERG: So, I don't need
20 to explain what you to direct examination,
21 cross-examination, or redirect examination?

1 THE WITNESS: No.

2 PRESIDENT VAN DEN BERG: Thank you. If
3 any question is being asked of you, some questions
4 may be originally in Spanish and will be translated
5 or interpreted, excuse me, into English. If they
6 are unclear, please do seek a clarification or if
7 any question is unclear for other reasons, please
8 seek a clarification. Otherwise, the Tribunal will
9 assume that you fully understood the question, and
10 that your answer corresponds to the question.

11 THE WITNESS: Okay.

12 PRESIDENT VAN DEN BERG: Now, you will
13 appreciate that the appearing as a witness before
14 court or an Arbitral Tribunal is very serious
15 business, and that questions the Tribunal will
16 request you to give the declaration. I think the
17 text is in front of you.

18 THE WITNESS: Yes.

19 PRESIDENT VAN DEN BERG: Would you read
20 it.

21 THE WITNESS: I solemnly declare upon my

1 honor and conscience that I shall speak the truth,
2 the whole truth and nothing but the truth.

3 PRESIDENT VAN DEN BERG: Thank you,
4 Mr. Mitchell. Mr. Crosby, please proceed with the
5 direct examination.

6 DIRECT EXAMINATION

7 BY MR. CROSBY:

8 Q. Mr. Mitchell what is your position with
9 Thunderbird Gaming Corporation?

10 A. I'm the CEO and President.

11 Q. And how long have you held that position?

12 A. Since, I believe the month was May or
13 thereabouts in 1997.

14 Q. Did you also at any time hold an executive
15 position with the entity commonly known as
16 EDM-Matamoros?

17 A. I believe I was the President of that
18 entity.

19 Q. Do you still sit in that position today?

20 A. I believe so.

21 Q. Same question as to EDM-Nuevo Laredo.

1 Have you ever held an executive position with that
2 entity?

3 A. Yes, I believe I am the President and was
4 the President of that entity.

5 Q. And finally, the same question with
6 EDM-Reynosa. Did you hold an executive position
7 within that entity?

8 A. Yes, I did.

9 Q. What was the purpose for having you serve
10 as the President of these EDM entities?

11 A. Well, we typically operate in many, many
12 countries, and the lawyers typically make me the
13 president of all of those entities. It's more of a
14 matter of custom in terms of how we operate our
15 business.

16 Q. What was your involvement in the decision
17 to approach the Mexican Government to seek an
18 opinion or approval or some representation from the
19 government on the proposed EDM skill machines?

20 A. That was my decision.

21 Q. What did you do? What events led up to

1 making of that decision?

2 A. Well, we had--we operate businesses in
3 several Latin American countries, and we had begun
4 to investigate the gaming in Mexico, and during
5 that process I made many trips to Mexico. We
6 retained legal counsel in Mexico. We met with a
7 lot of people in various businesses, lottery, horse
8 racing, existing types of businesses that were
9 there, and began to learn about the law of Mexico.

10 And there was an evolution of our
11 understanding of the law and the many versions of
12 the law and cases that were out there, and it
13 ultimately resulted in our requesting that Baker &
14 McKenzie, our lawyers, drive a process wherein we
15 were hopeful to obtain a letter giving us the
16 confidence to move forward with a significant
17 investment there.

18 Q. Why did you decide to have Thunderbird
19 approach the government as opposed to simply
20 opening a skill machine operation?

21 A. Well, that was an evolution as we learned

1 more about the legal landscape there. We came to
2 the conclusion that the existing state of the law
3 on operation of skill machines was not something
4 that we were absolutely sure that we could predict
5 the outcome of any kind of controversy. So, in
6 order to move forward and work with our investors
7 and make a significant development there, we
8 determined that we needed certainty.

9 So, we became aware that the people who
10 were empowered with this decision making was the
11 Ministry of Gobernacion, and our lawyers began a
12 process with them to give us the certainty that we
13 needed to be confident we could operate as we
14 intended to operate.

15 Q. And why was that important with respect to
16 your relationships with your investors? Or with
17 Thunderbird's investors?

18 A. Well, we had some very sophisticated
19 investors. One of our investors is the owner of
20 the rights to Nike for Latin America. We have
21 very, very wealthy investors from Minneapolis that

1 are on large public company boards, and one of our
2 lead representatives is a very sophisticated
3 international lawyer from Panama, who actually came
4 to Mexico and reviewed many of these issues with
5 me, and it was a consensus among several lawyers
6 that the amparo process which had been utilized
7 successfully prior to our entry into the market did
8 not give us enough confidence and certainty that we
9 wouldn't have a problem.

10 So, we felt it was necessary to go to the
11 people empowered with this decision making and
12 obtain something in writing from them that gave us
13 the confidence that what we were going to do would
14 be allowed to do it without interference from them.

15 Q. And, Mr. Mitchell, understand that there
16 has been--you already have extensive direct
17 testimony in front of the Tribunal, so my questions
18 will be very limited. I want to ask you one
19 concluding question in a broad sense and let you
20 talk about it, and that is why did Thunderbird
21 choose to withdraw its legal actions in the Mexican

1 courts?

2 A. Well, we had been into a long dialogue
3 after this hearing that occurred in July in Mexico
4 City with the senior people in the new government,
5 and the head of judiciary, the legal lawyer
6 responsible for this was a fellow by the name of
7 Cabeza de Vaca, and I met with him in March of
8 2002, and this was after we had had the so-called
9 hearing, and after we had been closed down, and I
10 was with a couple of other people, and there were a
11 couple of people from the Mexican Government of
12 cycle down there, and he indicated to me at that
13 point in time that the Mexican Government was in
14 the process of passing a law, that he believed it
15 would pass, that that law would provide for
16 differentiation between skill machines and slot
17 machines, and that he would appreciate our input as
18 to whether--as to writing those standards.

19 And he also indicated that there had never
20 been a definitive determination made, as of March
21 of 2002, on what a skill machine in Mexico was.

1 MR. MOWATT: Mr. President, I don't like
2 to interject unnecessarily, and I sustained myself,
3 but we have gone quite a bit beyond the corners of
4 the statement which I think--if we are going to be
5 getting now what people have told them, we have no
6 opportunity to check it out. It's too far.

7 PRESIDENT VAN DEN BERG: In that respect,
8 we still would like to proceed with the answer for
9 this question.

10 THE WITNESS: So, of course, being told in
11 2002, after having spent months with what we
12 thought was going to be a process that would give
13 us a day in court, and to hear that still there was
14 no official position taken by the government as to
15 what a skill machine was, I walked away from the
16 meeting thinking that there was no remedy in Mexico
17 that was going to allow us any justice. So, I made
18 the decision and instructed the lawyers that we
19 need to go to a forum and a process outside of this
20 country.

21 MR. CROSBY: No further questions.

1 PRESIDENT VAN DEN BERG: Thank you.
2 Who, on your side, Mr. Perezcano, will be
3 doing the examination?
4 MR. PEREZCANO: Mr. Mowatt.
5 PRESIDENT VAN DEN BERG: Mr. Mowatt,
6 please proceed.
7 MR. MOWATT: Thank you, Mr. President. I
8 have a brief of exhibits that will be distributed.
9 PRESIDENT VAN DEN BERG: They are
10 increasing in size.
11 MR. MOWATT: We will try not to look at
12 all of them.
13 MR. CROSBY: Mr. President, I request
14 leave to ask one additional question.
15 PRESIDENT VAN DEN BERG: Okay. Please go
16 ahead.
17 MR. CROSBY: Thank you. I appreciate the
18 leeway.
19 BY MR. CROSBY:
20 Q. Mr. Mitchell, there has been some
21 testimony before you came in to testify about the

1 North Carolina law and the applicability of North
2 Carolina law to skill games during the period of
3 2000, 2001.
4 Are you aware of the law in North Carolina
5 with respect to the applicability, its
6 applicability to skill games?
7 A. Well, I'm generally familiar with the
8 tribal interstate compact between the Cherokee
9 Tribe and the State of North Carolina.
10 Q. And what is your understanding of the law
11 of North Carolina with respect to the operation of
12 skill machines?
13 A. Well, you have to distinguish between the
14 law of North Carolina outside of the jurisdiction
15 of the native tribe, and the law that applies to
16 the Indians in the tribal interstate agreement that
17 was executed between the Indian tribe and the State
18 of North Carolina.
19 Q. And what is the applicability of that
20 tribal state or that tribal state compact to the
21 operation of skill machines in North Carolina?

1 A. Well, my understanding of the tribal state
2 compact is that it provides that the gaming allowed
3 under the tribal state compact is video gaming
4 described as games that involve the skill and
5 dexterity of the player.

6 MR. CROSBY: Mr. President, thank you for
7 leave for the additional questions.

8 PRESIDENT VAN DEN BERG: Thank you.
9 Mr. Mowatt? Please proceed now with the
10 cross-examination.

11 CROSS-EXAMINATION

12 BY MR. MOWATT:

13 Q. Mr. Mitchell, if you would turn to the
14 first tab in that book that's been put in front of
15 you?

16 A. Yes.

17 Q. You will see a photocopy of an E-mail,
18 that's Respondent's Exhibit 95 that was sent
19 apparently carbon copied to you, that appears to be
20 an E-mail from Peter Watson to Mauricio to carbon
21 copy Jack Mitchell.

1 Do you recall receiving this E-mail?

2 A. No.

3 Q. This document was produced to us in
4 response to requests for documents made recently,
5 and was, I believe, identified as a Mitchell
6 E-mail.

7 Can you, upon reading it and refresh your
8 memory as to whether you're familiar with this?

9 A. Well, you have to give me a second to read
10 it. As you can appreciate, I receive thousands of
11 E-mails.

12 PRESIDENT VAN DEN BERG: When you refer to
13 tabbed exhibit, if you could tell us the original
14 exhibit number.

15 MR. MOWATT: The original exhibit number
16 is Respondent 95.

17 PRESIDENT VAN DEN BERG: It will be easier
18 in reading the transcript.

19 (Witness reviews document.)

20 THE WITNESS: Okay.

21 BY MR. MOWATT:

1 Q. Do you recollect the E-mail or the
2 contents of the E-mail?

3 A. Do I recollect this E-mail?

4 Q. Yes, or the matters it discusses.

5 A. Well, I'm generally familiar with these
6 individuals and the circumstances around which this
7 is talking. I just don't specifically remember
8 this E-mail.

9 Q. Do you recall calling Peter
10 Mitchell--sorry, Peter Watson on May the 6th to
11 talk to him about a potential gaming opportunity in
12 Mexico that you heard about from Ivy Ong?

13 A. I'm sorry, but I don't recall anything on
14 May the 6th several years ago in 2000.

15 Q. Do you recall Ivy Ong telling that he had
16 acquired through amparo the right to operate four
17 slot machine operations in Mexico?

18 A. I recall Ivy Ong meeting with me in San
19 Marcos, California, in a restaurant and describing
20 in a lot of detail of what had occurred in relation
21 to this matter.

1 Q. And did you recall him saying that he
2 began his operation and had some discussion with
3 Gobernacion and then obtained an amparo which,
4 according to Ivy Ong, they were now okay with? Do
5 you recall that discussion?

6 A. No. What happened was he presented me
7 with a large file of Spanish documents. We met in
8 a restaurant in San Marcos, California, and he
9 indicated that they had open skill game facilities
10 in Mexico and were operating them.

11 Q. And they were operating them under an
12 amparo? Is that your understanding?

13 A. What he indicated is they had had legal
14 proceedings, and he indicated to me at that time
15 that they had won those proceedings, and those
16 involved court cases, and he had copies of the
17 court cases which were in Spanish.

18 Q. Could you flip the page, flip to Tab 2.
19 This is Respondent's Exhibit 127. These were notes
20 produced to us in the request for production of
21 documents, and we understand that these are your

1 notes.

2 Do you understand this to be your
3 handwriting, sir?

4 A. Yes, sir.

5 Q. So, at the top of page is 51700, I take
6 that to be May 17, 2000; is that right?

7 A. Correct.

8 Q. Ivy Ong's name's at the top. I assume
9 this records a conversation with Ivy Ong; is that
10 right, sir?

11 A. I believe so.

12 Q. Under item 1, Juarez, Code that runs track
13 Matamoros some regulations final decision only on
14 the first run, is this Juarez operation that Ivy
15 Ong was involved in?

16 A. I'm sorry, I'm not following you. Where
17 it says K with Mexico partner - Juarez?

18 Q. Sorry. If you look under item one, there
19 is a column that says one, and then Juarez, code
20 that runs track Matamoros, same regulations, final
21 decision only on the first run.

1 A. Yes, I see that.

2 Q. Now, was that the operation that Ivy Ong
3 was involved in, or was that a different one?

4 A. There were two things in Juarez. Just a
5 second. Yes, that would have been Ivy Ong, yes.

6 Q. And under item two it says time estimates.

7 It says September November, must create rights

8 before this. What does that mean?

9 A. I would be speculating.

10 Q. Do you remember what it means or know what
11 it means?

12 A. I don't specifically remember what that
13 refers to.

14 Q. What is your best impression or belief as
15 to what it means?

16 PRESIDENT VAN DEN BERG: Either the
17 witness knows or doesn't know. But speculation--

18 MR. MOWATT: That's fine.

19 BY MR. MOWATT:

20 Q. Look it says below, Casino need to look at
21 two stages, amparo-suspension, and B, then stay

1 open.

2 Does that mean if you were going to open a
3 gaming facility you needed to get an amparo to
4 suspend the closure and then stay open? Is that
5 what you recorded there in those notes?

6 A. Again, I would be speculating if I
7 indicated what it appears to mean to me today.

8 Q. You written it down, but you don't
9 remember what it means?

10 A. Correct.

11 Q. Turn the page, please, and look at item
12 three, amparo-two, amparo and Juarez. And it says
13 didn't act on first deal beside it. Does that mean
14 that Ivy didn't act on the first deal, wasn't
15 involved in it?

16 A. I really don't remember what I was
17 thinking at the time.

18 Q. You said you thought that there were two
19 operations in Juarez. Can you tell us what those
20 operations were? Or are?

21 A. I recall there was an operation at the

1 race track which I visited.

2 Q. Yes. And who owned it? Do you know?

3 A. I believe it was a Mexican national by the
4 name of Guardia.

5 Q. What is the other operation in Juarez, or
6 was it?

7 A. At this time I don't recall, nor did I--I
8 don't remember another operation at this time.

9 Q. Moving on, item four, it says gambling
10 illegal situation. Can you tell us what you meant
11 in recording that?

12 A. Specifically?

13 Q. Yes.

14 A. Well, again, I'm speculating it related to
15 the situation of Mexican law, from this meeting
16 with Ivy Ong.

17 Q. Okay. Beneath that it says, five,
18 initiate process and amparo. It is by company, and
19 then beneath that, six A machines not by machine
20 location, some limit politically, much better to
21 only do a few. See entity. It is by company so

1 you can obtain, and then it stops, and then seven,
2 appealable, is there a right? Only Gobernacion can
3 be appealed?

4 Looking at the totality of that, can you
5 tell us what you were recording in respect of what
6 Ivy Ong told you?

7 A. I think I was focusing in or at least
8 discussing with Mr. Ong the amparo situation either
9 as it related to what he had done or possibly what
10 was involved in an amparo.

11 Q. So, it was pretty clear to you whatever
12 Ivy Ong was proposing involved having to get an
13 amparo, which you understood meant challenging
14 whatever actions were taken by the government to
15 close the facility; is that correct?

16 A. No, I understood that he had had amparo
17 proceedings.

18 Q. Right.

19 A. But I understood also from him that they
20 had won their cases against Gobernacion.

21 Q. But he was describing to you a process of

1 how things worked down there or how things had
2 worked for him; correct? Or was he proposing that
3 you invest in something that already had an amparo
4 in place?

5 A. He was proposing that we invest in
6 something where legally they had established rights
7 to do the skill games.

8 Q. Under an amparo, clearly, from his notes.

9 MR. CROSBY: Is that a question, or is
10 that a statement?

11 MR. MOWATT: It's a question, and I could
12 put it in a statement and ask him whether it's true
13 or not.

14 THE WITNESS: Ivy Ong is a Chinese
15 gentleman who is--does not have a lot of formal
16 education, and our discussion didn't get into a lot
17 of legal specifics. He was basically there to tell
18 me that he believes the operation of skill machines
19 was legal, that they had litigated it, and we could
20 be comfortable coming into Mexico and operating
21 these games that they were operating at that point

1 in time.

2 BY MR. MOWATT:

3 Q. All right. Could you count into the sixth
4 page in on those notes, please.

5 A. Yes.

6 Q. At the top it says 52600. That's May the
7 26th, 2000; correct?

8 A. Correct.

9 Q. Ong group deal refers again to the same
10 matter you were discussing before?

11 A. Correct.

12 Q. And he says, under item two or you've
13 noted, must have standing before the law comes.

14 What law do you mean?

15 A. Well, I'm pretty sure that during all this
16 process there was a belief that gaming regulation
17 was going to be enacted at some time.

18 Q. Right. And then beneath that is
19 provisional amparos, 24 to 74 hours, 30-day case
20 file, and that appears to be a time line. Is that
21 recording the need to establish an amparo after

1 commencing operations?

2 A. I'm sorry?

3 Q. It says provisional amparo.

4 A. Right.

5 Q. It appears to be like a time line running
6 below it or some sort of line that says 30 days.

7 A. Right.

8 Q. 24 to 72 hours.

9 What you're recording here is the need to
10 establish an amparo after opening and to operate
11 under the protection of the amparo?

12 A. The need to? Or the fact that it might be
13 something that would occur?

14 Q. The need to as a part of the operation
15 that you would be involved in.

16 A. I can't recall that in order--to draw the
17 inference from these notes here that it sets forth
18 a need to.

19 Q. If you go back one page, to five, Ivy Ong,
20 it gives a phone number. Underneath it says terms
21 for our participation, one, two, three. Three

1 months into process, amparo in place, operate the
2 place, we, so we operate the place, percentage of
3 net win.

4 A. You will see to the left there where it
5 says per Doug?

6 Q. Yes.

7 A. Typically, I would write that as notes of
8 what someone were telling me were the terms that
9 would be necessary.

10 Q. That's Doug Oien said that?

11 A. That's a fair assumption. That's the
12 other person involved with Ivy Ong.

13 Q. If you turn, please, to Tab 3. This is
14 Respondent's Exhibit 96, Letter of Intent dated
15 May 26, 2000.

16 A. Okay. That's not the same Tab 3 that I
17 have.

18 Q. I apologize. That's your statement. It's
19 Tab 4.

20 A. Okay.

21 Q. Flip to the last page, you will see that

1 you actually executed this document, and it's dated
2 26th of May, 2000.

3 A. Correct.

4 Q. It's also executed by Ivy Ong and Doug
5 Oien; correct?

6 A. Correct.

7 Q. If you would like to take a moment, if you
8 need to, to recall the essential terms, I would
9 just like to go through those.

10 A. Okay.

11 Q. So, Article 1 stipulates essentially that
12 the parties will form operating companies in Mexico
13 to establish locations and obtain local permits to
14 operate skill games; is that right, sir?

15 A. Correct.

16 Q. Article 2, Thunderbird commits to supply,
17 install, manage, and operate and maintain up to
18 2000 video lottery terminals at a mutually agreed
19 upon locations.

20 A. Correct.

21 Q. Article 3, the obligations of the Ong

1 group are to provide consulting, among other
2 things, for implementation and management of legal
3 matters, obtaining all necessary federal, state,
4 and local permits, locations, leases, and local
5 matters, political affairs relating to the
6 contemplated business, and the type and
7 specifications applicable to the permitted games;
8 is that right?

9 A. Correct.

10 Q. If you flip the page, in fact, over two
11 pages, you will see Article 18 provides that this
12 is nonbinding.

13 A. Correct.

14 Q. It's a letter of intent, and 20 stipulates
15 for ongoing due diligence. Each party shall
16 cooperate with the other in providing any and all
17 relevant information. And in the second sentence
18 specifically Thunderbird shall connect a thorough
19 investigation concerning regulatory issues to
20 satisfy itself the placement of VLTs comply with
21 all federal, state, and local law in Mexico; is

1 that right?

2 A. Correct.

3 Q. Now, you then move to enter into a formal
4 agreement with a company controlled by Ivy Ong and
5 Doug Oien; is that right, sir?

6 A. I'm not sure about that.

7 Q. Well, if you would flip the page to
8 Exhibit 5, or Tab 5, it's exhibit--Respondent's
9 Exhibit 98, Revenue Share and Consulting Agreement
10 dated June 22, 2000.

11 A. Okay, A-1 Financial.

12 Q. And A-1 Financial International, LTD,
13 supplants Messrs. Oien and Ong from the Letter of
14 Intent; is that right?

15 A. I'm not sure that one is different than
16 the other. In other words, you say supplant. I'm
17 not sure what--

18 Q. In other words, for the purposes of this
19 agreement, for the purposes of the agreement
20 contemplated by the Letter of Intent, Ivy Ong and
21 Doug Oien appear in a corporate form for A-1

1 Financial International, LTD; is that right?

2 A. I have to trust that to your statement.

3 I'm not sure who controlled this organization.

4 It's signed by Eduardo Falcon and Doug Oien.

5 Q. Okay. Well, Oien signs on behalf of A-1

6 Financial, Ltd. And Eduardo Falcon signs as the

7 President of JDMI.

8 Do you know who that person is?

9 A. No, I don't recall JDMI. I recall that

10 DOug Oien was involved with A-1 Financial, and that

11 was the entity that he operated with.

12 Q. Well, think about JDMI for a moment, and

13 perhaps I can give you its full name, Juegeos de

14 Mexico, Inc.

15 Do you recognize that name?

16 A. Today?

17 Q. Yes.

18 A. No.

19 Q. Do you know whether or not JDMI is a

20 subsidiary of or ever was a subsidiary of

21 Thunderbird Gaming Corporation, direct or indirect?

1 A. Well, we, I believe, and understand we

2 operate hundreds of companies. It seems like

3 hundreds. It may only be 60 or 70, but I believe

4 we purchased an entity that was developing the

5 Matamoros facility.

6 Q. Right.

7 A. And if that was JDMI, then we had some

8 transaction, then we would have had some

9 transaction with JDMI.

10 Q. Let's go through the agreement and see if

11 it helps to refresh your memory.

12 A. Okay.

13 Q. If you look at Article 1(1), technical

14 expertise and financial commitment, JDMI possesses

15 technical expertise and experience in acquiring and

16 operating video games of skill, skill video

17 machines as described, and has the skill and

18 experience to manage these games at various

19 locations throughout Mexico. So, that's equivalent

20 to the same numbered Article in the Letter of

21 Intent that you signed about a month earlier.

1 A. Okay.

2 Q. Knowledge and experience, A-1 Financial is
3 a limited partnership under Texas law and so on.
4 It intends to pursue all permits and licensing
5 requirements so as to authorize the operation of
6 skill video machines in various Mexico
7 municipalities and seek approval for such operation
8 in accordance with Mexico law. A-1 has the
9 necessary knowledge and experience to monitor and
10 control the licensing and approvals to enable JDMI
11 to operate such skill video machines in Mexico.

12 Correct? That's the--and that's
13 equivalent to the Article 2 in the Letter of Intent
14 that you signed on the 26th of May; is that right?

15 A. It appears to be. I'd have to compare
16 them to know exactly.

17 Q. Now, we look at Article 1.4, still, that
18 would be on the second page of this agreement. It
19 says: Acquisition of interest in Entertainmens de
20 Mexico, SRL, JDMI shall acquire 100 percent
21 interest in the Entertainmens de Mexico SRL

1 commonly known as the, quote, Matamoros operation,
2 in accordance with Addendum A.

3 Does that assist you in recalling how this
4 Matamoros operation was acquired?

5 A. Well, I'm inferring that what this refers
6 to is that a group owned, Entertainmens de Mexico,
7 and then JDMI was purchasing 100 percent, were they
8 conveying it to us in this document?

9 Q. Well, that's what I'm asking you, whether
10 you or JDMI.

11 A. I have to read this entire document.

12 Q. If you would like to take a minute to read
13 it, because it's an important point.

14 Perhaps I could short-circuit things
15 slightly. If you turn to the end and look at
16 Addendum A, it's in the last page at that tab.

17 A. Okay.

18 Q. That's Addendum A that referred to in
19 Article 1.4. It speaks of the acquisition of the
20 Matamoros operation.

21 A. Well, as I said, I'm sure that we entered

1 into a transaction to purchase the existing
2 Matamoros operation as it was being developed. I
3 just don't recall the exact legal structure of
4 those entities.

5 Q. It says, JDMI shall acquire 100 percent of
6 the shares, interest in Entertainmens de Mexico SRL
7 which operates that certain business commonly known
8 as the Matamoros operation from its existing owner,
9 in the amount of \$450,000 based upon the following
10 payment schedule. I have two questions.

11 Firstly, who were the existing owners?

12 A. I can't tell you. I know who that I
13 would--the individuals I was talking to at the time
14 we were negotiating this transaction. There were
15 four individuals.

16 Q. And who are they?

17 A. Doug Oien was involved in the transaction,
18 Ivy Ong, and then there were a couple of other
19 investors who invested with them, and I don't
20 recall specifically what their names were, but they
21 were involved in the conversation also.

1 Q. Okay. Let's look at the payment schedule.
2 It says, first payment, \$225,000 due within five
3 days following the grant of a preliminary amparo,
4 allowing the operation of the Matamoros operation.

5 You see that? Do you recall that term
6 specifically?

7 A. Do I recall?

8 Q. Do you recall this requirement to pay
9 \$225,000 within five days following the grant of a
10 preliminary amparo allowing the operation of the
11 Matamoros operation?

12 A. No.

13 Q. And then the balance, under subparagraph B
14 to be paid at a rate of \$45,000 a month for five
15 months beginning 30 days after the grant of a
16 preliminary amparo allowing the operation. I take
17 it you don't recall that, either?

18 A. No.

19 Q. Do you recall whether any sum was paid to
20 the existing owners of the Matamoros operation by
21 Thunderbird or any of its subsidiaries?

1 A. Well, we paid those people some of the
2 money that they had invested. I don't recall that
3 this was the agreement that determined the rights,
4 but basically our agreement with them was that if
5 we were successful and eventually opened up and ran
6 the business, we would reimburse them for the cash
7 that they had put into the business.

8 Q. Right.

9 Now, do you have any recollection of how
10 much was paid and to whom and when?

11 A. No.

12 Q. Was it conditional upon the business being
13 run--opening up and running successfully?

14 A. In my mind, it was conditional upon the
15 business being opened up and run successfully.

16 You know, I would have to see the legal
17 document. Again, I'm not sure, and I recall that
18 there were a lot--my recollection was that when we
19 started looking at all of these entities, there was
20 a lot of legal work to be done to get all of the
21 legal shares in the proper hands, and my experience

1 in doing that in Latin countries, a lot of times
2 there is a lot of bureaucracy in terms of moving
3 shares around and the legal work that's required to
4 do that.

5 So, my recollection is that Baker &
6 McKenzie was taking care of those things. For all
7 I know, this gentleman may have worked for--Eduardo
8 Falcon may have been involved with Baker &
9 McKenzie, I'm not sure.

10 But I recall specifically in negotiating
11 the transaction, not the exact amount of dollars,
12 but the fact that we would reimburse these
13 gentleman, these investors, if you will, the money
14 that they had put into the business if, in fact, we
15 were successful in getting the business up and
16 running.

17 Q. All right. So, just to recap, you signed
18 the May 26th, 2000 Letter of Intent. This document
19 appears to be the formal agreement contemplated by
20 the Letter of Intent, but you're not sure whether
21 JDMI was a corporate entity controlled at any time

1 by Thunderbird; is that correct?

2 A. Correct.

3 Q. You don't and can't tell us who Eduardo
4 Falcon is, but you can see that a company
5 apparently represented by Doug Oien is the other
6 party, and that's about all you can tell us about
7 this agreement?

8 A. Correct.

9 Q. If you would turn, sir, to the invoice
10 that appears at Tab 6. It's Claimant's Exhibit 9.
11 Were you aware that machines were ordered for this
12 location in Matamoros on the 20th of July 2000?

13 A. My recollection of the transaction with
14 Bestco was that Doug Oien had--who was an
15 individual with a gaming background and really my
16 contact for all of these business discussions, he
17 had indicated that he was getting machines from
18 Bestco, and he had been talking to Bestco for some
19 period of time, because while we were trying to
20 figure out whether we were going to do this deal,
21 and how we were going to do this deal, they

1 continued to build out the premises, and they were
2 ordering and acquiring all the things they would
3 need to operate it.

4 So, if we didn't go forward with the
5 transaction, they were going to go ahead and open
6 the place as their business and do things the way
7 they had done them in the past with the team they
8 had in place.

9 Q. Right. If you turn the page, please, sir,
10 to exhibit or Tab 7, which is Respondent's
11 Exhibit 36--do you read Spanish?

12 A. I hate to rely upon my Spanish for a
13 proceeding this important.

14 Q. Well, I'm not going to question you in any
15 detail on this, but I think you would agree, even
16 with limited Spanish, that this is a contract for
17 the purchase of shares; is that right?

18 MR. CROSBY: Mr. President, the witness
19 just said he doesn't want to rely upon his Spanish
20 to answer questions about a Spanish document.

21 PRESIDENT VAN DEN BERG: He could be

1 assisted by the translator. But even I could tell
2 you that it says on the heading of it Contract de
3 Compra--

4 MR. CROSBY: I could see that as well.
5 But I'm just trying to make a point, Mr. President.

6 PRESIDENT VAN DEN BERG: The question was,
7 is this an agreement for the purchase of shares. I
8 assume the witness can answer.

9 MR. CROSBY: Very well.

10 PRESIDENT VAN DEN BERG: The further
11 question, of course, may be different concerning
12 this document.

13 THE WITNESS: Yes, I believe the title
14 means contract for the purchase of shares.

15 BY MR. MOWATT:

16 Q. And if you would like to take a minute
17 just to look it over rather than me parse through
18 it, can you confirm that this document, this
19 contract was executed in Mexico City on the 10th of
20 August 2000, and that Juegeos de Mexico, Inc.,
21 represented by Luis Ruiz de Velasco acquired all of

1 the shares in the company we had been calling
2 EDM-Matamoros, but its name will be more
3 specifically spelled out, social capital of
4 Entertainmens de Mexico SA to CD.

5 A. As you may know, many transactions in
6 Latin America are done months, sometime years after
7 the fact, legal transactions, and the fact that it
8 says this contract "firmen las partes," I think
9 says it was signed the 10th of August, but I would
10 not put any faith that that was the actual date
11 that the contract was signed, knowing what I know
12 about hundreds of transactions in Latin America.

13 Q. Do you personally know the date that JDMI
14 acquired the shares in Entertainmens de Mexico, SA
15 to CD?

16 A. No.

17 Q. Sir, the next page is a press release, and
18 it appears as exhibit, Respondent's Exhibit 88, and
19 it's a PDF page 42, if that's necessary for the
20 record. It's Tab 8.

21 And this is your announcement in paragraph

1 two or the second paragraph on that page, that the
2 company had entered into an agreement with JDMI to
3 operate skill video gaming operations in Matamoros;
4 is that correct, sir?

5 A. Correct.

6 Q. And do you know the date that the facility
7 actually opened? It says it's actually scheduled
8 to open on the 17th of August.

9 A. I believe that's on or about the date that
10 it opened.

11 Q. Did it open with 80 skill machines? Do
12 you know?

13 A. I have every reason to believe this is
14 relatively accurate.

15 Q. Did it ever increase to 150 skill machines
16 as it says there it may?

17 A. I'm not sure whether there was an addition
18 of machines or not there. I believe there may have
19 been, but I just can't recall exactly.

20 Q. Okay. I would like to refer you now, sir,
21 to Tab 10, which is Respondent's Exhibit 124, pages

1 eight and nine, and these are minutes of a board
2 meeting that was held in San Jose, Costa Rica, on
3 September 10, 2000.

4 Would you please refer to page eight.

5 This is actually the second page in this document,
6 and I would like to ask you some questions about
7 what's been recorded concerning Mexico in the
8 following two pages.

9 A. Okay, you're asking that I read all the
10 section below part F?

11 Q. Yes.

12 A. Okay.

13 (Witness reviews document.)

14 A. Okay.

15 Q. So, under the first paragraph, paragraph
16 numbered 1, F-1, you indicate that there has been a
17 projected profit and loss based on getting
18 200--2500 or 2,500 machines by December 31, 2000,
19 end of that year; is that right?

20 A. Yes.

21 Q. At 10 locations.

1 A. Correct.

2 Q. And then you give some amounts for
3 development and the cost of machines; correct?

4 A. Correct.

5 Q. Would you read paragraph two.

6 A. Correct.

7 Q. Just read it to the Tribunal, please.

8 A. "The casino law may be implemented by
9 December 2000, but could drag out to the year 2001.
10 If the casino loss passes, our capability to put in
11 more machines will be in doubt and we probably
12 can't add more locations either.

13 Q. And paragraph three. Would you read that
14 as well.

15 A. There is a short window of opportunity, so
16 we have to get as many machines as possible into
17 Mexico between now and December. Most people think
18 the law will change in February, but it could be as
19 early as November. If EDM had been grandfathered
20 we may be able to continue bringing in machines and
21 develop other sites. Public and political pressure

1 will decide this.

2 Q. That's all right. I'll stop you there.

3 What was it about the casino law that had you
4 anxious to bring new machines into Mexico? What
5 was your understanding or belief?

6 A. Well, the way the laws typically work in
7 Latin America, and this is a very consistent theme,
8 is many of these countries have not modernized
9 their laws, and so many times businesses open and
10 operate for a period of time, and thereby gain
11 legal standing through being grandfathered, so it's
12 very difficult if a business is operated for a
13 period of time without any interference for a new
14 law to come in and then change all the rules that
15 would cause that business to be put out of
16 business.

17 Q. So, your hope was to get a foothold
18 basically and get some machines in the country and
19 then operate them.

20 A. Exactly.

21 Q. Would you call that the first mover

1 advantage you see in some of your publications?

2 A. We are definitely on the forefront in many
3 of these countries.

4 Q. Paragraph 6 on the pages says, We need
5 eight other sites before December with a minimum of
6 250 machines in each. This will be the marking
7 model. So that's what your plan was based on?

8 A. I believe so. I believe these to be
9 accurate.

10 Q. Then at paragraph 11 you say we should
11 provide a subscription agreement for the initial
12 stage that gives the investor the ability to
13 reinvest after the law changes. Also need a
14 nondisclosure, noncircumvention agreement. I take
15 it the idea here is you would get investors to
16 subscribe for these various locations, and there
17 would be some provision for them to continue on as
18 investor in the event of a change in the law that
19 saw you grandfathered. Is that basically what
20 you're saying there?

21 A. Yeah, or if--in many cases, if you have a

1 successful operation and the law changes, then you
2 become one of the primary bidders for whatever the
3 new licenses or legal regimen are, so we had a
4 philosophy, we still do, that if someone
5 participates at one point in building the industry
6 or the business, those people should participate as
7 the law changes also.

8 Q. Then at bottom it says: The Chairman then
9 asked for a motion to approve all Mexico projects
10 subject to our ability to raise the funds needed to
11 complete these projects. Motion in those terms was
12 properly moved and seconded.

13 Was that the only condition that was
14 placed on proceeding with the Mexico projects that
15 are discussed in these minutes?

16 A. No, that would be an absurd presumption.

17 Q. Well, firstly, let's says it's the only
18 one that is recorded in the minutes, isn't it?

19 A. The purpose of these minutes in our
20 meeting is to indicate that the board has been
21 briefed on a particular matter, and indicate that

1 they have approved the initiative to move forward.
2 There is always a very implicit and very clear
3 understanding that management is responsible to do
4 the proper investigation, retain lawyers, do proper
5 agreements, and do all the things that a
6 responsible business is going to do to enter into a
7 significant, you know, investment or development.

8 Q. So, to put it simply, the main points have
9 been disclosed to the board, the main commitments
10 that the company intends to make are disclosed to
11 the board, but management will carry the obligation
12 to see it through in a prudent fashion; isn't that
13 correct?

14 A. And has responsibility to investigate what
15 is always a significant risk in each of these
16 jurisdictions we are dealing in, and that is to
17 employ lawyers and study the laws and enter into,
18 you know, competent agreements. And there is a
19 whole process here that's ongoing every day with
20 many things happening.

21 Q. Would you turn the page, now, please to

1 Tab 11, which is Respondent's Exhibit 121. It
2 would be a letter to you from Peter Watson and
3 Associates, addressed to you and Mr. Atallah. I
4 would like you to take a minute to read that, and
5 also to refer to the last of its enclosures.

6 A. Okay.

7 Q. You're familiar with the enclosure at the
8 end which is a draft letter to Mr. Aspe and
9 Mr. Arroyo, dated August 10, 2000?

10 A. I know of the existence of a draft letter.

11 Q. Did you see it? Apparently, this was
12 enclosed to you in this letter.

13 A. I'm confident I saw this letter at some
14 point in this process.

15 Q. This letter proposes payment of a fee of
16 300,000. That's U.S. dollars, I take it? In fact,
17 it says USD, so 300,000 U.S. dollars to Messrs.
18 Aspe and Arroyo as a success fee.

19 A. Correct.

20 Q. How did this notion of paying them a
21 success fee arise?

1 A. Well, these gentlemen had handled these
2 cases that had resulted in Mr. Guardia, at least we
3 were under the impression, had resulted in this
4 Mr. Guardia being able to operate his facility at
5 the Juarez race track. So--and Doug Oien had been
6 working with him and was involved in that
7 operation.

8 And when they sat down and laid out all of
9 the legal bases on how they had done that, and they
10 also represented that they can, in fact, assist us
11 at some point in the process, we are trying to
12 delineate or ensure that Gobernacion was on the
13 same page in terms of our operation of these
14 machines.

15 Q. But wasn't it Baker & McKenzie that
16 recommended to you that you apply for the--send in
17 the solicitud and apply for this letter, official
18 letter, that was issued on the 15th of August?

19 A. Well, what Baker & McKenzie told us was we
20 are not comfortable that you have certainty with
21 the cases that Aspe and Arroyo and Guardia have

1 litigated.

2 Q. Right.

3 A. So, of course, being a U.S. lawyer, I had
4 some mistaken belief that there would be some
5 precedence to these cases, and the fact that these
6 gentlemen had supposedly won the cases, indicated
7 that we would have--we would be going into courts
8 or into a system that had litigated this issue, and
9 had a determinative finding to allow these types of
10 machines.

11 So, when Baker & McKenzie basically
12 identified that we did not have that certainty,
13 that we could come up with any number of results,
14 depending on which court, which state, et cetera--
15 Q. It was contemplated that there could be
16 different results in different courts? That was
17 one of the concerns you had; is that right?

18 A. Correct.

19 Q. Yeah. Now, didn't Baker & McKenzie,
20 though, take the lead in applying for this oficio
21 through the solicitud process?

1 A. Well, it depends on what "take the lead"
2 means.

3 Q. They recommended that that's the course of
4 action you take; is that right?

5 A. They definitely recommended and advised us
6 that this was what we should be doing.

7 Q. Didn't the solicitud itself have Mr. De
8 Velasco's name on it? Wasn't he the person that
9 applied?

10 A. Well, I know that these gentleman were
11 involved on a daily basis working with him on this
12 process. I never had the impression that he was
13 the one that was carrying the ball and doing all of
14 this work.

15 Q. What I personally find difficult is that
16 Mr. Aspe and Arroyo should get \$300,000 for getting
17 a letter which appears to me to be something that
18 one applies for and one is issued. Why would you
19 pay them that amount of money?

20 A. What they were obtaining had a dramatic
21 economic value, and if the new government had

1 honored--this solicitud that the old government
2 issued, this value would have been worth tens of
3 millions of dollars, so we were very willing to pay
4 \$300,000, when we pay three and a half million
5 dollars for a license in Panama. We are very
6 willing to pay \$300,000 to these gentlemen if they
7 were able to deliver us what we felt and what we
8 were advised by Baker & McKenzie with certainty
9 that skill machines of the type we were going to
10 operate were allowable in Mexico.

11 So, that amount of money is not, in my
12 opinion, significant at all for what they did.

13 Q. Look at the second paragraph. It says,
14 (reading) It is our mutual understanding that the
15 above-mentioned letter will be granted exclusively
16 for the benefit of Thunderbird or its subsidiaries
17 and designees in Mexico, and no other such
18 permission would be granted to other potential
19 competing parties. Otherwise, no additional fees
20 will be owed.

21 Is what you're saying here that this

1 oficio responding to the solitud then give you
2 some exclusive rights to operate in Mexico?

3 A. No. Let me tell you what that meant,
4 okay? Because I recall having this discussion.
5 The fear was--and Peter Watson didn't get that
6 exactly straight. The fear was, and the discussion
7 was, that these guys understood skill machines.
8 They understood the cases involving skill machines.
9 They had worked with all of the players involving
10 this industry. I didn't want to pay them a
11 significant amount of money and have them go out
12 the next day and sell the same skill--their same
13 expert sort of value to the next guy down the
14 street.

15 So, what I was concerned about with Aspe
16 and Arroyo was they could only work for us and
17 provide us their exclusive relationship so every
18 month there wasn't a new player coming into the
19 market using what we felt at that point was an
20 incredibly valuable, incredibly, you know, unique
21 ability to operate these machines.

1 Q. All right. I'm going to refer you next to
2 the actual letter and actually--

3 A. Could I say one more thing?

4 Q. Sure.

5 A. We are not so naive to think that any
6 government is going to give us any kind of
7 exclusive right to operate an industry. I mean,
8 that's a fairly ridiculous assumption.

9 Q. Clearly, it would be wrong for the
10 government to give you a letter--

11 A. I think it would be illegal. I don't
12 think they could do it.

13 Q. Yes. All right.

14 (Pause.)

15 Q. I'm going to refer to an English version
16 of Exhibit 106. The Spanish language exhibit
17 appears at Tab 12 of the binder, but these letters
18 are both provided to us by the claimant in response
19 to the last order for production of documents. And
20 as I understand it, one is simply the English
21 equivalent of the other. But I thought for the

1 sake of ease for the witness, we should have the
2 English one in front of us. I certainly would
3 undertake to make copies for you all and provide
4 them later.

5 MR. CROSBY: May I see a copy of it?

6 MR. MOWATT: Sure. I will wait until
7 Mr. Crosby has a copy of it.

8 MR. CROSBY: You could go ahead.

9 BY MR. MOWATT:

10 Q. Could you read the terms of the letter
11 after "Dear Messrs. Aspe and Arroyo."

12 A. (Reading) On behalf of International
13 Thunderbird Gaming, ITG, and this is--I don't know
14 who is addressing this letter. It doesn't say who
15 is authoring it. I wish to confirm payment that
16 will be made in favor of the person and to the
17 address indicated by you in writing for the amount
18 of U.S. dollars 300,000 as payment of success fees
19 in the obtaining of the official letter to be
20 issued by the Minister of the Interior, Secretaria
21 de Gobernacion, in response to our application

1 dated August 3rd, 2000. Said official letter shall
2 contain the terms and conditions set forth in our
3 application and shall be previously approved by
4 Baker & McKenzie. Said official letter shall also
5 indicate that there will be no opposition or
6 limitation to our operation in the skill video
7 machines in Mexico. In accordance with our
8 understanding, the official letter will be granted
9 exclusively in favor of ITG and/or its subsidiaries
10 in Mexico and shall not be granted to any other
11 person or legal entity competing in the same field
12 or business.

13 Q. Now, isn't it obvious from its own words
14 that the expectation is that you will get a letter
15 and no one elsewhere will?

16 A. No, it doesn't say that. What it says is,
17 in accordance with our understanding, the letter
18 shall be granted to Thunderbird. In other words,
19 that letter is not going to be granted to three
20 entities in such a way that anybody can go pick
21 that letter up and say this applies to the world.

1 Doesn't mean somebody won't go in the next day and
2 get a letter. But what it says is it's going to be
3 granted that letter in the name of Thunderbird or
4 its subsidiary.

5 Q. Did you apply for the board's approval to
6 spend \$300,000 on this item? It doesn't appear in
7 the board minutes of August 10th that we just read.

8 A. I don't--I don't recall specifically.

9 Q. Did you consider it was a discretionary
10 expense?

11 A. Typically, the way we operate is we set up
12 approximate budgets, and those budgets, for
13 instance, if we were going into a project in
14 Mexico, we may say--or anywhere, we may say we
15 think this project will cost \$1.5 million, and the
16 board typically approves it at that level. It's
17 not normal for the board to go through on a
18 line-item-by-line-item basis--

19 Q. Do you think this has been approved in
20 some budget somewhere?

21 A. That's our general practice. When we

1 spend significant dollars for anything, whether
2 it's success fees of which in many countries we
3 have paid large success fees, we add that into our
4 project budgets.

5 Q. Did it--I mean, what would have been wrong
6 with--let me put it this way--to allow Mr. Luis de
7 Velasco send the solicitud in his own name as it
8 appeared to have been sent in and await a response
9 as the government is obliged to give one?

10 A. It's our practice in having obtained
11 licenses and worked with several government
12 agencies and gaming commissions, and officials in
13 many, many Latin countries to employ people who
14 have relationships with them because it can mean
15 the difference between obtaining something in a
16 month or obtaining it in three years. It is not
17 like in the United States where anybody off the
18 street can go the up, stick an application across
19 in front of the counter, and it's going to be
20 received with a number like every other
21 application.

1 So, we did not see that transaction as
2 unusual or in any way inappropriate.

3 Q. But what you got here was not a license,
4 was it? I mean, it was a letter responding to a
5 question or a hypothetical question almost.

6 A. We felt it was a legal opinion which, in
7 effect, since licenses weren't available for
8 nonregulated gaming, that it was a green light and
9 legal definition on what we would be allowed to do
10 by Gobernacion.

11 Q. Right. And you appreciated that this was
12 nonregulated gaming is what you were involved in
13 here; is that right? That's what you just called
14 it.

15 A. Correct. Their law was passed in 1947 and
16 doesn't have a gaming commission, in effect.

17 Q. I want you to just flip to your witness
18 statement which you have in front of you.

19 A. Okay.

20 Q. If the Tribunal will need a copy, there is
21 one at Tab 3.

1 As we saw before, in your witness
2 statement at paragraph eight, you say, (reading)
3 Back in the spring of 2000, I met if Ivy Ogn at a
4 restaurant in San Marcos. Ong advised
5 me--indicated that he had a permit to operate skill
6 game machines in Mexico and that this "permit" had
7 been tested successfully in the Mexican courts.

8 You use the word "permit" there when it's
9 pretty obvious from those notes what he talked
10 about was an amparo; correct?

11 A. That's an unfortunate use of terminology
12 on my part.

13 Q. Correct.

14 A. And what would be more accurate is that he
15 had litigated rights, is the way I understood it.

16 Q. Operating under an injunction will be a
17 good way to put it in the North American or the
18 Anglo-American context?

19 A. Again, I didn't understand the cases or
20 inquired. I submitted them all to Baker & McKenzie
21 and asked for their opinions to evaluate them.

1 Q. So, if you turn to page--sorry, Tab
2 13--this is Exhibit R-107, Respondent's Exhibit
3 R-107--a letter from Mr. Aspe, including their
4 written instructions regarding payment of success
5 fees.

6 A. Um-hmm.

7 Q. If you flip through--well, turn the page,
8 you will see that the name of final beneficiary is
9 Rafael Ramos Velasco. Do you know who that person
10 is?

11 A. No.

12 Q. Was this payment made by Thunderbird
13 Greeley?

14 A. That's the U.S. company that we operate
15 with. All of our U.S. operations are administered
16 through Thunderbird Greeley.

17 Q. And how was this cost booked in terms of
18 the Mexican projects and the claim in this
19 proceeding? Can you tell me where it is?

20 A. You will have to ask Mr. Copeland
21 tomorrow, our CFO.

1 Q. All right. If you flip now to Tab 14,
2 that's the Baker & McKenzie letter of August 25th,
3 2000. Is this the advice you say you relied on in
4 getting into the gaming business in Mexico?

5 A. This may have been a part of it. We had
6 many, many meetings and conversations about all
7 this.

8 Q. Was there any other written advice from
9 Baker & McKenzie that you could direct us to at
10 this time concerning the official letter?

11 A. That exists or that I have personal
12 recollection of?

13 Q. That you recollect or that exist.

14 A. I would have to review the documents in
15 the file to know if it exists, but I don't recall
16 if I recall other documents in my memory right now.

17 Q. The second paragraph reads as follows:
18 (Reading) Based upon the principal terms of the
19 letter, the Ministry of Interior states it does not
20 have any jurisdiction over the operation of said
21 machines since in accordance with the

1 representations made by EDM in its application, the
2 video game skill machines to be operated by EDM do
3 not fall within the classification of slot machines
4 which are forbidden in pursuant to applicable laws,
5 in view of the fact they are considered to be
6 gaming or betting machines.

7 That was their advice to you; correct,
8 sir?

9 A. That's what this says.

10 Q. And it was on the basis of that advice
11 that you say that you had invested in Mexico?

12 A. We felt like this was--this was the sort
13 of belt and suspenders. We were really relying
14 upon the letter that we received from the
15 government. But because this law firm was
16 interpreting all of these things for us, we went
17 the extra step to say that to the law firm, we want
18 you to opine on what we have received here, because
19 they were advising us orally that we had a very,
20 very strong position with this official letter from
21 Gobernacion. And this is, in effect, I guess, what

1 we received.

2 Q. You understood that Gobernacion had
3 litigation with Guardia in the Juarez
4 establishment; is that correct?

5 A. Yes.

6 Q. And it's been said on numerous occasions
7 here that his gaming equipment is similar,
8 identical to your own; is that correct, sir?

9 A. Yes. I actually went there personally.

10 Q. Yes.

11 A. To view the machines myself.

12 Q. Right.

13 A. And determined that our machines had as
14 much or more skill components than all of the
15 machines that were being operated, at least when I
16 saw them on the trip I went there, which was
17 about--you know, it was during this period before
18 we opened.

19 Q. But you understood he was in a legally
20 adversarial relationship with Gobernacion having to
21 apply for an amparo to operate his business?

1 A. We understood he had been in a legally
2 adversarial situation, but we also understood he
3 had some very strong contacts with the government,
4 and it wasn't necessarily an adversarial situation,
5 at a point that we were talking to the various
6 players in the scenario.

7 Q. Right.

8 Now, you say in your letter, or sorry, in
9 your witness statement, that you instructed counsel
10 to make full disclosure to Gobernacion.

11 A. Correct.

12 Q. In the solicitud.

13 A. Correct.

14 Q. Did you instruct them to say you were
15 proposing to use the same kind of machines or have
16 the same kind of operation as Guardia had in
17 Juarez?

18 A. I instructed them to be sure that the
19 government knew we were using these type of
20 machines. I don't recall if I said exactly the
21 same type of machines because I don't think they

1 were the same model and make, but I instructed the
2 lawyers, and I talked to the lawyers several times,
3 this has to be a transparent situation. There
4 should be no confusion whatsoever that these
5 machines are the type of machines we're going to
6 come and operate.

7 Q. Did you personally read the solicitud
8 before it was sent?

9 A. No.

10 Q. So, if there isn't an adequate description
11 of your machines, it's the lawyer's error, not
12 yours, not your failure of instructions?

13 A. I'm sorry? Would you repeat that
14 question?

15 Q. If the machines aren't adequately
16 described as to their features, that would be a
17 problem and the lawyers failing to implement your
18 instructions; is that correct? Would that be
19 correct?

20 A. I really don't understand what.

21 Q. Let me ask you. I think your other

1 responses made it pretty clear. Let me put this
2 more simply.

3 A. Okay.

4 Q. You said you told the lawyers to make full
5 disclosure and that the lawyers, I presume, knew
6 what your games did and didn't do. So, if there
7 was a failure of disclosure, it's the lawyers'
8 fault, not yours; is that a fair assertion?

9 A. Again, I'm not sure the lawyers' fault. I
10 didn't speak with the Mexican Government officials,
11 so--

12 Q. You had no direct hand in the solicitud?

13 A. Correct.

14 So, I suspect anything that happened
15 between the Mexican government officials and Baker
16 & McKenzie and Aspe and Arroyo occurred between
17 them, and I can't comment on--

18 Q. Well, all we have is the letter or the
19 solicitud itself?

20 A. Correct.

21 Q. And the manner in which it described the

1 machines, and you are saying you didn't read it
2 before it was sent. Have you read it since it was
3 sent?

4 A. You know, at that time I didn't speak
5 great Spanish. I don't know if it was translated,
6 the solicitud. I know I read the official letter
7 when it came back translated.

8 Q. Right.

9 A. I'm not sure--I don't recall reading the
10 solicitud when it was sent. I may have.

11 Q. To fully describe your machines and their
12 distinction between slot machines, wouldn't the
13 letter need to say the difference between our
14 machines and slot machines is that we have spinning
15 reels that the player stops by pushing a button and
16 the slot machines stops all by itself?

17 A. Look, I said to all of these lawyers in a
18 room the week before we did the solicitud, is there
19 any question whatsoever in your minds that these
20 gentleman at Gobernacion who are dealing with this
21 matter, who you have been talking to, have any

1 doubt whatsoever we are going to operate machines
2 like those that you have been litigating with them
3 in Juarez for the past years? And everyone in that
4 room told me there is no doubt whatsoever that
5 Gobernacion knows exactly--

6 Q. Wait a minute, but that's a statement that
7 we are hearing from you for the first time.

8 A. It's an answer to your question.

9 Q. And it doesn't say in the letter, does it,
10 that these are the same as the equipment at Juarez
11 or that we notified them that it's the same as the
12 equipment of Juarez. It's completely silent on
13 that point, is it not, sir?

14 A. Yes.

15 I assume you're referring to the official
16 letter?

17 Q. Yes.

18 A. Okay.

19 Q. The solitud.

20 PRESIDENT VAN DEN BERG: How many more
21 minutes?

1 MR. MOWATT: I expect I will have to carry
2 on in the morning. I'm going to try to cut it down
3 tonight.

4 PRESIDENT VAN DEN BERG: Otherwise, I
5 would suggest we have a five-minute break. I'm
6 mindful of the interpreters and the Court Reporter,
7 so if you take a five-minute break--

8 MR. MOWATT: I may be able to cut a little
9 bit out.

10 PRESIDENT VAN DEN BERG: It would be a
11 useful use of the five minutes.

12 MR. CROSBY: For scheduling reasons or for
13 Mr. Mitchell's scheduling purposes, do we intend to
14 finish his cross-examination tonight? Today?

15 MR. MOWATT: We will see how it goes.

16 PRESIDENT VAN DEN BERG: I will not go
17 beyond 6:00. Let's be very clear about that one.

18 (Brief recess.)

19 PRESIDENT VAN DEN BERG: Mr. Crosby, your
20 side ready?

21 MR. CROSBY: Yes.

1 PRESIDENT VAN DEN BERG: Thank you.
2 Mr. Moat, please proceed.
3 MR. MOWATT: Thank you, Mr. President.
4 BY MR. MOWATT:
5 Q. Mr. Mitchell, in expecting your lawyers to
6 make full discovery, or full disclosure to
7 Gobernacion, was it your expectation, then, they
8 would have notified Gobernacion that the machines
9 you proposed to use were the same or similar to
10 those used by Mr. Guardia at Juarez?
11 A. Yes.
12 Q. Would it have been your expectation that
13 they would have given description of the machines,
14 for example, how they differed from a traditional
15 slot machine?
16 A. Not necessarily.
17 Q. Would you expect to tell the Gobernacion
18 that the games that you proposed to use included
19 video poker?
20 A. I'm sorry?
21 Q. Would have you expected them to inform

1 Gobernacion that the games that you proposed to use
2 included video poker?
3 A. I don't believe the games we proposed to
4 use include video poker that we ever put--
5 Q. I understood Mr. Atallah to agree today
6 that video poker was one of the games used in
7 Mexico.
8 A. Again, I didn't hear that testimony. I'm
9 telling you that we did not, to my knowledge, ever
10 have a video poker game on the floor in Mexico.
11 Q. Or anything equivalent to a poker game?
12 A. Well, what's equivalent? You--
13 Q. That which performs essentially the same
14 function as a poker game or operates in the same
15 manner where cards are drawn and held and not--and
16 discarded.
17 A. Cards is a significant element of poker.
18 Without cards, if you have a numbers type game, I
19 don't think in my opinion it would be a poker game.
20 Q. What about retaining symbols type of game
21 instead of cards?

1 A. Yes, we had those types of games.

2 Q. Analogous to poker? Substituting a symbol
3 for a playing card.

4 A. You are using your terminology. I don't
5 think it's analogous to poker.

6 Q. Did--would you expect, then, some
7 description of that kind of game, symbol-lock down
8 of game, of skill I believe was described in one
9 witness statement to be expressly informed to
10 Gobernacion as part of a full disclosure?

11 A. My understanding was that the lawyers who
12 were working with Gobernacion in this litigation
13 were communicating that these were the same
14 machines, the same style of machines that were
15 utilized in Juarez, which I had viewed and which I
16 had believed to be skill games. I didn't believe
17 it was more complicated than that. I thought that
18 it was a working relationship where people had for
19 a year or more talked about a certain type of
20 machine. We are aware exactly of what these
21 machines were and had seen these machines.

1 Q. And should they also have disclosed to
2 Gobernacion in order to make full disclosure that
3 one inserts currency either in coins or dollars,
4 denominations of dollar bills, and one wins a
5 ticket which is convertible for cash?

6 A. You're asking my opinion on Mexico--

7 Q. Should that have been disclosed to
8 Gobernacion in order to meet full disclosure, as
9 you would have expected it?

10 A. That's how the machines functioned in
11 Juarez.

12 Q. Right.

13 A. And again--

14 Q. That's something--

15 A. The position was that they were going to
16 operate the same machines that were being operated
17 in Juarez in the same fashion they were being
18 operate in.

19 Q. So that factor, paying in of cash and the
20 receiving of a ticket convertible for cash as a
21 prize, is a factor that one way or another should

1 have been made known to Gobernacion in order to
2 make full disclosure, as you defined it; correct?

3 A. Again, your question--I don't understand
4 your question.

5 Q. Well, let's put it another way.

6 A. Okay.

7 Q. You said you wanted the lawyers to make
8 full disclosure.

9 A. Correct.

10 Q. It seems to me that a fundamental aspect
11 of this gaming equipment is that it receives money.

12 A. Correct.

13 Q. And pays money, or a ticket which can be
14 converted for money.

15 A. Correct.

16 Q. Those are--that's a fundamental aspect of
17 the equipment you propose to operate; is that
18 right?

19 A. Correct.

20 Q. In order to make full disclosure, then,
21 should that feature or aspect of the equipment have

1 been made known to Gobernacion?

2 A. Again, if you show them exactly what
3 you're going to do and those are the features of
4 exactly what you show them, then I assume that's
5 full disclosure. Does it have to be written down?
6 Is that your question? Should it have been written
7 down and submitted in a written document with a
8 photograph?

9 Q. Well, I guess my question is whether
10 simply the fact that your equipment that you're
11 applying to under the solicitud to operate in
12 Mexico in order to be fully disclosed ought to have
13 included that feature, that it receives money and
14 pays money or the equivalent of money.

15 A. Well, I don't know that that should have
16 been put into the solicitud.

17 Q. Thank you.

18 After you started to operate the Matamoros
19 facility, you set about plans for establishing new
20 facilities in Nuevo Laredo and in Reynosa?

21 A. Correct.

1 Q. And you also set about plans to get
2 investors who had subscribed for shares in the
3 operating companies for Matamoros, Nuevo Laredo,
4 and Reynosa; is that correct?

5 A. Correct.

6 Q. And is it your memory or your recollection
7 that Nuevo Laredo was the first subscription--I
8 could show you a document, if it would assist you.

9 A. I thought we did Matamoros first.

10 Q. You acquired Matamoros, but it seems from
11 the documents that Matamoros was one of the last,
12 or that Matamoros and Reynosa were basically
13 subscribed at about the same time in June 2001; is
14 that right?

15 A. I accept--if you have the document.

16 Q. If you flip to page two, 15, Tab 15, you
17 will see claimant's Exhibit 35, and I'm not going
18 to go through this in any detail, but obviously the
19 cover page for subscription and investment
20 representation agreement, and it's dated
21 November 30, 2000.

1 A. Okay.

2 Q. So, investors in Nuevo Laredo invested
3 their money based on the representations and terms
4 and conditions contained in this agreement; is that
5 correct?

6 A. At least partially.

7 Q. Yes.

8 And then Nuevo Laredo was closed soon
9 after it opened; is that right, sir? Initially.

10 A. The first time.

11 Q. It opened initially January of 2001 and
12 was closed, I think, on the 25th of February 2001;
13 is that right?

14 A. I thought it was earlier in February. It
15 could be mistaken. I thought it was the first few
16 days of February, but it was in February sometime
17 2001.

18 Q. And then it was reopened--firstly,
19 EDM-Nuevo Laredo, the operating company, filed for
20 an amparo; is that correct?

21 A. Correct.

1 Q. And then there was some negotiations with
2 Gobernacion and the amparo was lifted or dismissed,
3 and the closure seals were lifted; is that right?

4 A. That's my understanding.

5 Q. And part of that arrangement was that the
6 company would submit to an administrative
7 proceeding whereby it would attempt to establish
8 through means of proof that these machines were
9 skill machines and not slot machines as Gobernacion
10 felt they were; is that correct?

11 A. Yes. That's my understanding.

12 Q. And that was your understanding at the
13 time that the closure seals were lifted; is that
14 right?

15 A. Yeah--yes, I'm sorry.

16 Q. I would like you to look now at Tab 16.
17 This is the subscription investment representation
18 agreement for one of the two other deals. This one
19 is for Reynosa, and I think concurrently there was
20 one done for Matamoros; is that your recollection?

21 A. Yes.

1 Q. This document--

2 (Pause.)

3 Q. On page 10, if you would like to take a
4 minute to look at subparagraph eight, reliance on
5 entitlement granted to EDM.

6 A. Do you want me to read that entire page or
7 that paragraph?

8 Q. I would like you to familiarize yourself,
9 and I will ask you a couple of questions.

10 A. Okay.

11 (Witness reviews document.)

12 A. Okay.

13 Q. In the third paragraph it says, (reading)
14 The company has been advised by Baker & McKenzie,
15 special Mexico counsel to Thunderbird and EDM, the
16 entitlement states the operation of skill machines
17 by EDM is not prohibited in Mexico. Further, the
18 entitlement also confirmed that so long as EDM
19 operates skill machines as described to the
20 government by EDM, the government will not
21 challenge EDM's operations. Based on this letter,

1 although no specific entitlement was granted to the
2 company either directly or indirectly by approving
3 EDM's franchise system, the company believes its
4 operations of the business is contemplated will
5 also be permitted in Mexico.

6 We can see from this that in June of 2001
7 the company, Thunderbird, is still using the
8 oficio, the official letter of August 15, and the
9 Baker & McKenzie advice as inducement to investors
10 to invest; is that correct, sir?

11 A. Correct.

12 Q. Over the page it says one of the
13 companies' affiliates--this is the top of page
14 11--known as EDM-Laredo experienced litigation with
15 respect to its skill machine operation. The
16 circumstances and results of that litigation
17 process are outlined in Exhibit 1. I'm sorry, it's
18 Exhibit I. I apologize.

19 Now, if you flip the page, that exhibit
20 has been included. And what you will see here, the
21 sum total of what's here is an administrative

1 decision, which announces effectively the lifting
2 of the closure seals at EDM-Laredo and the Nuevo
3 Laredo facility. And another document which
4 evidences the actual removal of the seals, and then
5 two or three pages of documents that I don't really
6 understand nature and content of, but I suggest
7 that none of these documents explains anywhere that
8 EDM or Thunderbird is engaged in an administrative
9 procedure with the Gobernacion officials whereby
10 the legality of EDM's machines will be finally or
11 conclusively determined.

12 You can correct me if I'm wrong, what I'm
13 asking you effectively, that was disclosed to
14 potential investors?

15 A. I don't see it disclosed right here, but I
16 know that we talked about the fact that what we
17 believe was this rogue police officer was trying to
18 close us down.

19 Q. You understood, though, sir, that there
20 would be a judicial or administrative proceeding
21 whereby proofs would be offered and evidence taken

1 and hearing held and determination made; isn't that
2 right?

3 A. Well, I didn't understand exactly what all
4 of the proceedings would be. I knew we had an
5 agreement.

6 Q. Right.

7 A. With the government that they would take a
8 look at what we were operated and make a
9 determination, if, in fact, these were skill
10 machines versus slot machines.

11 Q. Can you show me anywhere else in the
12 document where there is a disclosure of this
13 particular process? I want to make sure we
14 exhausted this because I haven't found it. I seen
15 this reference on the top of page 11 to EDM's
16 experienced litigation and the documents that are
17 attached, which to be fair, I think, only give the
18 reader the impression that there was a problem and
19 it's been resolved.

20 A. Again, I have not examined every page of
21 the document--

1 Q. This is a very important point and I would
2 invite you to examine this document and to tell us
3 if there is any express warning or notice to the
4 prospective investor that there is a proceeding
5 pending whereby your machines and use in your
6 various facilities will be up for judgment.

7 A. Let me bring something to your attention.

8 Q. Sure.

9 A. Reynosa was invested in by a very high net
10 worth individual in the United States, Dennis
11 Langley. Hundreds of millions of dollars of net
12 worth.

13 His counsel is a fellow by the name of
14 Tino Minaldo, who we have several years of
15 experience with. I'm positive that we explained in
16 detail every aspect of what was happening in Mexico
17 at the time because Mr. Minaldo has been to every
18 property in every location where we do business,
19 and has a close business and professional
20 relationship with me.

21 And we would not have neglected--I would

1 not have neglected--I can't speak to this
2 document--to make it very clear to Mr. Minaldo
3 exactly what was going on, what happened, when it
4 happened, and what our view of the issues were
5 relating to that investment.

6 Q. Did you disclose this to the public that
7 there was a proceeding pending that would determine
8 the legality of your machines?

9 A. I would have to review the press releases.

10 Q. Let's do that. Let's turn to Tab 17,
11 probably Tab 19.

12 Actually, before we go there, if you look
13 at Tab 17, it should be a press release dated March
14 16th.

15 A. I have it.

16 Q. March 16th, 2001. That's Exhibit Number
17 88, Respondent's Exhibit 88, page seven, I believe,
18 of the PDF file. Would you read the first
19 paragraph, sir.

20 A. (Reading) International Thunderbird Gaming
21 Corporation is pleased to announce it has reopened

1 the skill machine facility in the Nuevo Laredo
2 initially opened February 9, 2001. Thunderbird and
3 the Mexican Ministry of Interior entered a
4 voluntary dismissal of the Nuevo Laredo amparo
5 proceeding paving the way for reopening of the
6 operation. Thunderbird has initiated a joint
7 dialogue with Gobernacion on issues relating to
8 skill machines. Thunderbird--

9 PRESIDENT VAN DEN BERG: Games.

10 THE WITNESS: Sorry, skill games.

11 Thunderbird continues to implement its
12 expansion plans for Mexico. The first skill game
13 operation in Matamoros continues to perform well,
14 averaging at 78 per machine per day in February
15 2001.

16 BY MR. MOWATT:

17 Q. So, your characterization of what the
18 process was with Gobernacion was that you entered
19 into a joint dialogue on issues relating to skill
20 games; is that right?

21 A. Typically, these documents are written by

1 Mr. Atallah, and I do review them before they go
2 out.

3 Q. Sure. Let's flip the page to see if you
4 reviewed and signed this one.

5 A. Correct.

6 Q. This bears your signature, so this
7 document went out under your signature.

8 A. Correct.

9 Q. I have been through the press releases for
10 the period of time that followed and don't see
11 anything which announces any kind of proceeding or,
12 indeed, any question that there was a legal issue
13 with Gobernacion, but I'm asking you whether you
14 recall having made an announcement to the public
15 that such an issue existed?

16 A. No, I don't recall anything other than
17 what I'm seeing here.

18 Q. Please turn now to Tab 19.

19 PRESIDENT VAN DEN BERG: Could I ask a
20 very small question?

21 The press release here, Tab 17, which is

1 Exhibit R-0088, you see in the second paragraph for
2 the California tribe settlement?

3 THE WITNESS: Yes.

4 PRESIDENT VAN DEN BERG: You see there is
5 a settlement, including payment by the tribe of
6 \$500,000.

7 THE WITNESS: Correct.

8 PRESIDENT VAN DEN BERG: Delivery of 404
9 game machines from Thunderbird.

10 Since you are the CEO of Thunderbird, do
11 you know what happened with these 404 machines?

12 THE WITNESS: Typically, what we did with
13 the machines that we recovered in California was to
14 sell those machines to SCI, who then used them for
15 parts or refurbished or redesigned and used them or
16 sold them to various places. That would be the
17 most likely use, the result of those.

18 PRESIDENT VAN DEN BERG: Do you recall?

19 THE WITNESS: I don't recall exactly what
20 we did with those 404 machines.

21 PRESIDENT VAN DEN BERG: To store them in

1 the warehouse or office is a little too much, isn't
2 it?

3 THE WITNESS: We didn't keep machines
4 around. That's a big problem. You have to move
5 them out to the people who have licenses to hold
6 those machines, so they would have been moved out
7 very quickly somewhere.

8 PRESIDENT VAN DEN BERG: Thank you.

9 Excuse me, sorry, Mr. Mowatt, that I
10 interrupted your flow of questioning by asking an
11 entire different question, but I couldn't resist
12 asking you questions.

13 MR. MOWATT: Not at all. Thank you,
14 Mr. President.

15 BY MR. MOWATT:

16 Q. Mr. Mitchell, please turn to Tab 19. It's
17 a press release dated October 15, 2001.

18 MR. MOWATT: This also appears,
19 Mr. President, in Respondent's Exhibit R-88, which
20 is a serious of press releases for that year.

21 BY MR. MOWATT:

1 Q. Would you please read us the first
2 paragraph and the second as well.

3 A. (Reading) The director of amparos for La
4 Secretaria de Gobernacion, Federal Government for
5 Mexico, issued a report and findings related to
6 International Thunderbird Gaming Corporation skill
7 machine operations in Nuevo Laredo and Matamoros.
8 The findings included an order for immediate
9 closure of Thunderbird's operations in Nuevo Laredo
10 and in Matamoros, which was effected in the night
11 of October 11, 2001. The findings state that the
12 Nuevo Laredo and Matamoros operations are in
13 violation of the law. The company was shocked
14 about the unannounced action by the government
15 after receiving assurances that all actions by the
16 government would be according to law with rights to
17 appeal. The company has received an opinion letter
18 from Gobernacion authorizing its right to operate
19 skill machine.

20 Q. Before you go on, you're still talking
21 about the letter of August 15, 2000--is that

1 correct?--when you speak of that letter. The
2 company's received an opinion letter?

3 A. I believe so. Again, I didn't
4 probably--probably didn't write this.

5 (Reading) Certain members of the Fox
6 government have indicated their intention not to
7 honor the prior government legal opinion.
8 Gobernacion's action is arbitrary without reliance
9 on prior legal precedent and unfortunately a risk
10 of operating in the Mexico market. The company
11 intends to file an amparo requesting that each of
12 the operations remain open while legal proceedings
13 are pending. We fully expect the Mexican courts to
14 do the right thing, but there are no guarantees.
15 If Mexico is successful--

16 PRESIDENT VAN DEN BERG: You said
17 "Mexico." Thunderbird is successful.

18 THE WITNESS: (Reading) If Thunderbird is
19 successful in its arguments, the facilities are
20 expected to reopen in a week to 10 days under the
21 protection of an amparo, while the legal

1 proceedings determine compliance with local and
2 Federal laws are resolved.

3 BY MR. MOWATT:

4 Q. Before you go on, I submit that this was
5 the original plan, was it not, to open up and then
6 operate under an amparo within a few days of being
7 closed and carry on business?

8 A. When I first began talking to Mr. Ong,
9 that was what the discussions resolved (sic)
10 around.

11 Q. Right.

12 A. As we researched, hired attorneys,
13 received opinions, we determined that that was not
14 a prudent course of action.

15 Q. Right.

16 A. So, we resolved to follow the advice of
17 Baker & McKenzie and get something in writing from
18 Gobernacion.

19 Q. Okay. I understand all of that, and I
20 just wanted to make sure that when we are talking
21 about an amparo that that was the same process that

1 you had in mind before.

2 The other point I want to make here is the
3 company did exercise rights of appeal, did it not,
4 in respect of this closure? There were no rights
5 of appeal denied the company. It leaves the reader
6 the impression that they are shocked about
7 unannounced action and having received assurances
8 that action would be according to law and with
9 rights of appeal while you exercised rights of
10 appeal.

11 A. No. My understanding was--and I believed
12 that once an order was issued--we would be given
13 notice of the order before there would be a
14 closure, not that it would be done simultaneous,
15 and we would have a period of time to appeal that
16 order before there was a closure. And that's what
17 I was told that the law in Mexico provided.

18 Q. You intimated a moment ago that you
19 thought somebody else had written this, but if you
20 flip the page you will see the page bears your
21 signature.

1 A. I read all of these press releases, and
2 they have a form signature that after I approve
3 them via E-mail as approved that they put the form
4 signature onto the press release.

5 Q. These corporate disclosures don't go out
6 without you reading them first?

7 A. Correct, not the press releases.

8 Q. Okay. Can you direct me to any corporate
9 disclosure statement or any document in the context
10 of the subscription and representation agreements
11 that puts the prospective investor on notice that
12 there exists between you, and by you I mean
13 Thunderbird and Gobernacion, as to the legality of
14 the gaming equipment in Mexico.

15 A. What--

16 Q. Between the time that Nuevo Laredo was
17 reopened and the time that this closure was
18 effected in October of 2001.

19 A. Right. I'm not aware of any document that
20 I can recall that I can hand you that demonstrates
21 that we had disclosed to a prospective investor

1 what was going on.

2 Q. Certainly not later in February when the
3 Nuevo Laredo closure occurred or early March. You
4 had been aware at least that the government or the
5 officials responsible for regulating this business
6 or for law enforcement in this area did not take
7 the view that the August 15, 2000oficio, oficio
8 granted you the right to operate the machinery you
9 had in your premises? You knew that by then, at
10 least?

11 A. Well, we assumed again it was just this
12 one person. We did not believe it was a
13 governmental position.

14 Q. And this one person was the person
15 responsible for enforcement, wasn't it?

16 A. He was involved in the enforcement.

17 Q. And having that knowledge that at least
18 this person involved in enforcement for Gobernacion
19 did not share your view that this letter of 15
20 August 2000 granted you some right to operate these
21 machines, or at least they took the view they

1 weren't machines as described in the letter.

2 A. Correct.

3 Q. You nonetheless have held that letter out
4 in at least two subscription agreements as being
5 some sort of entitlement, have you not?

6 A. An entitlement?

7 Q. An entitlement is what it says in the
8 actual text of the agreement.

9 A. Again, the only location you're really
10 talking about was one investor, and--for Reynosa,
11 who was involved in this process after this point
12 in time, who is--and who had--I have to look at the
13 development schedule. We probably already invested
14 a significant amount of money in Reynosa in terms
15 of getting leads, in terms of beginning to do
16 construction and a lot of those things, and Albert
17 and I would have been extremely careful to make
18 sure this investor, because he's one of our most
19 important investors, shareholders, lenders, was
20 almost up to the day, and that would have been done
21 probably a lot more orally in conversations with

1 him than us sending letters to him.

2 Q. What about the investors in the Matamoros
3 facility? The Matamoros deal was done concurrently
4 with this one? The dates were the same or
5 substantially the same.

6 A. The Matamoros money was spent, and
7 therefore must have been concluded sometime prior
8 to August 17th of 2001, so the Reynosa opening was
9 in August--okay, 2000, so the year 2000 was
10 Matamoros. You had an opening in August which
11 means at or about that period of time the money was
12 spent.

13 Q. Let me tell you what documents say. The
14 documents show you did a subscription for Nuevo
15 Laredo in November of 2000.

16 A. Correct.

17 Q. And that you did subscriptions for
18 Matamoros, notwithstanding that you already owned
19 it.

20 A. Correct.

21 Q. And for Reynosa in June of 2001.

1 A. Okay.

2 Q. Some four months, say, after the closure
3 of Nuevo Laredo and the reopening under this
4 agreement to submit to an administrative procedure.

5 A. Correct.

6 Q. The point I'm trying to make, sir, is
7 pretty simple, is we have a dozen or more people
8 who filed witness statements in this case who say,
9 we relied on this letter that the government had
10 issued, and I'm saying, well, certainly you knew as
11 late as March of 2001 that the government did not
12 share your view as to what that letter covered. At
13 the very least, the government didn't think that
14 the--that your equipment was as described in the
15 letter, and that you were in an adversarial
16 position legally on that point, and that was not
17 disclosed to a single one of them, or at least in
18 writing that we could see anywhere.

19 A. But what you're doing--

20 Q. The point is to try to blame Mexico--

21 MR. CROSBY: Mr. President, can we have a

1 question and not argument? I would like to argue
2 for a half hour, too.

3 PRESIDENT VAN DEN BERG: This is not
4 argument. This is leading up to a question after a
5 series of questions, so the question is allowed.

6 BY MR. MOWATT:

7 Q. My question to you is this: Don't you
8 think that any of those people who have been told,
9 hey, look it, we got a proceeding on June the 10th,
10 some three weeks or July the 10th, some three weeks
11 from the date of this subscription agreement where
12 our machines are determined to be legal or illegal,
13 let's hold phone and see what happens?

14 A. You're assumptions are totally inaccurate
15 because what happened--you're looking at some dates
16 on documents. What happened was people wrote their
17 checks significantly in time before those documents
18 are dated. In other words, all of the commitments
19 were made, and these are people I have dealt with
20 many, many years and on many, many projects. All
21 of the checks were written, all of the commitments

1 were made prior to the February action with the
2 exception--and I'm saying it was probably made and
3 a lot of money that was spent on Reynosa, also. If
4 you look at Matamoros, the facility was opened in
5 August of 2000. Consequently, those people wrote
6 their checks, paid their money, and the
7 documentation followed. That would be the exactly
8 the same situation with Laredo.

9 Q. Let's address that in terms of securities
10 law, and you're familiar with it. What happens
11 when a material representation turns out to be
12 incorrect--I'm not going to say false--incorrect,
13 untrue, between the date that the issuer makes the
14 representation and the deal closes? I submit to
15 you what happens is the issuer tells the subscriber
16 that there has been a change of material
17 circumstances, doesn't it? Isn't that what is
18 expected in the law?

19 A. Given all of your assumptions you just
20 made, you made a correct statement of the law.

21 But--

1 Q. Let's assume and put it in real terms.

2 PRESIDENT VAN DEN BERG: I think it would
3 be fair to Mr. Mitchell to let him finish his
4 answer.

5 MR. MOWATT: If he wants to carry on,
6 that's fine.

7 THE WITNESS: First of all, these are
8 credit investors which you as you know under
9 securities laws changes all the rules.

10 Second of all, we had a long-term
11 relationship with these people, and at the time we
12 took their checks and the time we made all the
13 disclosures to them, the event of closure in Laredo
14 had not occurred. That's the point I'm making.
15 You're assuming that all of these securities
16 transactions occurred after February of 2001. All
17 of the things occurred prior to February of 2001.

18 BY MR. MOWATT:

19 Q. Let's say that these deals didn't close
20 until June of 2001 because that's the date on the
21 agreement the date it became effective.

1 A. The deal closes when the investor gives
2 you his money and invest in your transaction based
3 upon a certain set of criterion (sic) that you have
4 agreed upon with the investor.

5 Q. But isn't the agreement defined in the
6 subscription and representation agreement? Aren't
7 those the terms you agreed upon? And haven't you
8 in the terms of context of that agreement said,
9 look, we had this letter Gobernacion which, in our
10 view, is an entitlement to operate the machines we
11 operate? Oh, by the way, there is some litigation
12 involving Nuevo Laredo, but if you look at the
13 documents you will see they are all concluded.
14 That's the terms of they invested on, are they not?

15 A. No.

16 Again, the terms they invested on was the
17 totality of documentation, conversations,
18 circumstances that existed prior to them writing
19 the check, giving you the money that you then used
20 to build out the investment, not what may be stated
21 in a document that's dated six months later after

1 the entire transaction has been concluded.

2 Q. You proceeded to open the Reynosa facility
3 some six weeks or so after the Gobernacion hearing.

4 A. Correct. I believe it was--actually, July
5 10th was the hearing. I believe it opened
6 August 25th.

7 Q. Those dates record it.

8 A. Okay.

9 Q. You felt sufficiently confident in your
10 prospects of succeeding as a result of that hearing
11 that you felt it safe to open Reynosa?

12 A. I'm sure what we did is we evaluated the
13 fact that we had already invested significant
14 amounts of money and time and investment, and
15 we--and we felt extremely confident. We really had
16 very little doubt that we would win this process.
17 When I say we were "shocked," we were shocked, so
18 we were operating with what has turned out to be
19 false confidence that we would prevail, and we
20 invested a lot of the money. In these operations,
21 it takes you probably six months from the time you

1 first make a commitment on the lease to the time
2 you open the facility.

3 So, the fact that we had this hearing and
4 opened shortly thereafter, you would really have to
5 look at the investment we made versus what new
6 risks we felt at that point after the hearing, and
7 what we needed then is to get open and weigh all of
8 those things.

9 Q. So, in weighing all of these things, what
10 transpired at the hearing wasn't so egregious or
11 disturbing that you found it necessary to, even for
12 a minute, to put the Reynosa project on hold?

13 A. No, we found the hearing to be extremely
14 egregious.

15 Q. So, I find it a contradiction, sir, that
16 you can say that you had confidence that you would
17 win and on that basis stuck your neck out and
18 continued the construction of this facility and
19 opened it in what could have been violation of the
20 law, and yet that you found the hearing itself to
21 be egregious and disturbing.

1 A. Well, the hearing was really the first
2 part, the first time that we sort of developed this
3 strong sense that we were in big trouble with this
4 government.

5 Q. Right. So, instead of being confident
6 about the outcome, you felt you were in big
7 trouble?

8 A. We felt confident that we would prevail
9 because we were being told that by our lawyers.

10 Q. I see. What about, then, the fact the
11 place had been closed and the closure seals were
12 lifted--and I'm referring to Nuevo Laredo--in the
13 events of late February, early March. Obviously,
14 as a result of those discussions, you must have
15 known at that time that you were in an adversarial
16 relationship as to the legal effect of your
17 machines.

18 A. We didn't really feel that we were in an
19 adversarial relationship with anyone except for
20 this one individual. We were repeatedly assured by
21 Coronado Aguilar, who was very, very important

1 person; by Guillermo Flores; by many people in the
2 government that we were going to receive an
3 extremely fair process, and we felt like that we
4 had all of the facts and evidence our side.

5 So, it was only when we received this
6 hearing that we realized we had a big problem.

7 Q. Mr. Mitchell, I have just been handed a
8 document that comes from C-89, which shows--
9 PRESIDENT VAN DEN BERG: Will you show it
10 to Mr. Mitchell.

11 MR. MOWATT: I will.

12 BY MR. MOWATT:

13 Q. It shows funds paid in, C-89, this is
14 obviously claimant's exhibit, million dollars for
15 MRG throughout the month of June or at least
16 several installments in June and July and August.

17 A. Okay.

18 So, that goes to the point that I
19 indicated, that a significant amount of that money
20 had been funded in the middle of 2001 when the
21 opening of the facility was not until August 25th,

1 after the closing.

2 Q. Well, the dates here are all--appear to be
3 on or after the closing date. I'm going to return
4 to this.

5 A. Closing was on July 11th.

6 Q. I'm sorry?

7 A. July 10th or 11th.

8 Q. That was the hearing.

9 A. Okay. But we were open, then. Then we
10 were closed subsequently in October 2001.

11 Q. Would you please turn to Tab 20, Annual
12 Information Form. This was filed on May 12, 2002,
13 for the fiscal year ended 2001.

14 Do you recognize this, sir?

15 A. Yes.

16 MR. MOWATT: That was, Mr. President,
17 Respondent's Exhibit 26, pages 16 and 17.

18 BY MR. MOWATT:

19 Q. On page 16, there is a section for legal
20 matters, and this section, as I understand it, is
21 where the company reports all material litigation

1 involving the company which may have an effect on
2 the company's financial interests; is that correct?

3 A. Again, you state your assumption.

4 Q. My understanding is that as part of the
5 annual information report, issuers that are listed
6 in the province of Ontario, as well as other places
7 I'm sure, but are expected to list the litigation,
8 disclose the litigation that exists that may
9 materially affect the company; is that correct,
10 sir?

11 A. I believe so.

12 Q. And is it an expectation that full, fair,
13 and accurate disclosure will be made in such
14 reports?

15 A. I believe that's the standard.

16 Q. At the bottom of the page, there is an
17 action listed between A-1 Financial International,
18 LTD, and International Thunderbird Gaming
19 Corporation, et al., Superior Court of California.

20 A. Correct.

21 Q. If you look over the page, I wonder if you

1 could read us the first three sentences.

2 A. Case number 01cc16207, Superior Court of
3 California, County of Orange, Central Division.

4 Q. You could skip actually to the narrative
5 itself.

6 A. (Reading) A-1 Financial filed--I believe
7 part of my page may be cut off because I don't see
8 the A-1. A-1 Financial filed an action against
9 Thunderbird, et al., claiming they're in default of
10 their payment obligations under a termination
11 settlement and release agreement executed by the
12 parties on April 12th, 2001. Thunderbird and its
13 investment group invested well over 6 million in
14 cash and two million in capital equipment based
15 upon the representation made by A-1 Financial
16 concerning the viability of business in Mexico.

17 Q. You could stop there.

18 Was that disclosure true and accurate,
19 sir?

20 A. I have--I don't know. I didn't prepare
21 this or review this.

1 Q. Well, as the president and CEO of the
2 company, you take some responsibility for what is
3 filed in the annual report of the company and the
4 annual information form. Both are documents
5 required by law; correct?

6 A. Correct.

7 Q. Let's just examine the statement firstly.
8 (Reading) Thunderbird and its investor group
9 invested well over \$6 million in cash, 2 million
10 capital and equipment based upon representation by
11 A-1 concerning the viability of business in Mexico.

12 Is that a true statement?

13 A. I believe that--again, my financial people
14 would have put those numbers, and I would rely on
15 that to be true.

16 Q. It's the question of whether the numbers
17 are accurate or not as to your concern as to
18 whether it's a true and accurate statement?

19 A. It seems true.

20 Q. All right. And is it true because A-1
21 Financial made representations which induced you

1 and others to invest?

2 A. We certainly relied upon them in the
3 initial stages.

4 Q. What were the representations they made
5 that you relied on?

6 A. That they had been involved in a skill
7 gaming facility and were partial owners/managers
8 with Mr. Guardia, who was the primary owner/manager
9 in Juarez, Mexico, at the race track.

10 Q. All right.

11 A. And they had worked with these two
12 lawyers, Oien and Arroyo and Aspe, to secure rights
13 to operate that facility.

14 Q. It was based on those representations that
15 Thunderbird made its investment or Thunderbird and
16 its investor group invested the sums mentioned; is
17 that correct, sir?

18 A. Exclusively on those?

19 Q. Is that the representation you're
20 referring to in that sentence?

21 A. I didn't write the sentence, so I don't

1 know exactly what representation--

2 Q. Well, what other representation was there
3 that there could have been that you are referring
4 to there?

5 A. Again, what I recall, I have already
6 stated were the things that I relied upon,
7 Mr. Oien, who was the principal of A-1 Financial.

8 Q. Let's carry on to the next sentence.
9 (Reading) Based upon that representation,
10 Thunderbird opened three locations and is currently
11 battling the Government of Mexico in attempt to
12 shut the entire operation down.

13 Was that true?

14 A. No.

15 Q. Well, what's untrue about it?

16 A. It was not that representation that caused
17 us to open these locations.

18 Q. All right. But you said that I think an
19 agreement on the first--the previous sentence was
20 representations by Guardia and Arroyo--Aspe and
21 Arroyo concerning Guardia's operations which

1 induced this investment; correct?

2 A. No. I said that they were a factor.
3 Those representations were a factor and are moving
4 forward on this transaction and getting involved in
5 it. They weren't--the reason we entered into this
6 transaction was the culmination of a tremendous
7 amount of--I made 27 trips to Mexico.

8 Q. Okay. Let's carry on to the next
9 sentence.

10 A. Okay.

11 Q. (Reading) Thunderbird intends to file a
12 cross-complaint against A-1 Financial to seek not
13 only the payments made to date but also damages
14 arising from fraud, intentional misrepresentation,
15 interference with contractual relations, and so on.
16 So, what is the fraud and intentional
17 misrepresentation of A-1 and of--A-1 Financial in
18 this case?

19 A. I'm not aware of any. That sounds like
20 lawyerese in an answer to a complaint where you are
21 throwing a bucket of everything at somebody who is

1 suing you.

2 Q. What is the point of saying all that in a
3 corporate disclosure statement?

4 A. You will have to ask the author.

5 Q. Now, was this--have you ever made this
6 kind of allegation with respect to anyone else?

7 A. I'm sorry?

8 Q. Have you ever accused anyone else of being
9 responsible for getting you into the gaming
10 business in Mexico and causing a loss in damage,
11 apart from the Government of Mexico, Oien, Ong,
12 Aspe, and Arroyo or others?

13 A. Have I made this accusation against
14 another person? I don't recall making this
15 accusation against anybody.

16 Q. Well--

17 PRESIDENT VAN DEN BERG: You have two
18 minutes left for today.

19 MR. MOWATT: I have one thing I can
20 conclude quickly. I have a little bit of
21 carryover, but I will conclude my next question.

1 BY MR. MOWATT:

2 Q. If you turn the page to the form filed in
3 the following year, December 31, 2002, for the year
4 ended December 31, 2002, and turn the page to 16
5 and look at item E, again a legal matter, would you
6 please read what item E says.

7 A. (Reading) This lawsuit was filed in
8 relation to the companies' investment in the skill
9 game operations in Mexico. Brannon claims the
10 company owes him 350,000 stemming from his transfer
11 of all interest he had in the entity, Entertainmens
12 de Mexico. The company intends to vigorously
13 defend the action and will also file a cross claim
14 against Brannon, claiming fraud and
15 misrepresentation of Brannon's assertion that the
16 company could take over the business and operate
17 the skill game facility. The company is now
18 engaged in a NAFTA claim. See item D, which is a
19 related action.

20 Q. So, did Brannon make best representations?
21 First of all, who is Brannon? Can you tell us?

1 A. Remember in the prior testimony when I
2 indicated that there were four individuals involved
3 in the Matamoros facility, and there were two
4 investors who invested money?

5 Q. Yes.

6 A. Brannon is one of those investors.

7 Q. He claimed to be owed \$350,000. Was he
8 owed that money?

9 A. Well, he had--he had invested that money
10 in Matamoros and we indicated to him, and we had
11 an agreement with him if we were successful in
12 getting the business up and running, we would
13 reimburse him for his cost. If that was how much
14 he had put into it, then yes, he would have been
15 entitled to that, if we had successfully operated.

16 Q. What was the misrepresentation Brannon
17 made to you?

18 A. I don't recall any misrepresentation he
19 made to me.

20 Q. Well, what misrepresentation did he make
21 to Thunderbird or EDM or anybody else that would

1 reflect this?

2 A. Again, you would have to ask the author of
3 this document. I'm not aware of what was bringing
4 about that claim.

5 MR. MOWATT: This will be a convenient
6 time. I'm hoping I won't be long tomorrow.

7 PRESIDENT VAN DEN BERG: Mr. Mitchell, you
8 are under testimony, which means you may discuss
9 anything with your partner and your lawyers except
10 this case. So, what I suggest is you have a quiet
11 private night.

12 THE WITNESS: Thank you.

13 And that applies to any other person, I
14 assume, also, anyone that may testify?

15 PRESIDENT VAN DEN BERG: Yes, right.

16 Are anything procedural?

17 MR. CROSBY: Mr. President, can I get some
18 indication how long--we have already gone twice as
19 long as the hearing documents indicated. I tried
20 to be very brief with my direct, so could I get
21 some indication of whether we're going to have

1 hours and hours of cross-examination of

2 Mr. Mitchell tomorrow?

3 MR. MOWATT: I don't expect to be more
4 than 30 minutes tomorrow. In fact, I hope to be
5 less than that. The witness has taken longer to go
6 through material than I anticipated, and I
7 apologize for underestimating the time for the
8 Tribunal.

9 PRESIDENT VAN DEN BERG: It's my usual
10 experience you always double lawyers' time
11 estimates; let's put it that way.

12 Is there any other procedural?

13 MR. CROSBY: No further.

14 PRESIDENT VAN DEN BERG: Mr. Perezcano?

15 MR. PEREZCANO: No.

16 PRESIDENT VAN DEN BERG: Then I remind you
17 we have one on your side the corporate chart,
18 Mr. Crosby, and we have still the chronology
19 outstanding, and then dramatis personae. We have
20 three things.

21 MR. CROSBY: We have all of those

1 outstanding, still.

2 PRESIDENT VAN DEN BERG: The piece de
3 resistance, if I may call it that way, is the
4 tentative list of issues.

5 MR. CROSBY: We have received that.

6 PRESIDENT VAN DEN BERG: If the Tribunal
7 could receive the comments tomorrow, we would very
8 much appreciate it.

9 Thank you. We see you tomorrow at 9:00.

10 (Whereupon, at 6:00 p.m., the hearing was
11 adjourned until 9:00 a.m. the following day.)

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1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RDR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.

11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

16

17

DAVID A. KASDAN, RDR-CRR

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