

NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES  
AND THE  
NORTH AMERICAN FREE TRADE AGREEMENT

INTERNATIONAL THUNDERBIRD GAMING CORPORATION

Claimant

versus

THE UNITED MEXICAN STATES

Respondent

POST-HEARING BRIEF  
OF CLAIMANT  
INTERNATIONAL THUNDERBIRD GAMING CORPORATION

2 August 2004

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1 **Preliminary Issues**

2 **A. Thunderbird Organizational Charts.**

3 At the hearing, the Tribunal requested complete organizational charts for International  
4 Thunderbird Gaming Corporation (“Thunderbird”) referencing the EDM entities. Claimant believes it  
5 completed that task at the hearing but the transcript is unclear on the point. Accordingly, attached hereto  
6 are organizational charts for Thunderbird referencing the various EDM entities.

7 **B. Reference to Success Fee in Thunderbird Evidentiary Showing.**

8 \_\_\_\_\_At the hearing, Respondent United States of Mexico (“Mexico”) requested from Claimant  
9 specific references in the record to the success fee paid to lawyers who negotiated with the Mexican  
10 government for issuance of the August 15, 2002 SEGOB opinion letter. The Matamoros success fee is  
11 referenced in the declaration of Booker T. Copeland III filed in support of the PSoC. That declaration  
12 refers to Exhibit 86-D as a “summary document of the success fees and buy-out arrangements that were  
13 paid or are otherwise owed to various attorneys and consultants that were obligations of EDM  
14 Matamoros”. The payment of the success fee was also reflected in the internal financials provided in  
15 Exhibit 86-D. Finally, the success fee is noted in the Notes to Combined Financial Statements, Note (6)  
16 Deferred Charges, of the December 31, 2001 KPMG Audit included in Thunderbird’s evidentiary  
17 showing as Exhibit 90-B

18 **C. Additional Evidence from Mexico of Legal Proceedings re Domestic Skill Machine**  
19 **Operators.**\_\_\_\_\_

20 During the Hearing, the Tribunal provided the Respondent with one last opportunity to submit  
21 evidence in support of its claim that all of the domestic firms currently operating skill games in Mexico  
22 are only operating under the protection of temporary amparo orders that are “pending appeal” [*Hearing*  
23 *Transcript, pages 985-986*]. This argument was made by the Respondent after its original claim that  
24 no skill gaming facilities were open in Mexico became untenable to sustain.

25 As described in more detail in Section 8 below, Respondent has still failed to provide the  
26 necessary evidence, whether documentary or testimonial, to substantiate either of these allegations.  
27 With its final delivery of three documents earlier this month, Respondent was unable to cure this crucial  
28 flaw in its case. The new evidence does not establish that all of the skill game facilities claimed to be

1 closed in Mexico are actually closed, or that all of the facilities claimed to be open only pursuant to a  
2 temporary *amparo* order (in conjunction with an ongoing case) are actually open on such seemingly  
3 tenuous grounds. The simple truth is that Mexico has not met its evidentiary burden with respect to the  
4 status of competing skill game operations in Mexico. Having been unable to meet its burden, the  
5 national treatment arguments which such evidence was supposed to buttress must fail.

6 **D. Whether *Estoppel* Applies to Bar the Claimant from Bringing a NAFTA Claim.**

7 The President of the Tribunal posed a question to counsel at page 1209 of the Transcript  
8 concerning the doctrine of *estoppel*. The President wanted to know whether the Claimant could be  
9 estopped from bringing a NAFTA claim because it had made a prior choice to abandon domestic  
10 dispute settlement in favor of international dispute settlement.

11 The answer is no. In international law, *estoppel* is applied in cases of detrimental reliance on a  
12 specific commitment; not when a potential avenue of redress is thoughtfully foregone. The Claimant  
13 chose to frame its claim for arbitrary treatment under NAFTA Chapter 11, rather than seeking further  
14 recourse under domestic law. It was entitled to make that choice pursuant to NAFTA Article 1121 and  
15 the customary international law practice of waiving all other claims in favor of international arbitration.

16 In the *Serbian Loans* case, the Permanent Court of International Justice held that even where  
17 there had been a failure on the part of a bondholder to protest against debt payments made in an  
18 undesirable currency for fourteen years, it was nonetheless not estopped from pursuing its claim before  
19 the Court. This case is completely analogous to the question posed by the President. As the Court  
20 stated:

21 There has been no clear and unequivocal representation by the bond holders upon which  
22 the debtor State was entitled to rely and has relied. There has been no change in position  
23 on the part of the debtor State. The Serbian debt remains as it was originally incurred;  
the only action taken by the debtor state has been to pay less than the amount owing  
under the terms of the loan contracts.<sup>1</sup>

24 Similarly, because the Claimant gave no specific assurances to Mexico that it was ever satisfied  
25 with the treatment it received at the hands of officials such as Guadalupe Vargas, there can be no  
26 reliance on Mexico's part and therefore no *estoppel*.

27 \_\_\_\_\_  
28 <sup>1</sup> PCIJ Reports, Series A, Nos. 20-21, Judgment No. 14 (1929) at 37-39.

1 **General Issues**

2 **1. What is the applicable law for resolving each of the Issues mentioned below?**

3 The applicable law for resolving *all* issues presented in this arbitration consists of the claimed  
4 provisions of Section A of NAFTA Chapter 11 and the applicable rules of international law.  
5 Interpretation of the NAFTA Chapter 11 provisions at issue should be undertaken in accordance with  
6 the applicable rules of international law and in light of the objectives of the NAFTA and its governing  
7 principles. Those governing principles are specified in Article 102 as transparency, national treatment  
8 and most-favored-nation treatment.

9 Claimant and Respondent do not disagree as to the applicable law for the issues presented in this  
10 arbitration. See Particularized Statement of Claim of Claimant International Thunderbird Gaming  
11 Corporation (“PSoC”), pages 35–38, and the Statement of Defense (“SoD”), page 4.

12 **2. Which of the Parties has the burden of proof for each of the Issues mentioned below?**

13 Claimant has the legal *burden of proof* upon its claims under the applicable rules of international  
14 law. Conversely, Respondent has the legal burden of proof upon any affirmative defenses raised.  
15 Separate and distinct from these well-established overall legal burdens is the *burden of producing*  
16 *evidence* which shifts upon a sufficient evidentiary showing. Respondent, in its SoD, and Canada, in  
17 its Article 1128 Submission, confuse the *burden of proof* with the separate and distinct *burden of*  
18 *producing evidence*. [SoD, para. 202, and para’s. 19 – 20 of Canada’s Article 1128 Submission.]

19 A claimant responsible for meeting a legal burden of proof upon a claim must first produce  
20 evidence upon each element of its claim sufficient to establish a *prima facie* showing on that claim. If  
21 claimant fails to make a *prima facie* evidentiary showing on each and all of the required elements of  
22 its claim, it fails upon that claim and the responding party bears no burden to produce evidence. If the  
23 claimant makes a *prima facie* evidentiary showing on each and all of the required elements of its claim,  
24 the burden shifts to the responding party to produce evidence necessary to rebut the facts established  
25 by the claimant. For example, while it is the responsibility of Claimant to prove that it received less  
26 favourable treatment than a comparable investor under Article 1102, once Claimant has made its *prima*  
27 *facie* evidentiary showing of less favourable treatment, the burden shifts to Respondent to produce  
28 evidence to rebut that evidentiary showing and prove why claimant is wrong.

1 In this arbitration, Mexico has failed to meet its *burden of producing evidence* to rebut  
2 Thunderbird's *prima facie* showing of NAFTA Treaty violations.<sup>2</sup> Thunderbird submitted substantial  
3 evidence in support of its NAFTA claims. Thunderbird submitted numerous detailed declarations from  
4 the individuals principally involved in all of the facts and circumstances of this case and thousands of  
5 pages of documents and records. It presented additional relevant testimony at the time of hearing.  
6 Thunderbird accordingly made its *prima facie* showing of NAFTA treaty violations. The burden then  
7 shifted to Mexico to rebut Thunderbird's evidentiary showing.

8 In its SoD and at the hearing, Mexico did not sustain that burden. Mexico presented little  
9 evidence refuting the principal factual elements of Thunderbird's claim. In fact, essentially all of the  
10 material factual elements of Thunderbird's case are either admitted or left un-rebutted by Mexico's  
11 defense. At pages 96 through 116 of the SoD, Mexico presented a paragraph-by-paragraph response to  
12 Thunderbird's Statement of Facts set forth at pages 3 through 34 of the PSoC. This response showed  
13 that little of the evidence presented by Thunderbird was actually rebutted by Mexico. Substantial  
14 portions of Thunderbird's Statement of Facts were admitted by Mexico. Other portions were generally  
15 denied but not contradicted with rebutting evidence. Mexico had the burden to *produce evidence* to  
16 rebut Thunderbird's *prima facie* evidentiary showing – not simply to issue unsubstantiated denials of  
17 that showing.

18 Thunderbird's claim centers largely around three events: (1) issuance of the August 15, 2001  
19 opinion letter addressing EDM's proposed skill machine operations; (2) the February, 2001 closure of  
20 the Nuevo Laredo facility by Guadalupe Vargas; and, (3) the July 10, 2001 administrative hearing  
21 before Guadalupe Vargas leading to final closure all of the EDM facilities. Thunderbird's evidentiary  
22 showing on these events is largely admitted or left uncontradicted by Mexico.

23 As to facts surrounding the August 15, 2000 opinion letter, Mexico admits that the August 3,  
24 2000 *solicitud* was a formal request to Mexico concerning proposed skill machine operations and that  
25 the *solicitud* notified Mexico of EDM's intention to operate 2000 machines at various locations in  
26 Mexico.*[SoD, Pages 105-106.]* Mexico admits that August 3, 2000 *solicitud* was a direct request to  
27

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28 <sup>2</sup> This failure to rebut on Mexico's part is addressed at length at pages 6 through 9 of the Statement of Reply ("SoR")

1 the Director General of Gobernacion for official opinion that the identified machines were not  
2 prohibited by Mexican law [SoD, Page 106]. Mexico admits that on August 15, 2000, Gobernacion  
3 issued the official opinion letter and that it was signed by the official in charge at the highest level of  
4 the Mexican government with direct authority over gaming [SoD, Page 106]. In its SoD and at the  
5 hearing, Mexico made a considerable effort to parse the words of that letter and reformulate its  
6 meaning. But Mexico does not dispute that the letter was solicited from the appropriate Mexican  
7 authorities; that it was solicited with respect to the proposed operation of identified skill machines; that  
8 it was solicited and issued as an official opinion from SEGOB determining that the identified machines  
9 were not prohibited by Mexican law and setting forth an operating standard for Thunderbird skill  
10 machines; and that it was issued by the Mexican official with direct authority over such activities.  
11 Finally, Mexico does not dispute the text of the August 15, 2000 opinion letter offered as evidence.

12 In both its SoD and SoRej, and at the hearing, Mexico attempted to argue that the Mexican  
13 government officials who issued and/or signed the letter were confused or misled and therefore that  
14 the official letter could not be the basis for Thunderbird's detrimental reliance. But *argument* is all that  
15 Mexico provided on this point. Mexico did not meet its *burden of producing evidence* to support its  
16 claims. It did not produce one witness, nor any documentation, to prove that the officials who issued  
17 and/or signed the letter were, *as a matter of fact*, confused or misled by Thunderbird. Mexico's failure  
18 to produce evidence from its own government officials should be viewed as an admission that its  
19 assertions and arguments on this issue are made without any factual basis.

20 As to the February, 2001 closure of the Nuevo Laredo facility, Mexico admitted that Guadalupe  
21 Vargas personally closed the facility after conducting a "visual inspection" of the operation [SoD, Para.  
22 415.]. Mexico presented no evidence that Guadalupe Vargas had the requisite knowledge to discern  
23 the operational differences between skill machines and traditional slot machines. In fact, there is no  
24 evidence that *anybody* on behalf of Mexico *ever* undertook to critically analyze operation of EDM's  
25 skill machines. Even Professor Rose, Mexico's gaming expert at the hearing, conceded that he never  
26 actually saw, operated or analyzed EDM's skill machines even though Mexico has had possession and  
27 control of those machines for almost three years [Transcript, 747:7 – 748:16]. When asked by the  
28 Tribunal President to explain his opinions as to the nature of the EDM machines, Professor Rose

1 conceded that he could not provide a reliable opinion without actually playing the machines.

2 *PRESIDENT VAN DEN BERG:*

3 *You said, when I saw the machines, I was nearly convinced that they were slot machines.*

4 *THE WITNESS:*

5 *And as I said--*

6 *PRESIDENT VAN DEN BERG:*

7 *Why is that that you came to that conclusion, because of the features of the machine? And you haven't looked into the machines because you think to get to the conclusion, you have to open up the machine to see what's in it?*

8 *THE WITNESS:*

9 *Actually, today, it doesn't help much to open up the machine because what you find inside is a computer board and computer chips, so physically looking at it doesn't give you very much information, unless it's one of the old style reels, three mechanical reels.*

10 *I obviously have not played the machine myself or seen it, but--and you can't tell what the percentage is by the payout amount. That was testified to yesterday, and I want to make it clear that simply because it pays on a pair of tens or more or pair of dwarfs or mind cards, whatever they are or more doesn't tell you anything because you don't know how often they're programmed to come up. We don't know if this is a design to accurately simulate a deck of cards.*

14 *But the, machines in every feature that they have look identical to the slot machines that you find in casinos. **But, unless you played them, you don't know what they are.** [Transcript, 782:8 – 783:16; emphasis added]*

16 As to the July 10, 2001 administrative hearing, Mexico did not rebut Thunderbird's factual  
17 assertions that it presented Guadalupe Vargas with various forms of evidence attesting to the legality  
18 of the EDM skill machines [SoD, page 116]. Mexico does not dispute that evidence included  
19 declarations and testimony from various experts [SoD, pages 115-116]. Mexico admits that all of  
20 Thunderbird's evidence presented at the hearing was excluded because it was allegedly provided in  
21 photostatic copy form as opposed to original documents [SoD, page 121].<sup>3</sup> Mexico even admits that  
22 declarations provided by Thunderbird/EDM at the hearing were excluded because they were offered in  
23 English and because they were offered by employees of Thunderbird [SoD, page 121]. Significantly,  
24 Mexico also offered no evidence addressing the following factual assertion:

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26 <sup>3</sup>The factual assertion that Thunderbird and EDM presented anything other than original documents at the hearing is simply  
27 false. Original documents were provided [Velasco, para. 18; Watson, para. 39]. Further, participants at the hearing on  
28 Thunderbird's part recalled no issue over the admissibility and consideration of Thunderbird's evidence [Watson, para. 39;  
Velasco, para. 18]. Mexico has not presented any evidence in these proceedings to the contrary. Mr. Alcantara, a participant  
in the July 10, 2001 hearing, did not dispute these facts in his witness statement or at the hearing in this matter.



1 Further, there is no evidence cited in the administrative findings and order that the  
2 machines were any different than those specifically identified in, or operated in any  
3 manner different from that described in, the original August 3 solicitud in response to  
4 which the August 15 official opinion letter was issued. [SoD, Page 121]

5 In defense of Thunderbird's NAFTA claims, Mexico submitted evidence from only two  
6 percipient witnesses: Barragan and Alcantara. In his declaration, Alcantara addresses the administrative  
7 and legal efforts undertaken by the Mexican government with respect to Thunderbird's EDM  
8 operations. Alcantara's testimony at the hearing simply reiterated those efforts. The declaration of  
9 Barragan describes the interiors of the EDM facilities as seen during inspections in November, 2003  
10 and authenticates certain damage graphics. Neither these declarations nor Alcantara's hearing testimony  
11 even attempted to meet or rebut Thunderbird's factual showing.

12 Thunderbird addressed the absence of rebutting evidence in its opening statement at the hearing:

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

15 *We believe that, on the evidence before the Tribunal, it's largely uncontradicted. The*  
16 *August 3 solicitud, the issuance of the August 15th letter, the opening of the three*  
17 *facilities, the efforts to open the other three facilities, the formation of the six EDM*  
18 *entities, the initial closure of Nuevo Laredo by Mr. Guadalupe Vargas, the opening of*  
19 *Nuevo Laredo per the agreement with Mexico, the July 10 hearing, and there is some*  
*dispute about what happened there, but that's largely uncontradicted as well; the*  
*issuance of the October 10 order, and the final closures of the EDM entities. We believe*  
*that these critical elements of our claim are largely undisputed and uncontradicted.*

20 *Thunderbird has presented numerous--I mean, there are voluminous witness statements*  
21 *from essentially all of the parties involved; all the principal players on our side of the*  
22 *case have presented testimony to this Tribunal. We have provided complete*  
23 *documentation of our financial transactions as they related to the EDM entities, not*  
*only in summary form, but also in source form. I'm sure that the Tribunal has seen the*  
*production that we made in support of the submission. It's essentially all of our*  
*documentation on the financial aspects of these entities.*

24 *In contrast, Mexico presents witness testimony from essentially one participant, one*  
25 *percipient witness to the events at the time. That's Mr. Alcantara, and that testimony in*  
26 *both of his witness statements is general in nature and really distinct to a few issues.*  
27 *What we believe is rather glaring, and I think in large part is what this whole issue is*  
28 *about or this whole argument is about is the inability of the absence of any witness*  
*testimony or direct testimony from any of the principal players on Mexico's side. There*  
*is no testimony from any of the individuals involved in the EDM entities and Mexico's*  
*treatment of the EDM entities either from the prior Mexican administration or the*  
*present Mexican administration. There is no witness statement and no testimony from*  
*Mr. Antunano, the signatory to the August 15th letter. There is no witness testimony*

1 from Mr. Orozco Aceves, the government official over whom's signature and over  
2 whom's authority the August 15<sup>th</sup> letter was issued and signed. There is no witness  
3 testimony from Mr. Guadalupe Vargas, the principal protagonist on the other side of  
4 this case, and the individual who took the actions to shut down our facilities.  
5 There is no witness statement from Mr. Aguilar Coronado, the signatory to the October  
6 10 order which caused the final seizure and closure of our facilities.

7  
8 There is no witness statement or testimony from Cabeza de Vaca. There is no witness  
9 statement or testimony from Mr. La Bastida. We view this as a glaring lack of evidence,  
10 and in our view, in the absence of that evidence, substantial portions of Mexico's case  
11 are simply argument in the absence of supporting evidence, and this absence of  
12 testimony and this absence of evidence is particularly telling in the arguments  
13 surrounding the August 15th letter.

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

24  
25 But there is not one shred of evidence offered on that issue, offered directly on that  
26 issue, much less any witness statements from the government officials who created,  
27 drafted, negotiated, issued that letter. There is no evidence whatsoever, and again I  
28 invite the Tribunal's scrutiny of the evidence. There is no evidence whatsoever that  
Mexico was misled or misunderstood exactly what Thunderbird and the EDM entities  
intended to do.

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

In our view, this is a gaping and fatal hole in Mexico's evidentiary defense on the  
detrimental reliance case.

[Hearing Transcript, pages 21 through 27]

The parties have submitted their claims and defenses. They have made their evidentiary  
showings. The hearing is over. Mexico's failure to produce rebutting evidence is a gaping and fatal hole  
in its defense of Thunderbird's NAFTA claims. Thunderbird's arguments concerning the failure of  
Mexico to meet its *burden of producing evidence*, set forth both in Thunderbird's SoR and in its  
comments opening the hearing, remain accurate and beyond dispute.

**Jurisdiction and/or Admissibility**

3. **Does Claimant “own or control directly or indirectly” at the relevant times any of the companies listed below (the “EDM Companies”) that would entitle it to submit to arbitration a claim on behalf of them under Article 1117 NAFTA? If not, what are the consequences thereof?**

At page 39 of the PSoC and pages 22 – 28 of the SoR, Thunderbird addressed application of NAFTA Article 1117 in these proceedings. Article 1117 permits an investor to bring a claim on behalf of its investment enterprises, even though they are legal persons of the host state. As Professor Acconci writes at pages 152-153 of her article on the link between an investor and its corporate investment, the use of provisions such as Article 1117 has become a common trend in investment protection treaties.<sup>4</sup>

Article 1117 provides four ways in which an investor can bring a claim on behalf of an investment enterprise established in the territory of another NAFTA Party:

- (1) One may “own” the enterprise “directly”;
- (2) One may “own” the enterprise “indirectly”;
- (3) One may “control” the enterprise “directly”; or,
- (4) One may “control” the enterprise “indirectly.”

Ownership: Under customary international law, “ownership” of an enterprise is generally acknowledged to require proof of share ownership greater than 50%. Indirect ownership involves ownership through a conglomeration of corporations or through beneficial ownership. Direct ownership is self-explanatory. Proving ownership is a simple matter of effectively connecting the dots with documentary evidence of ownership.

It is undisputed that at all relevant times, Thunderbird directly owned, and still owns, all outstanding shares of Entertainmens de Mexico Puebla (“EDM-Puebla”), Entertainmens de Mexico Monterey (“EDM-Monterey”), Entertainmens de Mexico Juarez (“EDM-Juarez”). [*Atallah declaration in support of PSoC, paras. 38 -46; PSoC Exhibit Nos. 48-50, 52-53, 55-57; Also, see Thunderbird Organizational Charts attached hereto as Exhibit “A”*]

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<sup>4</sup>P. Acconci, “Determining the Internationally Relevant Link between a State and a Corporate Investor” 5 (2004) *Journal of World Investment & Trade* 139.

1 While it at all relevant times owned, and still owns, significant interests in Entertainmens de  
2 Mexico, S. de R. L. de C.V. (“EDM-Matamoros”), Entertainmens de Mexico Laredo S. de R. L. de  
3 C.V. (“EDM-Laredo”), and Entertainmens de Mexico-Reynosa S. de R. L. de C.V. (“EDM-Reynosa”),  
4 Thunderbird has never claimed full ownership of those EDMs, whether direct or indirect. [Atallah dec.  
5 in support of PsoC, paras. 21-30, Exhibits Nos. 2, 11, 12, 13, 14, 27, 28, 29, 31, 34, 35 39, 42, 43, 45;  
6 PSoC, page 39; SoR, pages 22-28; Also, see Thunderbird Organizational Charts attached hereto as  
7 Exhibit “A”]

8 Control: Thunderbird confirms that it has at all relevant times possessed, and still possesses,  
9 control of EDM-Matamoros, EDM-Laredo and EDM-Reynosa. [PsoC, page 39, lines 8-12; SoR, page  
10 22, line 11 through page 28, line22; Atallah declaration in support of PSoc, paras. 15 -42; PSoC  
11 Exhibit Nos. 11-14, 27-29, 31, 34-35, 37, 39, 42-45, 48-50, 52-53, 55-57; Declarations of Monaldo,  
12 Watson, Berger, Aquilino De Le Guardia, Bennett, Carlos De La Guardia, Harari, Girault, Rudd, ,  
13 Snow, Strunz, McDonald and Sawin filed in support of SoR. ] Whether that control is characterized as  
14 “direct” or “indirect” is not material. The evidence is overwhelming that Thunderbird and its executive  
15 officials maintained complete control over the EDMs. Conversely, there is no evidence that anybody  
16 else ever exercised actual, *de facto* control over the EDMs. In other words, the EDMs were never  
17 “rudderless ships” in wont of direction. That direction obviously came from Thunderbird.

18 Acconci writes that “direct control” is generally construed as requiring evidence of the investor’s  
19 power to make decisions for the enterprise.<sup>5</sup> Such evidence can be seen in corporate documents and it  
20 can be seen in the exercise of such power. Acconci states that proof of control is obviously a matter to  
21 be evaluated on a case by case basis. She also notes, at page 158, that more recent ICSID case law  
22 indicates a preference for using economic criteria to establish proof of control over legal criteria for  
23 making such a determination. Claimant agrees. For example, economic criteria such as the cross-  
24 employment of management staff between investor and investment would be much more useful in  
25 establishing the existence of control than would be legal criteria such as whether a shareholders’  
26 agreement exists. In this case, however, there is overwhelming evidence of Thunderbird’s *de facto*

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27  
28 <sup>5</sup> Acconci at 154.

1 control over the EDMs – no matter what kind of criteria is employed. There simply is no plausible  
2 alternative investor who could be said to have controlled these EDMs, directly or indirectly.

3 **(a) Entertainmens de Mexico S. de R. L. de C.V. (“EDM-Matamoros”)**

4 At all relevant times Thunderbird owned, and still owns, a significant interest in Entertainmens  
5 de Mexico, S. de R. L. de C.V. (“EDM-Matamoros”). Thunderbird controlled directly and/or indirectly  
6 EDM-Matamoros and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-30,*  
7 *Exhibits No.s 2, 11, 12, 13, 14, 27, 28, 29; Watson dec. in support of SoR, paras 1-5; Berger dec in*  
8 *support of SoR, paras 1-5, de la Guardia dec. in support of SoR, paras 1-5; Bennett, dec. in support*  
9 *of SoR, paras 1-5; Carlos de le Guardia dec. in support of SoR, paras 1-5; Harari dec. in support of*  
10 *SoR, paras 1-5; Girault dec. in support of SoR, paras 1-5; Snow dec. in support of SoR. paras.1-5;*  
11 *Strunz dec. in support of SoR, paras 1-5; McDonald dec. in support of SoR, paras 1-5; Sawin dec. in*  
12 *support of SoR, paras 1-5; Watson Hearing Testimony, 406:16 - 409:1 Also, see Thunderbird*  
13 *Organizational Charts attached hereto as Exhibit “A”].*

14 **(b) Entertainmens de Mexico Laredo S. de R. L. de C.V. (“EDM-Laredo”)**

15 At all relevant times Thunderbird owned, and still owns, a significant interest in Entertainmens  
16 de Mexico Laredo S. de R. L. de C.V. (“EDM-Laredo”). Thunderbird controlled directly and/or  
17 indirectly EDM-Laredo and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-30,*  
18 *31-33; Exhibits Nos. 31, 34, 35; Monaldo dec. in support of SoR, paras 1-10; Bennett, dec. in support*  
19 *of SoR, paras 1-5; Rudd dec. in support of SoR, paras 1-5; Snow dec. in support of SoR. paras.1-5;*  
20 *Sawin dec. in support of SoR, paras 1-5; Watson Hearing Testimony, 406:16 - 409:1; Also, see*  
21 *Thunderbird Organizational Charts attached hereto as Exhibit “A”].*

22 **(c) Entertainmens de Mexico Reynosa S. de R. L. de C.V. (“EDM-Reynosa”)**

23 At all relevant times Thunderbird owned, and still owns, a significant interest in Entertainmens  
24 de Mexico Reynosa S. de R. L. de C.V. (“EDM-Reynosa”). Thunderbird controlled directly and/or  
25 indirectly EDM-Reynosa and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-30,*  
26 *34-37; Exhibits Nos. 39, 42, 43, 45; Monaldo dec. in support of SoR, paras 1-10; Sawin dec. in support*  
27 *of SoR, paras 1-5; Watson Hearing Testimony, 406:16 - 409:1; Also, see Thunderbird Organizational*  
28 *Charts attached hereto as Exhibit “A”].*

1           **(d) Entertainmens de Mexico Puebla S. de R. L. de C.V. (“EDM-Puebla”)**

2           At all relevant times Thunderbird owned, and still owns, all outstanding shares of Entertainmens  
3 de Mexico Puebla S. de R. L. de C.V. (“EDM-Puebla”). Thunderbird controlled directly and/or  
4 indirectly EDM-Puebla and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-30,*  
5 *38-40; Exhibits Nos. 48-50, 52; Also, see Thunderbird Organizational Charts attached hereto as*  
6 *Exhibit “A”].*

7           **(e) Entertainmens de Mexico Monterrey S. de R. L. de C.V. (“EDM-Monterrey”)**

8           At all relevant times Thunderbird owned, and still owns, all outstanding shares of Entertainmens  
9 de Mexico Monterrey S. de R. L. de C.V. (“EDM-Monterrey”). Thunderbird controlled directly and/or  
10 indirectly EDM-Monterrey and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-*  
11 *30, 41-43; Exhibits Nos. 53, 55, 56; Also, see Thunderbird Organizational Charts attached hereto as*  
12 *Exhibit “A”].*

13           **(f) Entertainmens de Mexico Juarez S. de R. L. de C.V. (“EDM-Juarez”).**

14           At all relevant times Thunderbird owned, and still owns, all outstanding shares of Entertainmens  
15 de Mexico Juarez S. de R. L. de C.V. (“EDM-Juarez”). Thunderbird controlled directly and/or indirectly  
16 EDM-Juarez and all aspects of its operation. *[Atallah dec. in support of PsoC, paras. 21-30, 44-46;*  
17 *Exhibits Nos. 57-60; Also, see Thunderbird Organizational Charts attached hereto as Exhibit “A”].*

18 **4. Does the filing by Claimant of waivers on behalf of EDM-Puebla, EDM-Monterrey and**  
19 **EDM-Juarez on 15 August 2003 comply with the requirements of Article 1121 NAFTA?**  
20 **If not, what are the consequences thereof?**

21           NAFTA Article 1121(2) requires that when an investor makes a claim on behalf of an  
22 investment enterprise, both the investor and the investment enterprise are to respectively consent to the  
23 arbitration and waive their right to initiate or continue proceedings for damages in other judicial or  
24 administrative forums. Article 1121(3) directs that the consent and waiver required under this position  
25 are to be made in writing; that they are to be delivered to the disputing Party; and that they shall be  
26 included in the submission of a claim to arbitration. All of these requirements were satisfied by the  
27 Claimant with its delivery of the waivers for EDM-Puebla, EDM-Monterrey and EDM-Juarez with the  
28 delivery of its PSoC on August 15, 2003.

1 At the April, 2003 Preparatory Hearing, Mexico argued that both the August 1, 2002 “Notice  
2 of Arbitration and Statement of Claim” and the November 11, 2002 “Amended Notice of Arbitration  
3 and Statement of Claim” were not submitted in compliance with the NAFTA requirements, did not  
4 serve to invoke jurisdiction under the NAFTA and did not properly act to initiate the arbitration process.  
5 Mexico argued the claim and amended claim were deficient because they were not sufficiently detailed  
6 and did not include evidence supporting Thunderbird’s right to seek damages under NAFTA Chapter  
7 11. Thunderbird, on the other hand, argued that the documents complied with the requirements for a  
8 “Statement of Claim” under the UNCITRAL Rules.

9 The Tribunal resolved this dispute by suggesting that Claimant submit a new and fully-  
10 particularized statement of claim. *[Transcript, Page 94-97]* Mexico agreed with that approach.  
11 *[Transcript, page 97-98]* The Tribunal then ordered the parties to so proceed, despite the initial  
12 objections of claimant. *[Transcript, Page 98-99]*.

13 Thunderbird submitted the PSoC to the Tribunal and to Mexico on August 15, 2003 as per  
14 Procedural Order No. 1 and attached the waiver letters for EDM-Puebla, EDM-Monterrey and EDM-  
15 Juarez which had been inadvertently missing from earlier filings. As of that date, all of the conditions  
16 of Article 1121 were met. There is nothing in the record to suggest that parties, or the Tribunal, intended  
17 that the submission of the PSoC under Procedural Order No. 1 was not to be deemed “the submission  
18 of a claim to arbitration” under Article 1121. Given its arguments during the preliminary hearing, it was  
19 clear that Mexico thought the arbitration was void until that time. Further, upon its receipt of the PSoC  
20 and waiver letters, Mexico gave no indication that compliance with Article 1121 was at issue in this  
21 case. It would be disingenuous for Mexico to now assert that compliance with Article 1121 is an issue  
22 in dispute.<sup>6</sup>

23 Thunderbird has fully complied with Article 1121. Moreover, even if it were assumed solely  
24 for the purposes of argument that the waiver letters were submitted after delivery of the “claim,”  
25 previous NAFTA Tribunals have found that such minor procedural defects cannot be used to defeat an  
26

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27 <sup>6</sup> Moreover, Article 21 of the UNCITRAL Rules requires all pleas as to jurisdiction to be made by the submittal of the  
28 Statement of Defense. Mexico did not raise this particular objection, pertaining to date of delivery of the waiver letters,  
before or with the submission of its SoD.

1 otherwise meritorious claim. Claimant has already referred to one of these authorities at pages 69-70  
2 of its SoR: *Mondev v. USA*. Another example would be the very first NAFTA case, *Ethyl v. Canada*,  
3 where the claimant was found to have “jumped the gun” by filing both its Notice of Intent and its  
4 Statement of Claim before the measure actually came into force as law in Canada. Nonetheless, the  
5 Tribunal dismissed all of Canada’s claims as to jurisdiction.<sup>7</sup>

6 Even more to the point, in *Pope & Talbot v. Canada*, the Tribunal was asked to dismiss the  
7 portion of a claim involving one of the relevant investment enterprises because the waiver letter was  
8 not served until approximately two years after the statement of claim had been served.<sup>8</sup> The *Pope &*  
9 *Talbot* Tribunal agreed with the *Ethyl* Tribunal that the submission of a claim to arbitration results in  
10 a constructive waiver of recourse to all related or analogous legal proceedings which would – *per force*  
11 – be broader in scope than the waiver required under Article 1121. Because a failure to provide such  
12 a waiver could only prejudice the interests of the investor, the Tribunal concluded, at paragraphs 6-17  
13 of its order, that “... there would be no good reason to make the execution of the investor’s waiver a  
14 precondition of a valid claim for arbitration.”

## 15 Merits – General

### 16 **5.1 Does Chapter Eleven of NAFTA recognize and protect the right of a Contracting** 17 **Party to regulate a certain conduct that it considers illegal?**

18 NAFTA Chapter 11 establishes the levels of treatment that the NAFTA parties have agreed to  
19 honor in their treatment of investors and investments. It also establishes that when such obligations  
20 are not honored, a claim for compensation stemming from offending government conduct can be made.  
21 NAFTA Parties are accordingly entitled to act in whatever manner they choose, so long as they do not  
22 breach the obligations contained within Chapter 11 in the process (or so long as they are willing to pay  
23 compensation when they do).

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26 <sup>7</sup> The Tribunal instead chose to order the claimant to pay the costs of the jurisdictional proceeding, which was deemed to  
27 have been otherwise unnecessary, but for the claimant’s having “jumped the gun” in filing both its Notice of Intent and its  
28 Statement of Claim and waivers out of sequence. *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL Tribunal, Award on  
Jurisdiction (24 June 1998) at 90-91.

<sup>8</sup> *Pope & Talbot v. Canada*, NAFTA/UNCITRAL Tribunal, Order re: “Harmac Motion” (4 February 2000).



1 As demonstrated in the text of Article 1114, governments are entitled to label and regulate any  
2 conduct they choose as being “illegal” for domestic purposes. However, NAFTA Parties cannot exercise  
3 the right to regulate as a prop for protectionism, bad faith, discrimination, or any other motive or action  
4 that violates its international obligations. The only question for a NAFTA tribunal is whether the  
5 NAFTA party has carried out its regulatory activities in a manner that does not violate its Chapter 11  
6 obligations. It is no defense to a NAFTA claim to say that domestic law justifies the State behavior in  
7 question..

8 **5.2 If so, does the Ley Federal de Juegos y Sorteos of 31 December 1947 form part of**  
9 **Mexico’s law to regulate a certain conduct that it considers illegal, and what are**  
10 **the consequences thereof?**

11 The Ley Federal de Juegos y Sorteos of 31 December 1947 law constitutes a “measure” under  
12 NAFTA Chapter 11, as do the various forms of enforcement activity arising from it (from the granting  
13 of official or unofficial dispensations to the closure of facilities to administrative proceedings held to  
14 make determinations relevant for its application). These “measures” must be developed and employed  
15 in a manner consistent with Mexico’s obligations under NAFTA Chapter 11.

16 **5.3 What is the role and jurisdiction of the Tribunal in relation to the Mexican judicial**  
17 **system regarding the subject matter of Claimant’s claims in the present case?**

18 This Tribunal has no role in relation to the Mexican judicial system regarding the subject matter  
19 of this case. It does not stand as a domestic court of appeal or review. As with any NAFTA tribunal,  
20 this Tribunal must simply determine whether the measures framed by the Claimant have been developed  
21 or executed in a manner inconsistent with Mexico’s NAFTA Chapter 11 obligations. The only evidence  
22 provided by the Claimant pertaining to the Mexican Court system was its showing that Thunderbird’s  
23 leadership pursued the NAFTA option only after it was determined that the local courts would not  
24 adequately safeguard their interests or compensate them for their losses [*Transcript 236-238. 421-425,*  
25 *426-428 & 429-434*]. Thunderbird has not claimed damages for being denied justice before a Mexican  
26 court, which is the only limited context within which a municipal court decision could be the subject  
27 of a NAFTA claim (such as the cases of *Loewen & Loewen Corp. v. U.S.A.* or *Mondev v. U.S.A.*, where  
28 judicial outcomes were directly challenged as measures in and of themselves).

1           **5.4    If and to what extent do administrative proceedings of SEGOB form part of Issue**  
2                           **5.3?**

3           The *ad hoc* administrative proceeding chaired by Guadalupe Vargas was not a judicial  
4 proceeding. Rather, it had the character of an administrative fact finding or quasi-judicial proceeding,  
5 which should be adjudged against standards of due process and procedural fairness expected of similar  
6 bodies operating locally or internationally. In other words, the relative unfairness of the Vargas hearing  
7 and the surrounding events should be tested against the standards applicable to administrative officials,  
8 rather than true judicial officials. This conclusion is supported by the Final Award in *Waste*  
9 *Management II*, where the Tribunal took pains to differentiate between the Article 1105 standards  
10 applicable where a normal measure is at issue versus when a court decision is at issue:

11                           . . . the [Loewen] tribunal held that, where the minimum standards of  
12 international law in question in a particular case are raised in respect of  
13 a claim of judicial action - that is, a denial of justice - what matters is  
the system of justice and not any individual decision in the course of  
proceedings.<sup>9</sup>

14           Claimant has established that the Vargas hearing and surrounding events fell far below any  
15 acceptable standard for administrative or quasi-judicial decision-making, much less the standards  
16 applicable to members of the judiciary. [*PSoC, pages 17-29, 85-98 and the evidence cited therein; SoR,*  
17 *pages 13-17 and 57-63 and the evidence cited therein; Hearing Transcripts, pages 141-142.]<sup>10</sup>*

18           There is nothing in the evidentiary record which would suggest that the Vargas hearing could  
19 be characterized as being “judicial.” The outcome of the hearing – albeit a foregone conclusion – was  
20 used to justify acts of harassment and closure at the facilities of each operating EDM. Following upon  
21 these closures, court action was initially taken by the investor and its EDMs – until it became apparent  
22 that such action would be futile. Had the Vargas hearing been part of the judicial process, there would

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25 <sup>9</sup> *Loewen II*, Final Award, t para’s. 95-97.

26 <sup>10</sup> Also relevant to this point is witness Alcantara’s failure to address, in any significant respect, the Vargas hearing in his  
27 declaration or in his hearing testimony. Alcantara was present at the Vargas hearing. He did not dispute in any material  
28 respect Thunderbird’s evidence as to the conduct of that hearing. In fact, in its SoD, Mexico, through Alcantara’s declaration,  
misrepresented that Aguilar-Coronado was present and presided over the hearing. At the hearing, Mexico argued that  
Aguilar-Coronado “presided” over but was not “present” at the hearing. Further, evidence indicates that Aguilar-Coronado  
signed the hearing minutes, as if present, at a later date. [*Transcript, pages 628 - 630*]

1 have been no need for the intervening acts of closure and petitions for judicial relief from them. Rather,  
2 one would have gone straight through to some type of formal, statutory appeal.

3 **6. Is the functionality of the machines, technically or otherwise, operated by the EDM**  
4 **Companies relevant in the present case?**

5 The functionality of the machines is relevant in three ways:

6 First, it is relevant in assessing Mexico's justification, or lack thereof, for seizing Thunderbird's  
7 investment enterprises. Specifically, the absence of any evidence that the machines functioned in a  
8 manner inconsistent with the standards set out in the August 15, 2000 SEGOB opinion letter bears upon  
9 Mexico's breach of the Article 1105 "Minimum Standard of Treatment" - based upon theories of  
10 detrimental reliance, administrative due process and abuse of rights.

11 The SEGOB opinion letter did two things: (1) it stated that Thunderbird and its EDMs could  
12 operate the machines it had described in the August 3, 2000 *solicitud* without government regulation  
13 and (2) it defined a standard for the operation of skill machines. Thunderbird addressed this issue in its  
14 opening statement at the hearing as follows:

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

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

22 *But it went further. And the letter attempted to define exactly the operation of skill*  
23 *machines in Mexico, and that is Exhibit 17, and it stated as follows: Quote, In this light,*  
24 *it is important to clarify that, if the machines that your representative exploits operate*  
25 *in the form and conditions stated by you, this government entity is not able to prohibit*  
26 *its use. That's the first thing that this letter did, a direct response to our request.*

27 *Then it goes on. In the understanding that the use of machines known as coin*  
28 *swallowers, token swallowers, or slot machines, which they identified, paraphrasing,*  
*which they identified as potentially prohibited machines, and then they describe how*  
*you tell if you're working with coin swallowers, token swallowers, or slot machines.*  
*They define them. They say that those machines are those in which the principal factor*  
*of operation is luck or gambling and not the user's ability of skillfulness, and then it*  
*proceeds on to indicate that those types of machines, as defined there, could be*  
*prohibited under Mexican law.*

*So, the letter did two things, from our point of view. Said that we could do what we*  
*proposed to do, or said that Mexico could not prohibit us from what we proposed to do.*  
*And it further defined a standard by which we could operate skill machines. And I*

1           *would just point out that that standard set forth in that August 15 letter is consistent*  
2           *with, and if not largely identical to, the declaration of Mr. Maida, Mr. Lozano, and Mr.*  
3           *McDonald, provided to Guadalupe Vargas at the July 10 hearing. It's consistent with*  
4           *what Mr. Carson says, what Mr. Watson say in their declarations provided in these*  
              *proceedings. It's absolutely consistent with what our understanding was at the time that*  
              *we were proceeding with these investments. So, that was deemed to be the standard*  
              *under which we would operate our facilities. [Transcript, pages 31-33]*

5           Mexico never produced evidence indicating that the EDM machines were being operated in  
6 fashion which was contrary to the operating standard established in the August 15, SEGOB opinion  
7 letter. Rather, Mexico merely alleged the non-compliance of skill machines with the laws of various  
8 American states and with the basic prohibition contained within the Ley Federal de Juegos y Sorteos,  
9 failing to mention the authority contained within this legislation to permit gaming activities otherwise  
10 so prohibited [*SoD para 's. 90-94; SoRej para 's. 14-18*]. This lack of evidence bears upon Claimant's  
11 theories of detrimental reliance, denial of justice and abuse of rights.

12           Simply put, Mexico told Thunderbird the manner in which it could operate skill machines in its  
13 opinion letter, which had been specifically solicited by Thunderbird for that purpose. In reliance,  
14 Thunderbird operated its machines consistent with the standards set forth in it. Thereafter, Mexico  
15 arbitrarily seized the EDM facilities claiming the machines were illegal without any evidence that  
16 Thunderbird was acting in a manner inconsistent with the opinion letter. Thus, evidence of the  
17 functioning of the machines in a manner inconsistent with the standard set forth in the opinion letter,  
18 or more precisely, the *absence* of such evidence at time of the seizures and administrative hearing  
19 before Guadalupe Vargas, bears upon and acts to establish an 1105 treaty breach.

20           At the hearing Mexico made a belated attempt, through its expert, to establish that the EDM  
21 machines were not operated in compliance with the August 15 opinion letter; i.e., that the machines  
22 were not “predominately skill.” The effort failed. As set forth above, Professor Rose never operated,  
23 analyzed or played the EDM machines and thus conceded his inability to give a reliable opinion as to  
24 the degree of skill involved without playing the machines (Rose: “. . . unless you played them, you don't  
25 know what they are.”) [*Transcript, page 783*] Conversely, Kevin McDonald, the manufacturer of the  
26 machines and the software chips used therein testified the EDM machines were “predominately skill”  
27 [*Transcript, page 548*]. This issue is thus conclusively established in the evidentiary record. The  
28

1 machines were, as a matter of fact established by the evidence before the Tribunal, skill machines  
2 operated in accordance with the August 15 letter.

3         Assuming for the sake of argument that Mexico had been able to present evidence at the hearing  
4 of non-compliance with the August 15 letter, such evidence would still have been provided three years  
5 too late. The relevant point of inquiry is at the time of the seizures, not three years after the fact and  
6 over a year into a NAFTA proceeding. The fact that Mexico even attempted to present evidence of non-  
7 compliance with the August 15 opinion letter, for the first time, at the hearing in this case underscores  
8 the lack of any justification for the seizure and destruction of Thunderbird’s investment enterprises.  
9 If Mexico was justified in seizing Thunderbird’s skill machine facilities in 1991, without evidence that  
10 the EDMs operated in violation of the August 15 opinion letter, why did it make a belated attempt to  
11 present such evidence at the hearing in this matter three years later?

12         During the Vargas administrative hearing (which was obviously used as a pretense to justify the  
13 closures), Mexican officials never provided the EDMs with the kind of evidence they attempted to  
14 present before this Tribunal. So why does Mexico now attempt to provide such evidence at the hearing  
15 in this case? It does so because Respondent now recognizes that SEGOB officials should have done  
16 so in the first place. It does so because it has no proof that it was ever done in the first place.  
17 Thunderbird operated its machines in strict compliance with the dictates of the August SEGOB opinion  
18 letter and there is no evidence to the contrary. Mexico’s ineffective attempt to use Professor Rose to  
19 manufacture an after-the-fact justification for its improper seizure of the EDM facilities should be  
20 viewed as a continuing breach of its Article 1105 “Minimum Standard of Treatment” obligation.

21         Second, the functionality of the machines is relevant to the issue of detrimental reliance under  
22 Article 1105 in that use of similar equipment was already familiar to Mexican officials – prior to August  
23 15, 2000 – due to their use in facilities already being regulated by Mexico (e.g. the Guardia facilities).  
24 Thunderbird asserted at page 82 of the PSOC and at 65 of the SoR that Mexico must have had  
25 substantial knowledge of the operation of skill machines when it issued the August 15 opinion letter.  
26 In fact, the August 3 *solicitud* referenced to SEGOB the fact that such activities were “already done in  
27 at different locations on the country.” [Ex. C-17]

1 Third, the functionality of the machines is relevant for Article 1102 to the extent that similar  
2 equipment has been, and remains, in use in other facilities while the EDMs remain closed.

3 **6.1 If so, is that question to be determined under the Ley Federal de Juegos y Sorteos of**  
4 **31 December 1947 and/or on some other basis?**

5 The ways in which the functionality of the machines is relevant for the NAFTA case do not  
6 involve a determination of whether the machines are or were compliant with Mexican law. As  
7 acknowledged by both Alcantara and Rose during the merits hearing, the *Ley Federal de Juegos y*  
8 *Sorteos* vested Mexican officials with the discretion necessary to permit the use of equipment involving  
9 chance and betting [*Transcript, pages 931 and 771-772*]. Accordingly, whether the machines were in  
10 compliance with the rudimentary prohibition set out in that same legislation cannot be at issue in this  
11 case.

12 The question of functionality is material to whether the EDMs were entitled to reasonably rely  
13 upon the SEGOB letter of August 15, 2000 and whether other domestic operators received more  
14 favorable treatment by being permitted to operate similar machines while the EDMs were not. The  
15 relevant “standards” are those found in NAFTA Articles 1102, 1105 and 1110, and in the applicable  
16 rules of international law. That Mexico has failed to provide a more transparent and functional set of  
17 domestic standards for gaming machines merely set the stage for how and why the relevant NAFTA  
18 standards were breached.

19 **6.2 If so, by whom should that question be determined? In particular, is the Tribunal to defer**  
20 **to the determination by SEGOB? And if so, was that opinion relevant for the dispute: (a)**  
21 **before 15 August 2000; (b) between 15 August 2000 and 10 October 2001; and/or ©) after**  
22 **10 October 2001?**

23 The determination of SEGOB concerning the functionality of the machines, at any given time,  
24 is only relevant to the issue of whether any actions taken on the basis of these determinations violates  
25 the relevant NAFTA provisions. The evidence is clear that SEGOB officials did not maintain a constant  
26 determination as to the nature, functionality and legality of the machines during the periods of time  
27 mentioned above. Ambassador Montano clearly articulated this fact in his testimony at the hearing:  
28

1            *ARBITRATOR WALDE: In your statement, it's number eight I'm referring to.*  
2            *You said "I was convinced they were the victims of the first strange in democratic terms*  
3            *in Mexico in 71 years. Are you suggesting that the dispute has arisen out of a change*  
4            *of government, and does this change of government have to do with something with the*  
5            *change of policy? Is that what you're suggesting here?*

6            *THE WITNESS: Yes, I'm suggesting quite clearly that the document issued by*  
7            *Gobernacion in August the previous year, and the person who had signed it was still*  
8            *working for the new administration, but the new person could not explain why with this*  
9            *document those measures were taken.*

10            *I'm talking about the Director for Government Mr. Orozco did not understand*  
11            *why one his subordinates but with whom there was no control relationship had decided*  
12            *to close these facilities.*

13            *So, I think there was a contradiction between what had been said by*  
14            *Gobernacion on the one administration and what the Gobernacion people were saying*  
15            *under a different administration. [Hearing Transcript, page 150-151]*

16            Application of NAFTA standards to these facts requires no display of “deference” to these  
17            determinations. They are merely evidence to be considered in application of the relevant NAFTA tests.

18            **6.3 Assuming that the question is to be determined by the Tribunal, what are the relevant**  
19            **criteria for such a determination? Specifically:**

20            **(a) Were the machines in question skill machines or slot machines?**

21            The only criteria relevant in this proceeding is the standard set forth in the August 15, 2000  
22            SEGOB opinion letter; i.e., whether the “principal factor of the operation is luck or gambling and not  
23            the user’s ability of skillfulness.” Further, such criteria is only relevant to determining whether Mexico  
24            possessed and demonstrated evidence of non-compliance with the SEGOB opinion when it seized  
25            Thunderbird’s investments. The parties agree that it is not for this Tribunal to analyze and independently  
26            determine whether the EDM skill machines were legal or illegal under Mexican law. Mexico has not  
27            posited that issue for determination in these proceedings. That would not be the proper function of a  
28            NAFTA Tribunal under these circumstances. It is respectfully asserted that the Tribunal’s role, as  
29            clearly articulated in Chapter 11, is to decide, based upon the facts before it, whether Mexico breached  
30            its NAFTA obligations in the manner in which it treated Thunderbird’s investments. This includes  
31            determining (1) whether domestic investors have been treated better than Thunderbird’s EDM  
32            investments; (2) whether Thunderbird’s EDM investments have been accorded fair and equitable

1 treatment; (3) whether Thunderbird reasonably relied, to its detriment, on government assurances; and  
2 (4) whether compensation is owed by Mexico for expropriation of Thunderbird’s EDM investments.

3 **(b) Is there a “uniqueness for Mexico,” as is contended by Claimant, and if so, is it**  
4 **relevant for such determination?**

5 Yes. The machines and, more specifically, the chips that run the machines, were manufactured  
6 specifically for the Mexican market [*McDonald Dec. In support of SoR, para. 10*]. However, the  
7 factual issue of “uniqueness” is not relevant to the case. It does not bear upon any issue of Treaty  
8 breach. It was raised in response to the unsubstantiated claim made by Mexico that Thunderbird  
9 somehow brought machines into Mexico that were illegal in other jurisdictions. The false implication  
10 was that Thunderbird “dumped” illegal machines into the Mexican market. Thunderbird countered this  
11 false and outrageous claim with evidence that machines from other jurisdictions had not been brought  
12 into Mexico and that EDM machines, and more specifically the chips in those machines, were  
13 manufactured for Mexico.

14 Further, Even if such an allegation had been proved, it would still be unclear what bearing this  
15 factual point could have on the issues before the Tribunal. The law of other jurisdictions has no direct  
16 bearing upon the operation of skill machines in Mexico by Thunderbird in accordance with the August  
17 15 SEGOB letter. Professor Rose made this point clear in his testimony:

18 *Q. Professor Rose, looking at your declaration filed in this case, is it your opinion*  
19 *and general position that the introduction of a skill-stop feature into a gaming*  
*device does not make it a lawful gaming device?*

20 *A. Whether something is lawful or not depends on the law of the jurisdiction, so*  
21 *there is no way to know unless you know the law of the jurisdiction.*

22 [*Transcript page 733-734; emphasis added*]

23 In this regard, it must also be recalled that Professor Rose was not a Mexican-trained lawyer and  
24 admitted that he was not an expert on the *Ley Federal de Juegos y Sorteos* or Mexican gaming law  
25 [*Transcript page 735*].



1 **6.4 Assuming that the question is to be determined by the Tribunal and in light of the answer**  
2 **to Issue 6.3, did the machines in question meet the applicable criteria?**

3 Yes. Moreover, the machines were conclusively established, as a matter fact established by the  
4 evidence before the Tribunal, to be “skill machines” operated in accordance with the August 15 letter.  
5 The only evidence presented on this issue by Mexico was the opinion of Professor Rose. Professor Rose  
6 never operated, analyzed or played the EDM machines and he conceded his inability to give an opinion  
7 as to the degree of skill involved without playing the machines (Rose: “. . . unless you played them, you  
8 don't know what they are”) [Transcript, page 783]. Conversely, Kevin McDonald, the manufacturer  
9 of the machines and the software chips used therein testified the EDM machines were “predominately  
10 skill”. [Transcript, page 548]

11 **7.1 If and to what extent is a legitimate expectation legally relevant under Article 1102, 1105**  
12 **and/or 1110 NAFTA?**

13 Legitimate expectations are relevant to the application of Article 1105 because the governmental  
14 acts of creating and then frustrating legitimate expectations violate the international law principle of  
15 good faith and the customary international law standard of fair and equitable treatment.

16 Legitimate expectations are relevant to the application of Article 1110 because it is arguable that  
17 compensation should not be paid for regulatory takings where it can be established that the  
18 investor/investment never enjoyed a vested right in the business activity which was subsequently  
19 prohibited. It is the right to enjoy the benefits of such activity that is recognized by the payment of  
20 compensation for the potential value derived from such right.

21 Legitimate expectations are also relevant to the application of Article 1102. Mexico has never  
22 disputed that under Mexican law the author of a *solicitud* is entitled to rely upon the answer it receives  
23 from government officials. Thunderbird and the EDMs were entitled to “treatment no less favorable”  
24 than that provided to all other petitioners who have made *solicitud* applications to Mexican officials and  
25 subsequently relied upon the answers received without experiencing any loss or damage. By failing to  
26 honour the terms of the August 15, 2001 letter, Mexico breached Article 1102 in relation to the more  
27 favorable manner in which all other *solicitud* petitioners in Mexico have been treated. This is because  
28 Mexico never denied that its law provides individuals with a right to rely on government advice

1 obtained through such official solicitations [See: Ex. C-3 para 6; PSoC pages 9-11 & SoD pages 105-  
2 106].

### 3 **7.2 What are the standards for a legitimate expectation in that respect?**

4 Thunderbird articulates the content of the standard of protection for legitimate expectations at  
5 pages 77-79 of the PSoC and at pages 54-56 of the SoR.

6 Through its ratification of the NAFTA, Mexico authored a set of legitimate expectations upon  
7 which an investor or investment could reasonably rely. It promised full protection and security and fair  
8 and equitable treatment to all investors who chose to invest in Mexico, or maintain their investments  
9 in Mexico, as of January 1, 1994. It promised to provide treatment no less favorable to  
10 investors/investment than that received by comparable businesses and it promised not to expropriate  
11 investments without the payment of full, prompt and effective compensation. It committed to do so in  
12 order to “increase substantially investment opportunities...” in its territory and to “promote conditions  
13 of fair competition in the free trade area.”<sup>11</sup>

14 The Tribunal in *Occidental Exploration and Production Company v. The Republic of Ecuador*<sup>12</sup>  
15 recently summarized the means by which legitimate expectations are generated by the ratification of  
16 a trade or investment treaty, stating:

17 Although fair and equitable treatment is not defined by the Treaty, the Preamble clearly  
18 records the agreement of the parties that such treatment “is desirable in order to maintain  
19 a stable framework for investment and maximum effective utilization of economic  
20 resources.” The stability of the legal and business framework is thus an essential  
21 element of fair and equitable treatment.

22 ...

23 Various arbitral tribunals have recently insisted on the need for this stability. The  
24 Tribunal in *Metalclad* held that the Respondent “failed to ensure a transparent and  
25 predictable framework for Metalclad’s business planning and investment. The totality  
26 of these circumstances demonstrate a lack of orderly process and timely disposition in  
27 relation to an investor of a Party acting in the expectation that it would be treated fairly  
28 and justly...” Also the Tribunal in *Técnicas Medioambientales*, as recalled by the  
29 Claimant, has held:

30 It is quite clear from the record of this case and from the events discussed in this  
31 Final Award that such requirements were not met by Ecuador. Moreover, this

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32 <sup>11</sup> NAFTA Article 102(1).

33 <sup>12</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, LCIA/UNCITRAL Tribunal  
(Case No. UN 3467) (July 1, 2004). Available at: <http://www.asil.org/ilib/OEPC-Ecuador.pdf> (visited 26 July 2004).

1 is an objective requirement that does not depend on whether the Respondent has  
2 proceeded in good faith or not.<sup>13</sup>

3 The *Occidental* Tribunal also noted that while these legitimate expectations are encouraged by  
4 the ratification of trade and investment treaties, they must be honored as a matter of the customary  
5 international law minimum standard of treatment (regardless of whether a “fair and equitable treatment”  
6 provision is contained within a particular treaty). It stated:

7 The Tribunal is of the opinion that in the instant case the Treaty standard is not different  
8 from that required under international law concerning both the stability and  
9 predictability of the legal and business framework of the investment. To this extent the  
10 Treaty standard can be equated with that under international law as evidenced by the  
11 opinions of the various tribunals cited above. It is also quite evident that the  
12 Respondent’s treatment of the investment falls below such standards.

13 The relevant question for international law in this discussion is not whether there is an  
14 obligation to refund VAT, which is the point on which the parties have argued most  
15 intensely, but rather the legal and business framework meets requirements of stability  
16 and predictability under international law. It was earlier concluded that there is not a  
17 VAT refund obligation under international law, except in the specific case of the *Andean*  
18 *Community* law... but there is certainly an obligation not to alter the legal and business  
19 environment in which the investment has been made. In this case it is the latter question  
20 that triggers a treatment that is not fair and equitable.<sup>14</sup>

21 In the case before this Tribunal, not only is the general obligation to provide a consistent, fair  
22 and reliable environment for investment at issue; the actions of Mexican officials - which generated a  
23 more specific obligation upon which the EDMs reasonably relied to their detriment - are also at issue.  
24 In responding to the Claimants’ *solicitud* with a statement of “negative permission,” Mexican officials  
25 generated another expectation upon which the EDMs should have been able to reasonably rely. It would  
26 be inequitable for Mexico to be permitted to escape responsibility for the issuance of this letter, either  
27 by misrepresenting the circumstances that led to its issuance or by implying that the letter was prepared  
28 negligently, by containing less-than-ideal, or otherwise equivocal, language. Such sharp practice is  
prohibited under the general international law principle of good faith and the customary international  
standard of fair and equitable treatment.

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<sup>13</sup> *Ibid.*, at at para’s. 183-186.

<sup>14</sup> *Ibid.*, at para’s. 190-191.

1 **7.3 What is the meaning and legal status of the SEGOB letter of 15 August 2000, and what is**  
2 **the relevance thereof?**

3 The August 15, 2002 SEGOB opinion letter did two things. First, it granted Thunderbird what  
4 the Tribunal identified as “negative clearance” to operate the specific machines identified in the August  
5 3, 2000 *solicitud*. Second, it defined a standard in accordance with which Thunderbird could operate  
6 skill machines without regulation by the government. The standard defined was that the machines had  
7 to be ones in which the “principal factor” of operation was the user’s skill and ability [*Ex.C-18*].

8 As to the legal status of the August 15, 2000 letter, Claimant has never asserted that it obtained  
9 a government permit, license or other species of formal authorization to operate with the letter.  
10 Nonetheless, Mexico has still argued that SEGOB did not provide the EDMs with a “license” through  
11 the issuance of the August 15, 2000 letter [*SoD, Para’s.7, 132 & 165*]. Use of terms such as  
12 “approval” by the parties is largely a matter of semantics. In the August 15, 2000 letter, Mexico advised  
13 Thunderbird/EDM that its intended operations were not prohibited by Mexican law and defined a  
14 standard by which the EDMs could operate skill machines. In light of the clearly-stated desire of  
15 Thunderbird/EDM to proceed with the intended operations, a responsive statement by the government  
16 that it could not prohibit the investment and a statement of the standard to be applied in the operation  
17 of such machines could hardly be deemed as anything other than an approval of action consistent with  
18 the standards set forth in the August 15<sup>th</sup> letter.

19 Whether the letter is characterized as an “approval” or a “government assurance”, there can be  
20 little doubt that it was intended by Mexico, and understood by Thunderbird, to be a statement by the  
21 Government of Mexico that the intended investment was not prohibited and could go forward without  
22 threat of government restriction or regulation. As noted above, that Vargas would conduct a hearing that  
23 completely ignored the question of whether Thunderbird was in compliance with the standards  
24 contained within the opinion letter is evidence of a lack of good faith in administration.

25 **7.4 Did EDM fail to disclose relevant facts, in particular in its solicitud of 3 August 2000, as**  
26 **it is alleged by Respondent, and if so, what is the relevance thereof?**

27 No. There is absolutely no evidence in the record that supports Respondent’s *post facto* legal  
28 arguments that its officials were misled. Mexico could have provided such evidence with ease - by

1 simply providing direct testimony from one of those officials. Further, there is evidence that the  
2 SEGOB officials who issued the letter must have been familiar with the skill machines whose operation  
3 was proposed by the EDMs.

4 Mexico has repeatedly implied in its submissions that its officials issued the letter without  
5 sufficient understanding the operation of the machines and/or that they were misled by Thunderbird.  
6 Respondent plainly bears the burden of producing evidence on this point. The logical, if not the only,  
7 way to factually establish this assertion would have been to present testimony from the individuals who  
8 issued the letter to the effect that they did so without adequate information or that they were misled into  
9 issuing the letter. Mexico did not produce such evidence.

10 More importantly, evidence that “negative clearance” might have been issued negligently by  
11 confused or ignorant officials would be of little assistance to Respondent’s case. The EDMs were  
12 entitled to rely upon the permission granted in that letter, in good faith, regardless of why the officials  
13 decided to offer it. Respondent has argued that the EDMs acted in bad faith - by apparently lying to  
14 SEGOB officials about the nature of the machines they planned to operate - without providing a scintilla  
15 of direct evidence. International tribunals are naturally reluctant to make findings of bad faith unless  
16 it is absolutely necessary to do so, requiring strong evidence before acting. In this case, Respondent has  
17 audaciously sought such a finding from this Tribunal, without actually offering any direct evidence to  
18 prove it.

19 Instead of supporting such unsupportable allegations, the evidence in the record establishes how  
20 Mexico officials must have known exactly what they were doing when they issued the August 15  
21 opinion letter. First, Mexico had been involved in litigation with Guardia over the operation of skill  
22 machines immediately prior to the time SEGOB issued the August 15 letter [*Watson, para 7; Mitchell,*  
23 *para 11*]. Neither Thunderbird’s understanding at the time nor the fact of Guardia’s prior litigation  
24 leading to issuance of an amparo are factually disputed by Mexico [*SoD, Pages 98 through 99*]. In fact,  
25 at the hearing Mexico affirmatively represented that there had been extensive litigation concerning skill  
26 machines operations and committed to providing the Tribunal with copies of those court proceedings.  
27 Mr. Alcantara testified to enforcement activities and litigation going back as far as 1998. [*Transcript,*  
28

1 *page 852-853*]. Given this evidence, it must be presumed SEGOB officials had knowledge of the  
2 exact nature and operation of the machines proposed for use by the EDMs.

3 Second, there were no requests for additional information from the officials. There is no  
4 evidence that SEGOB sought, much less required, additional information to respond to August 3, 2000  
5 *solicitud*. Contrast this lack of apparent concern by SEGOB officials over Thunderbird's *solicitud*  
6 against the SEGOB response attorney Carlos Gomez two months later, when he requested permission  
7 from Gobernacion and the Department of Interior on behalf of a client other than claimant to operate  
8 skill machines. The Gobernacion response was written by the very same individual who signed the  
9 August 15, 2000 letter to Thunderbird. It requested specific information about the machines to be  
10 utilized from Lic. Gomez, including make and model numbers, methods of operation, and other detailed  
11 information [*Gomez, paras. 3, 4, 5; Ex. 93*]. This was the *exact same information* provided by  
12 Thunderbird in its August 3, 2000 *solicitud*. It was the exact same information upon which  
13 Gobernacion officials relied to opine that SEGOB did not have the authority to prohibit the use of these  
14 machines. Both of these cases demonstrate the kind of information that Gobernacion sought, and relied  
15 upon, in making its regulatory decisions about the use of skill machines. If Gobernacion had required  
16 more information, there would be evidence of it asking for such information. There is none - because  
17 they clearly knew what they were doing when the letter was issued.

18 Third, the letter itself provides a clear indication that the involved officials had knowledge of  
19 skill machines. As set forth above, the August 15 SEGOB letter did not just provide clearance to  
20 Thunderbird to operate the identified machines, it also served to set a standard for the future operation  
21 of skill machines by Thunderbird, which would eventually number 2000 throughout Mexico. The fact  
22 that SEGOB acted to set a standard for the machines based upon the predominance of skill in their  
23 operation indicates knowledge on SEGOB's part of the nature and operation of skill machines.

24 Fourth, in a later meeting with Peter Watson, former SEGOB Secretary Francisco La Bastida -  
25 who was a very influential figure in Mexican government and politics at the time - acknowledged that  
26 he was aware of the *solicitud* and of the August 15, 2000 response. La Bastida stated that since there  
27 was already a successful skill operation in Mexico and a precedential court case, the August 15, 2000  
28 letter was an appropriate response to the *solicitud*. [*Watson, para. 16*]

1 Fifth, the unfettered operation of skill machines at Matamoros for six months until the new  
2 administration came into power provides perhaps the best evidence that Thunderbird and the prior  
3 administration were in agreement as to exactly what the EDMs could and could not do vis-à-vis  
4 operation of the skill machines.

5 That SEGOB failed to provide a more transparent letter of approval on August 15, 2000, or that  
6 SEGOB apparently changed its mind about the kinds of machines which would be allowed - or perhaps  
7 only the nationality of the people who would be permitted to operate them - does not detract from the  
8 simple fact that these officials must have known what they were doing when they provided Thunderbird  
9 with the authorization necessary to proceed with the business it had so recently proposed.

10 **7.5 What are the consequences of the answers to the foregoing Issues 7.1 - 7.4?**

11 Mexico has failed to honor both the general and the specific expectations upon which the  
12 Claimants reasonably relied – not only in initially establishing the EDM investments, but also in  
13 operating and taking steps to expand them to a total of 2000 machines in six different facilities. In  
14 ratifying the NAFTA, Mexico effectively promised all potential and existing investors that it would  
15 provide a fair, transparent and consistent regulatory regime to them – which in this case clearly was not  
16 provided. This failure includes Mexico’s apparent inability to provide the security that comes from  
17 knowing that a professional and unbiased bureaucracy is capable of regulating in a coherent and rational  
18 manner when asked to do so.

19 In issuing the SEGOB letter of 15 August 2000, Mexico provided the Claimant with assurances  
20 upon which it reasonably relied to its detriment. Thunderbird and its EDMs were entitled to rely upon  
21 the professionalism of SEGOB officials; they were entitled to believe that those officials must have felt  
22 comfortable enough to issue assurances upon which their business model was based; and they were  
23 entitled to proceed with that business when given clearance to do so. There is absolutely no evidence  
24 on the record that SEGOB officials were anything less than completely satisfied with the information  
25 they received prior to issuing the assurances upon which Thunderbird and the EDMs relied.

26 There is no evidence the SEGOB officials were not familiar with the machines which were the  
27 subject of the EDMs’ *solicitud*. The only available contemporaneous evidence is that they had been  
28 involved in the regulation of domestic companies using similar – if not identical – machines. Claimant

1 has clearly met its burden in establishing that permission was sought from the appropriate officials and  
2 that those officials issued assurances to the Claimants, in the form of “negative permission.” Mexico  
3 has clearly failed to provide any evidence to the contrary, for example: by simply providing this  
4 Tribunal with a witness statement from any of the officials involved in considering the application or  
5 issuing the August 15, 2000 letter.

6 **Merits – Articles 1102, 1105 and 1110 NAFTA**

7 **8.1 Which of the following tests as postulated by the disputing parties is the test to be applied**  
8 **under Article 1102 NAFTA? Specifically:**

9 **(a) As it is contended by Claimant, is the Tribunal to apply a three-part test, being: (I)**  
10 **identification of the relevant subjects of the national treatment comparison (the**  
11 **basis being the likeliness of comparators); (ii) consideration of the relative**  
12 **treatment received by each comparator (the basis being the best level of treatment**  
13 **available to any other domestic investor operating in like circumstances); and (iii)**  
14 **consideration whether factors exist which could justify any difference in treatment**  
15 **so found (to be construed narrowly and the burden of proof shifting to**  
16 **Respondent)?**

17 Claimants’ argument as to the appropriate test of national treatment can be found at pages 41  
18 through 52 of the PSoC; pages 45 through 49 of the SoR; and, pages 51 through 56, 1051 through  
19 1055, 1066 through 1067, 1087 through 1099 of the Transcript. Contrary to the arguments of Canada  
20 and Mexico, investment treaty tribunals have thus far demonstrated remarkable consistency in applying  
21 the test advocated by the Claimant. Relevant examples include: *Pope & Talbot v. Canada*;<sup>15</sup> *U.S.A. –*

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26  
27 <sup>15</sup> Where the class of comparators was defined as those engaged in the production of softwood lumber; the more treatment  
28 was defined as entitled to ship lumber “fee-free” across the Canada-US border; and the justification for differential treatment  
was based upon the fact that certain members of the industry (including the claimant) were targeted by the USA for trade  
remedy actions whereas those receiving better treatment were not similarly targeted.



1 *Cross Border Trucking*;<sup>16</sup> *S.D. Myers v. Canada*;<sup>17</sup> *Group ADF v. U.S.A.*;<sup>18</sup> *Feldman v. Mexico*;<sup>19</sup> and  
2 most recently the UNCITRAL Tribunal in *Occidental Chemicals v. Ecuador*.<sup>20</sup>

3 **(b) Or, as it is contended by Respondent, is the Tribunal to apply Article 1102 in the**  
4 **sense that it is directed only to nationality-based discrimination and proscribes**  
5 **only demonstrable and significant indications of bias and prejudice on the basis on**  
6 **nationality, which are to be proven by Claimant, “the like circumstances” of**  
7 **Article 1102 requiring an adequate comparison on the basis of the facts, thereby**  
8 **taking into account, in particular, compliance with local law relating to illegal**  
9 **conduct?**

10 The Respondent’s test actually represents the customary international law prohibition against  
11 discrimination that is subsumed in the minimum standard of treatment included in Article 1105.<sup>21</sup> No  
12 known investment treaty tribunal has found that such a test applies to a national treatment or MFN  
13  
14

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15  
16 <sup>16</sup> Where the class of comparators was defined as those interested in providing truck transportation services in portions of  
17 the U.S.A. outside of a special border zone; the more favourable treatment was the entitled to be considered for the requisite  
18 trucking licenses; and the justification that Mexican firms could be excluded *en masse* from the licensing process because  
19 of their allegedly poor reputation for environmental compliance was rejected as unfounded and more restrictive than  
20 necessary.

21 <sup>17</sup> Where the class of comparators was defined as those businesses desiring to offer PCB destruction services in Canada; the  
22 more favourable treatment was the ability to provide such services unhindered by a hastily-imposed border ban; and the  
23 justification that Canadian officials would be unable to ensure the environmentally appropriate destruction of Canadian  
24 wastes if they were permitted to cross borders was rejected as baseless and designed to offer cover for what was obviously  
25 the discriminatory intent of the Minister of the Environment, who forced her officials to adopt a course of action which they  
26 advised her was not in keeping with Canada’s international obligations.

27 <sup>18</sup> Where the class of comparators was defined as those firms engaged in structural steel fabrication for large-scale  
28 construction projects; and the Tribunal concluded that the claimant had failed to prove how it had received less favourable  
treatment than its US-based competitors.

<sup>19</sup> Where the class of comparators was defined as firms engaged in the importation and sale of cigarettes; the more favourable  
treatment was defined both by the existence of a less-stringent enforcement process for local competitors and the entitlement  
of those domestic competitors to tax rebates withheld from the claimant during the same periods – despite the fact that the  
Tribunal concluded the claimant was not otherwise entitled to those rebates, either as a matter of domestic or international  
law (under a theory of legitimate expectation). No justification for the difference in treatment was offered by Mexico and  
a Majority of the Tribunal concluded that such failure was determinative of the case, because the Claimant has met its burden  
of establishing a *prima facie* case of less favourable treatment as between it and relevant comparators.

<sup>20</sup> Where the class of comparators was defined as all exporters seeking entitlement to tax rebates; the more favourable  
treatment was entitlement to those rebates denied to the claimant; and no justification for the difference in treatment was  
apparently offered or accepted.

<sup>21</sup> T. Weiler, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York:  
Transnational, 2004) at 40-41.

1 treatment provision such as Article 1102. By contrast, the tribunals in *Pope & Talbot*; *Feldman*; and  
2 (most recently) *Occidental Chemicals* explicitly rejected such a test.<sup>22</sup>

3 **8.2 On the basis of the test to be applied, did Respondent actually breach Article 1102?**

4 **Specifically, and to the extent relevant under the test to be applied:**

- 5 **(a) Does the fact that Guardia and de la Torre are allegedly operating machines**  
6 **essentially identical to the machines operated by the closed EDM Companies mean**  
7 **that Respondent has not accorded to the EDM Companies treatment no less**  
8 **favourable than that it accords, in the like circumstances, to its own investors**  
9 **under Article 1102?**

10 Yes. In its PSoC, Thunderbird argued that Mexico breached the “National Treatment” standard  
11 as follows:

12 Application of the Article 1102 “National Treatment” standard is simple and  
13 straightforward under the facts of this case. Thunderbird’s EDM enterprises  
14 were seized and closed because of the machines the facilities were utilizing.  
15 Mexico asserted Thunderbird’s skill machines were illegal “cash slot machines”  
16 [Ex. 70]. Yet, domestic investors were, and are, open and operating essentially  
17 identical machines at locations in Mexico. Mexico breached its 1102 obligation  
18 of failing to provide claimant and its investments with treatment no less  
19 favorable than it provided to these domestic investors. [PSoC, page 52]

17 Thunderbird then identified Guardia’s “Club 21” in Mexico City and the Reflejos skill machine  
18 facilities as appropriate comparators. Mexico did not ever really dispute that these operations were  
19 inappropriate comparators, on a *prima facie* basis of operating the same machines for the same business  
20 in the same territory.

21 Respondent’s original reply argument was based on the premise that no such competitors  
22 existed, because all but one were apparently closed down [SoD, para. 205]. This argument was proved  
23 false by the Claimant through its evidentiary showing. As of the date of the SoR and still as of the date  
24 of the date of the hearing, numerous skill machines facilities of domestic investors remained, and still

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25  
26 <sup>22</sup> *Occidental v. Ecuador, infra*, where, at para. 172, the Respondent is reported as having argued that there could be no  
27 breach of a national treatment obligation in the absence of discriminatory intent. At 177, the Tribunal accepted that there  
28 was no intent to discriminate against the claimant in this case, and that officials were dispatching the less favorable treatment  
in a very “professional” and good faith manner. Nonetheless, at para. 179 the Tribunal concluded that the very fact that other  
taxpayers received a rebate that was withheld from the investment constituted a breach of the obligation to provide treatment  
no less favourable under the treaty. Lack of direct evidence of discriminatory intent was simply not relevant.

1 remain, open and operating. [*Sor, pages 18 through 20; Jesus de la Rosa Buenrostro Dec. filed in*  
2 *support of the SoR; Gilberto Vazquez Cuevas dec. filed in support of SoR, paras. VI, VII; Notary*  
3 *Declaration re Reflejos in Rio Bravo filed in support of SoR; [C. P. Luis Arredondo Cepeda Y Torres*  
4 *dec. filed in support of SoR, para VII; Gomez Hearing Testimony. Transcript, pages 9-19].*

5 Having failed in its attempt to claim that none of the EDMs' competitors were still open and  
6 operating, in its SoRej Respondent retreated to the position that in every circumstance where a skill  
7 machine operator remained open, it was doing so with a temporary amparo order, allowing it to remain  
8 open for an impliedly short time pending the resolution of some kind of judicial process [*SoRej, para 's.*  
9 *101-116].* Thus, Mexico argued that the EDMs were not in "like circumstances" with the domestic  
10 operators who remained open because those operators "have filed appeals against the closures and some  
11 have obtained a temporary injunction to continue in business, at least on a temporary basis, while their  
12 court appeals are pending" [*SoRej, paras. 101-116].* These open facilities "have been granted  
13 injunctive relief as a precautionary measure while their appeals are pending" [*SoRej, paras. 133].*  
14 According to Mexico, "EDM is not in like circumstances to other facilities that have been granted  
15 injunctions that temporarily suspended the closure orders" [*SoRej, paras. 134].*

16 As described below, Thunderbird disputes that this is an adequate legal basis to claim "unlike  
17 circumstances," especially in light of the fact Mexico had - and still has - the ability to allow the EDMs  
18 to remain open as a similarly "cautionary" measure, pending final resolution of these allegedly ongoing  
19 pieces of litigation concerning the use of the same machines. The simple question of whether Mexico  
20 had accorded Thunderbird and its EDMs less favorable treatment than its own investors can be stated  
21 as follows:

22 The bottom line, under Article 1102, is that some local Mexican businesses,  
23 operating in like circumstances, are open today while Thunderbird's EDMs are  
24 not. Mexico has provided no valid explanation – such as a claim that these  
businesses are using different gaming equipment and software – to justify this  
difference in treatment. [*SoR, Page 46]*

25 Thunderbird asserts that Mexico's argument is an invalid justification for the less favorable  
26 treatment it has accorded to Thunderbird and its EDM operations. But, before the Tribunal can even  
27 begin to consider this kind of argument, it must determine whether Mexico has offered a sufficient  
28 evidentiary basis upon which argument would be based. Because Mexico is offering a defense to

1 Thunderbird's *prima facie* case, it bears the burden of providing enough evidence upon which to find  
2 the facts necessary to make its claim. Mexico did not provide such proof at the hearing and it has failed  
3 to do so afterward, despite having been given one last chance to do so.

4 **Guardia – “Club 21” in Mexico City.**

5 In its PSoC, Thunderbird established that Guardia has long been operating, and continues to  
6 operate, skill machine facilities at several locations in Mexico and that he is operating visibly and  
7 apparently under the apparent protection of the Mexican law [*Watson, para. 4, 7, 57; Velasco, para.*  
8 *25; Montano, para.19; Luz A. Armas Sawin, para. 4,5, 6, 7; Sawin, para. 8; Dec. of Cepeda y Torres;*  
9 *Gomez, paras. 28-30, 72-73; Ex. 82-85, 94*]. Throughout Thunderbird's initial development and  
10 operation of its enterprises; throughout the period of seizures and legal challenges; throughout the  
11 present NAFTA proceedings; and up to the present time, Guardia has continued, and still continues, to  
12 operate these skill machine facilities in Mexico - with no end in sight.

13 Eyewitness testimony established that Guardia was operating skill machines several years ago,  
14 several months ago, and up to several weeks prior to the PSoC [*Watson, para. 4, 7, 57; Velasco, para.*  
15 *25; Montano, para.19; Luz A. Armas Sawin, para. 4,5, 6, 7; Sawin, para. 8; Dec. of Cepeda y Torres;*  
16 *Gomez, paras. 28-30, 72-73; Ex. 82-85, 94*]. There is also no doubt that Guardia was and is operating  
17 skill machines substantially similar, if not identical, to the machines once operated by the EDMs [*Luz*  
18 *A. Armas Sawin, para. 4,5, 6, 7; Sawin, para. 8; Dec. of Cepeda y Torres; Ex. 82-85*]. For example,  
19 as of the PSoC, Guardia's “Club 21” located in Mexico City remained open and operating with as many  
20 as 70 machines which accepted U.S. dollars and pay out dollars as prizes [*Reply-C. P. Luis Arredondo*  
21 *Cepeda Y Torres, para VII*].

22 Further, as of the PSoC, Club 21 and other Guardia skill machine facilities had remained open  
23 and operating in a very public fashion. In a Mexican publication, Mileno, Guardia, referred to in the  
24 article as “Lord of the Casinos”, spoke of his “nationwide betting centres” operating “machines of skill  
25 and ability”. Guardia further spoke of a favorable ruling from the Supreme Court of Justice that allows  
26 him to operate “skill machines” without problems. The article featured color photographs of rows of  
27 skill machines in a Guardia facility [*Ex. C-97*].

1 In its SoD, Mexico argued that Club 21 had been closed but was open and operating under a  
2 “suspension of the act [of closure] and that CPD had appealed the judgment” [SoD, para. 176]. In its  
3 SoR, Thunderbird re-established that Club 21 remained open and operating [SoR. Page 19; Reply-C.  
4 P. Luis Arredondo Cepeda Y Torres, para VII].

5 And at the hearing, Mr. Alcantara addressed the fact that Club 21 remained open as follows:

6 *Q. Could you describe the status of each of these actions, the current status, the  
7 most recent status of these actions in connection with each one of these  
8 facilities?*

9 *A. Yes, of course. If the Tribunal allows me to do so, I would like to add something.  
10 I know about all these facilities because amparo proceedings are assessed by  
11 me. Club 21 the first one here, is a facility operated in the State of Mexico very  
12 close to the City of Mexico. This was one of the facilities operated by Jose  
13 Maria Guardia. “Máquinas tragadolares” (Slot machines) prohibited by the  
14 law of gaming and sweepstakes were installed in Club 21. In this case  
15 specifically in connection with this facility in the State of Mexico, in the  
16 Interlomas Commercial Center, Mr. Guardia was able to operate this facility  
17 because a legal concept under amparo called the suspension of claimed  
18 actions. **This means that the courts stop the action being challenged - in this  
19 case the closing-, and allows the negotiation to continue operating.***

*In connection with this specifically facility, Mr. Guardia obtained a favorable  
20 judgment of amparo. We know of these judgments, that are issued for effects  
21 “para efectos” meaning that in these cases what happened is that they were  
22 procedural violations, but not substantial or merit violations in the act  
23 performed by the authority.*

*In this specific kind of amparo proceeding, there was no pronouncement by any  
24 authority that qualifies as legal the machines that were being operated here or  
25 the ones that he, in fact, operates right now.*

*[Hearing Transcript, page 855-857, emphasis added]*

26 It was unclear what Mr. Alcantara meant when he said the “suspension” stopped the court and  
27 allowed “the negotiation to continue operating.” It appears that Alcantara was saying that the  
28 suspension allowed Guardia to stay open and negotiations were ongoing as to his continued operations.  
Clearly, the EDMs did not have the benefit of such negotiations.

Upon cross-examination, Alcantara was pressed about Club 21. He testified as follows:

29 *Q. Mr. Alcantara, when did Club 21 first open? And when I mean open, I mean  
30 physically open. People could come in and play.*

31 *A. I wouldn't be able to tell you the exact date because I don't know. Nonetheless,  
32 the illegal activities were detected in the year 2000.*

33 *Q. When did you come into your position in government?*

1 A. *I have been working for Gobernacion for 18 years. The post that I hold today*  
2 *I entered into in the past year, but as Director of Amparo, five years, since*  
3 *approximately 1997.*

3 Q. *So, the first that Gobernacion became aware of Club 21 was in year 2000;*  
4 *correct?*

4 A. *You're making reference to Club 21 in Interlomas in the State of Mexico?*

5 Q. *Yes.*

6 A. *Very well. Not necessarily. At Interlomas I should note that there is also a*  
7 *sport book operating, even though the machines were not noted until 2000.*

8 Q. *And am I correct that Club 21 is still operating skill machines today?*

9 A. *Club 21 has never operated skill machines. Club 21 has operated illegal*  
10 *machines and, in effect, it continues operating illegal machines to this day.*

10 Q. *That's a fair point. Are illegal slot machines being operated in Club 21 today?*

11 A. *Yes.*

12 Q. *From year 2000 to today, has the operation of slot machines at Club 21 been*  
13 *uninterrupted?*

14 A. *No, sir.*

15 Q. *For what period of time was the operation of slot machines at Club 21*  
16 *interrupted?*

17 A. *I should say that the machines ceased operating for a short period, perhaps six*  
18 *months as of the shutdown by Gobernacion, and until the suspension of the*  
19 *amparo was granted to it.*

19 Q. *And during what year did that six months of inactivity occur?*

20 A. *Without being able to say for sure, but perhaps 2000, 2001.*

20 Q. *Just so I understand I will ask you very simply, what is the status of legal*  
21 *proceedings with respect to Club 21 today?*

22 A. *I reiterate the Club 21, the business that operates in the State of Mexico is*  
23 *operating under a suspension of amparo that was granted to it and an amparo*  
24 *of effect, which was granted to it.*

24 Q. *Has there been any subsequent action taken by the government after the*  
25 *issuance of that suspension and that amparo?*

25 A. *That amparo was issued about one month and a half ago, in late February,*  
26 *perhaps. I don't have the exact date. Nonetheless, yes, in effect, Gobernacion*  
27 *has taken note of the actions that the judge, when ruling, noted. And as I*  
28 *explained in response to one of the questions from Mr. Perezcano, an amparo*

1           *para efectos, for effect, does not keep the authority from acting once again. Indeed, the*  
2           *authority must set very clearly the manner in which it will do so, undoubtedly to combat*  
3           *illegal gaming.*

3           ***Q.     How soon will that action be taken?***

4           ***A.     Were it to depend on myself, believe me, it would be right away. The***  
5           ***Secretaria de Gobernacion, through the authority on gaming and lotteries***  
6           ***must review, as I explained a few moments ago, the criminal acts, the criminal***  
7           ***matters that might come about so as to implement an effective action.***

7           ***Q.     I will ask you respectfully again. How soon will that happen?***

8           ***A.     As soon as those actions and strategies allow.***

9           ***Q.     Are those actions and strategies under active discussion today?***

10          ***A.     Of course.***

11          ***Q.     What is your involvement in the discussion of those actions and strategies?***

12          ***A.     None.***

13          ***Q.     And whose decision is it to take action against Club 21 in Mexico City?***

14          ***A.     The government unit of Gobernacion.***

15          ***Q.     When was the last time you received any information from that, the Secretary of***  
16          ***Gobernacion that there was intended action to be taken against Club 21 in***  
17          ***Mexico City?***

18          ***A.     I traveled to Washington last Saturday, and I had an opportunity to discuss***  
19          ***these issues with those authorities on Thursday, of last week.***

20          ***Q.     These have been open and operating for at least two years, based upon your***  
21          ***testimony, uninterrupted; correct?***

22          ***A.     Yes.***

23                   *[Hearing Transcript, pages 877 through 882; emphasis added]*

24           This testimony indicates that Guardia is currently operating Club 21 and that further actions are  
25           being considered by the government *but that none had been taken*. Whether any action would ever be  
26           taken was apparently for the government unit of Gobernacion to decide “as soon as actions and  
27           strategies allow.”

28           In subsequent testimony, Alcantara was asked whether an appeal is pending with respect to the  
29           closure or any legal proceedings concerning Club 21. Alcantara answered as follows:

1           *Yes. In this case, Gobernacion fought the judge's decision to grant an amparo para*  
2           *efectos. That is the ruling that we are awaiting. And of course, that would be what*  
3           *would allow the Secretariat to set the strategies to which I was referring.*

4           But when asked to identify evidence in the record that substantiates the “pending appeal”.  
5           Alcantara could not do so [Transcript pages 883-886]. As noted above, Mexico was given the  
6           opportunity by the Tribunal to submit evidence of the amparo and “pending appeal.” In response,  
7           Mexico has provided a single document, which appears to indicate that Guardia himself has filed an  
8           appeal even though he continues to enjoy *amparo* protection in the meantime.

9           Despite this new evidence, the simple fact is that Guardia has been operating Club 21 in Mexico  
10           uninterrupted for years despite Respondent’s claims that “aggressive action” has been taken to shut his  
11           operations down. He operates with impunity under amparos and the government takes no real action  
12           to stop him. It is important to note that Professor Rose testified that one way governments allow  
13           favored domestic operators to remain open, despite running a putatively “illegal” business, is to ensure  
14           that provisional relief is granted to such operators, while withholding it from others. The operator will  
15           open; the government will take some action; the operator will secure provisional relief and remain open  
16           through “technically illegal.” Proceedings towards final resolution of the alleged dispute will then  
17           stretch on for years while the favored operator remains in business [Transcript page 800]. In this case,  
18           Guardia has been operating Club 21 under an *amparo* order and the government has failed to  
19           demonstrate that it has ever really been serious about taking immediate and decisive action to shut it  
20           down, while demonstrating its ability to do so when foreign competitors are involved.

21           **Guardia - Ciudad Juarez**

22           \_\_\_\_\_ At the hearing, Thunderbird presented evidence that Guardia skill machine facilities were open  
23           and operating with 170 machines at Ciudad Juarez [Transcript pages 708 - 710]. Alcantara initially  
24           asserted that Guardia’s Juarez facility was “not open” [Transcript pages 708 - 710]. He later testified  
25           that he learned that the facility was open from facts expounded by counsel for Mexico at the hearing  
26           [Transcript page 887]. He testified that the Secretary of Gobernacion “understands that it must be  
27           closed” [Transcript page 887]. There was no evidence presented that Juarez was operating under a  
28           grant of provisional relief with an appeal pending. Mexico has again not met its burden to prove the  
          factual predicates for application of its “not in like circumstances” argument.



1 From documents produced after the hearing, it appears that Mexico has now initiated some new  
2 action against Juarez facility. It also appears the facility remains open despite Alcantara’s claims of  
3 “systematic violation of the law” by Guardia immediately stopped by the government whenever  
4 presented [*Hearing Transcript, pages 875*]. Alcantara testified that if Guardia in fact was operating  
5 at Ciudad Juarez, it would amount to the “commission of a felony” [*Hearing Transcript, pages 866*].  
6 Mexico has presented no post-hearing evidence that the Juarez facility has been shut down and/or that  
7 Guardia has been arrested for this alleged crime.

8 In summary, Mexico has failed to provide the necessary evidence to even consider its defenses  
9 to national treatment. But even if one assumes, for the sake of argument, that Mexico could prove its  
10 case, Alcantara admitted during the hearing there is no reason to conclude that these proceedings will  
11 end in the foreseeable future, much less produce the result that he would apparently prefer [*Transcript*  
12 *pages 880 - 881*]. Mexico’s “likeness” argument is based upon the premise that the domestic  
13 regulatory proceedings against people such as Guardia are moving apace, and that they will definitely  
14 deliver a state of parity for all gaming industry members (i.e. closure for everybody). Because the court  
15 processes in which Guardia is engaged do not appear as if they will produce a definitive result any time  
16 soon, it would be folly to rely upon their mere existence in order to justify less favorable treatment for  
17 a foreigner who was unable to obtain as good a result in the local court system as an apparently “well-  
18 connected” local competitor.

19 More to the point, Thunderbird reiterates that it is simply inconceivable that Mexico could rely  
20 upon the mere availability of its court system as an acceptable ground of discrimination against a  
21 foreigner who is entitled, by Treaty right, to select an international remedy in place of a domestic one  
22 for government actions that harm its investments [*SoR, pages 47-49*]. To permit such an argument to  
23 succeed is to read in an exhaustion of local remedies rule that does not exist in the treaty text. To permit  
24 such an argument to succeed would result in an interpretation of Article 1102 that violates the kind of  
25 security promised in the NAFTA preamble, in its objectives listed in Article 102, and the purpose of  
26 Chapter 11 dispute settlement set out in Article 1115.

1           **(b) Are other “skill game” operators that have resorted to local remedies and that have**  
2           **obtained injunctive relief pending a final disposition of the legality of**  
3           **Gobernacion’s closure order against them ‘in like circumstances’ to the EDM**  
4           **companies, as contended by Claimant?**

5           Moreover, even if one accepted, for the sake of argument, that Respondent could rely upon  
6 Thunderbird’s alleged “failure” to fully avail itself of local court remedies as a legitimate reason for  
7 allowing competing facilities to stay open indefinitely, and even if all of the cases which Respondent  
8 claims are before courts were actually before courts and about to be concluded in Mexico’s favor,  
9 Mexico would still be in breach of Article 1102. It would still be in breach because the Respondent has  
10 failed to provide any reasonable justification as to why facilities that it claims are closed - and not  
11 subject to other judicial proceedings - were actually open as recently as one week before the hearing  
12 began. One example of this phenomenon is the Bella Vista facility.

13           **Bella Vista Entertainment Center in Monterey**

14           In its SoR, Thunderbird submitted evidence of a large skill machine facility, known as El Centro  
15 de Entretenimiento Bella Vista, located in Monterey. This is one of the locations where Thunderbird  
16 and its controlled EDM-Monterey were preparing to open a facility (in order to ramp up to the 2000  
17 machines promised and guaranteed through the *solicitud* process). The Bella Vista is located at la  
18 Avenida Jorge del Moral s/n, en la Colonia Lomas del Roble en el Municipio de San Nicolas de los  
19 Garza, Nuevo Leon. The facility was operating at least 426 video skill machines. The entrance to the  
20 center contains the rules of play and specifically states that the customers will be playing “video  
21 machines using the player's skill and ability”. [*Jesus de la Rosa Buenrostro Dec. filed in support of the*  
22 *SoR*].

23           In its SoRej, Mexico asserted the Bella Vista facility was closed. [*SoRej, page 40*], and yet, at  
24 the hearing, Carlos Gomez testified that he had visited the Bella Vista facility one week before the  
25 hearing and that it remained open with 450 skill machnies in one room and another 100 in an adjoining  
26 room. Gomez testified that the machines paid out prizes which could be exchanged for pesos.  
27 [*Transcript pages 713-715*] At the conclusion of Mr. Gomez’s direct examination, counsel for Mexico  
28

1 asserted - without supporting evidence - that “during the last few days, actions have been taken with  
2 regard to some of these establishments”. [Transcript, page 716]

3 The Tribunal advised counsel that it was interested in the Bella Vista facility because it was  
4 identified as “definitely closed” while the other facilities under scrutiny were designated with “appeals  
5 pending” [Transcript, page 716]. The Tribunal continued Mexico’s cross-examination of Mr. Gomez  
6 to later in the day to give Mexico time to secure current information on Bella Vista and the other  
7 facilities [Transcript, pages 717-718]. That afternoon, counsel for Mexico indicated that he had  
8 secured the information he needed and proceeded with cross-examination of Gomez [Transcript page  
9 817]. But, during his cross-examination of Gomez, counsel for Mexico did not address the Bella Vista  
10 facility. [Transcript, pages 819-830].

11 Respondent later called Alberto Alcantara, a government lawyer with authority over the amparo  
12 proceedings [Transcript, pages 850-851]. Alcantara addressed the Bella Vista facility, stating that  
13 because Thunderbird’s pleadings had identified the facility as open, Mexico had taken action  
14 [Transcript pages 868-871]. Mr. Alcantara’s testimony on the action taken is as follows:

15 Q. Mr. Alcantara, I'm going to give you an additional table, a page that was  
16 missing from the document that we distributed a little while ago, pages 37 and  
17 38 of the rejoinder. We are going to refer to the last facility.

18 I'm going to refer to the last facility if the table on page 38. Could you tell us  
19 about the current status of that place.

20 A. Yes, of course. There is a facility called Bellavista Centro de Entretenimiento.  
21 As far as I know, that place used to operate inside a hotel in the State of Nuevo  
22 Leon in northern Mexico. In this place, there were games forbidden by law  
23 detected, and Gobernacion immediately closed down the place. Those who were  
24 operating this facility presented an amparo judgment, and they withdrew it a  
25 little while after they filed it. When I say withdrew it, I'm saying that they  
26 stopped trying for that judgment to continue. They decided that a judge should  
27 not solve this case or decide this case, and by giving up on the case, the closing  
28 became firm, and the facility closed.

29 Q. Mr. Alcantara, the Ministry of Economics as part of this procedure, informed  
30 Gobernacion that because of pleadings presented in this case we found out that  
31 apparently this facility had been operating. Could you tell us about that  
32 situation.

33 A. When the Secretariat of Gobernacion found out what the Secretariat of the  
34 Economy had advised it, it immediately called on an inspector to go to this  
35 facility. Some photographs were taken, which, unfortunately, were not taken  
36 close enough to be able to detect the exact situation how it was found, but

1                   undoubtedly, when I looked at those photographs, I realized that the closing  
2                   seals are still in place, the ones that Gobernacion put in place.

3                   When we received that information from the inspector appointed by  
4                   Gobernacion itself, and in order to have greater clarity about the exact status  
5                   of this facility, we asked for more information, and we are awaiting additional  
6                   information right now.

7                   Q.     A few moments ago we asked Gobernacion at Mexico for those photographs.  
8                   They were sent to us. Mr. President, I would like to show them. Obviously, these  
9                   are new photographs.

10                  PRESIDENT VAN DEN BERG:

11                  Have they been shown to Thunderbird?

12                  MR. PEREZCANO:

13                  No, no, I'm sorry, we just got them a few moments ago.

14                  PRESIDENT VAN DEN BERG:

15                  Would you please first show them to Mr. Crosby.

16                  MR. CROSBY:

17                  May I inquire of the witness one question?

18                  PRESIDENT VAN DEN BERG:

19                  The question is allowed.

20                  BY MR. CROSBY:

21                  Q.     Mr. Alcantara, when were these photographs taken?

22                  A.     These photographs were taken in February of this year.

23                  MR. CROSBY:

24                  No objection.

25                  PRESIDENT VAN DEN BERG:

26                  Mr. Perezcano, please proceed. I will admit them into the record.

27                  BY MR. PEREZCANO:

28                  Q.     Mr. Alcantara, do you have the photographs?

                  A.     Yes, sir.

                  Q.     Are those the pictures you were referring to?

                  A.     Yes, sir.

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*Q. Could you describe us what you can see in them?*

*A. I will repeat that although the photographs don't have the resolution that I would like them to have to have total certainty as to what I would be saying, what I can see is that on the glass doors at the back of these photographs you still see the closing seals that Gobernacion places in every case when it detects games that are forbidden by law.*

*Q. Thank you very much, Mr. Alcantara. [Hearing Transcript, 868 through 870]*

Mr. Alcantara gave no further direct testimony on the Bella Vista facility. The inspector who took the picture from a distance was not called as a witness. There was no explanation as to why better information or evidence was not offered at the hearing relative to the Bella Vista facility. Mexico had been aware of Thunderbird's evidence concerning operation of the Bella Vista facility since the filing of the SoR on February 9, 2004. Yet, it presented no evidence relative to the Bella Vista facility in its SoRej on April 7, 2004. It simply provided the following statement in Footnote 115 without attribution to evidence: "Gobernacion visited the location and verified that the facility remains closed. The facility identified by the Claimant is a different facility located in the same building." Apparently, Mexico thought this unsubstantiated statement would go unchallenged at the hearing. When pressed for evidence at the hearing, counsel for Mexico had to seek information from outside the record through phone calls and faxes from Mexico. The evidence so obtained was the poor photograph taken at least two months before the hearing. There was no explanation as to why Mexico took no more action than taking a photograph of the facility from a distance.

The evidence presents a factual issue for determination by the Tribunal. Was the Bella Vista facility open and operating as of the date of hearing and/or before? Is Mexico's assertion that Bella Vista was closed, based solely upon the admittedly-poor photograph taken two months earlier, credible when considered against the witness statement of Jesus de la Rosa Buenrostro, an uninvolved Mexican Notary, and the hearing testimony of Carlos Gomez? In that regard, it is telling that counsel for Mexico did not seek to cross-examine de la Rosa Buenrostro at the hearing and did not cross-examine Mr. Gomez as to his hearing testimony on the Bella Vista issue?

Thunderbird asserts that Mexico's evidence on this issue is simply not believable. If the Bella Vista facility was in fact closed, Mexico had it within its power to present incontrovertible evidence

1 of that fact in its SoRej and at the hearing. It could have offered statements and hearing testimony from  
2 witnesses to that fact of Bella Vista’s closed status. Mr. Alcantara could himself have visited and  
3 inspected the premises in the two months prior to the hearing and provided testimony on the results of  
4 that visit. Given the critical importance of this factual issue to Mexico’s defense of the Article 1102  
5 “National Treatment” claim, the absence of such stronger and, if Mexico is to be believed, presumably  
6 available evidence casts into serious question Mexico’s claim that the Bella Vista was or is closed.

7 If the Tribunal determines as a matter of fact that the Bella Vista facility was open and operating  
8 as contended by Claimant, then Thunderbird has established a prima facie breach of Article 1102 and  
9 Mexico has failed to rebut that showing with evidence establishing a reasonable and legally-recognized  
10 justification for the less-favorable treatment accorded the Thunderbird EDMs. In fact, it has not even  
11 met its own more dubious standard which would require imposition of a *de facto* exhaustion rule in the  
12 interpretation of Article 1102.

13 Thunderbird has offered evidence that the Bella Vista facility was an appropriate comparator  
14 under Article 1102 analysis [*Jesus de la Rosa Buenrostro Dec. filed in support of the SoR; Hearing*  
15 *transcript, pages 713-715*]. Mexico offers no rebutting evidence on that point. Further, Mexico does  
16 not dispute, and essentially concedes, the assertion that Bella Vista facility and the other identified skill  
17 machine operators are appropriate comparators. Unless this Tribunal believes that the Bella Vista  
18 facility was/is closed when Thunderbird’s witnesses have sworn it was open, a breach of Article 1102  
19 has been established.

### 20 **Reflejos in Rio Bravo and Matamoros**

21 In its SoR, Thunderbird established that the Reflejos skill machine facilities were open and  
22 operating [*Notary Declaration re Reflejos in Rio Bravo filed in support of SoR; Gilberto Vazquez*  
23 *Cuevas dec, filed in support of SoR, paras. VI, VII*]. At the hearing, it was established that the Reflejos  
24 had been operating under *amparo* orders and had closed through no action of the government [*Hearing*  
25 *Transcript, pages 863-865*]. There is no evidence in the record that there were appeals pending against  
26 these companies or that any other type of government action was being taken at the time these facilities  
27 were voluntarily closed.

1 To be sure, however, it must be stressed that before the Tribunal can even consider Mexico's  
2 argument that the Thunderbird EDMs were not in "like circumstances" with the Reflejos operations,  
3 it must determine whether Mexico has provided a sufficient evidentiary basis upon which to even make  
4 the argument. Of the skill machine operators in Mexico scrutinized in these proceedings, only the  
5 Thunderbird EDMs were actually closed by Mexico, and most regulatory activity appeared to be the  
6 direct result of research undertaken by Thunderbird - rather than by the Mexican officials who are  
7 supposed to regulate gaming. Accordingly, it is unsurprising that Thunderbird has already come into  
8 possession of new evidence that even more skill machine operations are open and operating in Northern  
9 Mexico at this time. It is unclear what the legal status of those operations is and what actions, if any,  
10 are being taken by Mexico. It is quite likely that Mexican regulators are officially unaware of any other  
11 them, given their record thus far.

12 **(c) Did SEGOB take action against facilities of the kind of the EDM Companies,**  
13 **including those owned by Guardia and de la Torre, as it is alleged by Respondent,**  
14 **and if so, what is the relevance thereof?**

15 The evidence overwhelmingly demonstrates that the EDMs have been the subject of far more  
16 virulent regulatory attention than other comparable businesses. Other facilities remain open despite  
17 claims by Mr. Alcantara that they are actually closed. Still other facilities remain open indefinitely  
18 under what Mexico claims are only temporary injunctions, despite the fact that Mr. Alcantara says these  
19 injunctions can and should be lifted immediately. Instead, Mr. Alcantara admits that he has no idea  
20 when, or if, the injunctions will ever be lifted – apparently because his SEGOB colleagues do not share  
21 the same zeal that he demonstrated at the hearing

22 Mexico has neither argued, nor provided evidence to support an argument, that the reason it has  
23 failed to regulate every skill game operator equally is for lack of resources. Even if such an argument  
24 were made, Mexico would need to demonstrate the steps it has taken to ensure that its regulatory regime  
25 has not been applied in a *de facto* discriminatory manner. It would need to demonstrate, for example,  
26 why it has not permitted each facility to remain open pending a final appellate court decision or global  
27 legislative solution. It would need to demonstrate that people such as Mr. Vargas demonstrated as much  
28 zeal in "personally" regulating local skill game operators as he did the EDM facilities. It has not done

1 so, leaving no excuse for why the EDMs bore the brunt of confiscatory regulation, while competitors  
2 have remained open relatively unmolested.

3 **(d) What is the relevance, if any, of the fact that EDM abandoned judicial redress in**  
4 **Mexico against the closure of its facilities?**

5 Thunderbird's' decision to abandon recourse to judicial proceedings for extraordinary relief in  
6 Mexico is not relevant to the issue of whether Mexico breached NAFTA Articles 1102, 1105 or 1110  
7 in its treatment of them [see: SoR, pages 47-49]. Thunderbird was entitled to abandon domestic  
8 remedies in favour of NAFTA remedies when it encountered government conduct for which it suffered  
9 loss or damage, and it was obliged to do so within the three-year period provided in Article 1117. The  
10 basic NAFTA test is whether the "measures" in question breach the relevant Chapter 11 standards.  
11 While "measures" have been found to include an outcome of the judicial process,<sup>23</sup> NAFTA tribunals  
12 have already concluded that the NAFTA parties have chosen not to impose an "exhaustion of local  
13 remedies rule" on claimants, as a precondition of bringing a successful claim [SoR page 48].

14 And finally, in the further alternative, even if Mexico somehow succeeded in proving that every  
15 one of Thunderbird's competitors were either closed or open pursuant to a temporary *amparo* order, and  
16 even if the Tribunal accepted this new exhaustion rule as a "likeness" defense under Article 1102,  
17 Mexico would still be in breach of Article 1102. It would still be in breach because there was no valid  
18 reason as to why Gobernacion officials could not have exercised their authority under Article 3 of the  
19 *Ley Federal de Juegos y Sorteos*. to grant temporary approval to at least the three already-open EDMs  
20 to remain in operation until the overall compliance of skill game machines with the Law was finally and  
21 conclusively resolved by appellate court judgment or by decisive legislative action.<sup>24</sup>

22 **9.1 What does the "Minimum Standard of Treatment" under Article 1105 NAFTA mean and**  
23 **how is it to be applied by a NAFTA arbitral tribunal?**

24 Claimants' arguments concerning the scope and content of the minimum standard of treatment  
25 can be found at pages 57-79 of the PSOC; 49-63 of the SoR; and 1062-1087 of the Transcripts. This  
26 Tribunal has been well-briefed by the parties on the meaning of Article 1105. Claimant accordingly

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27 <sup>23</sup> *Loewen & Loewen Corp v. U.S.A.*, Preliminary Award, NAFTA- ICSID/AF Tribunal (5 January 2001) at para's. 40-46.

28 <sup>24</sup> Alcantara & Rose, Transcript, Day III, at pages 931 & 771-772, respectively.



1 cites only the most recent restatement of the Article 1105 standard made by the Tribunal in *Waste*  
2 *Management II*, which was delivered subsequent to the April, 2004 hearings. After summarizing most  
3 of the previous NAFTA awards involving Article 1105, and noting how the standard applies both to  
4 classical denials of justice before courts and administrative unfairness not involving a question of the  
5 character or operation of the entire justice system, the *Waste Management II* Tribunal stated:

6 The search here is for the Article 1105 standard of review, and it is not necessary to  
7 consider the specific results reached in the cases discussed above. But as this survey  
8 shows, despite certain differences of emphasis a general standard for Article 1105 is  
9 emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest  
10 that the minimum standard of treatment of fair and equitable treatment is infringed by  
11 conduct attributable to the State and harmful to the claimant if the conduct is arbitrary,  
12 grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to  
sectional or racial prejudice, or involves a lack of due process leading to an outcome  
which offends judicial propriety—as might be the case with a manifest failure of natural  
justice in judicial proceedings or a complete lack of transparency and candour in an  
administrative process. In applying this standard it is relevant that the treatment is in  
breach of representations made by the host State which were reasonably relied on by the  
claimant.<sup>25</sup>

13 As reflected in the aforementioned arguments, the Article 1105 test is flexible and generally  
14 applied to State action rising above some *de minimus* level of unfairness and harm caused. The standard  
15 is certainly not limited to cases where recourse to local court proceedings has resulted in a flagrant and  
16 outrageous denial of justice. There is no need for recourse to local remedies at all. The NAFTA  
17 drafters did away with an exhaustion rule in favor of the Article 1121 “fork-in-the-road” approach.  
18 Rather, this case only relates to a discrete package of harms visited administratively on the EDMs.

19 There is no need for this or any other Tribunal to evaluate the system of Mexican justice as a  
20 whole, when judgments or orders of a local court do not constitute the focal-point of the claim. As  
21 described below, and in Claimant’s previous written submissions, the conduct of SEGOB officials in  
22 this case smacks of exactly the kind and level of arbitrariness that the *Waste Management II* Tribunal  
23 would conclude violates the minimum standard under Article 1105. Such arbitrary conduct is an  
24 anathema to fair and equitable treatment at the international level and thus requires compensation under  
25 Article 1105.

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28 <sup>25</sup> *Waste Management, Inc. v. Mexico*, Final Award, NAFTA-ICISD-AF Tribunal, at para. 98.

1 **9.2 Subject to the answer to Issue 7 and 9.1 above, was there a detrimental reliance by**  
2 **Claimant on SEGOB’s letter of 15 August 2000, also in light of Claimant’s solicitud of 3**  
3 **August 2000, and if so, did it constitute a breach of Article 1105 NAFTA?**

4 Yes. Thunderbird and the EDMs detrimentally relied upon SEGOB’s August 15, 2000 in  
5 pursuing their investments in Mexico. Claimant presented its position on this point at pages 79 through  
6 85 of the PsoC and evidence cited therein, pages 36 through 39 of the SoR and evidence cited therein,  
7 in its opening statement at Transcript, pages 30 through 33, and in its closing argument at Transcript,  
8 pages 1111 through 1016. Jack Mitchell, the President of Thunderbird addressed this issue in his  
9 hearing testimony at pages 233 through 237

10 The EDMs were not only entitled to rely upon the SEGOB letter because of its contents; but also  
11 because of the expectations generated by Mexico’s ratification of the NAFTA. It is not merely a  
12 question of whether the opinion letter could be reasonably relied upon by the Claimants, given that the  
13 parties appear to agree that its contents are not a “model of clarity.” It is a question of whether, given  
14 the kinds of assurances contained within the NAFTA text – including its preambular language, its  
15 objectives and its substantive provisions – the EDMs were entitled to presume that SEGOB officials  
16 would not have issued the opinion letter on August 15, 2000 if they entertained any serious doubts as  
17 to what the EDMs wanted and what they would do as a result of receiving it.

18 In other words, while the NAFTA should not be construed as a policy of insurance against all  
19 apparent and unforeseen business risks, its implementation by the NAFTA Parties can be taken by  
20 investors as an assurance that governmental officials will not offer bad advice when approached by  
21 someone obviously desirous of conducting business based upon the advice so solicited. That the EDMs  
22 would start using skill machines in their facilities if they received a favorable response to the August  
23 3 *solicitudo* must have been obvious to the SEGOB officials who wrote the letter. If they did not know  
24 what the machines were, they should never have issued the letter. They could have asked for more  
25 information, as they did when approached two months later by Carlos Gomez.

26 But for the Claimant’s reliance on the August 15 SEGOB letter, the investments would not have  
27 been established, operated or expanded, with a projected goal of having 2000 machines in operation  
28 throughout the country. But for the arbitrary *volte face* of SEGOB officials, in repudiating their

1 predecessor's "negative permission" granted in that letter, all of the damages sought by Thunderbird  
2 on behalf of the EDMs would not have accrued. But for the actions of people such as Guadalupe  
3 Vargas, there is every reason to believe that Thunderbird would be operating at least 2000 machines  
4 throughout Mexico, through various EDMs, if not more.

5 **9.3 Subject to the answer to Issue 9.1 above, was there a failure to provide due process,**  
6 **constituting an administrative denial of justice, in the proceedings relating to the ruling**  
7 **of 10 October 2001, and if so, did it constitute a breach of Article 1105 NAFTA?**

8 The record contains consistently-corroborated, contemporaneous evidence from numerous  
9 sources about just how patently arbitrary and unfair the process ran by Mr. Guadalupe Vargas was  
10 [*PSoc pages 19-26 and evidence cited therein, SoR, pages 13-17 and evidence cited therein, Hearing*  
11 *Transcript, pages 140-141 & 211-213*]. Guadalupe Vargas was a man who obviously held the claimant  
12 and its submissions in total contempt, and who had accordingly prejudged the case before him. It is  
13 accordingly no surprise that Respondent chose not to provide his testimony, or the testimony of his  
14 superiors, to this Tribunal for its evaluation.

15 While Guadalupe Vargas did not need to possess the wisdom and independence of a judge, he  
16 was obliged to obey the most basic principles of due process – known to all of the world's major legal  
17 systems and to the practice of international law and administration. Thunderbird and the EDMs  
18 obviously would never have agreed to submit the issue of whether they were in compliance with the  
19 August 15 letter to an administrative hearing if they had known Guadalupe Vargas would have been  
20 chairing it or that he would be running the way that he did.

21 In and of itself, the process visited upon Thunderbird and its EDMs by Guadalupe Vargas fell  
22 below the minimum level of "fair and equitable treatment" required under both Article 1105 and  
23 customary international law. Because the hearing effectively ended all businesses owned and/or  
24 controlled by the Claimant in Mexico, this NAFTA breach alone supports all of the damages sought by  
25 the Claimants in this case. Based upon the operation and results of this hearing, all of the damages  
26 claimed by Thunderbird on behalf of its EDMs - up to the profits to be expected from the operation of  
27 no less than 2000 machines throughout Mexico - were reasonably foreseeable as of the date of breach.

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1 **9.4 Subject to the answer to Issue 9.1 above, was there manifest arbitrariness in**  
2 **administration, constituting proof of an abuse of right, in the proceedings before SEGOB,**  
3 **and if so, did it constitute a breach of Article 1105 NAFTA?**

4 While this Tribunal may conclude that all of the damages sought are justified upon either the  
5 detrimental reliance described above, or the patently-flawed administrative hearing process described  
6 above, the Tribunal may also adopt an alternative analysis which examines the net result of the  
7 regulatory treatment offered to the Claimants and other members of the industry. Such an analysis is  
8 based upon the principle of good faith – seen as an obligation to refrain from arbitrary conduct which  
9 would otherwise constitute an abuse of right (such as the right to regulate gaming).

10 Examined from this perspective, the record demonstrates that Thunderbird and the EDMs have  
11 suffered the wrath of one particular individual, Guadalupe Vargas, who displayed a special interest in  
12 shutting down the EDMs. At the end of the day, the EDMs remain closed and other operators remain  
13 open without sufficient justification. Such an arbitrary result is evidence of a systemic failure to provide  
14 fair and equitable treatment to Thunderbird and the EDMs. It is also evidence of a failure to provide  
15 “treatment no less favourable” to them – thus demonstrating the point at which the facts of this case  
16 intersect with both Articles 1105 and 1102.<sup>26</sup>

17 **10.1 Does the fact that Claimant did not submit to arbitration a claim on its own behalf under**  
18 **Article 1116 NAFTA, but rather on behalf of the EDM Companies under Article 1117**  
19 **NAFTA, preclude it from obtaining compensation under Article 1110?**

20 Claimant’s submissions on this issue can be found at pages 64-69 of the SoR, and have been  
21 supported by the United States of America at para’s. 2-16 of its Submission. In short, the purposes of  
22 the NAFTA would be completely frustrated if investors were not entitled to bring claims under Article  
23 1110, on behalf of their investment enterprises established in the territory of another NAFTA Party.

24 **(a) In this connection, should, as it is requested by Claimant at pages 69-70 of its SoR,**  
25 **leave be granted to Claimant to amend its PSoC to include, in the further**  
26 **alternative, a claim for 100% of the damages caused to the businesses of each EDM**

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27 <sup>26</sup> Because the result of this treatment was the total destruction of the Claimants’ business in Mexico, this is also a point of  
28 intersection for Article 1110 – which is strictly concerned with results, explanations notwithstanding.

1                   **Company as a result of Respondent’s alleged breach of Article 1110, using Article**  
2                   **1116 NAFTA?**

3                   Yes. Because Mexico has been aware of this potential ground of liability since August 2002  
4 (when the initial statement of claim did not even mention Article 1117, but did include an allegation  
5 of the breach of Article 1110), it could not possibly be prejudiced by such an amendment being made  
6 at this time, if necessary.

7                   **(b) Does a breach of Article 1110 NAFTA also constitute a breach of Article 1105**  
8                   **NAFTA, as it is contended by Claimant?**

9                   In this particular case, the customary international law prohibition against the illegal taking of  
10 an investment overlaps with the obligation contained within Article 1110. Claimant does not represent  
11 that the customary international law definition is in all respects identical to the carefully-drafted version  
12 found in Article 1110 and modified by other NAFTA provisions. The most obvious area where NAFTA  
13 Article 1110 and the customary international law prohibition could diverge would be found in the  
14 definition of “property” subject to compensation under customary international law, as contrasted  
15 against the much broader definition of “investment” referred to in Article 1110.<sup>27</sup> Accordingly, because  
16 an uncompensated taking of the EDMs’ businesses would constitute an uncompensated taking of  
17 property under customary international law, in this case a breach of Article 1105 would occur.

18                   **(i) In this connection, what is the relevance, if any, of Section B.3 of the Notes of**  
19                   **Interpretation of Certain Chapter 11 Provisions by the NAFTA Free Trade**  
20                   **Commission of 31 July 2001 (“A determination that there has been a breach of**  
21                   **another provision of the NAFTA, or of a separate international agreement, does**  
22                   **not establish that there has been a breach of Article 1105(1)”)?**

23                   The NAFTA Commission Statement confirms Claimant’s arguments on Article 1110. The  
24 Statement prohibits claimants from arguing that Article 1105 is breached because Article 1110 has been  
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26 <sup>27</sup> For example, it appears that the destruction of all benefits derived from a investor’s intellectual property rights would  
27 constitute a discrete expropriation of the investor’s “investment” (i.e. its “intangible” property rights), regardless of whether  
28 such deprivation resulted in the destruction of the investment itself as a going concern. Note that Article 1110(8) clearly  
contemplates IP rights as being subject to protection under this provision. It is doubtful that the same protection yet exists  
in customary international law.

1 breached. It does not prohibit the argument that Article 1105 has been breached because customary  
2 international law prohibits uncompensated takings of property (which would just so happen to also  
3 breach Article 1110 in many cases too). In fact, the Statement clarifies that any breach of accepted  
4 standards of customary international law constitutes sufficient evidence of a breach of Article 1105.

5 **(c) Does Article 1110 NAFTA impose an obligation of Respondent vis-à-vis the EDM**  
6 **Companies?**

7 NAFTA Article 1110 requires the payment of full, prompt and effective compensation for the  
8 taking of an “investment.” It is uncontested that the EDMs constitute an “investment” under the  
9 NAFTA. NAFTA tribunals have universally adopted the “substantial interference” standard to  
10 determine whether the business of such an investment has been effectively destroyed as a result of the  
11 application of a governmental measure. Accordingly, it is obvious that NAFTA Article 1110 imposes  
12 an obligation upon the Respondent vis-à-vis the EDMs.

13 **10.2 Subject to the answer to Issue 10.1 above, and also having regard to Issue 10.3 below, is**  
14 **it relevant to determine which is or are the expropriation standard or standards to be**  
15 **applied under Article 1110 NAFTA? If so, which is that standard or are those standards?**

16 As stated above, and at pages 99-105 of the PSoC, the standard for determining whether a taking  
17 has occurred is whether government action has resulted in substantial interference with the investment  
18 (and if the “investment” is an enterprise, one considers whether substantial interference has been  
19 suffered by that enterprise’s business).

20 **10.3 Subject to the answers to Issues 7, 10.1 and 10.2 above, did any rights legitimately**  
21 **acquired by the EDM Companies exist in the businesses conducted by them? Specifically:**  
22 **(a) Did the EDM Companies operate on the basis of a business undertaking that is**  
23 **unlawful under Mexican law?**

24 The relevant question is not whether the EDMs’ businesses were unlawful under Mexican law.  
25 The question is whether a vested right existed in the operation of those businesses at the time of their  
26 taking? Because the NAFTA Parties maintain legal systems that support mixed-market economies,  
27 vested rights are to be presumed from the default position of “liberty” enjoyed by all legal persons in  
28 each territory. In other words, unless and except for heavily-regulated industries – where detailed and

1 highly-transparent rule structures are the norm – it would be expected that a business activity not  
2 otherwise clearly prohibited would be entitled to protection from taking.

3 In this case, it is clear that the state of Mexican law concerning the operation of skill game  
4 machines is, at best, rudimentary and unclear. It is undisputed that Mexican law does not define or even  
5 address skill machines in the context of its constitutional prohibition against gambling. When  
6 Thunderbird entered the Mexican market, it was presented with a mixed landscape of similar businesses  
7 operating under seemingly different legal assumptions. In other words, the gaming industry in Mexico  
8 was not a good example of a regulated industry (as it is in many Canadian and American jurisdictions).  
9 Because they chose the most prudent course of action when faced with these circumstances – i.e.  
10 consulting with, and ultimately presenting an official *solicitud* to, SEGOB officials – Thunderbird and  
11 its EDMs were entitled to expect that the results they obtained through that process would be honored.

12 **(b) Did the EDM Companies operate on the basis of a legitimate expectation, being**  
13 **similar to the detrimental reliance as alleged by Claimant under Article 1105?**

14 Yes. Detrimental reliance is the result of what happens when a legitimate expectation is  
15 generated but not honoured. That reliance can take place both with respect to the open promises found  
16 in investment treaties and investment legislation, and with respect to particularized statements or  
17 assurances provided specifically to an investor/investment by the appropriate government official.

18 **(c) Assuming that the answers to Issues (a) and (b) of the present Issue 10 are in the**  
19 **affirmative, do the actions of SEGOB amount to expropriation within the meaning**  
20 **of Article 1110 NAFTA?**

21 Yes. The EDMs established their investments in Mexico on the general promise of fair and  
22 equitable treatment and with the added security of the “negative permission” contained within the  
23 SEGOB response to the Claimants’ *solicitud* process. The closure of these facilities destroyed the  
24 EDMs’ businesses, requiring the payment of fair market value for these investments so taken.

25 **Merits – Damages**

26 **11. If the answer to Issues 8 and/or 9 and/or 10 above is in the affirmative, is Claimant**  
27 **entitled to damages, and if so for what amount?**

28 Claimant has provided the Tribunal with a plea for damages based upon three scenarios which

1 best reflect the likely performance of the EDMs but for the NAFTA breaches committed by Mexico  
2 [See 122 – 123 of the PSoC & pages 5-11, 129 & 151-157 of the Rittvo Valuation Report, Exhibit C92].  
3 Each of these scenarios provides a reasonable basis upon which the Tribunal can put the EDMs in the  
4 place each would have been in but for the breach – by awarding the restitution value of these  
5 investments as required under international law.

6 **11.1 What are the compensation principles to be applied to damages in the present case?**

7 As long ago as in the *Norwegian Shipowners’* case, the principle was established that full  
8 restitution will normally include compensation for lost profits on the grounds that:

9 Just compensation implies a complete restitution of the *status quo ante*, based, not upon  
10 future gains of the United States or other powers, but upon the loss of profits of the  
11 Norwegian owners as compared with the other owners of similar property.<sup>28</sup>

12 As detailed in pages 106 – 112 of the PSOC, each of the NAFTA Tribunals to award damages  
13 thus far have had recourse to the principles of restitution founded in the *Norwegian Shipowners’* case  
14 and the *Chorzow Factory* case. Customary international law supports the simple proposition that an  
15 award of damages should serve to make the claimant “whole” – by giving back to it the present value  
16 of what it lost as a result of the breach.

17 **(a) Are these principles different with respect to breaches of Articles 1102, 1105 and**  
18 **1110 NAFTA, and if so, what are the differences? Specifically: (i) Is international**  
19 **law jurisprudence concerning the value of compensation for expropriation as**  
20 **relevant for breaches of NAFTA Articles 1102 and 1105 as they are for Article**  
21 **1110, as it is contended by Claimant? (ii) Or is fair market value valuation limited**  
22 **to Article 1110 (expropriation) and is compensation for breaches of Articles 1102**  
23 **and 1105 limited to losses or damages suffered as a result of the breach, as it is**  
24 **contended by Respondent? If so, has Claimant failed to prove damages with**  
25 **respect to breaches of Articles 1102 and 1105?**

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26 <sup>28</sup> *Norwegian Shipowners’ Claims (Nor. v. U.S.)*, 1 R.I.A.A. 307 at 338 (Perm. Ct. Arb. 1922). Accordingly the  
27 compensation awarded for the seizure of ships under construction in US dockyards by US authorities, and the concordant  
28 assumption of the Norwegians’ rights in the contracts for their construction, included the high value of shipping contracts  
in the open market as of the date of requisition, rather than the end of the First World War, when economic circumstances  
had irrevocably changed.



1 The *Myers* Tribunal has provided the following guidance concerning this question, stating in  
2 its award (which did not involve a breach of Article 1110):

3 By not identifying any particular methodology for the assessment of compensation in  
4 cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA  
5 intended to leave it open to tribunals to determine a measure of compensation  
6 appropriate to the specific circumstances of the case, taking into account the principles  
of both international law and the provisions of the NAFTA. In some non-expropriation  
cases a tribunal might think it appropriate to adopt the ‘fair market value’ standard; in  
other cases it might not.<sup>29</sup>

7 Claimant submits that while in certain cases it may not be appropriate to employ a fair market  
8 value analysis to determine the appropriate level of compensation to be granted for a breach of NAFTA  
9 Articles 1102 or 1105, there will be other times when it is completely appropriate. As the *Myers*  
10 Tribunal noted, a determination of the appropriate damage analysis to be employed cannot take place  
11 in the abstract. Rather, it must be grounded in the particular facts of the instant case.

12 In this case, the actions of Mexico’s officials can be characterized as having breached three  
13 different, but closely related, standards of treatment. The result of this treatment, no matter how it is  
14 characterized, was the permanent loss of the ability of each EDM to operate.

15 As noted at pages 64 – 67 of the SoR, Articles 1105 and 1110 are deeply interwoven. Article  
16 1110(1) specifically mentions the breach of Article 1105 in its text and the requirement of paying  
17 prompt, adequate and effective compensation for expropriation is widely accepted as a rule of  
18 customary international law which would be subsumed in Article 1105 if it was not set out in Article  
19 1110.<sup>30</sup> The primary difference between Articles 1105 and 1110 is that the latter addresses cases where  
20 the investment has been effectively neutralized by acts attributable to the State, whereas the former  
21 addresses cases where the interference may have been less severe.<sup>31</sup> For those times when the result is  
22 the total deprivation of a business undertaking, both provisions will have been equally violated.

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23  
24 <sup>29</sup> *Myers* Final Award, at para’s. 309-311.

25 <sup>30</sup> The reason why the inclusion of both provisions does not constitute a redundancy is because NAFTA Article 1110 contains  
26 various conditions and exceptions which would diverge from the general rule against expropriation without compensation,  
thus establishing a *lex specialis* for takings within the context of the NAFTA which was better addressed through the  
inclusion of a provision separate and apart from Article 1105.

27 <sup>31</sup> This is why Article 1110 requires compensation for all takings, no matter whether they were non-discriminatory or for a  
28 public purpose or procedurally fair – because it is aimed at cases where the investment has been essentially destroyed.  
Article 1105 is aimed at issues of equity and procedural fairness, which must be honoured even where the result has been  
less than the near-total deprivation of the value of an investment.

1 In cases involving Article 1110, it is necessary to prove the effective loss of an investment in  
2 order to establish liability; for Article 1105, it is only necessary to provide proof of loss. These  
3 questions of liability should not be confused, however, with the establishment of proximate cause  
4 between the wrongful act and the claimed loss. It just so happens that in this case, the losses stemming  
5 from Mexico's illegal conduct constitute the total deprivation of the value of each EDM enterprise.  
6 Accordingly, Articles 1105 and 1110 completely overlap in this case, requiring the restitution value of  
7 each EDM enterprise to be awarded in order to make them whole.

8 But for the reliance placed by Thunderbird and its EDMs on the "negative permission" they  
9 sought and were granted by Mexican officials, the EDM facilities would not have opened and operated,  
10 and Thunderbird would not have been engaged in the process of establishing more of them. But for the  
11 fact that Mexican officials reneged on the assurances they gave, all six of those EDM facilities would  
12 be open today with a collective 2000 machines in operation and would be generating significant profits.

13 But for the utterly arbitrary manner in which Thunderbird and its EDM's were treated by  
14 Mexican officials – and the procedurally unjust manner in which they were treated throughout – their  
15 EDMs would be open and operating 2000 machines today, much like their various domestic  
16 competitors, and in accordance with the *solicitud* of August 3, 2000. In this regard, one can see the  
17 overlap between the application of Articles 1102 and 1105 in this case. The EDMs are closed while  
18 their competitors are indefinitely open, as even the chief of *amparo* actions at the SEGOB, Lic.  
19 Alcantara, does not know when – if ever – these various facilities might be similarly closed.

20 The simple way to remedy what could only be charitably characterized as Mexico's grossly  
21 uneven gaming enforcement history (which might be more accurately characterized as its blatantly  
22 discriminatory regulation of Thunderbird and its EDMs) is to permit the EDMs to remain open as long  
23 as their competitors remain open. The only way to value the losses suffered by these EDMs for being  
24 permanently closed – when the best available treatment is to be indefinitely open – is to award the fair  
25 market value of those investments to them, as of the date less favourable treatment was first bestowed  
26 upon them.

27 Claimant accordingly submits that it has proven both the damages claimed and the proximate  
28 cause linking those damages to the actions attributable to Mexico as simultaneous breaches of Articles

1 1102, 1105 and 1110 of the NAFTA.

2 **(b) Does a distinction arise from whether the act complained of is lawful or unlawful?**

3 Article 1110 specifies that it is a breach of the NAFTA to fail to provide full, fair and effective  
4 compensation even where the expropriatory act is for a public purpose, non-discriminatory and in  
5 accordance with the norms of due process and procedural fairness espoused in Article 1105.  
6 Accordingly, it does not matter whether the expropriatory act was lawful for purposes of Article 1110.  
7 This state of affairs was confirmed by the practice of the Iran-US Claims Tribunal, of which Judge  
8 Brower has noted the following:

9 In no case, however, has the Tribunal ever granted less than full compensation; nor has  
10 the Tribunal ever found a taking to be unlawful. Thus, the Tribunal uniformly has held  
11 that under principles of customary international law, in the context of both large-scale  
12 nationalizations and discrete expropriations, the proper standard is that of full  
13 compensation, which in the case of a going concern is equal to “going concern” or “fair  
14 market” value.<sup>32</sup>

15 Further, by definition, an act which constitutes a breach of the standards of treatment contained  
16 within Article 1102 and 1105 is “unlawful” as a matter of international law. Pursuant to the principle  
17 of good faith espoused in the *pacta sunt servanda* rule, State responsibility attaches to any act in breach  
18 of a treaty obligation. Accordingly, it is impossible for an act which is found in breach of Articles 1102  
19 or 1105 to be characterized as “lawful” under international law.

20 **(c) At which date are the damages to be determined?**

21 The date upon which damages should be determined is the date upon which the wrongful acts  
22 of Mexico’s officials were visited upon the EDMs. For the purposes of Article 1102, 1105 and 1110,  
23 that date is 11 October 2001, when the EDMs at Matamoros and Laredo were summarily and  
24 permanently closed by Guadalupe Vargas. For the remaining EDMs, the date is 28 January 2002, when  
25 the Reynosa was forcibly closed. This date is applicable for the other three EDMs, because it was upon  
26 this date that Thunderbird learned of the harm that would be visited upon them as a result of Vargas’  
27 unfair hearing and his arbitrary and uneven enforcement exercises against them.

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28 <sup>32</sup> Charles N. Brower, *The Iran-United States Claims Tribunal* (Martin Nijhoff: The Hague, 1998) at 344. Judge Brower goes on to note, at pages 344 - 350, how the question of whether a taking was lawful is not relevant to the quantum of compensation to be awarded under customary international law analyses of takings, and how in the case of going concerns that quantum should reflect a fair market value often best captured by a discounted cash flow method of valuation.

1 **11.2 Is there a sufficient causal link between the breach and the damages claimed by Claimant?**

2 As described above, but for the conduct of Guadalupe Vargas and his colleagues – in changing  
3 the rules upon which the EDMs were operating; in not providing the EDMs with due process and  
4 procedural fairness in demonstrating their compliance with the *solicitud*; and in not fairly and equitably  
5 enforcing the new gaming rules against domestic competitors as well as Thunderbird and its EDMs –  
6 the EDMs would be in business today (much like some of their competitors)

7 **11.3 Are the damages claimed by Claimant a reasonably foreseeable consequence of the act**  
8 **that constituted the breach by Respondent?**

9 Yes. Claimant has not even sought to obtain any consequential losses that it might have suffered,  
10 on its own behalf, because of Mexico’s wrongful conduct. For example, Thunderbird has not sought  
11 to recover the “opportunity costs” associated with the seizure of its investments in Mexico; i.e.,  
12 damages suffered in terms of opportunities foregone (and the benefits that could be received from those  
13 opportunities) to proceed with the Mexico investments. Claimant has not sought damages for  
14 investments allegedly foregone or delayed in other countries as a result of the losses it suffered through  
15 its investments in Mexico. Thunderbird has not sought these types of damages even though they are  
16 clearly a foreseeable result of Mexico’s wrongful conduct. This is especially true in light of  
17 Thunderbird’s success in other Latin American markets. Simply put, if it had proceeded with  
18 investment activities somewhere other than Mexico, Thunderbird could, and likely would, have made  
19 a lot more than simple interest on the money lost in Mexico. Neither has the Respondent provided  
20 evidence of any independent, intervening act which could have been responsible for the closures of its  
21 EDM facilities (such as an economic depression or natural disaster).

22 On a general basis, that each EDM would be deprived of its reasonably expected profits (to be  
23 discounted to reflect relevant risks and an appropriate present value) as a result of the illegal conduct  
24 Mexican officials such as those of Guadalupe Vargas is entirely foreseeable. As noted in the seminal  
25 text on damages in international law:

26 Prospective profits are frequently allowed in international cases, however, on the ground  
27 that such losses were within the contemplation of the parties to a contract or, in other  
28 cases, that the damage is the direct, or the proximate, or the immediate consequence of  
the wrongful act. However, in order to be allowable, prospective profits must not be too  
speculative, contingent, uncertain, and the like. There must be proof that they were

1 *reasonably* anticipated; and that the profits anticipated were probable and not merely  
2 possible...<sup>33</sup>

3 In order that profits may be allowed in cases arising in tort it is usually required that the  
4 business from which profits were anticipated, for instances, must have been established,  
5 or the product which was about to be sold at a profit must have been in hand, at least in  
6 part, ready to be sold, or the profitable venture must have been underway – with the  
7 reasonable prospects of accomplishment or of success – at the time that the respondent’s  
8 wrongful act occurred. Otherwise, the allowance of damages for the loss of prospective  
9 profits would not be reasonable.<sup>34</sup>

10 In other words, the question of whether the value of lost profits should be included in an award  
11 of damages is a question of proximate cause which can only be answered within the specific context  
12 of a given case. This approach was effectively approved and updated by the IUSCT Chamber sitting  
13 in *Phillips*, as quoted at page 118 of the PSoC, which provided a complete checklist as to how to ensure  
14 the proper discounted value of an investment is ascertained in any given case (which it described as a  
15 discounted cash flow model).

16 There simply is no bright line test of when a claim which includes the value of lost profits as  
17 part of the value of the harmed investment should be allowed or disallowed. There is no universally-  
18 applicable debt-to-equity ratio or clear temporal rule as to how long it takes for an established  
19 investment to be considered as a going concern. In short, there simply is no absolute criterion that can -  
20 or should be - be applied universally across all manner of different industries and different fact patterns.  
21 The test is simply whether the losses claimed in this particular case were the reasonably foreseeable  
22 consequence of wrongful actions found by the Tribunal.

23 **11.4 Subject to the answers to Issues 11.1 - 11.3 above, should the damages be valued on the**  
24 **basis of a fair market value of the EDM Companies calculated for anticipated future**  
25 **profits by a discounted cash flow (“DCF”) method, as contended by Claimant?**

26 The DCF method of analysis is the most accurate way to balance the probability of lost profit  
27 against the risk of negative contingencies, producing net full value of the investment as of the date of  
28 breach. The goal of the DCF analysis is to answer the question of reasonable foreseeability of damages  
using all available evidence – not merely to answer the question of whether “profitability” can be

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<sup>33</sup> Marjorie M. Whiteman, *Damages in International Law*, Vol. III (United States GPO, D.C.: 1943) at 1836-7.

<sup>34</sup> *Ibid.*, at 1840.

1 claimed in the abstract. Rather, the DCF analysis permits the Tribunal to assign a specific value to a  
2 reasonably foreseeable level of profitability, discounted to reflect all necessary contingencies (both  
3 positive and negative).

4 Referring to the outcome of a proper DCF analysis as being the “fair market value” of an  
5 investment is really an exercise in semantics that is beside the point of the analysis. The DCF analysis  
6 ascribes the appropriate value to the business, as harmed by the wrongful actions of a respondent State,  
7 regardless of whether the relevant State action breaches a treaty provision which calls for compensation  
8 that is “just,” “appropriate” or equivalent to the “fair market value” of the investment prior to the  
9 breach. In all cases, the obligation is to restore the claimant to its prior position by restoring the value  
10 of the asset or opportunity deprived to the claimant. From a legal perspective, the DCF method is  
11 merely a modern expression of the equitable notion that appropriate deductions must be made against  
12 any award of damages for reasonable or ordinary expenses or contingencies which were foreseeable as  
13 of the date of breach.

14 As reflected in Article 1115, the goals of dispute settlement under Chapter 11 are to provide  
15 investors and investments with equal treatment and due process in adjudication. These goals can only  
16 be met through the fair adjudication of each claim on an individualized basis. Accordingly, it is  
17 incumbent upon each Tribunal to ensure that if it awards damages that those damages best reflect the  
18 particularities of the individual case before them. These goals are best realized through the use of a  
19 valuation method that is appropriately tailored to reflect the factors and criteria most relevant to the  
20 instant case.

21 In other words, the more accurate the DCF analysis, the more accurate the award of damages  
22 will be as a reflection of an individual claimant’s actual loss – suffered as a reasonably foreseeable  
23 consequence of the wrongful act. This is why the Claimant provided an expert with extensive  
24 experience in the gaming and entertainment industry to present its damages analysis – as opposed to  
25 proffering a valuator with generic accounting experience. It did so in order to ensure that the most  
26 relevant criteria would be employed in properly assessing the true value of the EDM businesses as of  
27 the date they were effectively destroyed by Mexican officials.

28

1           **(a) If so, should any of the following scenarios be assumed, as contended and**  
2           **quantified by Claimant: (I) 10 years scenario with no expansion at the existing**  
3           **Matamoros, Nuevo and Reynosa locations; (ii) 10 years scenario with expansion**  
4           **at the existing Matamoros, Nuevo and Reynosa locations; or (iii) 10 years scenario**  
5           **with expansion at the existing Matamoros, Laredo and Reynosa locations and**  
6           **developments at the Puebla, Ciudad Juarez and Monterrey locations?**

7           At pages 31 – 33 of the PSoC, Claimant demonstrated just how immensely profitable the EDM  
8 facilities at Matamoros, Nuevo Laredo and Reynosa already were, and promised to be, showing net  
9 winnings of over US\$3.5 million during the months and days that they were open. Even Mr. Martinez,  
10 the valuation expert for Mexico, was forced to agree upon cross-examination that all three functioning  
11 EDMs were already in a positive cash flow position before being closed down, and yet so soon after  
12 having been opened [*Transcript pages 974-975*]. This basic fact explains why Mr. Martinez was forced  
13 to shift his focus from the actual, contemporaneous financial records of the EDMs to the audited  
14 financial statements (which naturally reflected the reality and costs of regulatory closure, thus  
15 “poisoning the well” for these documents’ potential use in valuation). Not possessed of the necessary  
16 expertise to value a gaming business, Mr. Martinez also treated the EDMs no differently from a shoe-  
17 shine or financial services business.

18           **(b) Or is the fair market value not proven or quantified properly by Claimant because**  
19           **the EDM Companies would not have operated for a sufficiently long period of time**  
20           **to establish a performance record (not a going concern) and/or have failed to make**  
21           **a profit and/or other reasons (including possible negative contingencies and the use**  
22           **of unaudited statements), as it is contended by Respondent?**

23           As discussed above, there is no finite period of time required to establish the existence of a  
24 going concern capable of a damages award that includes the value of lost profits. The test is whether  
25 the profits claimed as part of the value of the lost investment were a reasonably foreseeable consequence  
26 of the wrongful action of the Respondent.

27           The Claimant has already noted the analogous case of *Myers v. Canada*, at pages 71-73 of the  
28 SoR, where a US investor was precluded from gaining access to the Canadian market for the destruction

1 of PCB wastes. To be clear, *Myers* did not ever establish a waste treatment facility in Canada. The only  
2 investment it had “on the ground” was a subsidiary sales office which at no time employed more than  
3 two people in Canada, and often occupied no office space at all. The Tribunal awarded millions of  
4 dollars in damages to the Claimant for Canada’s decision to close the border for fourteen months, which  
5 it found to constitute breaches of Articles 1102 and 1105 of the NAFTA. The value of the lost market  
6 share was based upon a population of bids, quotations and signed contracts between Myers and  
7 Canadian customers. The total population was discounted thoroughly to take into account various  
8 negative contingencies, after consideration had first been given to the Claimant’s track record of success  
9 in pursuing the same business in other countries (principally the United States). The Tribunal had less  
10 than a handful of completed contracts to consider, completed in the few months between Canada’s  
11 opening of the border and its subsequent closure by a US court. Thus, despite not nearly as much  
12 evidence of actual, operational success in the relevant market – as compared to the case before this  
13 Tribunal (where the claimant similarly has a track record of success operating the same business as the  
14 investment in other countries) – the *Myers* Tribunal had no difficulty in issuing an award of damages  
15 which included lost profits discounted to reflect all foreseeable risks and contingencies.

16 Other recent international awards similarly support the proposition that it is not necessary for  
17 there to be a fixed period of time in operation for the harmed investment. Instead, the test of whether  
18 an award of damages should contemplate the value of lost profits is based upon whether it can be  
19 proved (on a balance of probabilities) that those profits were a reasonably foreseeable consequence of  
20 the breach.

21 For example, in the *Himpurna* case,<sup>35</sup> the Tribunal focussed upon the particularities of the  
22 industry in question to award hundreds of millions of dollars in damages for a frustrated investment that  
23 never successfully operated. The claimant invested in the development of geothermal power generation  
24 in Indonesia, which included a pay-or-purchase agreement with a state enterprise that provided the  
25 necessary incentive for such a long term investment to be made. Taking into account the nature of

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27 <sup>35</sup> *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listrik Negara* Final Award, 4 May 1999), 14 Mealey's  
28 Int. Arb. Rep. December 1999 A-1; *Himpurna California Energy Ltd. v. Republic of Indonesia* (Interim Award 26 September  
1999), 15 Mealey's Int. Arb. Rep. January 2000, A-1; and *Himpurna California Energy Ltd. (Bermuda) v. Republic of  
Indonesia* (Final Award, 16 October 1999), 15 Mealey's Int. Art. Rep. February 2000 A-1



1 investments in this particular industry, the Tribunal did not adopt a temporal test of operations to  
2 conclude that profits would be reasonably foreseeable in these circumstances.

3 The same result accrued in the *Patuha Power* awards, which involved the same industry and  
4 respondent state.<sup>36</sup> Similar conclusions were also made in *Karaha Bodas v Indonesia*, although in that  
5 case the Tribunal arguably erred in double-counting the damages due (by adding the net value of the  
6 assets controlled by the investment to its calculation of the discounted present value of future expected  
7 cash flows from the project to arrive at a total damages amount). And in the *Delagoa Bay & East*  
8 *African Railway* case, the claimant was awarded damages which took expected future profits into  
9 account, even though the concession in question involved a railway that was not yet finished  
10 construction.<sup>37</sup>

11 The common thread running through all of these cases is not the length of time presumably  
12 required to conclude that a going concern exists. Rather, the theme is that the particular circumstances  
13 of the industry in question must be taken into serious consideration when determining whether damages  
14 claimed to flow from wrongful acts were reasonably foreseeable as a result of such acts. Accordingly,  
15 in order to understand whether a going concern exists in any given case, it is crucial to understand the  
16 nature of the industry in question – and such an understanding normally only comes from the  
17 elucidation of experts in the field.

18 In this case, only one expert with experience in the gaming industry was produced, Mr. Rittvo.  
19 As indicated at pages 671-672 and 683-687 of the transcript, Mr. Rittvo has enjoyed years of experience  
20 valuing “literally hundreds” of businesses in the same sector as the EDMs. His valuation work has  
21 formed the basis of more than \$18 billion in financing for similar gaming businesses worldwide, most  
22 often with no track record whatsoever. It is precisely because gaming businesses can so quickly become  
23 profitable, and that Rittvo has developed such a useful analytical model for valuation in this particular  
24

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25 <sup>36</sup> *Patuha Power Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Final Award, 4 May 1999)*, Mealey's Int. Arb.  
26 Rep. December 1999 B-1; *Patuha Power Ltd. (Bermuda) v. Republic of Indonesia (Interim Award 26 September 1999)*, 15  
27 Mealey's Int. Arb. Rep. January 2000, B-1; and *Patuha Power Ltd. (Bermuda) v. Republic of Indonesia (Final Award, 16*  
28 *October 1999)*, 15 Mealey's Int. Arb. Rep. February 2000 B-1.

<sup>37</sup> *Delagoa Bay and East African Railway Company Case (Great Britain & U.S. v. Portugal)* in Whiteman, *ibid*, at 1694-1703  
& 1839.

1 industry, that billions of dollars will be successfully invested based upon his valuation of the probable  
2 success of various gaming businesses. In stark contrast to Mr. Rittvo and his specialized credentials,  
3 the witness for Mexico, Mr. Martinez, not only admitted that he lacked any particular knowledge of the  
4 gaming industry; he even admitted that he has never even valued this type of business before  
5 *[Transcript page 952]*. It should come as no surprise that Mr. Martinez's analysis was accordingly not  
6 helpful in determining the appropriate quantum of damages for this case.

7 For example, Martinez appeared unaware that his treatment of marketing and staffing start-up  
8 costs as fixed and recurring made no sense for the gaming industry *[Transcript, pages 963-964 and 667-*  
9 *668]*; or that his focus on potential discrepancies between audited and unaudited financial statements  
10 would not provide an accurate picture of the worth of a gaming business at the relevant time (of taking)  
11 *[Transcript, pages 956-958 and 669-671]*. His inexperience with the vagaries of gaming industry was  
12 also demonstrated in Martinez's attempt to use the Thunderbird holding company as a would-be proxy  
13 for his valuation of the business model adopted by the EDMs *[Transcript, pages 954-955 & 967-969]*.  
14 To his credit, however, Mr. Martinez possessed the requisite humility to admit, at pages 950-951 of the  
15 Transcript, that his entire DCF valuation analysis was "not reliable."

16 **(c) Or should fair market value be calculated on the basis of the amount contributed**  
17 **by Claimant in the EDM Companies, their book value or their liquidation value,**  
18 **as it is contended and quantified by Respondent?**

19 "Fair market value" is merely a euphemism for restitution value. At the end of the day, the  
20 Claimant is entitled to be provided with an award of damages that effectively cures the wrongs visited  
21 upon its investments. The evidence is clear that if those facilities remained open, they would have made  
22 substantial profits. It is the nature of the gaming industry, explaining why Professor Rose agreed that  
23 obtaining any sort of permission to engage in a gaming business (even by acquiescence) would be very  
24 valuable in any jurisdiction *[Transcript page 798]*. It is why willing lenders and buyers can always be  
25 found for merely "proposed" gaming facilities, so long as the right factors are in place (such as an  
26 experienced management team, a stable business environment, a good location and good  
27 demographics). While track records may be more important for other industries, Mr. Rittvo and Mr.  
28 Martinez have both demonstrated how, when it comes to valuation, one size cannot fit all.

1 **11.5 To the extent that it is not addressed under Issues 11.1 -11.4 above, has Claimant proven**  
2 **the damages as claimed by it?**

3 Claimant has provided all available documentary evidence and the only expert report that can  
4 be used to value the true worth of the investments as of the day each was taken. Accordingly, Claimant  
5 has provided overwhelming evidence of the losses sustained by the EDMs as a result of being forcibly  
6 closed (or precluded from opening). The only appropriate remedy is to be awarded damages equal to  
7 the value of those businesses as of the date they were taken from Thunderbird and the other investors  
8 in each enterprise.

9 As noted above, Mr. Martinez, the Respondent's valuation expert, has admitted that his analysis  
10 cannot be relied upon for an award of damages based upon a net present value of each EDM, discounted  
11 to include potential risks and other negative contingencies. Accordingly, it is the Respondent who has  
12 utterly failed to prove its damages arguments in this case. Thunderbird has provided evidence of  
13 monies sunk into the EDM businesses [*Dec. Of Copeland in support of SoC, Exs. 86 and 87*], and it  
14 has provided a world-class expert's valuation of what was lost by each business due to Mexican  
15 government malfeasance. In order to truly place the EDMs back in the position they would have been  
16 in, but for the breach, there is only one available analysis - that which has been supplied by the  
17 Claimant's expert, Mr. Rittvo.

18 **11.6 Subject to the answers to the foregoing Issues 11.1 - 11.5, what is the amount of damages?**

19 Should this Tribunal conclude that Mexico breached NAFTA Chapter 11 in preventing  
20 Thunderbird from operating the businesses it controlled in Mexico three years ago, it must provide a  
21 remedy which can make each of its investment enterprises whole. Claimant has provided a range of  
22 options for the Tribunal to consider, based upon the Tribunal's analysis of what losses were foreseeable  
23 arising out of the breach. Tradition suggests that a tribunal would give more favorable consideration  
24 to the EDMs with the longest track record. Such consideration would include looking closely at what  
25 kind of value would have been derived from the business as it grew increasingly more profitable and  
26 expanded as intended. Under such a scenario, the Tribunal should consider awarding higher damages  
27 for the loss of EDM - Matamoros and EDM - Laredo than for the other EDM facilities, paying  
28 compensation equivalent to the earning capacity of each facility with a full inventory of skill game

1 machines, rather than the inventory on hand when their doors were forced shut (\$8.9 million for the  
2 former and \$29.3 million for the latter). EDMs with shorter track records could receive less  
3 compensation (such as \$6.7 million for Reynosa operating with only the inventory it possessed upon  
4 closure). The “low-end” total for damages sustained as a result of Thunderbird’s treatment in Mexico  
5 would accordingly be: \$44.9 million, excluding all damages for the three EDMs that never opened their  
6 doors.

7 Mr. Ritvo persuasively informs us, however, that a track record is not particularly useful for an  
8 expert valuation of gaming businesses. Based upon his analysis of the present value of the EDMs  
9 Matamoros, Laredo and Reynosa - which all demonstrated that they were already going to be very  
10 profitable - Rittvo recommends a range of between \$20.8 million and \$57.6 million (depending upon  
11 the amount of skill game machines added in an inventory expansion) . He also calculates that an  
12 additional \$19.3 million would be owed in relation to the Puebla facility, which had already negotiated  
13 the all-important real estate lease. Accordingly, a “mid-range” total for all damages suffered by  
14 Thunderbird, as a result of the actions of Guadalupe Vargas and his colleagues, would be between \$40.1  
15 million and \$76.9 million (still excluding all damages for the two EDMs which did not have committed  
16 leases in place).

17 It is ultimately for the Tribunal to conclude what number of EDMs, and what level of inventory  
18 in each, would most appropriately reflect the reasonably foreseeable loss suffered by Thunderbird’s  
19 investments in Mexico. In this regard, Claimant submits that since it originally sought - and obtained -  
20 approval in its *solicitud* for the operation of 2000 skill game machines in Mexico, it should be entitled  
21 to the reasonably expected profits from 2000 machines, given the additional information provided by  
22 Mr. Rittvo about the likely success of those machines in the six locations planned by Thunderbird. This  
23 is why Mr. Rittvo chose 2000 as the absolute cap for the expansion of Thunderbird’s six EDM  
24 investments in Mexico and why Thunderbird is accordingly entitled to receive the highest amount listed  
25 in the Rittvo report, totalling: \$164.2 million (for 2000 machines being operated in the six locations,  
26 with appropriate risks and other contingencies peculiar to the gaming industry built in).

27 Had Mexico treated Thunderbird and its investments with the simple fairness and equity they  
28 deserved, as a matter of right, they would - in all likelihood - be operating six facilities with 2000

1 machines today, not unlike the other local operators who remain open today (often in the same places  
2 that the EDMs were supposed to be). The EDMs are accordingly entitled to be placed back in that  
3 position, as required by the NAFTA and international law. An award of compensation is the only way  
4 remaining to restore them to this position, which Thunderbird has proved was a reasonably foreseeable  
5 consequence of the harm visited upon them, and which Mexico has failed to rebut.

6 **11.7 As regards interest with respect to the damages:**

7 **(a) What is the rate of interest to be applied, and which is the currency to be taken**  
8 **into account in that respect?**

9 Article 1135(1) contemplates an that an award shall include interest. The rate of interest to be  
10 applied for damages owed to EDMs Matamoros and Laredo should be 7.36%, payable from 11 October  
11 2001 to the date of the final award (where the earlier date represents the date of their closure), and  
12 7.23%, payable from 28 January 2002 to the date of the award, for all of the other EDMs (where the  
13 earlier date represents the effective date of their closure). This rate represents a daily average of the  
14 “Interbank Equilibrium Interest Rate” calculated by the Bank of Mexico using commercial bank  
15 quotations between 2001 and 2004.<sup>38</sup> The EDMs would have been entitled to no less than this rate of  
16 return for their business earnings in Mexico, had those earnings not been deprived from them by  
17 Mexico’s illegal conduct.

18 Post-judgment interest should be provided in the amount of 7.37%, which represents the current  
19 Interbank Equilibrium Interest Rate posted by the Bank of Mexico on its main English web site.<sup>39</sup>

20 The EDMs conducted their business and accounting practices predominantly in US currency.  
21 The valuations of the value of each enterprise have been undertaken in US currency. Customary  
22 international law dictates that an award of damages for a State taking of business property shall be  
23 compensated in an “effective” currency, such as the US dollar. Article 1110(5) also indicates a marked  
24 preference for the award being made in a G7 currency. Finally, Thunderbird was also clear in  
25

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26  
27 <sup>38</sup> See: [www.banxico.org.mx/sie/cuadros/ing/CF101.asp?lista=&select=ninguno](http://www.banxico.org.mx/sie/cuadros/ing/CF101.asp?lista=&select=ninguno), last visited 1 August 2004. The necessary  
28 data can be obtained from this page. Averages were calculated using the appropriate valuation dates (in October 2001 and  
January 2002) for each respective taking.

<sup>39</sup> See: [www.banxico.org.mx](http://www.banxico.org.mx), last visited 1 August 2004.

1 requesting in each of its claim documents that any award of damages be denominated in dollars.<sup>40</sup>  
2 Accordingly, Claimant submits that each EDM should be compensated in US currency, or in a formula  
3 consistent with Article 1110(5) (regardless of whether a breach of Article 1110 is found).

4 **(b) Is interest to be compounded?**

5 The *Metalclad* Tribunal awarded the investor pre-judgment interest, running from the date that  
6 Metalclad was wrongly denied its application for a construction permit by the local municipal  
7 government to 45 days after the award was rendered – at a rate of 6% compounded annually; as well  
8 as post-judgment interest of 6% compounded annually from the 45 day mark after the award. Other  
9 international arbitral awards have expressly allowed compound interest to be paid on the award of  
10 damages and the recent trend appears to be towards the provision of compound interest.<sup>41</sup> Dr. Mann  
11 and Professor Gaetano Arangio-Ruiz have similarly concluded that compound interest should be  
12 awarded to the claimant as an integral part of damages awards by international tribunals.<sup>42</sup>

13 The recent ICSID arbitration case, *Compania del Desarrollo de Santa Elena, S.A. v. The*  
14 *Republic of Costa Rica*,<sup>43</sup> provides a comprehensive review of the international arbitral case law related  
15 on the question of whether compound interest should be awarded. In the *Santa Elena* case, the Tribunal  
16 awarded compound interest to the claimant. The Tribunal explained its decision as follows:

17 Even though there is a tendency in international jurisprudence to award only simple  
18 interest, this is manifested principally in relation to cases of injury or simple breach of  
19 contract. The same considerations do not apply to cases relating to the valuation of  
property and property rights. In cases such as the present, compound interest is not  
excluded where it is warranted by the circumstances of the case.<sup>44</sup>

20 In the Iran-US Claims Tribunal, the *Sylvania v. Iran* case is cited as the standard with respect  
21

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22  
23 <sup>40</sup> In *Feldman v. Mexico*, the Tribunal appeared to render its award in Mexican pesos because the Claimant requested a sum  
24 of damages in pesos in its initial claim and because the case involved a tax rebate scheme which necessarily involved  
payment in pesos. The Tribunal in *Metalclad v. Mexico* made its award in US dollars, but did not express a reason for doing  
so..

25 <sup>41</sup> *Fabiani's Case*, *Moore's Digest of International Law* (1905) at 4878-4915; *The Affaire des Chemins de Fer Zeltweg-*  
*Wolfsberg*, III UNRIIAA, Vol.3, 1795 at 1808; *Kuwait v. Aminoil* (1982) 66 *International Law Reports* 518 at 613.

26 <sup>42</sup> Dr. F.A. Mann, "Compound Interest as an Item of Damage in International Law", *FURTHER STUDIES IN INTERNATIONAL*  
*LAW* (1990) at 380. Professor Ruiz, *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION* (1989) Vol. II, Part I, at 30.

27 <sup>43</sup> *Compania del Desarrollo de Santa Elena, S.A. and The Republic of Costa Rica*, Final Award, Case No. ARB/96/1,  
February 17, 2000 ("*Santa Elena*").

28 <sup>44</sup> *Santa Elena*, at para 97; citing with approval *Flexi-Van v. Iran* (1986) 9 Iran - US CTR 206, which states that: "Most  
awards allocate only simple interest, but occasionally compound interest has been awarded."

1 to the assessment of interest.<sup>45</sup> It was cited by the Iran-US Claims Commission Tribunal in other cases,  
2 such as the *Sola Tiles* case, as ensuring that commercial interest rates should be used by international  
3 tribunals. The Tribunal stated:

4 In accordance with the approach developed and applied by this Chamber since its award  
5 in the *Sylvania Technical Systems, Inc. v. Islamic Republic of Iran*, Award No. 180-64-1  
6 (27 June 1985), **the Claimant is entitled to interest on the amount awarded, at a rate  
7 based approximately on the amount that it would have been able to earn had it had  
8 the funds available to invest in a form of commercial investment in common use in  
9 its own country.**<sup>46</sup> [emphasis added]

10 And in *Santa Elena* it was written:

11 ... where an owner of property has at some earlier time lost the value of his asset but has  
12 not received the monetary equivalent that then became due to him, **the amount of  
13 compensation should reflect, at least in part, the additional sum that his money  
14 would have earned, had it, and the income generated by it, been reinvested each  
15 year at generally prevailing rates of interest.** It is not the purpose of compound  
16 interest to attribute blame to, or to punish, anybody for delay in the payment made to the  
17 expropriated owner; it is a mechanism to ensure that the compensation awarded the  
18 Claimant is appropriate in the circumstances.<sup>47</sup> [emphasis added]

19 Thus, in order to appropriately compensate the Claimant, interest should be awarded from the  
20 date of the unlawful act in question (i.e. the closure dates for the three operational EDMs and the first  
21 closure date for the non-operating EDMs). Such interest should be compounded annually to ensure the  
22 integrity of the award.

23 **(c) For which period of time is interest to be applied?**

24 As the first to render a NAFTA damages award, the *Metalclad* Tribunal relied upon established  
25 ICSID case law for the proposition that “interest becomes an integral part of the compensation itself, and  
26 should run consequently from the date when the State’s international responsibility is engaged.”<sup>48</sup> The  
27 same principles should be applied in this case.

28 As described above, interest should be applied as of the date of breach for each relevant EDM.  
It should be paid at an historically-averaged rate until the date of the award, and thereafter based upon  
the prevailing commercially available rate in the relevant territory (here: Mexico).

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<sup>45</sup>*Sylvania Technical Systems v. Iran* (1985) 8 Iran-US CTR 298 at 320-324.

<sup>46</sup>*Sola Tiles*, at para. 66.

<sup>47</sup>*Santa Elena*, at para. 104.

<sup>48</sup>*Metalclad*, at para. 128; *Asian Agricultural Products*, at para. 114. The Tribunal in *Asian Agricultural Products* quotes R. Lillich in his essay “Interest in the Law of International Claims”, *ESSAYS IN HONOR OF VADE SAARIO AND TOIVO SAINIO* (1983) at 55-56.

1 Costs

2 **12. What are the costs of the arbitration and which party shall bear those costs or in which**  
3 **proportion shall those costs be allocated between the parties?**

4 Article 1135(1) vests the Tribunal with authority to award costs in accordance with the applicable  
5 Arbitral Rules. Article 40(1) of the UNCITRAL Arbitration Rules stipulates that “the costs of arbitration  
6 shall in principle be borne by the unsuccessful party.” Article 40(2) also permits the Tribunal to also  
7 order an apportionment of counsel’s fees accrued during the arbitration. Article 38 of the UNCITRAL  
8 Rules specifies the types of costs to be contemplated. Thus far, the practice of some NAFTA Tribunals  
9 has been to award all or a portion of the costs of the arbitration in favour of a victorious Claimant,  
10 including counsels’ fees. However, there has never been a case where the victorious NAFTA Party has  
11 received an award of costs of against a claimant, partial or otherwise. Thunderbird submits that this  
12 practice is a sound development which should be followed in this case.

13 In *Pope & Talbot v. Canada*, the Tribunal noted that the Investor failed in most of its claims, but  
14 that the respondent lost in many of its preliminary and interrogatory motions. It also frowned upon the  
15 respondent’s uncooperativeness in the discovery process and in misleading the Tribunal concerning the  
16 existence of *travaux*. It accordingly awarded a portion of the shared tribunal costs to the claimant.<sup>49</sup>  
17 In *Myers v. Canada*, a majority awarded a portion of the tribunal costs to the claimant, taking into  
18 account the mixed success of the claimant, the reasonableness of the representation costs put forward  
19 by the claimant’s counsel, and the “conduct” of the parties in the proceeding.<sup>50</sup>

20 The *Mondev* Tribunal declined to make an award of costs in favor of the United States because  
21 it expressed sympathy for the claimants’ experience; determined that the respondent did not win all of  
22 its arguments; and concluded that it was too early in the life of the NAFTA to discourage claimants by  
23 awarding costs to a respondent.<sup>51</sup> The *ADF* Tribunal apportioned costs on a 50/50 basis, even though  
24 the claimant was completely unsuccessful in its claim, but it did not provide detailed reasons for its  
25

26  
27 <sup>49</sup> *Pope & Talbot, Inc. v. Canada*, Award on Costs, NAFTA-UNCITRAL Tribunal, 26 November 2002.

<sup>50</sup> *S.D. Myers, Inc. v. Canada*, Final Award (on Costs), NAFTA-UNCITRAL Tribunal, 30 December 2002.

<sup>51</sup> *Mondev International Limited v. United States of America*, Final Award, NAFTA-ICSID-AF Tribunal, No. ARB(AF)/99/2, 11 October 2002, at para. 159.



1 decision.<sup>52</sup> The *Loewen* Tribunal similarly made no award of costs, despite having dismissed all of the  
2 claimants' claims, in light of what it referred to as the "difficult and novel questions of far-reaching  
3 importance..." raised by both parties.<sup>53</sup>

4 In the *Azinian* Arbitration, the Tribunal declined to make an order of costs, in favor of the  
5 respondent, because the claimant least culpable for poor behavior involved in the case would have likely  
6 been forced to pay the award. It also noted that counsel for the claimants had prosecuted the case  
7 efficiently and that the NAFTA mechanism was very new at the time.<sup>54</sup> The *Metalclad* Tribunal made  
8 no award of costs, considering it to be "equitable" not to do so.<sup>55</sup> The *Feldman* Tribunal made no award  
9 of costs either, concluding that both parties have "partly won and partly lost, and that the percentage of  
10 victory and loss did not have any measurable effect on the amount of costs."<sup>56</sup> In *Waste Management*  
11 *II*, the Tribunal noted that the expeditious and efficient conduct of the proceedings was relevant, but also  
12 suggested that there is no rule (at least in ICSID proceedings) that costs should follow the cause. It  
13 ultimately concluded that because the conduct of the victorious respondent was "by no means beyond  
14 criticism," the parties would be ordered to bear the costs equally.<sup>57</sup>

15 In this case the Respondent has not acquitted itself well. It took a much larger share of the  
16 hearing time, for argument and cross-examinations, than the Claimant, most likely resulting from the  
17 much larger contingent of lawyers hired to present its case. Respondent made numerous objections to  
18 discovery requests which were ultimately granted by the Tribunal, and it was recalcitrant in providing  
19 access to the properties formally maintained by the EDMs. Even more importantly, Mexico has made  
20 outrageous allegations as to the propriety of Thunderbird's business practices without any evidentiary  
21 support. It falsely argued that Thunderbird effectively attempted to dump illegal machines from the US  
22 market into Mexico. It falsely argued that Thunderbird officials intentionally misled SEGOB officials

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24 <sup>52</sup> *ADF Group Inc. v. United States of America*, Final Award, NAFTA-ICSID-AF Tribunal, No. ARB(AF)/00/1, 4 January  
25 2003, at para. 200.

26 <sup>53</sup> *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Final Award, NAFTA-ICSID-AF Tribunal,  
27 No. ARB(AF)/98/3, 26 June 2003, at para. 40.

28 <sup>54</sup> *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, NAFTA-ICSID-AF Tribunal, No.  
ARB(AF)/97/2, 1 November 1999, at para's 126-127.

<sup>55</sup> *Metalclad* Final Award, at para. 130.

<sup>56</sup> *Feldman* Final Award, at para. 208.

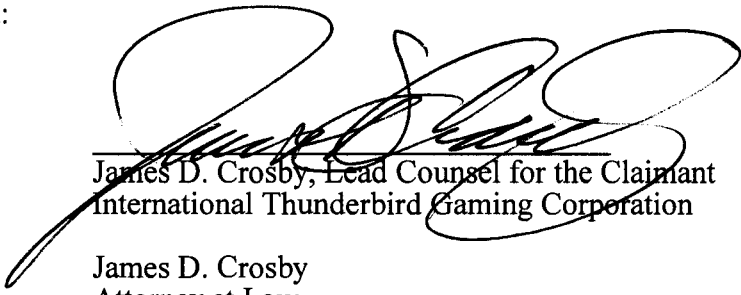
<sup>57</sup> *Waste Management II*, at para's. 179-184.

1 as part of the *solicitud* process. It falsely accused Thunderbird habitual illegal activity. These allegations  
2 were made without factual basis. They were never proven. They were false. Rather than meet the  
3 evidence presented by Thunderbird, Mexico felt compelled to slander the integrity of the claimant in an  
4 effort to deflect scrutiny of Mexico's own actions taken in violation of its NAFTA treaty obligations.

5 These wholly-unsubstantiated allegations, when combined with Mexico's obviously unnecessary  
6 jurisdictional motion and its conduct involving discovery requests and access to the EDM premises, all  
7 militate for a substantial award of tribunal costs being awarded in favor of the Claimant. The award  
8 should include all of the tribunal costs, not including translations, and the Claimants' solicitors' fees.

9  
10 All of which is respectfully submitted:

11  
12 Date: August 2, 2004



James D. Crosby, Lead Counsel for the Claimant  
International Thunderbird Gaming Corporation

James D. Crosby  
Attorney at Law  
13400 Sabre Springs Parkway, Suite 160  
San Diego, Ca. 92128  
Phone: (858) 486-0085  
Fax: (858) 486-2838  
E-Mail: crosby@crosbyattorney.com

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Todd Weiler, Co-Counsel for the Claimant  
International Thunderbird Gaming Corporation

Professor Todd Weiler  
NAFTALaw.org  
#101-3430 East Jefferson Ave  
Detroit, MI 43217  
Phone: (313) 686-6969  
Fax: (309) 210-2353  
E-Mail: tweiler@naftalaw.org

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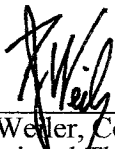
11  
12 Date: August 2, 2004

13 

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James D. Crosby, Lead Counsel for the Claimant  
International Thunderbird Gaming Corporation

14 James D. Crosby  
15 Attorney at Law  
16 13400 Sabre Springs Parkway, Suite 160  
17 San Diego, Ca. 92128  
18 Phone: (858) 486-0085  
19 Fax: (858) 486-2838  
20 E-Mail: crosby@crosbyattorney.com

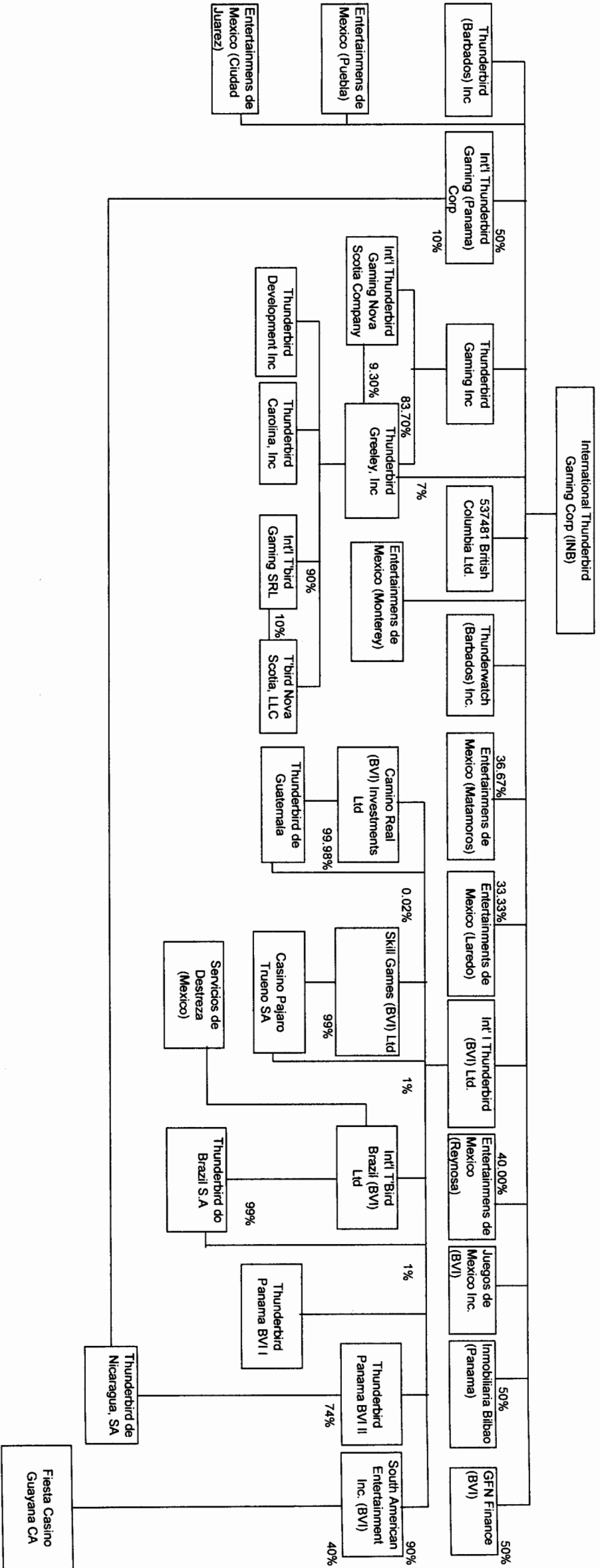
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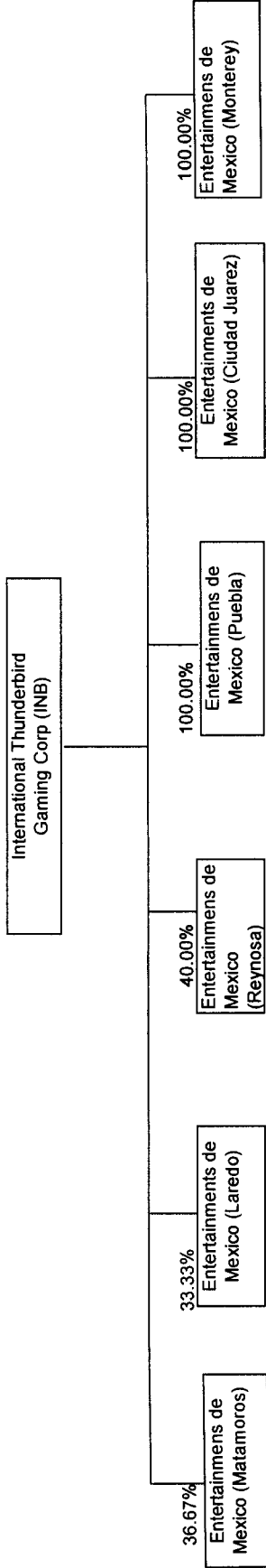
Todd Weiler, Co-Counsel for the Claimant  
International Thunderbird Gaming Corporation

23 Professor Todd Weiler  
24 NAFTALaw.org  
25 #101-3430 East Jefferson Ave  
26 Detroit, MI 43217  
27 Phone: (313) 686-6969  
28 Fax: (309) 210-2353  
E-Mail: tweiler@naftalaw.org

**Exhibit “A”**



AS OF DECEMBER 31, 2001



AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Matamoros)

Shareholders	Equity Interest
International Thunderbird Gaming Corporation	36.67%
Girault, Mauricio	10.00%
Watson, Peter	10.00%
Harari, Joe	8.33%
Bennett, Frank	6.67%
MRG Entertainment	6.67%
Berger, Larry	5.00%
de la Guardia, Aquilino	4.50%
de la Guardia, Carlos	4.50%
SCI, Inc	3.33%
Snow, Michael	3.33%
Strunz, Harry	1.00%
Total	<u>100.00%</u>

Exhibit C2	Article, By Laws
Exhibit C13	Acquisition of Shares
Exhibit C14	Acquisition of Shares
Exhibit C29	Quota Agreement

AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Laredo)

Shareholders	Equity Interest
RNST	43.10%
International Thunderbird Gaming Corporation	33.33%
Girault, Mauricio	8.34%
Watson, Peter	8.34%
Snow, Michael	3.45%
Bennett, Martha	1.72%
Rudd, Wayne	1.72%
Total	100.00%

Exhibit C31	Articles, By Laws
Exhibit C34	Investment Documentation
Exhibit C35	Subscription, Investment, and Quota Agreement
Exhibit C37	Managemnt Agreement



AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Reynosa)

<u>Shareholders</u>	<u>Equity Interest</u>
International Thunderbird Gaming Corporation	40.00%
MRG Entertainment	40.00%
Girault, Mauricio	10.00%
Watson, Peter	10.00%
Total	<u>100.00%</u>

Exhibit C39	Articles, By Laws
Exhibit C42	Subscription, Investment Documentation
Exhibit C43	Quota Agreement
Exhibit C45	Management Agreement

AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Puebla)

<u>Shareholders</u>	<u>Equity Interest</u>
International Thunderbird Gaming Corporation	<u>100.00%</u>

International Thunderbird Gaming Corporation was in the process of raising capital for this entity

Exhibit C48	Articles, By Laws
Exhibit C49	Subscription, Investment Documentation
Exhibit C50	Quota Agreement
Exhibit C52	Management Agreement

AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Ciudad Juarez)

<u>Shareholders</u>	<u>Equity Interest</u>
International Thunderbird Gaming Corporation	<u>100.00%</u>

International Thunderbird Gaming Corporation was in the process of raising capital for this entity

- Exhibit C57 Articles, By Laws
- Exhibit C60 Quota Agreement

AS OF DECEMBER 31, 2001

Entertainmens de Mexico  
(Monterey)

<u>Shareholders</u>	<u>Equity Interest</u>
International Thunderbird Gaming Corporation	<u>100.00%</u>

International Thunderbird Gaming Corporation was in the process of raising capital for this entity

- Exhibit C53 Articles, By Laws
- Exhibit C55 Subscription, Investment Documentation
- Exhibit C56 Quota Agreement