

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

SUBMISSION OF CLAIMANT
INTERNATIONAL THUNDERBIRD GAMING CORPORATION
IN RESPONSE TO RESPONDING BRIEF PREPARED BY
MEXICO IN COMPLIANCE WITH PROCEDURAL ORDER NO. 9

5 November 2004

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1 I.

2 **The New Evidence Concerning the Re-opened Office of Internal Control Investigation.**

3 Thunderbird has little to add to its August 13, 2004 letter addressing the relevance of the new
4 evidence concerning the re-opened Office of Internal Control Investigation into the actions of Aguilar
5 Coronado and Guadalupe Vargas Barrera. Thunderbird believes the new evidence suggests that Aguilar
6 Coronado used the October 10 administrative findings and order, which he *signed* but could not have
7 *authored*, to de-rail an investigation into his actions, and those of Guadalupe Vargas, initiated in
8 December, 2001. Mexico does not directly address this argument in its brief. It simply states, without
9 explanation, the argument is absurd. [*Mexico Proc. Order No. 9 Brief, para 60, English Translation*].

10 Further, the re-opening of this investigation *now*, at the presumed close of these NAFTA
11 proceedings, suggests that Mexico's assertion in these proceedings that the actions of Guadalupe Vargas
12 and Aguilar Coronado were appropriate and proper is the subject of skepticism at the Office of Internal
13 Control of the Secretary of State of Mexico. Mexico has offered no explanation why the investigation
14 was re-opened now.

15 Thunderbird invites the Tribunal to review the relevant documents and draw its own
16 conclusions.

17 II.

18 **The New Evidence Concerning Bella Vista, Reflejos/Matamoros**
19 **and Reflejos/Monterey and Analysis Under Article 1102.**

20 In its PSoC, Thunderbird argued that Mexico breached the "National Treatment" standard as
21 follows:

22 Application of the Article 1102 "National Treatment" standard is simple and
23 straightforward under the facts of this case. Thunderbird's EDM enterprises
24 were seized and closed because of the machines the facilities were utilizing.
25 Mexico asserted Thunderbird's skill machines were illegal "cash slot machines"
26 [*Ex. 70*]. Yet, domestic investors were, and are, open and operating essentially
27 identical machines at locations in Mexico. Mexico breached its 1102 obligation
28 of failing to provide claimant and its investments with treatment no less
favorable than it provided to these domestic investors. [*PSoC, page 52*]

27 Thunderbird then identified Guardia's "Club 21" in Mexico City and the Reflejos skill machine
28 facilities as appropriate comparators. Thunderbird subsequently identified the 400+ machine Bella Vista

1 facility as another comparator. Mexico has not disputed that these domestic operations were appropriate
2 comparators for an Article 1102 analysis.

3 Respondent's initial reply argument was that all such competitors had been closed down. [*SoD,*
4 *para. 205*]. This argument was proven false by the Claimant through its evidentiary showing. The skill
5 machine facilities of domestic investors were open and operating at the time Mexico seized the
6 Thunderbird EDMs. They have remained open and operating throughout these proceedings. [*Sor, pages*
7 *18 through 20; Jesus de la Rosa Buenrostro Dec. filed in support of the SoR; Gilberto Vazquez Cuevas*
8 *dec. filed in support of SoR, paras. VI, VII; Notary Declaration re Reflejos in Rio Bravo filed in*
9 *support of SoR; [C. P. Luis Arredondo Cepeda Y Torres dec. filed in support of SoR, para VII; Gomez*
10 *Hearing Testimony. Transcript, pages 9-19]*.

11 In fact, all of the domestic skill machine facilities identified by Thunderbird as comparators for
12 an Article 1102 analysis have remained open and operating. In its PSoC and SoR, Thunderbird
13 identified the following domestic skill machine facilities as appropriate comparators: Guardia's Club
14 21, Reflejos/Rio Bravo, Reflejos/Matamoros, Reflejos/Reynosa and Bella Vista. [*PSoC, page 34, SoR,*
15 *pages 18 - 20*]. Mexico has not disputed that these domestic businesses involve investment activities
16 identical to those undertaken by the Thunderbird EDMs; i.e., the operation of skill machines. Mexico
17 has not disputed that these domestic businesses are appropriate comparators for Article 1102 analysis.
18 At the commencement of, and throughout, these proceedings, Thunderbird has presented substantial
19 evidence that at all relevant times these identified facilities were, and have remained, open and
20 operating. At the hearing, Mexico conceded that Guardia's Club 21 was open and operating. [*Hearing*
21 *Transcript, pages 855-857 and 877-882*]. In their final submission, Mexico concedes that Reflejos/Rio
22 Bravo, Reflejos/Matamoros and Reflejos/Reynosa and Bella Vista remain open and operating. [*Mexico*
23 *Proc. Order No. 9 Brief, paras. 14-30, English Translation*].

24 In response to Thunderbird's substantial showing of an Article 1102 breach, Mexico made the
25 factual assertion that where skill machine operators remained open, they were doing so with temporary
26 amparo orders, allowing them to remain open for an impliedly short time pending final resolution of
27 some kind of judicial process [*SoRej, paras. 101-116*]. Thus, Mexico argued that the EDMs were not
28 in "like circumstances" with the domestic operators who remained open because those operators "have

1 filed appeals against the closures and some have obtained a temporary injunction to continue in
2 business, at least on a temporary basis, while their court appeals are pending” [SoRej, paras. 101-116].
3 These open facilities “have been granted injunctive relief as a precautionary measure while their appeals
4 are pending” [SoRej, paras. 133].¹ According to Mexico, “EDM is not in like circumstances to other
5 facilities that have been granted injunctions that temporarily suspended the closure orders” [SoRej,
6 paras. 134].

7 As described in its SoR and Post-Hearing Brief, Thunderbird disputes that this is an adequate
8 legal basis to claim “unlike circumstances,” especially in light of the fact that - under Mexico’s Law on
9 Gaming - officials always had the ability to allow the EDMs to remain open, pending final resolution
10 of these allegedly ongoing pieces of litigation concerning use of the same machines. The simple
11 question of whether Mexico accorded Thunderbird and its EDMs less favorable treatment than its own
12 investors can be stated as follows:

13 The bottom line, under Article 1102, is that some local Mexican businesses,
14 operating in like circumstances, are open today while Thunderbird’s EDMs are
15 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]

16 Thunderbird asserts that Mexico’s “in like circumstances” argument is an invalid justification
17 for the less favorable treatment it has accorded to Thunderbird and its EDM operations. But, before the
18 Tribunal can even begin to consider this kind of argument, it must determine whether Mexico has
19 offered a sufficient evidentiary basis to even make the argument. Because Mexico is offering a defense
20 to Thunderbird’s *prima facie* case, it bears the burden of providing enough evidence upon which to find
21 the facts necessary to make its argument. Mexico’s final submission is nothing short of a concession
22 that it has not met, and cannot meet, that evidentiary burden.

23 Bellavista

24 Contrary to what it claimed at the hearing and in its post-hearing brief, Mexico now concedes
25 that the 400+ skill machine facility at Bella Vista remains open and operating. Mexico asserts that it is
26 doing so with the benefit of a provisional suspension arising from an amparo proceeding instituted by

27 _____
28 ¹In its latest submission, Mexico describes these operators as having “managed to temporarily operate against the firm
determination of the competent authority that their activities are illegal” [Mexico Proc. Order No. 9 Brief, para 10]

1 a worker's union sometime after the hearing in these proceedings. [*Mexico Proc. Order No. 9 Brief,*
2 *paras. 15-21, English Translation*]. There is no explanation why the Bella Vista facility was open and
3 operating at the time of the hearing and *prior to* the worker's union amparo proceedings and provisional
4 suspension. There is no clear explanation of the circumstances under which the judicial suspension was
5 granted; for example, whether the amparo proceeding was the result of collusion between the operator
6 and the workers to keep the facility open and operating. There is no clear explanation why a
7 purportedly-illegal operation is allowed to stay open as a result of an ongoing labor dispute. Most
8 importantly, there is no evidence of actions taken by SEGOB to appeal or otherwise address the judicial
9 suspension or the amparo and proceed with closure of the facility. BellaVista appears to be open and
10 operating with the benefit of a judicial suspension and with no apparent action being taken by SEGOB
11 to address the claimed ongoing illegal activity and there is no evidence to even suggest when, or if,
12 those circumstances will change.

13 Reflejos/Matamoros and Reflejos/ Reynosa

14 Contrary to what it asserted at the hearing and in its closing brief, Mexico now concedes that
15 both of these skill machine facilities are open and operating. They are apparently operating under
16 amparos, obtained in 2002 and 2003, respectively. [*SoRej. Page41; Mexico Proc. Order No. 9 Brief,*
17 *paras. 27 - 30. English Translation*]. In its final submission, Mexico states that the amparos somehow
18 "preserve the SEGOB's power to reinstate the proceedings once the deficiencies in the proceedings that
19 motivated the concession of the amparo are corrected". [*Mexico Proc. Order No. 9 Brief, para 28,*
20 *English Translation*]. Mexico offers no evidence, however, that SEGOB has actually reinstated
21 proceedings or that it ever intends to do so (much less in the near future). Rather, Mexico asserts for
22 the first time that "SEGOB does not have the sufficient infrastructure and resources to close down this
23 type of establishments as promptly as it would like". [*Mexico Proc. Order No. 9 Brief, para 30, English*
24 *Transaction*].²

25 Until now, Mexico has asserted that equivalent action had been taken in each and every instance
26 where a skill machine facility has been identified as open. [*SoD, para. 212*]. Mexico has asserted that

27 ²This circumstance is remarkably similar to the situation of Guardia's Club 21 as testified to by Mr. Alcantara. See Hearing
28 Transcript, page 855-857 and 877-882.

1 it has vigorously and uniformly pursued any and all cases of the operation of these allegedly “illegal”
2 machines. At the hearing, Mr. Alcantara reiterated this assertion upon questioning from Mr. Walde:

3 Q: *My last question is, if you compare the way the closure was carried out against the*
4 *claimant and the way the closures are carried out - and I mean the closures against*
5 *Guardia, have they been carried out in the same way, with the same intensity, with the*
6 *same amount of security guards, rapid decision making, sudden closure? You see no*
7 *difference in terms of the manner they were carried out?*

8 A: *Absolutely no difference in the case of Guardia or in the case of any other company.*

9 *[Hearing Transcript, page 909-910]*

10 Until now, Mexico has asserted that where skill machine operators have remained open, they
11 have done so with judicial suspensions or amparos, allowing them to remain open for an impliedly short
12 time pending final resolution of some kind of judicial process. *[SoRej, para's. 101-116]*. Mexico has
13 argued that the EDMs were not in “like circumstances” with the domestic operators who remained open
14 because those operators “have filed appeals against the closures and some have obtained a temporary
15 injunction to continue in business, at least on a temporary basis, while their court appeals are pending”
16 *[SoRej, paras. 101-116]*.

17 Now, in its final submission, Mexico reverses its position. Mexico has finally conceded that the
18 skill machine operators identified as comparators by Thunderbird remain open with little or no action
19 being taken by the Mexican government to close them down. While Mexico suggests that the amparos
20 “expressly preserve the SEGOB’s power to reinstate the proceedings once the deficiencies in the
21 proceedings that motivated the concession of the amparo are corrected” *[[Mexico Proc. Order No. 9*
22 *Brief, paras. 28 and 36, English Translation]*, it does not even attempt to establish that it is actually
23 doing anything to reinstate such proceedings or to proceed with closures of the identified domestic skill
24 machine operators. Guardia’s Club 21 has been open for years under the protection of amparos.
25 Reflejos/Matamoros and Reflejos/Reynosa have been open and operating for years under the protection
26 of amparos. Bella Vista has been operating since sometime prior to February, 2004 and now is
27 apparently open and operating under the protection of an amparo. Yet there is little, if any, evidence of
28 efforts, much less vigorous and uniform efforts, to re-institute closure proceedings against these
facilities. Lacking such evidence, Mexico now offers, for the first time and without supporting evidence,
the excuse of a lack of manpower, infrastructure and resources sufficient to address these domestic skill

1 machine operations.

2 First, it must be noted that this new claim of a lack of resources and manpower to address
3 domestic skill machine operations is highly suspect - especially in light of the significant resources
4 Respondent has expended in these proceedings with a large panel of lawyers, multiple extensive
5 briefings and a lengthy hearing presentation. Further, Mexico's new claim of a lack of resources and
6 manpower stands in sharp contrast to the efficiency and ferocity of its enforcement activities against
7 Thunderbird and its EDMs. Undisputed testimony and videotape evidence offered with the PSoC
8 established clearly that significant resources and police power were arrayed against Thunderbird and
9 the EDMs by Mexico. It simply flies in the face of common sense for Mexico to assert that it somehow
10 lacks the resources to treat its domestic investors in the same manner that it treated Thunderbird's
11 EDMs if it really chose to so. Alternatively, it would have required no financial resources, manpower
12 or infrastructure for Mexico to accord the Thunderbird EDMs with the same treatment it accorded to
13 the identified domestic investors - allowing them to stay open pending some final resolution of the skill
14 machine issue.

15 Mexico's new claim that it lacks resources to act uniformly with regard to the identified group
16 of Article 1102 comparators is a significant reversal of position driven by a lack of supporting evidence.
17 Until now, Mexico has consistently asserted that it has acted in the same fashion against all skill
18 machine operators, domestic or foreign. Now, faced with a lack of supporting evidence, Mexico
19 concedes that it has not done so and offers a last-minute excuse for not having done so. In turn, Mexico
20 seeks to shift its Article 1102 argument. Mexico now wishes the Tribunal the focus on what it *intends*
21 to do with respect to the identified domestic skill machine facilities, if resources allow, rather than on
22 its oft-repeated claim of having taken vigorous and uniform enforcement against all skill machine
23 facilities. Mexico encapsulates this new argument in the following statement : "To pretend that what
24 is dictates the content of what should be is absurd." In other words, Mexico is saying: "look at what
25 we say we would like to do as opposed to what we are actually doing."

26 If accepted, this argument would provide any NAFTA Party with an absolute defense to any
27 Article 1102 claim. The Party need only assert that it *intended* to provide comparable treatment as
28 between domestic and foreign investors undertaking comparable investment activities to avoid a finding

1 of treaty breach, even where the facts establish that less favorable treatment was actually accorded to
2 the foreign investor. This is not the Article 1102 test. The test is whether a comparable investor is
3 receiving more favorable treatment *in result*.³ Mexico's shift of position on Article 1102, dictated by
4 the evidence or lack thereof on Mexico's part, can only be seen as an admission that less favorable
5 treatment has been accorded to Thunderbird and its EDM in breach of Article 1102 treaty obligations.

6 In addition to shifting its legal position on Article 1102 analysis, Mexico has also re-
7 characterized the actions of the domestic skill machine operators. Mexico *now* characterizes these
8 domestic operators – who have remained open and operating – not as investors who have properly and
9 successfully availed themselves of available local remedies but as individuals who, “through legal
10 subterfuge, have managed to temporarily operate against the firm determination of the competent
11 authority that their activities are illegal”. [*Mexico Proc. Order No. 9 Brief, para 10, English*
12 *Translation*]. This re-characterization of the action of the domestic skill machine operators is
13 significant. It leads to the following comparison: a foreign investor who sought and obtained prior
14 assurances from the host government as to its investment activities, who relied upon promises of
15 cooperation from officials of the host government, and who attempted to avail itself of local
16 administrative and legal remedies to address the seizure of its investments remains closed while
17 domestic businesses undertaking identical investment activities remain open through “*legal*
18 *subterfuge*”. [*Mexico Proc. Order No. 9 Brief, para 10, English Translation*]. A clearer example of
19 “less favorable treatment’ being accorded to a foreign investor would be hard to articulate.⁴

20 To be clear, there is no evidence before this Tribunal that Mexico actually had any difficulty in
21 equally or adequately enforcing what it claims was its policy of absolutely prohibiting the use of
22 machines such as the ones used by Thunderbird's EDMs and their competitors. The *best* that Mexico
23 can do is to explain that enforcement responsibilities are apparently divided inefficiently among
24

25 ³Pope & Talbot Award at paras. 39-42.

26 ⁴In its SoD, Mexico argued that EDM had made “fundamental errors” in it's efforts to seek legal redress in Mexican courts
27 for the seizures of its assets [SoD, para. 155]. Mexico now appears to be saying it isn't better lawyering that allows the
28 domestic operators to stay in business. Rather, it is the ability of those domestic operators to resort to “legal subterfuge”.

1 different agencies or divisions of the Mexican Government. State responsibility attaches to the conduct
2 of a Government as a whole. It is no excuse to claim that it is “somebody else’s responsibility” to
3 enforce what Mexico claims to be hard and fast laws. Mexico’s obligation, under Article 1102, is to
4 provide a level playing field to each and every individual NAFTA investor. Mexico made similar
5 arguments to the *Feldman* Tribunal, but the majority was not persuaded. It stated at pp. 79-80 as
6 follows:

7 For the Poblano Group and for other likely cigarette reseller/exporters, the Respondent
8 has asserted that audits are or will be conducted in the same manner as for the Claimant,
9 and implied that they will ultimately be treated in the same way as the Claimant.
10 However, the evidence that this has occurred is weak and unpersuasive. The inescapable
11 fact is that the Claimant has been effectively denied IEPS rebates for the April 1996
12 through November 1997 period, while domestic export trading companies have been
13 given rebates not only for much of that period but through at least May 2000, suggesting
14 that Article 4(III) of the law has been de facto waived for some if not all domestic firms.
15 While the Claimant has also been effectively precluded from exporting cigarettes from
16 1998 to 2000, there is evidence that the Poblano Group companies have apparently been
17 allowed to do so, notwithstanding Article 11 of the IEPS law. Finally, the Claimant has
18 not been permitted to register as an exporting trading company, while the Poblano
19 Group firms have been granted this registration. All of these results are inconsistent with
20 the Respondent’s obligations under Article 1102, and the Respondent has failed to meet
21 its burden of adducing evidence to show otherwise.

22 A majority of the *Feldman* Tribunal concluded that uneven enforcement by Mexico constituted a *prima*
23 *facie* breach of NAFTA Article 1102.⁵ Similarly, in the *Thai Cigarettes Case*, the Panel did not make
24 a finding that a developing country could impose a measure that was more-trade-restrictive than
25 necessary simply because of the fact that it was a developing country (with fewer regulatory resources).⁶
26 The national treatment obligation would be rendered meaningless if all a government had to do to avoid
27 providing “treatment no less favourable” to an investor was to claim that it was unable to do so for
28 administrative or fiscal reasons or because of any other domestic legal impediments. Similar
conclusions can be seen in the panel reports in both the *USA – Reformulated Gasoline* and *USA –*
Trucking cases. In both cases, the USA argued that less favourable regulatory treatment was acceptable
under GATT and NAFTA law for domestic fiscal purposes. In other words, the USA said that it would

26 ⁵ *Feldman v. Mexico*, Final Award, at para. 188.

27 ⁶ *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*, GATT Panel Report,
28 7 November 1990, DS10/R-37S/200, at para’s. 77-80.

1 cost too much to enforce its regulations in a manner that ensured a non-discriminatory result. In both
2 cases, the arguments were rejected and liability for breach of a national treatment provision was found.⁷

3 In the *Feldman* case, Mexico could not escape liability under Article 1102 for providing rebates
4 to one competitor but not the investor, at a time when it claimed that neither was entitled to the rebate
5 under domestic law. In the *Trucking* case, the United States could not refuse to allow Mexican truckers
6 to apply for permission to work in the United States while offering such rights to Canadian and
7 American competitors, merely because it was more administratively efficient to do so. For the same
8 reasons, Mexico cannot escape liability for failing to ensure that the EDMs received treatment no less
9 favorable than each of their competitors who seemingly obtained carte blanche to stay open in
10 perpetuity, whether through “legal subterfuge” or otherwise. Either Mexico should have exercised its
11 authority under applicable law to enforce its alleged policy prohibiting the operation of all gaming
12 machines, or it should have exercised its discretion under that legislation to grant the EDMs provisional
13 authorization to operate until such time as the legality of the machines was presumptively determined
14 for all.

15 More to the point, Mexico has simply not proved that it was actually unable to employ a fair and
16 balanced gaming enforcement regime. The overwhelming character of the evidence before this Tribunal
17 demonstrates that, in Mexico, strict gaming enforcement is reserved only for the foreign-owned
18 enterprises with the temerity to actually petition the regulator to establish the ground rules before
19 investing.

20 III.

21 Concluding Statement

22 In October, 2001, Mexico forcibly seized, closed and sealed Thunderbird’s skill machine
23 facilities. They remain seized and closed. At the same time it was seizing Thunderbird’s skill machine
24 operations, Mexico was allowing, and continues to allow, its own investors to operate identical skill
25 machine facilities. Mexico reneged upon promises and assurances made to Thunderbird concerning its
26

27 ⁷ *United States: In the Matter of Cross-Border Trucking Services*, NAFTA Chapter 20 Panel, 6 February
28 2001, at para’s. 256-270 & 273-275; and *United States - Standards for Reformulated and Conventional
Gasoline*, WTO AB Report, 29 April 1996, WT/DS2/AB/R, at pp. 17-19.

1 investment activities. Mexico arbitrarily and unjustifiably discriminated against a foreign investment.

2 In doing so, Mexico destroyed investment enterprises worth tens of millions of dollars.

3 The facts before the Tribunal clearly establish breaches by respondent The United Mexican

4 States if its NAFTA Article 1102, 1105 and 1110 obligations owed to claimant International

5 Thunderbird Gaming Corporation and its Mexican investment enterprises, Entertainmens de Mexico

6 S. de R. L. De C. V., Entertainmens de Mexico Laredo S. de R. L. de C.V., Entertainmens de Mexico

7 Reynosa S. de R.L. de C.V., Entertainmens de Mexico Puebla S. de R.L. de C.V., Entertainmens de

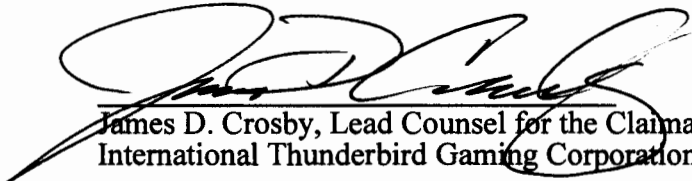
8 Mexico Monterey S. de R.L. de C.V. and Entertainmens de Mexico Juarez. S. de R.L. de C.V.

9 Claimant respectfully requests that the Tribunal award damages in amount representing the full

10 restitution value of Thunderbird's investment enterprises at the date of seizure by Mexico.

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12 Date: November 5, 2004



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