

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 COMPLIANCE WITH PROCEDURAL ORDER NO. 10

8 December 2004

1 **RESPONSE OF THUNDERBIRD TO MEXICO'S NOVEMBER 19, 2004**

2 **“ESCRITO DE DUPLICA AL ESCRITO DE THUNDERBIRD**

3 **DEL 5 DE NOVIEMBRE DE 2004”.**

4 At paragraph 3 of its submission, Mexico continues to make erroneous claims about what facts
5 are actually in dispute. It is very much in dispute as to whether Mexico has applied a consistent and
6 even-handed approach to its regulation of the gaming industry. There is also little or no evidence to
7 support Mexico’s contention that Thunderbird’s competitors are open on some sort of “temporary”
8 basis. As Mr. Alcantara admitted during the hearing [Transcript, pages 880-882], and contrary to
9 Mexico’s arguments at paragraphs 18-24 of its submission, there is little evidence of any real effort by
10 Mexico to change the status quo. Some of Thunderbird’s competitors remain open and operating
11 indefinitely under so-called “temporary” court orders, while others remain open and operating even in
12 the absence of such orders.

13 At paragraphs 6 and 7, Mexico mischaracterizes both the substance of Thunderbird’s arguments
14 and the substance of its international obligations. No matter how much they would now like it to be
15 so, the regulation of gaming is not black and white in Mexico. The law on gaming is drafted so as to
16 provide regulatory discretion to Mexican authorities to regulate in the public interest. [Rose testimony,
17 Transcript, Pages 770-771, 810-812; Alcantara testimony, Transcript, 930-931.]. Rather than choosing
18 to exercise that discretion in a manner consistent with its NAFTA obligation to provide treatment no
19 less favourable to foreign investors and their investments, Mexican authorities have engaged in a course
20 of conduct which has clearly favored domestic competitors in the industry over foreigners.

21 Moreover, Mexican authorities have done nothing, and they appear prepared to do nothing, to
22 correct the imbalance which Mexico now appears to have admitted to exist in its legal system, where
23 better-connected local investors can obtain rights to remain open through “legal subterfuge” not as
24 easily employed by foreigners attempting to find their way in that system.

25 Compliance with international obligations such as the NAFTA national treatment standard has
26 nothing to do with what a host government claims – after the fact – to be “illegal” or “non-compliant”
27 as a matter of local law. It is strictly about ensuring that an equality of competitive opportunity is
28 granted to the foreigner, as promised in the treaty. Much like the Tribunal in Feldman v. Mexico found

1 that the investor was entitled to rebates granted to domestic competitors – even though it was argued
2 by Mexico that nobody was entitled to those rebates as a matter of local law – this Tribunal can, and
3 should, find that Mexico has provided Thunderbird with an uneven playing field, in terms of gaming
4 regulation, and has failed to take the steps necessary to remedy the unfairness which has resulted.

5 At paragraph 10 of its submission, Mexico mischaracterizes Thunderbird’s arguments about the
6 role of the Mexican legal system in this case. Thunderbird has merely stated that it has not pursued a
7 classic denial of justice claim in respect of the treatment of its EDMs before Mexican courts.
8 Thunderbird’s complaint focuses on the conduct of Mexican regulators, who have consistently failed
9 to provide the EDMs with either “fair and equitable treatment” or “treatment no less favourable” as
10 required under the NAFTA. This does not mean that Thunderbird believes that it did receive, or could
11 have received, a “fair shake” in the hands of a Mexican court. It means that it is wholly unnecessary
12 to prove that a denial of justice has been committed by a Mexican court in order for Mexico to be found
13 in breach of its NAFTA obligations.

14 The definition of “measure” under NAFTA Article 201 is far broader than the decisions of
15 courts. And, as discussed in previous submissions, there is no “exhaustion of local remedies”
16 requirement in the NAFTA, when the measure at issue emanates from a government body other than
17 a court. In defending this claim, Mexico has attempted to retreat to its domestic legal system, arguing
18 that it did no wrong because it always offered Thunderbird access to what it had originally claimed was
19 a completely fair and equitable court system. Mexico’s obligation, under Articles 1102 and 1105, is
20 much broader than that. The NAFTA requires Mexico to provide “treatment no less favourable” and
21 “fair and equitable treatment” from all branches of government.

22 That Mexico has finally admitted that its legal system is open to abuse by local competitors who
23 can successfully engage in “legal subterfuge” is no defense. The logical deduction to be made from
24 this admission is not that Thunderbird has changed the focus of its claim (from the bureaucracy to the
25 courts). Rather, the conclusion to be drawn from Mexico’s admission is that – even if one were to
26 accept its flawed attempt to re-import an “exhaustion of local remedies” requirement into Articles 1102,
27 1105 and 1110 – it would still have failed to meet these basic international law standards in this case
28 because it permitted “legal subterfuge” to win the day.

1 Despite Mexico’s claims to the contrary, the NAFTA requires much more of it than to maintain
2 an open and accessible court system. For example, last month the Tribunal in GAMI provided a view
3 of the minimum standard which also confirms that Mexico must do more than simply maintain a court
4 system. It says that Mexico must do more than simply excuse itself from its NAFTA obligations
5 because of supposedly limited resources. In explaining what it saw as the Tribunal’s role in a NAFTA
6 dispute, the GAMI Tribunal said that its duty was:

7 ... to appraise whether and how pre-existing laws and regulations are applied to the
8 foreign investor. It is no excuse that regulation is costly. Nor does a dearth of able
9 administrators or a deficient culture of compliance provide a defense. Such is the
10 challenge of governance that confronts every country. Breaches of NAFTA are
11 assuredly not to be excused on the grounds that a government’s compliance with its own
12 law may be difficult. Each NAFTA Party must to the contrary accept liability if its
13 officials fail to implement or implement regulations in a discriminatory or arbitrary
14 fashion.

15 [GAMI Investments, Inc. v. Mexico, UNCITRAL/NAFTA Tribunal, Final Award, 15
16 November 2004, at para. 94.]

17 Accordingly, it does not matter if Mexico is held to its own admission that its legal system is
18 open to opportunistic legal subterfuge by local competitors. It does not matter that Mexico now claims
19 it lacks the resources to evenly treat domestic and foreign competitors in the gaming business. What
20 matters is that Thunderbird did not come to Mexico under the cover of darkness. It introduced itself
21 directly to Mexican officials and obtained “negative permission” from them to operate. What matters
22 is that in return for its acts of openness and transparency, and its good faith reliance, Thunderbird was
23 singled out for financially-devastating punishment not uniformly provided to others. What matters, as
24 noted by the GAMI Tribunal, is that Mexico must accept responsibility when its officials “fail to
25 implement” what would otherwise constitute ostensibly neutral regulations because they did so “in a
26 discriminatory or arbitrary manner.”

27 At paragraph 16 of its submission, Mexico argues that Thunderbird’s interpretation of the
28 discretion available in Mexico’s gaming law has been made without evidence. Thunderbird would draw
the Tribunal’s attention to the testimony of Mr. Alcantara and Professor Rose. Both men testified that
such discretion does indeed exist. [Transcript, Pages 770-771, 810-812, 930-931.] Mr. Alcantara’s
testimony on this issue was succinct and unequivocal.

1 Q. What authority does the Secretary de Gobernacion, and excuse my language,
2 have under Article 3 of the federal law of games and raffles?

3 A. Gobernacion may authorize, supervise, regulate, and generally control all those
4 activities that the law refers to, in other words, laws on gambling and lotteries.

5 Q. So if there is an activity that would be deemed betting and otherwise illegal
6 under Article 1 or Article 2, Article 3 would allow the Secretaria de
7 Gobernacion to regulate, authorize, control, or oversee games which otherwise
8 would be illegal betting; is that correct?

9 A. I think that would be contradictory. The authority could only authorize
10 whatever Articles 1 and 2 allow.

11 Q. Well, Article 1 allows--let me ask it just straight out and let you answer it: Is
12 the definition, the English definition that I'm working with, of Article 3, allows
13 the Secretaria de Gobernacion to regulate, authorize, control, oversee games
14 when they involve betting of any kind; correct?

15 A. That's right.

16 Q. Does that allow the Secretary to authorize games that involve betting?

17 A. That's right.

18 Q. He could grant a license to a game that involves betting under Article 3; correct?

19 A. That's correct.

20 [Alcantara testimony, Transcript, pages 930-931]

21 Professor Rose gave similar testimony at Transcript, pages 770-771. He later described his own
22 experience with the exercise of such discretion by Mexican authorities.

23 Q. Professor Rose, you mentioned that you were involved in a horse betting facility
24 in Caliente? I'm sure I got that wrong.

25 A. I was working with a U.S. lawyer on Caliente sports and race books, and I have
26 done, you know, various projects with them.

27 Q. Was that a gambling facility?

28 A. Yes.

1 Q. How was that facility allowed to operate in Mexico, to your understanding?

2 A. They have licenses.

3 Q. So, though it's a gambling or betting facility, the government would have the
4 discretion to issue it a permit or license if it chose to do so.

5 A. Well, of course, obviously you need the constitution to allow it, and the statutes
6 to allow it, and then whatever regulations are in place, and then they get their
7 license.

8 Q. Is that your understanding of how that particular facility was allowed to operate,
9 because it had secured a license from the government?

10 A. I believe so.

11 Q. Though it was gambling?

12 A. Right. It's clearly gambling. They also have a--they have a regular race book,
13 race track, but they also have--do sports betting, and this is pursuant--I believe
14 it's pursuant to license. It's certainly legal.

15 [Rose testimony, Transcript, pages 770-771]

16 Finally, with respect to Mexico's arguments at paragraphs 25-36, Thunderbird stands by its
17 previous arguments about the significance of the proceedings instituted before Mexico's Internal
18 Control Organ, which apparently were originally scheduled to coincide perfectly with the close of
19 submissions in this case.

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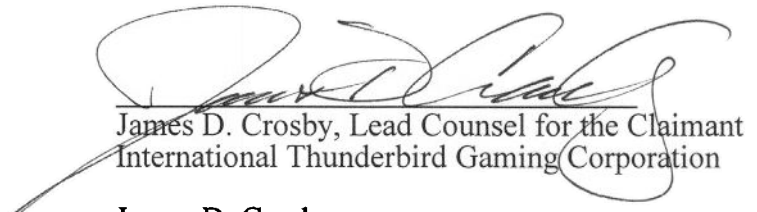
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2 Based upon the foregoing, and upon all of the parties' previous oral and written submissions,
3 Thunderbird asserts that it has overwhelmingly satisfied its burden of proof under Articles 1102, 1105
4 and 1110, and that its EDMs are accordingly entitled to be placed back in the profitable position each
5 clearly would have been in but for Mexico's breaches of these NAFTA provisions.

6 Date: December 8, 2004



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