

NAFTA Arbitration under the UNCITRAL Arbitration Rules

INTERNATIONAL THUNDERBIRD GAMING CORPORATION

Claimant

versus

THE UNITED MEXICAN STATES

Respondent

PROCEDURAL ORDER NO. 1

(By Consent)

(27 June 2003)

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CONSIDERING:

- (A) The written suggestions with respect to the arbitral proceedings made by Claimant and Respondent on 16 and 21 April 2003 as requested by the Tribunal in its letter of 31 March 2003;
- (B) The Preparatory Conference held in Washington, DC, on 29 April 2003;
- (C) The Tribunal's letter of 21 May 2003, requesting comments from the Parties, to which Respondent reacted by letter dated 3 June 2003, Claimant having not made comments;

THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:

1. Applicable Rules

- 1.1 The arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules, except as modified by the provisions of Chapter Eleven of the NAFTA.
- 1.2 The IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules") shall be followed as a guideline.

2. Place of Arbitration

- 2.1 The place of arbitration in the legal sense shall be Washington, DC, without prejudice to the provisions of Article 16(2)-(4) of the UNCITRAL Arbitration Rules.

3. Language

- 3.1 The arbitration shall be conducted in the English and Spanish language.

- 3.2 Communications, submissions, witness statements and documentary evidence can be submitted in either language, without a translation being necessary.
- 3.3 Examination of witnesses and oral argument shall be interpreted simultaneously in the other language. If the circumstances so require, the Tribunal may, at the request of a party or witness or on its own motion, order that the interpretation of the examination of a witness be consecutive. The cost of the interpretation shall be advanced by each party in equal shares.
- 3.4 The transcript of the Hearing referred to in § 14.9 shall be available in the English and Spanish language, the modalities of which shall be determined by the Tribunal in consultation with the parties at the telephone conference referred to in § 14.3.
- 3.5 Any award shall be issued in both languages.
- 3.6 Communications and Orders from the Tribunal can be made in either language, without a translation being necessary.

4. Administrative Services

- 4.1 With the agreement of the parties, the Secretariat of ICSID shall render administrative services in relation to the arbitral proceedings similar to those rendered in arbitrations under the ICSID Additional Facility Rules.

5. Costs

- 5.1 The arbitrators will be remunerated in accordance with the ICSID schedule of fees.
- 5.2 The arbitrators' disbursements will also be in accordance with ICSID practice, it being understood that night travel of more than six hours for a stay of less than 24 hours may be first class.

5.3 Deposits for the fees and disbursements are to be made for the amounts and in the manner as directed by the Secretariat of ICSID. Deposits made with the Presiding Arbitrator shall be transferred to the account designated by the Secretariat of ICSID.

6. Confidentiality

6.1 The arbitration is not confidential, subject to the provisions of this Section.

6.2 The provisions relating to Access of Documents set forth in Section A of the Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission of 31 July 2001 shall apply.

6.3 As provided in Article 25(4) of the UNCITRAL Arbitration Rules, hearings shall be held *in camera*. However, the transcript of a hearing is not confidential.

6.4 In cases of commercial or technical confidentiality and political or institutional sensitivity that the Tribunal determines to be compelling, the parties can agree on a confidentiality undertaking and, in the absence of agreement on such undertaking, apply to the Tribunal for suitable confidentiality protection.

7. Sequence of the Proceedings

7.1 The sequence and timing of the proceedings shall be the following:

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.1(a)	29 May 2003	Claimant and Respondent	Request for Production of Documents		§ 12.1

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.1(b)	27 June 2003	Claimant and Respondent	Response to the Request for Production of Documents		§ 12.2
7.1(c)	15 Aug 2003	Claimant	Particularized Statement of Claim	PSoC	§ 11.1 § 13.1
7.1(d)	22 Aug 2003	Respondent	Supplementary Request for Production of Documents		§ 12.4
7.1(e)	12 Sep 2003	Claimant	Response to Respondent's Supplementary Request for Production of Documents		§ 12.4
7.1(f)	15 Dec 2003	Respondent	Statement of Defense	SoD	§ 11.2 § 13.1
7.1(g)	18 Dec 2003	Claimant	Observations on bifurcation of Preliminary Question and the merits		§ 8.3
7.1(h)	21 Dec 2003	TRIBUNAL	Decision on bifurcation		§ 8.4

7.2 With reference to Section 8, if the Tribunal decides that no bifurcation will take place, the subsequent sequence and timing of the proceedings shall be the following:

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.2(a)	31 Dec 2003	Claimant	Supplementary Request for Production of Documents		§ 12.5
7.2(b)	21 Jan 2004	Respondent	Response to Claimant's Supplementary Request for Production of Documents		§ 12.5
7.2(c)	31 Jan 2004	Claimant	Statement of Reply	SoR	§ 11.3 § 13.1
7.2(d)	15 Mar 2004	Respondent	Statement of Rejoinder	SoRej	§ 11.4 § 13.1
7.2(e)	21 Mar 2004	Claimant and Respondent	Witness notification		§ 13.3
7.2(f)	TBD	Presiding Arbitrator, Claimant and Respondent	Telephone conference re organization of the Hearing		§ 14.3
7.2(g)	26-30 Apr 2004	All	Hearing		§ 14

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.2(h)	14 May 2004	Canada and/or USA	Article 1128 submissions, if any		§ 10.1
7.2(i)	21 May 2004	Claimant and Respondent	Post Hearing Briefs	C-PHB R-PHB	§ 15 § 10.2

7.3 If the Tribunal decides that a bifurcation shall take place as referred to in Section 8, the subsequent sequence and timing of the first phase of the proceedings concerning the Preliminary Question shall be the following in lieu of the schedule set forth in § 7.2:

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.3(a)	7 Jan 2004	Claimant	Response to the Preliminary Question		§ 8.6
7.3(b)	TBD	Presiding Arbitrator, Claimant and Respondent	Telephone conference re conduct of the Hearing on the Preliminary Question		§ 8.7
7.3(c)	3 Feb 2004	All	Hearing on the Preliminary Question		§ 8.7

	Date	Party / Tribunal	Description	Abbreviation	Section of this Order
7.3(d)	13 Feb 2004	Canada and/or USA	Article 1128 submissions on the Preliminary Question, if any		§ 10.1
7.3(e)	20 Feb 2004	Claimant and Respondent	Response to Article 1128 submissions on the Preliminary Question		§ 10.2

7.4 Extensions of time shall, upon the application of a party or on its own motion and before or after the expiry of a time limit, be granted by the Tribunal in exceptional cases only, as determined by the Tribunal at its discretion or as agreed between the parties.

8. Possible Bifurcation of the Proceedings

- 8.1 Without prejudice to the provisions of Article 21(3) and (4) of the UNCITRAL Arbitration Rules, Respondent is invited to inform Claimant and the Tribunal with respect to its position whether it pursues its objections based on lack of jurisdiction and/or inadmissibility and, if so, indicate briefly the factual and legal grounds (herein referred to as the “Preliminary Question”) within 14 days after receipt by the Respondent of the documents requested by it as referred to in § 12.1.
- 8.2 If Respondent pursues the Preliminary Question, it shall give the factual and legal grounds in the Statement of Defense (“SoD”) referred to in § 11.2, to be filed on or before the date referred to in § 7.1(f). In that case, Respondent shall also state whether and if so for what reasons it applies for a bifurcation of the proceedings.

- 8.3 In the event that Respondent applies for a bifurcation of the proceedings as referred to in the preceding paragraph, Claimant may submit its observations on the bifurcation of the proceedings on or before the date referred to in § 7.1(g).
- 8.4 The Tribunal shall decide on the bifurcation on or before the date referred to in § 7.1(h).
- 8.5 If the Tribunal decides that the proceedings are bifurcated, the schedule set forth in § 7.3 shall apply and not the schedule (including the paragraphs referenced therein) set forth in § 7.2, pending resolution of the Preliminary Question.
- 8.6 If the Tribunal decides that the proceedings are bifurcated, Claimant shall file a Response to the Preliminary Question on or before the date referred to in § 7.3(a).
- 8.7 In the case of bifurcation, the conduct of the Hearing on the Preliminary Question shall be determined by the Tribunal in consultation with the parties during a telephone conference between the Presiding Arbitrator and counsel to the parties in advance of the Hearing.

9. **Administrative Arrangements Concerning Written Submissions and Notifications**

- 9.1 All notifications and communications shall be made through the Secretariat of ICSID.
- 9.2 Written submissions by the parties shall be routed through the Secretariat of ICSID as follows:
- One copy for each arbitrator;
 - One copy for the other party; and
 - One copy for the Secretariat of ICISD.

- 9.3 The date of receipt by the Secretariat of ICSID shall, for all purposes, be deemed to be the date of receipt of a submission, notification or communication.
- 9.4 All notifications and communications arising in the course of this arbitration shall be deemed to have been validly made by delivery against receipt, registered mail, courier, facsimile transmission, email or any other means of telecommunication that provides a record of the sending thereof. Transmissions by facsimile, email and other means of telecommunication need not be confirmed by a hard copy.
- 9.5 All submissions and documents shall also be submitted in searchable pdf format.
- 9.6 The abbreviations for written submissions indicated in Section 7 may be used in these arbitral proceedings for reasons of convenience.
- 9.7 Any binder containing a submission within the meaning of Section 11, containing documents within the meaning of Section 12 and containing witness statements within the meaning of Section 13 shall be numbered consecutively in Roman numerals. The number of each binder submitted by Claimant shall be preceded by the letter “C”. The number of each binder submitted by Respondent shall be preceded by the letter “R”.

10. Participation by the Governments of Canada and the United States of America

- 10.1 The Governments of Canada and the United States may make written submissions within the meaning of Article 1128 of the NAFTA on or before the date referred to in § 7.2(h) and/or if the Tribunal decides that a bifurcation is to take place on or before the date referred to in § 7.3(d).
- 10.2 The parties may respond to the submissions of the Governments of Canada and the United States in their Post Hearing Briefs referred to in § 7.2(i) and/or, as the case may be, in a Response to Article 1128 Submissions on the Preliminary Question on or before the date referred to in § 7.3(e).

- 10.3 The Governments of Canada and the United States shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA. Without prejudice to the provisions of Article 1129 of the NAFTA, for all practical purposes, the Secretariat of ICSID shall provide the copy to the Governments.
- 10.4 The Governments of Canada and the United States shall be entitled to attend any hearing in the present arbitration.

11. Written Submissions

- 11.1 Claimant shall file a Particularized Statement of Claim (“PSoC”), including all factual and legal arguments in support thereof, on or before the date mentioned in § 7.1(c).
- 11.2 Respondent shall file a Statement of Defence (“SoD”), including all factual and legal arguments in support thereof, on or before the date mentioned in § 7.1(f).
- 11.3 Claimant shall file a Statement of Reply (“SoR”) in response to Respondent’s Statement of Defence on or before the date mentioned in § 7.2(c), unless the Tribunal has decided that the proceedings will be bifurcated as referred to in Section 8.
- 11.4 Respondent shall file a Statement of Rejoinder (“SoRej”) in response to Claimant’s Statement of Reply on or before the date mentioned in § 7.2(d), unless the Tribunal has decided that the proceedings will be bifurcated as referred to in Section 8.
- 11.5 Evidence regarding the quantification of the costs of arbitration shall be submitted by each party in the form and at a time as will be directed by the Tribunal.

12. Documentary Evidence

- 12.1 On the date referred to in § 7.1(a), each party may serve to the other party a Request for the Production of Documents. Such a Request shall not be copied to the Tribunal.
- 12.2 On the date referred to in § 7.1(b), each party shall provide the other party the documents responsive to the other party's Request.
- 12.3 If and to the extent that a party objects to requested documents with reference to the objections listed in Article 9(2) of the IBA Rules, that party shall file at the same date as referred to in § 7.1(b) such objection in writing with the Tribunal, with a copy to the other party. The Tribunal shall decide on the objection after having afforded the requesting party an opportunity to comment in writing on the objection.
- 12.4 On the date referred to in § 7.1(d), Respondent may serve to Claimant a Supplementary Request for Production of Documents in relation to matters arising out of the PSoC. Such a Request shall not be copied to the Tribunal. On the date referred to in § 7.1(e), Claimant shall provide Respondent the documents responsive to Respondent's Request. The provisions of § 12.3 apply accordingly.
- 12.5 Subject to the Tribunal's decision on bifurcation referred to in Section 8, on the date referred to in § 7.2(a), Claimant may serve to Respondent a Supplementary Request for Production of Documents in relation to matters arising out of the SoD. Such a Request shall not be copied to the Tribunal. On the date referred to in § 7.2(b), Respondent shall provide Claimant the documents responsive to Claimant's Request. The provisions of § 12.3 apply accordingly.
- 12.6 The provisions of Article 3(3) of the IBA Rules shall apply to a (Supplementary) Request to Produce Documents.
- 12.7 The PSoC and SoD shall be accompanied by, to as large an extent as possible, the documentary evidence as well as the legal authorities relied upon by the

parties. Further documentary evidence as well as legal authorities relied upon by the parties may be submitted in conjunction with the SoR and SoRej.

12.8 Neither party shall be permitted to submit additional or responsive documents after the dates for the SoR and SoRej, save under exceptional circumstances as determined by the Tribunal. If the Tribunal grants an application for submission of an additional or responsive document after the afore-mentioned dates, the Tribunal shall ensure that the other party be afforded sufficient opportunity to make its observations concerning such a document.

12.9 The documents shall be submitted in the following form:

- (i) Exhibits shall be contained in a separate binder, each Exhibit having a divider bearing on the tab the Exhibit's identification number.
- (ii) The Exhibits shall be numbered consecutively throughout these proceedings.
- (iii) The number of each Exhibit containing a document produced by Claimant shall be preceded by the letter "C". The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter "R".
- (iv) A party shall be permitted to produce within one Exhibit several documents relating to the same subject matter, provided that each page within such Exhibit is numbered separately and consecutively.
- (v) Exhibits shall also be submitted in pdf format and shall start with the number "C-0001" and "R-0001," respectively.
- (vi) Voluminous or technical documentary evidence may be submitted in the form of a summary of documents, containing lists and/or categories of documents, without prejudice to the right of a party or the Tribunal to request the production of any document so listed or categorised. The underlying documentary evidence is part of the record.

(vii) Voluminous or technical documentary evidence may be analysed in, and be presented in the form of, reports by qualified persons, such as an accountant, without prejudice to the right of a party or the Tribunal to request the production of any document on which any such report is based. The underlying documentary evidence is part of the record.

12.10 Each Party shall submit all relevant documentary evidence in accordance with the procedures set forth in this Section regardless whether such documentary evidence has or has not a negative effect on its case.

12.11 Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party.

13. Evidence of Witnesses

13.1 If a party wishes to adduce evidence by witnesses in respect of its contentions, it shall submit written witness statements in conjunction with the PSoC and SoD, respectively, on the dates mentioned in §§ 7.1(c) and 7.1(f). Witness statements in rebuttal to the aforementioned statements shall be submitted in conjunction with the SoR and SoRej, respectively, on the dates mentioned in §§ 7.2(c) and 7.2(d).

13.2 Each witness statement shall contain the details set forth in Article 4(5) of the IBA Rules or, in the case of expert witnesses, the details set forth in Article 5(2) of the IBA Rules.

13.3 On the date referred to in § 7.2(e), each party shall notify the other party with a copy to the Tribunal which witnesses for whom it and/or the other party has submitted a witness statement it wishes to be examined at the Hearing.

13.4 The Tribunal encourages the parties to obtain witness statements in sufficient detail so as to avoid lengthy direct examination of a witness at the Hearing.

13.5 If a party is unable to obtain a witness statement because a witness is unwilling to give a statement and/or to appear at the Hearing, or if a witness cannot be made available for examination at the Hearing, that party may make an

application to the Tribunal for such measures as may be appropriate under the circumstances.

- 13.6 Witnesses who are affiliated with a party shall be treated in the same manner as witnesses not affiliated with a party, without prejudice to the relevance, weight and materiality of the evidence offered by a witnesses affiliated with a party.
- 13.7 Each party shall advance the costs connected with the evidence by its witnesses, including the cost of preparing the witness statements and attendance at the Hearing, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.
- 13.8 Unless the contrary is expressed, the provisions of this Section 13 also apply to expert witnesses.

14. Hearing

- 14.1 The Hearing shall take place at a venue to be determined by the Tribunal after consultation with the parties.
- 14.2 Subject to the provision of Section 8, the Hearing shall take place on the dates mentioned in § 7.2(g).
- 14.3 The Presiding Arbitrator shall hold a telephone conference with counsel to the parties in advance of the Hearing in order to address organizational details of the Hearing. The date and time of the telephone conference shall be determined in consultation with counsel to the parties.
- 14.4 The Hearing shall proceed as follows:
- (i) Opening Statement by Claimant;
 - (ii) Opening Statement by Respondent;
 - (iii) Examination of Claimant's witnesses;

- (iv) Examination of Respondent's witnesses;
- (v) Closing Statement by Claimant;
- (vi) Closing Statement by Respondent.

14.5 The length of each Opening Statement and Closing Statement shall be discussed at the telephone conference referred to in § 14.3, taking into account the principle mentioned in § 14.6.

14.6 The principle of equal time shall be observed with flexibility at the Hearing.

14.7 The procedure for examining witnesses at the Hearing shall be the following:

- (i) Each witness giving oral evidence shall first be examined by the party producing the witness ("direct examination"), then by the other party ("cross-examination"), and subsequently by the first party ("re-direct examination").
- (ii) The examination shall be limited to matters that have arisen in the witness statements, documents that have been submitted and/or oral evidence of the other witnesses.
- (iii) The re-direct examination shall be limited to matters that have arisen in cross-examination.
- (iv) The Tribunal shall have the right to interject questions during direct examination, cross-examination and re-direct examination.
- (v) The Tribunal shall also at all times have complete control over the procedure in relation to a witness giving oral evidence, including the right to limit or deny, on its own motion or at the request of a party, the right of a party to examine a witness in direct examination, cross-examination or re-direct examination, if it appears to the Tribunal that such examination or evidence is unlikely to serve any further relevant purpose.

14.8 The possible sequestration of witnesses shall be discussed at the telephone conference referred to in § 14.3.

14.9 In conformity with the provisions of § 3.4, the Hearing shall be transcribed by court reporters, the costs of which are to be advanced by each party in equal shares. The form and timing of the transcript shall be discussed at the telephone conference referred to in § 14.3.

15. Post-Hearing Memorials

15.1 Subject to the provision of Section 8, each party shall file a submission concerning what has emerged at the Hearing (“C-PHM”) and (“R-PHM”, respectively) on the date mentioned in § 7.2(i).

16. Tribunal Appointed Expert

16.1 In principle, the Tribunal will only appoint an expert if it is necessary to resolve one or more of the issues that are identified in the course of the proceedings. In any event, the Tribunal will consult the parties beforehand as to whether such an expert is indeed required and if so, on his or her terms of reference.

17. Inspection

17.1 Claimant shall show at the Hearing referred to in Section 14 skill and slot machines of the type operated by the Claimant at the sites in Mexico. The parties shall timely consult with each other about the selection and demonstration of the machines at the Hearing. The Tribunal has noted that parties deem it unnecessary to hold on site inspection.

18. Presiding Arbitrator

18.1 As provided in Article 31(2) of the UNCITRAL Arbitration Rules, the Presiding Arbitrator is authorized to decide questions of procedure alone, subject to revision, if any, by the Tribunal.

18.2 The Presiding Arbitrator is authorized to sign Procedural Orders on behalf of the Tribunal.

18.3 All members of the Tribunal shall physically participate in deliberations amongst themselves (whether in person, by telephone or otherwise) as well as in hearings and meetings with the parties, save for telephone conferences on procedural matters between the Presiding Arbitrator and counsel to the parties unless a party specifically requests that all members of the Tribunal participate in the telephone conference. The Presiding Arbitrator shall ensure that the co-arbitrators are timely and adequately apprised of such conferences.

19. Status of Orders

19.1 Any Order of the Tribunal may, at the request of a party or at the Tribunal's own initiative, be varied if the circumstances so require.

On behalf of the Arbitral Tribunal,



Professor Dr. Albert Jan van den Berg,
Presiding Arbitrator