

UNDER THE UNCITRAL RULES AND THE  
NORTH AMERICAN FREE TRADE AGREEMENT

CLAIMANT'S SUBMISSION ON  
WHETHER TO BIFURCATE THE PROCEEDINGS

Between:

INTERNATIONAL THUNDERBIRD GAMING CORPORATION

Claimant / Investor

and

GOVERNMENT OF MEXICO ("MEXICO")

Respondent / Party

December 22, 2003

I.

RESPONDENT HAS NOT SUBMITTED “FACTUAL AND LEGAL GROUNDS”  
FOR PURSUING THE PRELIMINARY QUESTION AND  
HAS NOT APPLIED FOR BIFURCATION AS REQUIRED UNDER  
SECTION 8.2 OF PROCEDURAL ORDER NO.1.

1. Procedural Order No. 1 provided Respondent with an opportunity to request bifurcation of these proceedings into jurisdictional and merits phases. Section 8.2 of Procedural Order No. 1 states as follows:

If Respondent pursues the Preliminary Question, it shall give the factual and legal grounds in the Statement of Defence (“SoD”) referred to in § 11.2, to be filed on or before the date referred to in § 71.(f). In that case, Respondent shall also state whether and if so for what reasons it applies for a bifurcation of the proceedings.  
[Emphasis in bold added]

As emphasized above, Section 8.2 is mandatory in its requirements; “....shall give the factual and legal grounds....”; “.....shall also state whether....”.

2. In its Particularized Statement of Defence (“PSD”), Respondent provided no more than a cryptic reference to the issue of the preliminary question, stating in footnote 224 that “....it is the Tribunal that must decide if it considers questions of admissibility and competence in a preliminary manner.” Respondent did not submit factual or legal grounds as to why its alleged objection to the jurisdiction of the Tribunal should be heard on a preliminary basis. Respondent did not apply for bifurcation or state the reasons it applied for bifurcation. Respondent failed to comply with the terms of Section 8.2 of Procedural Order No. 1. The Tribunal should therefore proceed to hear the entire case as dictated in Section 7.2 of Procedural Order No. 1.

II.

RESPONDENT HAS NOT RAISED A VALID OBJECTION TO THE TRIBUNAL’S  
COMPETENCE TO HEAR AND DETERMINE THUNDERBIRD’S CLAIM.

3. Should this Tribunal conclude that Respondent has complied with Section 8.2 of Procedural Order No. 1, it should nonetheless decide not to conduct a preliminary hearing because the Respondent has failed to raise a valid objection to the Tribunal’s competence to hear Thunderbird’s claim.
4. Article 21 of the UNCITRAL Rules provides, in relevant part, as follows:
  1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections

with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

...

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.
5. As noted in *Methanex v. U.S.A.*, absent the consent of the parties, NAFTA tribunals do not have authority under the UNCITRAL Rules to entertain non-jurisdictional objections on a preliminary basis.<sup>1</sup> Article 21 provides the sole and exclusive authority to hold a preliminary hearing, and it is premised on the condition that a valid jurisdictional objection has been filed no later than the delivery of the Statement of Defence.
6. The crux of Respondent's "preliminary" argument can be found in PSD Paragraph 274, wherein it alleges that Thunderbird has failed to provide sufficient evidence to demonstrate that it owns or controls the investments in question. Respondent has inexplicably styled this merits argument as going to the competence of the Tribunal to adjudicate Thunderbird's claim. What Respondent implies is a "preliminary question" is actually an element of proof under Article 1117. If Claimant cannot prove that element of its claim, it does not mean the Tribunal was without competence to hear that claim. It simply means that Claimant loses on the merits.
7. The Tribunal must make a factual determination, based upon the evidence before it, whether Thunderbird owns or controls, directly or indirectly, the investments named in its claim under Article 1117. The Tribunal was vested with the authority to make such a determination as soon as Thunderbird submitted its claim under Article 1117, as it contained all of the elements of a prima facie claim.<sup>2</sup> Accordingly, there is absolutely no reason for this Tribunal to entertain Mexico's objection on a preliminary basis. It is not a valid objection to the competence of the Tribunal.
8. Moreover, Respondent admits in PSD Paragraph 274 that its objection goes to the admissibility of the claim. As noted by the *Methanex* Tribunal, an argument as to the admissibility of a claim is based upon the proposition that, even assuming all of the facts alleged by the claimants are true, the substantive provisions would provide no remedy.<sup>3</sup>

---

<sup>1</sup> *Methanex Corp. v. U.S.A.*, Preliminary Award on Jurisdiction and Admissibility (NAFTA/UNCITRAL Tribunal) 7 August 2002, at para. 123.

<sup>2</sup> The very first Tribunal to issue an award under the NAFTA established that this time-honoured, customary international law approach to questions of tribunal competence should be observed by NAFTA tribunals. See: *Ethyl Corp. v. Canada*, Award on Jurisdiction (NAFTA/UNCITRAL Tribunal) 24 June 1998 at para. 61.

<sup>3</sup> *Supra*, note 1, at para. 109.

Under Article 32(1) of the UNCITRAL Rules, a NAFTA Tribunal may be able – under rare circumstances – to issue a partial award based upon assumed facts.<sup>4</sup> However, this is obviously not what Respondent seeks because its sole argument is that Thunderbird has failed to produce sufficient evidence of the very facts that would be assumed in order to proceed upon such a basis.

### III.

#### RESPONDENT RAISES NO SERIOUS QUESTION AS TO THUNDERBIRD'S OWNERSHIP OR CONTROL OF THE EDM ENTITIES.

9. Finally, Thunderbird strenuously denies the allegation that it has somehow failed to provide sufficient evidence to prove its standing to bring a claim under Article 1117. Thunderbird has presented a significant amount of evidence on the “ownership or control” issue. Included in that evidence is the following un-refuted declaration testimony:

I also discussed the issue of control with each of the eventual investors. They all understood that the investment each was making was a “silent investment” in which the investor would have no active participation. Thunderbird was to be the controlling party of each of the entities. PSOC, Atallah Declaration, paragraph 25.

Under the subscription and member agreements, Thunderbird maintained its significant ownership interest (40%) in EDM-Matamoros. Further, pursuant to the agreements, and through its subsequent actions, Thunderbird maintained and exercised complete control of the entity and over its operation in Matamoros. The only active investor in EDM-Matamoros was Thunderbird. With exception of Watson and Girault, whose participation is detailed in the declaration of Watson, all the investors in EDM-Matamoros were “passive”, having no control over management or operations. PSOC, Atallah Declaration, paragraph 30.

Under the subscription and quota agreements, Thunderbird maintained its significant ownership interest (40 %) in EDM-Nuevo Laredo. Thunderbird also entered a “Management Agreement” with EDM- Nuevo Laredo under which it undertook and maintained direct responsibility, through an appointed Managing Director, of the development and operation of EDM-Nuevo Laredo and its skill machine operation. Exhibit 37 contains a true and correct copy of that “Management Agreement”. Pursuant to these agreements, and through its subsequent actions, Thunderbird maintained and exercised

---

<sup>4</sup> Ibid, note 1, at para's. 122-126.

complete control of the entity and over its operation in Nuevo Laredo. The only “active” investor in EDM-Nuevo Laredo was Thunderbird. With exception of Watson and Girault, whose participation is detailed in the declaration of Watson, all the investors in EDM-Nuevo Laredo were “passive” investors having no control over management or operations. PSOC, Atallah Declaration, paragraph 30

Under the subscription and member quota agreements, Thunderbird maintained its significant ownership interest (50%) in EDM-Reynosa. Thunderbird also entered a “Management Agreement” with EDM-Reynosa under which it undertook and maintained direct responsibility, through an appointed Managing Director of the development and operation of EDM-Reynosa and its skill machine operation. Exhibit 45 contains a true and correct copy of that “Management Agreement”. Pursuant to the agreements, and through its subsequent actions, Thunderbird maintained and exercised complete control of the entity and over its operation in Reynosa. The only “active” investor in EDM-Reynosa was Thunderbird. With exception of Watson and Girault, whose participation is detailed in the declaration of Watson, all the investors in EDM-Reynosa were “passive” having no control over management or operations. PSOC, Atallah Declaration, paragraph 36.

Respondent submits *no witness testimony* to refute these facts.<sup>5</sup> Further, Claimant submitted literally hundreds of pages of documents bearing upon the “ownership or control” issue in support of its PSOC and in response to document requests. With its PSOD, Respondent submitted no documents which refute Thunderbird’s standing under Article 1117. Rather than submit its own evidence, Mexico simply challenges the sufficiency of Thunderbird’s showing. In doing so, it consistently misrepresents the true nature of Thunderbird’s showing in ways which will be addressed in reply and at the merits hearing.<sup>6</sup>

10. A clear example of Thunderbird’s control over the subject EDM entities was actually presented in these proceedings. In June, 2003, Claimant made a motion for interim measures

---

<sup>5</sup>In fact, Respondent submitted *no witness statements whatsoever* supporting its PSOD. Apparently, Respondent does not seek to adduce evidence by witnesses in respect of its contention under Section 13.1 of Procedural Order No. 1. Moreover, Mexico has not provided any of its own evidence to contradict any aspect of Thunderbird’s claim, as required under Sections 7.1(f), 12.7, and 13.1 of Procedural Order No. 1

<sup>6</sup>Additionally, Respondent relies upon inapplicable legal authority. In light of the plain text of Articles 1116 and 1117, Respondent’s reliance on the ICJ Majority Opinion in *Barcelona Traction* is entirely misplaced, and wholly without merit. See, e.g.: *Mondev v. U.S.A.*, Final Award (NAFTA/ICSID(AF) Tribunal) 11 October 2002, at para’s. 76-92; and *Pope & Talbot, Inc. v. Canada*, Award on Damages (NAFTA/UNCITRAL Tribunal) 31 May 2002, at para’s. 74-80

concerning inspections of the Matamoros, Reynosa and Nuevo Laredo facilities. That motion was the subject of a telephone conference between the Tribunal members, Claimant and Respondent. During that conference, it was agreed the inspections would proceed upon the making of formal requests to Gobernacion. Respondent insisted that the EDM entities, and not Thunderbird, would be required to make those requests. Thunderbird stated its willingness, and confirmed its ability, to have those requests made directly by its controlled EDM entities. Inspection requests were thereafter promptly made directly by the EDM entities. This presents a clear example, *within the context of these proceedings*, of Thunderbird's complete control over the EDM entities. In fact, it is starkly inconsistent for Respondent to *then* request that Thunderbird have the EDM entities take action in Mexico, a request that presumes control, and *now* argue that Thunderbird has not established its control over the same entities.


11. Even if it were assumed solely for the sake of argument that the sufficiency of Thunderbird's evidentiary showing on the issue of "ownership or control" under Article 1117 was properly considered a preliminary matter to be addressed in a bifurcated hearing, Respondent has produced no evidence that calls into legitimate question the sufficiency of Claimant's showing. Even a cursory review of the evidence currently on record raises no serious question as to Thunderbird's ownership or control of the EDM entities.

IV.

CONCLUSION

12. Respondent will be presented with a full and fair opportunity to test the Claimant's evidence at the merits hearing. There is simply no reason to go to the trouble of a preliminary hearing to determine what is obviously a merits issue: i.e. whether Thunderbird owned and/or controlled the investment, either directly or indirectly, at all relevant times. A preliminary evidentiary hearing would serve no other process than to unnecessarily delay these proceedings.
13. Claimant hereby requests that this Tribunal issue an order establishing that a preliminary hearing will not be necessary in this case; and directing the parties to observe the procedural timetable set out in Paragraph 7.2 of Procedural Order No. 1.

Date: December 22, 2003

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

Professor Todd Weiler, Co-Counsel for Claimant