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MEXICO DEFEATS THUNDERBIRD IN INVESTMENT/ STATE ARBITRATION

This month's issue of Latin America Investment & Arbitration Law Bi-Monthly takes a brief look at International Thunderbird Gaming Corporation v. Mexico an award handed down by the Tribunal composed of Lic. Agustin Portal Ariosa, Professor Thomas W. Wälde and Professor Dr. Albert Jan van den Berg (President), on February 26, 2006, under UNCITRAL Arbitration Rules and NAFTA Chapter 11.

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Thunderbird is a publicly held Canadian corporation, with its principal offices in San Diego, California, U.S.A., engaged in the business of operating gaming facilities. During 2000 and 2001, Thunderbird operated video gaming machines in three separate facilities in the State of Tamaulipas in the Republic of Mexico.

In August 2000 Entertainments de Mexico, S.A. de C.V. ("EDM"), a company controlled by Thunderbird, requested a ruling from Mexico's Ministry of Interior. The petition asked the Ministry to confirm that video game machines, designed basically for games of skill and ability and not chance, wagering or betting, were not forbidden by Mexico's related federal legislation. The Ministry answered (not having studied the specific machines, since this was not requested; no diagrams or expert opinions were filed to support the petition), that "if" the machines mentioned in the writ "operate in the form and conditions stated by you, this governmental entity is not able to prohibit its use" (Award, pr. 55).

After Mexico officially closed the facilities and EDM lost its case before the Mexican Courts (regarding two facilities) and discontinued the judicial process for the last one closed, Thunderbird filed for arbitration on March 21st, 2002, alleging violations to NAFTA Articles 1102, 1105 and 1110.

Article 1102. Thunderbird alleged that domestic investors operated and continue to operate machines under essentially identical circumstances. The Tribunal found that under Article 24 (1) of the UNCITRAL Rules, the burden of proof lies with Thunderbird, which did not show evidence of discriminatory treatment. The Tribunal found that domestic investors had repeatedly been officially closed by the Ministry, and continue to conduct a fierce legal defense, still pending in Mexican Courts.

Article 1105. The Tribunal stated that the threshold for finding a violation of the minimum standard of treatment remains high, as illustrated by international jurisprudence. It decided, based on NAFTA and customary international law (as directed by NAFTA Free Trade Commission's Notes of Interpretation of certain Chapter Eleven Provisions, dated 31 July 2001), that such violation must amount "to a gross denial of justice or manifest arbitrariness," which was not found in the present case (prs. 194 and 195).

Article 1110. The Tribunal found that the Ministry's ruling did not generate a "legitimate expectation" upon which EDM could reasonably rely in operating its machines, stating that the "threshold for legitimate expectations may vary depending on the nature of the violation.... and the circumstances of the case" (pr. 148).

¹ International Thunderbird Gaming Corporation v. Mexico Award of 26 January 2006 (Thunderbird). Available at:

www.naftaclaims.com/Disputes/Mexico/Thunderbird/ThunderbirdAward.pdf

In deciding whether EDM was directly or indirectly controlled by Thunderbird (under NAFTA, Art. 1117), the award refers to the distinction between “legal control” and “effective or *de facto* control”. The award found Thunderbird had control, identified as “the ability to exercise a significant influence on the decision-making of EDM”, in spite of holding less than 50% ownership (prs. 96-110).

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