IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

INTERNATIONAL THUNDERBIRD GAMING CORP.,

Claimant/Investor,

-and-

THE UNITED MEXICAN STATES,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to NAFTA Article 1128, the United States of America makes this submission to address certain questions of interpretation of the NAFTA arising in this case brought by International Thunderbird Gaming Corp. against the United Mexican States. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretations it offers below apply to the facts of this case.

2. This submission responds to the Tribunal's question, raised in paragraph 10.1 of the Tentative List of Issues dated May 6, 2004, whether an investor that submits a claim under Article 1117 of the NAFTA on behalf of its enterprise, but not under Article 1116 on behalf of itself, is precluded from obtaining compensation under Article 1110.

3. In the discussion that follows, the United States sets forth its understanding of the respective functions and purposes of Articles 1116 and 1117. We then explain the types of situations in which claims under Articles 1105(1) and 1110 of the NAFTA can be submitted under Articles 1116 and 1117.

Articles 1116 And 1117 Of The NAFTA

4. Articles 1116 and 1117 provide separate jurisdictional bases and serve distinct functions. Article 1116 provides for claims for loss or damage incurred by an investor of

a Party. Article 1117 addresses claims for loss or damage to an enterprise in the territory of the respondent State that is owned or controlled by an investor.[1]

5. The derivative right of action provided by Article 1117 is unavailable under customary international law for two reasons. First, it is well established that corporations have a legal existence separate from that of their shareholders. That a wrong done to the corporation also indirectly injures the shareholders does not in and of itself give the latter standing to bring a claim for compensation.[2]

6. Second, it is well established under customary international law that an international claim may not be asserted against a State on behalf of the State's own nationals.[3]

7. The NAFTA was drafted with this background in mind. The drafters of the NAFTA were aware of the difference between direct injury to an investor and injury to an investment. The drafters also recognized that investors often choose to carry out their investment activities in a State through a locally-incorporated entity. However, because of the customary international law principle of non-responsibility, customary

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[1] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 145 ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.").

[2] In *Barcelona Traction*, for example, the International Court of Justice held that Belgium had no standing to bring a claim against Spain for the alleged expropriation of assets of a Canadian limited liability company, the shareholders of which were overwhelmingly Belgian. The Court held that Belgium, the State of the shareholders, had no right to take action on behalf of the corporation; if the corporation was injured, only Canada, the State of the corporation itself, could espouse the claim. *See Barcelona Traction*, 1970 I.C.J. 3, 34 ¶ 41; *see also* Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHILIPPINE INT'L L.J. 71, 75 (1965) ("[I]f the acts complained of are directly aimed at the corporation as such and not directed against the shareholders' own rights . . . then it is only the corporation as such which will be called upon to act in municipal law and the State of nationality of the corporation [is] the only one which may take up its case in the international plane."); *Frenkel* (U.S. v. Aus.), Tripartite Claims Commission: Final Report of the Commissioner 111 (U.S.-Aus.-Hung. 1929).

[3] *See, e.g.*, *Forêts du Rhodope Central (Fond)* (Greece v. Bulg.), 3 R.I.A.A. 1389, 1421 (Mar. 29, 1933) ("A l'époque où s'est produit le fait dommageable – la prétendue confiscation des forêts – [deux des personnes en faveur desquelles la demande a été présentée] étaient donc incontestablement ressortissants du pays qui prenait les mesures incriminées. Dans ces conditions, il ne saurait être admissible, selon le droit international commun, de reconnaître au Gouvernement [demandeur] le droit de présenter des réclamations à leur profit pour ces faits dommageables, étant donné que ceux-ci ont été causés par leur propre Gouvernement.") ("At the time of the occurrence of the wrongful act – the supposed confiscation of forests – [two of the persons on whose behalf the claim was presented] were therefore indisputably nationals of the country that adopted the challenged measures. In these conditions, it would be impermissible, according to customary international law, to recognize in the claimant Government the right to present claims on their behalf for actionable damages, given that such damages were caused by their own Government.") (translation by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 483 (5th ed. 1998) (stating that in order for a claim to be admissible under international law, a claimant must "(*a*) hav[e] the nationality of the State by whom it is put forward, and (*b*) not hav[e] the nationality of the State against whom it is put forward").

international law remedies were not available to remedy injuries to such locally-incorporated entities.

8. To address this situation, the drafters of Chapter Eleven created a derivative right of action under Article 1117 that derogates from customary international law. The language of the article provides that it can be exercised only in cases where "*the enterprise* [not the investor] has incurred loss or damage by reason of, or arising out of, the breach."[4] Article 1117 thus addresses the situation where the alleged violation of Chapter Eleven causes loss or damage to a locally-organized enterprise.[5]

9. Without Article 1117, the investor would be denied a remedy where a locally-organized enterprise that it owns or controls has suffered an injury, because the enterprise itself does not have standing to bring a claim against the respondent State. The inclusion of Article 1117 in the NAFTA remedies this problem without eliminating the distinction between direct and derivative injuries or altering the general principle that the corporation, as opposed to its individual shareholders, may alone take action on behalf of the corporation.

Article 1117 Claims For Breach Of Articles 1105(1) Or 1110

10. Article 1105(1) of the NAFTA prescribes the minimum standard of treatment to be afforded to investments of investors of another Party. Under Article 1110, a Party may not expropriate an investment of an investor other than for a public purpose, on a non-discriminatory basis and in accordance with due process of law. Both articles address treatment of an "investment" of an investor of another Party, not the investor itself.

11. Article 1139 defines "investment" as an enterprise, certain interests in an enterprise, debt or equity securities of, or loans to, an enterprise, and various other interests.

12. As it pertains to Articles 1105(1) and 1110, Article 1116 provides a right of action for claims of loss to the investor based on the treatment of an investment that is owned or controlled, directly or indirectly, by the investor. Thus, for example, a claim that real property owned by the investor in the territory of the Party was expropriated can be submitted only under Article 1116.

13. Where an investor that is a shareholder in a locally-organized enterprise suffers a direct injury to its interest in the enterprise – for example, where the investor is denied its

[4] NAFTA art. 1117(1) (emphasis added).

[5] *See* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) ("Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.").

right to a declared dividend or its right to vote its shares – the investor has standing to bring a claim under Article 1116 in accordance with customary international law principles.

14. Finally, Article 1116 provides a right of action for claims by the investor that the entire enterprise has been expropriated and, therefore, its interest in the enterprise has been taken without compensation as well.

15. Where, however, the alleged loss or damage is suffered by the investor's locally-organized enterprise – for example, where an investment controlled by the enterprise is expropriated without compensation – Article 1117 provides a right of action for the injury to the local enterprise. In such an instance, each of the requirements of Article 1117(1) is met: (a) an investor of a Party asserts a claim (b) on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly (c) that the other Party has breached Section A – in the example, breaching Article 1110 by expropriating an investment indirectly controlled by the investor through the enterprise – and (d) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

16. To read Article 1117 as precluding such a claim would be to provide no remedy at all for a breach of Section A of Chapter Eleven whenever an investment is indirectly controlled by an investor through a locally-organized enterprise. Under such a reading, the investor would have no claim under Article 1116 because the injury would be to the enterprise and any loss to the investor would be derivative. Reading Article 1117 as precluding a claim on behalf of an enterprise for injury caused by expropriation of an investment controlled through that enterprise would, therefore, preclude any remedy under the investment chapter. The ordinary meaning of Article 1117, however, supports no such result.

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Respectfully submitted,

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Mark A. Clodfelter
UNITED STATES DEPARTMENT OF STATE
Office of the Legal Adviser
Office of International Claims &
Investment Disputes
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037