

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
*THE NORTH AMERICAN FREE TRADE AGREEMENT***

BETWEEN:

**INTERNATIONAL THUNDERBIRD
GAMING CORPORATION**

Claimant / Investor

and

THE UNITED MEXICAN STATES

Respondent / Party

**SUBMISSION OF
THE GOVERNMENT OF CANADA
PURSUANT TO NAFTA ARTICLE 1128**

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Introduction

1. Canada makes these submissions pursuant to Article 1128 of the NAFTA and the Tribunal's order of 27 June 2003. The submissions concern two issues of interpretation respecting Article 1102: 1) how to define the phrase "in like circumstances", and 2) where to place the burden of proof.

2. This submission is not intended to address all interpretive issues that may arise in this proceeding. To the extent that Canada does not address certain issues, its silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

3. Canada takes no position on any particular issues of fact, or on how the interpretations it submits below should apply to the facts of the case.

"In Like Circumstances"

4. Canada has advanced a consistent position on the appropriate interpretation of Article 1102 since the earliest arbitrations under NAFTA Chapter 11. In short, determining the existence of "like circumstances" is not merely a matter of determining whether investors operate in the same business sector.¹

¹ Canada most recently made similar submissions in its *Fourth Submission Pursuant to Article 1128 of the Government of Canada, Methanex Corporation v. United States of America*, 30 January 2004.

5. The relevant part of Article 1102 reads:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

6. To summarise, the “national treatment” provision in Article 1102 requires a NAFTA Party to accord treatment to an investment of another NAFTA Party that is no less favourable than the treatment it accords, in like circumstances, to domestic investments. It prohibits treatment which discriminates on the basis of the nationality of the investment or the investor.

7. The starting point for interpreting any provision of the NAFTA is Article 31 of the *Vienna Convention on the Law of Treaties*.² It provides that the words of a treaty are to be given their ordinary meaning in their context and in the light of the NAFTA's object and purpose. The first element in an Article 31 analysis is an examination of the text to be interpreted; properly applied, such an analysis makes it clear that treatment “in like circumstances” in Article 1102 cannot mean only that the investors in question are somehow similar (or even identical). Such a reading would convert the test in Article 1102 from one of treatment accorded “in like circumstances” into one of treatment accorded to “like investors” or “like investments”.

² *Vienna Convention on the Law of Treaties*, 23 May 1969, Can. T.S. 1980 No. 37 (also published at 1155 U.N.T.S. 331, (1969) 8 ILM 679), Article 31. (Tab 2)

8. Article 1102 does not address whether the investors are "like". It expressly addresses the question of whether treatment was accorded "in like circumstances". The two are not the same. A determination that investors or investments compete for the same business, or operate the same equipment, or are otherwise similar, may be one of several relevant factors in determining whether the treatment accorded by a NAFTA Party was "in like circumstances". However, it cannot be made the sole or determining factor.³

9. If the determination of whether treatment is accorded in "like circumstances" were to be based on this single criterion, it would expand the scope of the obligation in Article 1102 in manifestly unreasonable ways and conflict with the ordinary meaning of the provision.⁴

10. To give a single example, a NAFTA Party might choose to offer special privileges to start-up businesses to encourage investment. Such privileges would not be granted to well-established businesses in the same sector. Nothing in the NAFTA prohibits a Party from making such a distinction, provided it is not applied discriminatorily, but if the analysis of "in like circumstances" were limited to businesses in the same sector, this measure might be found to be a violation of Article 1102. Any well-established foreign investor (or foreign-owned investment) in the same business sector would be able to claim that it is not receiving the same treatment accorded to domestic start-ups.

³ Even in the WTO context, a determination of likeness depends on an overall appreciation of the facts at hand rather than a mechanical application of a "test". From its creation, the Appellate Body has insisted that "there can be no one precise and absolute definition of what is 'like'." See the Appellate Body's discussion of GATT Article III:2 in *Japan - Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R at 22. (Tab 3)

⁴ See Article 32 of the *Vienna Convention on the Law of Treaties*. (Tab 2)

11. In contrast, if Article 1102 were properly interpreted, the foreign investor or investment would have to demonstrate that it was accorded treatment “in like circumstances”. On the very simple facts of this example, it would not be able to do so.

12. This approach to the application of Article 1102 is confirmed by the ordinary meaning of the word “circumstances”, a relevant consideration in a *Vienna Convention* analysis. According to the *New Shorter Oxford English Dictionary*⁵, the term “circumstance” includes “that which stands around or surrounds; surroundings” or “the material, logical or other environmental conditions of an act or event”. The *Webster's Dictionary*⁶ definition of “circumstance” includes “a condition, fact, or event accompanying, conditioning, or determining another”.

13. The Tribunal must therefore take into consideration other elements such as the activities and operations of the respective investments or investors. Put another way, the Tribunal must look to the circumstances in which the treatment is accorded, as indicated by the plain words of Article 1102.

14. A more restrictive approach to “in like circumstances” would convert Article 1102 into an imitation of Article III of the *General Agreement on Tariffs and Trade*, which requires a “like product” analysis. However, the GATT “like products” test is not the same as the treatment accorded “in like circumstances” test in Article 1102.

⁵ Lesley Brown, ed., *The New Shorter Oxford English Dictionary*, vol. 1 (New York: Oxford University Press, 1993) at 405. (Tab 4)

⁶ *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Ontario: Thomas Allen & Son Ltd., 1993) at 208. (Tab 5)

15. Although arguably similar expressions can be found both in GATT Article III and in the *General Agreement on Trade in Services* at Article XVII (where it appears as “like services” and “like service suppliers”), the criteria are different in the three agreements, as is evident from the different wording. Indeed, in WTO cases, the Appellate Body has stressed that textual differences require that the word “like” not always have the same meaning, even in different paragraphs of the same Article.⁷ Clearly then, “like product” analysis cannot simply be applied *mutatis mutandis* to Article 1102.

16. Recalling that the second element of a *Vienna Convention* analysis is the context of the provision, Canada notes that the contexts of NAFTA Article 1102 and GATT Article III are also very different. The first consideration in examining a provision’s context is the agreement itself.⁸ Clearly, the NAFTA as a whole and Chapter 11 in particular are not the same as the GATT. Apart from anything else, GATT obligations apply only to goods, while NAFTA obligations apply more generally, including investment protection in Chapter 11, protection of intellectual property rights in Chapter 17 and temporary entry provisions in Chapter 16, for example. In addition to this, the Article 1102 and GATT Article III have different histories.⁹ There is simply nothing in the context of the provisions to justify importing the “like” analysis from one into the other.

⁷ See, for example, *European Community – Measures Affecting the Importation of Asbestos and Asbestos Products* (11 March 2001) WT/DS135/AB/R (Report of the Appellate Body) at paras. 94-96. (Tab 6)

⁸ *Vienna Convention*, Article 31(2).

⁹ Article 1102 is derived from completely different sources than GATT Article III and GATS Article XVII. Its origin can be traced to a Model Bilateral Investment Treaty developed by the United States. Given these different antecedents, the decisions respecting Article III of the GATT 1994 and its predecessor have very limited application to the provisions of Chapter Eleven.

17. The final element of an analysis under Article 31 of the *Vienna Convention* consists of considering the object and purpose of the agreement. While the preamble may contain useful hints as to the object and purpose, it is not the end of the inquiry. An obligation itself provides a strong indication of its object and purpose. In the case of Article 1102, its clear object is the prohibition of discrimination on the basis of nationality.¹⁰ It is not concerned with distinctions in treatment that are based on some consideration other than nationality.

18. The expression “in like circumstances” is critical in applying Article 1102 to prohibit discrimination based on nationality. It is clear in Article 1102 that all treatment accorded in unlike circumstances is to be disregarded. Application of Article 1102 begins by considering the treatment accorded by a Party to the foreign investor or investment. Consideration is then given to the treatment that is accorded by that Party to an investor or investment where *all* the relevant circumstances of the according of the treatment are “like”, *except* that the investor or investment is domestic. There is a breach of Article 1102 if, and only if, the foreign investor or investment receives the less favourable of these treatments.

¹⁰ See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, (26 June 2003), (Award), para. 139 (Tab 7), where the Tribunal said:

The effect of these provisions [paras. 1-3 of Article 1102], as Respondent’s expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct [*sic*] only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

Burden of Proof

19. The text of Article 1102 makes it clear that its interpretation requires no shifting burden of proof. The Article is a statement of the obligation the NAFTA Parties owe to each other. The obligation has a certain content; to demonstrate that a Party has violated the obligation, a claimant must show that the Party has failed to meet that content. It is well-established in international law that the burden of proving a fact rests with the party asserting it – indeed, this is one of the rules applying to the proceedings in this arbitration.¹¹ The claimant therefore necessarily bears the responsibility of demonstrating all the elements of an Article 1102 claim.

20. The only question, then, is the identification of these elements. Again applying the interpretive principles of the *Vienna Convention*, the first place to turn in this task is the text of Article 1102. In Canada's submission, all the elements are clearly expressed in this text. While Canada does not purport to set out here the exact order of analysis for the interpretation of Article 1102, a violation of the obligation clearly requires that the foreign investor or investment be accorded less favourable treatment (within the meaning of the Article) than that accorded, in like circumstances, to domestic investors or investments.

¹¹ Rule 24(1) of the UNCITRAL Rules provides, "Each party shall have the burden of proving the facts relied on to support his claim or defence".

21. There is nothing in the text of Article 1102 to justify concluding that the question of "in like circumstances" is a defence that the NAFTA Party must assert. It is plain on the face of the text that the existence of treatment "in like circumstances" is a constituent element of the obligation, not an exception to its application. It must follow that it is the investor's burden to demonstrate it.

22. The investor must therefore demonstrate that a NAFTA Party has accorded it (or its investment) and a domestic investor (or its investment) treatment "in like circumstances". Again, "in like circumstances" means that all the relevant circumstances of according the treatment are "like", except that the investor or investment is domestic. Absent this demonstration, there can be no violation of Article 1102.

23. The investor must further demonstrate that the treatment accorded "in like circumstances" is less favourable to it or its investment than to domestic investors or investments. Just as with "in like circumstances", absent this demonstration there can be no violation of Article 1102.

All of which is respectfully submitted,



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