

**NOTICE OF INTENT TO SUBMIT
CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**



HC 75247
99285/6696
9011

**SECRETARIA DE
ECONOMIA**

**INTERNATIONAL THUNDERBIRD GAMING CORPORATION OF
INVERSION EXTRANJERA**

Claimant

vs.

25 MAR 2012

GOVERNMENT OF MEXICO ("MEXICO")

Respondent

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Claimant, INTERNATIONAL THUNDERBIRD GAMING CORPORATION serves this Notice of Intent to Submit a Claim to Arbitration for breach of the Respondent's obligations under the North American Free Trade Agreement.

NAME AND ADDRESS OF CLAIMANT:

**INTERNATIONAL THUNDERBIRD GAMING CORPORATION
THUNDERBIRD GREELEY INC.
11545 WEST BERNARDO COURT SUITE 307
SAN DIEGO, CALIFORNIA 92127**

NAME AND ADDRESS OF RESPONDENT:

**GOVERNMENT OF THE UNITED MEXICAN STATES
DIRECCION GENERAL DE INVERSION EXTRANJERA
SECRETARIA DE ECONOMIA
AVENIDA INSURGENTES 1940, COL. LA FLORIDA
MEXICO D.F. 01030**

RESPONDENT'S REPRESENTATIVE

**DEPUTY MINISTER OF REVENUE
SECRETARIA DE HACIENDA Y CREDITO PUBLICO
AVE. HIDALGO NO. 77, MODULO 1, PISO 1
COL. GUERRERO
MEXICO CITY, D.F. 06300**

I. ARBITRATION

The relevant provisions embodying the approval of the parties to refer disputes of this nature to arbitration are found in NAFTA, Chapter 11, Section B, Articles 1115 through 1122, inclusive: more specifically:

- a. Article 1122 contains Respondent's consent to arbitral jurisdiction for Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules (1122 (2) a);
- b. Article 1121 sets forth the conditions precedent for Claimant herein to refer a dispute to arbitration, requiring that Claimant consent to arbitration in accordance with the procedures of NAFTA.
- c. Article 1119 requires that Claimant deliver to Respondent this "Notice of Intent to Submit Claim to Arbitration".

II. BREACH OF OBLIGATIONS

This dispute falls within the jurisdiction of Article 2(a) of the Rules Governing the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes. This is a legal dispute arising directly out of an investment between an Investor, who is a "citizen" of Canada, and not a Mexican national, and the United Mexican States, a disputing State that is not a party to the ICSID Convention. Claimant asserts violations of NAFTA, Chapter 11, Section A on the part of Respondent.

The Claimant alleges that the Government of Mexico has breached its obligations under Chapter 11 of the NAFTA including, but not limited to the following provisions:

- (i) Article 1102 – National Treatment;
- (ii) Article 1103 – Most-Favored Nation Treatment;
- (iii) Article 1105 – Minimum Standard of Treatment; and

The relevant portions of the NAFTA are:

Article 1102: National Treatment

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

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.

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

For greater certainty, no Party may:

- (a) *Impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or*
- (b) *Require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.*

Article 1103: Most Favored Nation Treatment

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

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 investors, of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105: Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with national law, including fair and equitable treatment and full protection and security:

Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party; non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory.

Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

III. FACTUAL BASIS FOR THE CLAIM

A. INTRODUCTION

International Thunderbird Gaming Corporation is a Canadian Corporation, whose stock is traded on the Toronto Stock exchange (INB- www.thunderbirdgaming.com). Its principal offices are in San Diego California. Although originally involved in Indian gaming in California in the early 1990's, Thunderbird shifted its activities in the mid-1990's to Latin America and since that time has been exclusively involved in gaming and entertainment operations in Latin America.

Thunderbird owns (in whole or in part) and operates gaming facilities in Panama, Venezuela, Guatemala, and Nicaragua.

B. BACKGROUND ON MEXICO OPERATIONS

The current law of gaming in Mexico, in effect since 1934, prohibits most forms of gaming. The law consists of the simple statement to the effect that the Mexican Constitution prohibits games of

... and random drawings. Although there has been considerable debate and a growing consensus that the law should be changed to allow casinos and gaming activities, to date the old law remains in effect. Nevertheless, a variety of gaming activities has been a part of Mexican society for many years, including the Mexican National Lottery, sports books throughout Mexico, horse racing, bingo, cock fights and even slot machines at various fairs. These activities have been open and ongoing for years and generally operated by Mexicans. Thus, while the law seems to prohibit games of chance, many exceptions have been created.

It was against this backdrop that in early 2000 Thunderbird began a dialogue with GOBERNACION (the Mexican Dept of the Interior that by law has jurisdiction over all gaming activity and enforcement) to determine the legality of "skill machines." Skill machines, as opposed to slot machines, are commonly understood in the gaming industry to differ from slot machines, in that the player is able to start and stop the activity of the play, to make decisions about which games and which symbols to hold, and to affect, through his skill and dexterity, the outcome of the game. None of these elements is present with a slot machine, where the player simply waits after pulling the arm to see if he has won anything.

It is important to note that in many states in the U.S. and other countries, skill machines have been permitted, even though laws similar to the Mexican laws exist on the books. Skill machines have been viewed as precursors to a change in the statutes permitting a wider range of gaming activities. This has occurred in North Carolina, Oklahoma, South Dakota and Texas.

With this in mind, with the help of the law firm of Baker & McKenzie in Mexico City and other legal specialists, that Thunderbird, after numerous discussions with officials of GOBERNACION, petitioned GOBERNACION in writing in August 2000, for permission and an opinion as to whether current law permitted or prohibited the operation of skill machines in Mexico. This request for permission and an opinion, known as a "solicitud," is required under Mexican law to be formally answered by GOBERNACION and the answer is considered under Mexican law to be legally binding. It is important to note that in the solicitude, Thunderbird not only made the request for clarification as to the legality, but also specifically identified the make and model of the skill machines, which Thunderbird would purport to import and operate if the opinion was favorable.

Gobernacion, after negotiations with Thunderbird's attorneys and much discussion, gave a favorable reply, indicating that it did not have any jurisdiction to exercise in this matter because in its opinion, skill machines were not prohibited under current Mexican law. This opinion was a declaration by the governing authority that the activity Thunderbird sought to engage in was not prohibited.

C. INVESTMENT IN OPERATIONS

In reliance on this favorable and binding opinion, Thunderbird sought to enter and test the market in Mexico. Thunderbird sought and obtained investment and financing from U.S. and Canadian investors of over 6.5 million dollars with the intention of operating between 8 and 10 facilities in various locations throughout Mexico. Thereafter, and during the period August 1, 2000 through August 1, 2001, Thunderbird opened three locations in Matamoros, Nuevo Laredo and Reynosa. The first site, known as "La Mina de Oro" in Matamoros, Mexico, opened for business in September 2000. The second site in Nuevo Laredo opened for business in February 2001 and the third site in Reynosa opened for business in August of 2001. All three operations were fully built, equipped and operated by Thunderbird, using Mexican employees. Full security systems were implemented and each of the operation were financially successful

Thunderbird spent an additional two million dollars of its own and investor's funds on development of other sites. Local permits from the state and municipal authorities were required as per the legal "permit" of GOBERNACION and took a great deal of expense and effort.

The development efforts included nearly every state in the Mexican republic and permits were sought and ratified in at least three other locations by the end of the year 2000.

By the time the Nuevo Laredo site opened, a new Federal administration was in place. President Fox appointed a new director of gaming in Gobernacion, and this individual, a Mr. Jose Guadalupe Vargas Barrera, arrived one Sunday approximately two weeks after the Nuevo Laredo facility had been in operation, and based upon his "visual inspection," closed the facility down. Thunderbird officials immediately met with the legal department of GOBERNACION, which admitted it had been hasty and had not followed proper procedure. The facility was allowed to re-open some three weeks thereafter. It operated without interruption until October 2001 as well.

D. ADMINISTRATIVE PROCEEDINGS

At the same time that the Nuevo Laredo facility was allowed to re-open, the new officials of GOBERNACION who Thunderbird was dealing with asked Thunderbird to enter into an administrative process within GOBERNACION whereby Thunderbird would bring proofs and substantiation that these machines were in fact skill machines and did not violate Mexican law. They readily confessed to possessing no familiarity with the distinction and indicated a willingness to work with Thunderbird. Thunderbird assured GOBERNACION that it could and would comply.

In July 2001, Thunderbird was summoned to Mexico City for the administrative hearing. In preparation for that hearing, Thunderbird had collected certifications from the machine manufacturers that the machines in use were skill machines. It had obtained affidavits from two other witnesses recognized worldwide as experts on the issues relating to the differences between skill and slot machines. Thunderbird also produced a live expert witness to answer any questions, and provided a physical sample of the machines used, with a live demonstration. In addition, and of note, an affidavit of an expert witness obtained by the Mexican attorney general's office was produced, which certified the machines in question as skill machines.

Nevertheless, it was immediately apparent upon attending the hearing, that the director of gaming was having none of this. He had no interest in even reviewing the proofs presented. He advised Thunderbird that the previous "permit" of GOBERNACION upon which Thunderbird had relied was nothing more than a "thesis." He continually referred to the machines as "tragadolares," or "money sallower" which has neither any meaning nor context within the gaming industry, and was not a concept that could even be addressed by Thunderbird. He had neither hired nor consulted with any experts, and he had no familiarity whatsoever with the concept of skill machines. His agenda was clearly to demonstrate that there was some element of chance, and therefore the machines violated the law. Again, this was not an argument that could be adequately addressed by Thunderbird. It must be remembered that there already existed numerous activities such as bingo in Mexico, which are replete with chance. Moreover chance is involve in bowling or walking across the street. In addition, back in June through August of the year 2000, GOBERNACION had been involved in litigation concerning skill game machines, and clearly understood what a skill machine involved prior to issuing the "permit letter".

It should be noted that a third site was under development and was opened in August 2001, in Reynosa, Mexico. Reynosa is located in the same state of Tamaulipas as the other two facilities. After this administrative hearing, consultants and executives of Thunderbird frequently met with and stayed in contact with the superiors of the director of gaming within GOBERNACION to try to ensure there would

be no adverse surprises or circumstances. Thunderbird was repeatedly assured by the director of GOBERNACION that Thunderbird were the "good guys," that they had complied with all administrative requirements, and should not worry.

E. POST ADMINISTRATIVE PROCEEDINGS:

On October 11th, 2001, an attorney from GOBERNACION appeared personally at the office of Thunderbird's attorneys, Baker & McKenzie, and served the attorney with a 20 page administrative Findings and Order, essentially finding that the machines used by Thunderbird violated the law because they were "tragadolares," and ordering the immediate closure of the two sites subject to the administrative proceeding in Matamoros and Nuevo Laredo. (The report did not address Reynosa because it had not been in operation at the time of the administrative process initiation). Within one hour of the personal service of this document upon Thunderbird's attorneys, in a carefully staged show, GOBERNACION officials arrived at Nuevo Laredo and Matamoros with dozens of Federal police officers and closed down both facilities. They threatened arrest, scared customers and employees alike, and caused a sensation of negative publicity in the local and national news media. Reynosa was not closed down. However, federal police were getting ready to do the same sort of thing. Thunderbird closed it until temporary "injunctive relief" ("Amparo") could be sought. The Amparo was granted on October 29th and the Reynosa facility re-opened only to be shut down again through a reversal of the order by a Mexico court of appeal. Under Mexican law it is very difficult to obtain injunctive relief once a facility has been closed. At present Thunderbird is therefore not operational in any of the three locations or others planned, and losing hundreds of thousands of dollars monthly due to these closures and millions per month by the denial of the right to open other facilities.

Since October 11th, GOBERNACION has continued to operate in a very duplicitous mode. On the one hand, the director of the legal department and the secretary of GOBERNACION, Mr. Umberto Aguilar have assured Thunderbird that there is a desire to work this out, to conciliate and to reach an understanding. At the same time, members of the legal staff are zealously and (on occasion) improperly doing everything possible to keep the facilities closed, influence the courts and the judges and to defame Thunderbird and its activities. In point of fact, the Reynosa facility was shut down by Gobernacion while the Claimant's Washington D. C. representative was meeting with the Mexican Ambassador who was assuring the Claimant that Gobernacion would "work with the [Claimant] and desired to resolve the problems.

IV. APPLICATION OF LAW TO THE FACTS

Thunderbird did everything possible to clarify and conform to the legal requirements of operating in Mexico from the inception of its business. Thunderbird and its investors completely relied on the word of GOBERNACION, and should not at this time be made to suffer as a result of a change in administration. In spite of investing more than 8 million dollars, and financing an additional 2 million dollars; in spite of employing more than 150 upper level salaried Mexicans and spending large amounts in each community on goods and services; in spite of making donations in each community for public works and social projects; in spite of overwhelming local support by municipal officials, citizens and the community as a whole; in spite of a track record of not one adverse incident; in spite of creating, in each locale, a safe, clean, recreative activity well received by all; in spite of full compliance with GOBERNACION'S request that we provide proof, documentation and substantiation; in spite of no substantive evidence to contradict our position that these are skill machines; nevertheless the government has taken this arbitrary and capricious position.

This claim for damages will demonstrate that the Government of Mexico is not one person; that there is continuity of administrations and that assurances made in writing are capable of being reasonably relied upon.

A. NATIONAL TREATMENT

The NAFTA Investment Chapter national treatment obligation ensures that all investments, operating in like circumstances, whether domestic or foreign, are treated equally. The actions taken by Gobernacion in contravention of the August 15, 2000 "permit" fail to meet this obligation as they fail to extend the best treatment available in Mexico to the Investments of Investors who operate in the listed provinces. These Investors, and their Investments, are prevented from operating skill games on the same basis as other Mexican operators in the regions not subject to the actions taken by Gobernacion against the investor. This government measure interferes with the expansion, operation, conduct and management of the Investor's investment which operates in a listed province and which is not permitted to operate in Mexico in the same fashion as similar investments conducting the same business operations operating in other provinces.

Discrimination is a separate basis of illegality under international law. Restatement, §712. This principle applies not only to discrimination on the basis of nationality, but also to discrimination against particular aliens. The Claimant will establish that certain Mexican nationals are allowed to operate identical businesses in Mexico City and Juarez. In one instance, a prominent Mexico newspaper reported that a Sr. Guardia had successfully challenged the Mexico Government in a similar case as the Claimants and is currently operating while boasting about his accomplishments.

The Investor has suffered harm as a result of the Government of Mexico's breach of its NAFTA investment chapter national treatment obligation.

B. MOST FAVORED NATION TREATMENT

NAFTA requires its Parties to provide to investors of other NAFTA Parties treatment no less favorable that it accords, in like circumstances, to investors of any Party or non-Party. Investors that own or control an identical investment in the listed provinces cannot operate in Mexico in the same fashion as other operators operating in the non-listed provinces.

The Investor has suffered harm as a result of the Government of Mexico's breach of its NAFTA most favored nation treatment obligation.

C. MINIMUM STANDARD OF TREATMENT

The NAFTA requires a Party to accord to investments of investors of other NAFTA Parties treatment in accordance with international law including fair and equitable treatment and full protection and security. The August 15, 2000 Permit should allow the Investor to operate and Gobernacion by its actions fails to provide equitable treatment to the investments of investors of other NAFTA Parties who operate in any listed province. Thus, the Investor and its Investment, are not accorded treatment in accordance with international law as required by NAFTA Article 1105.

D. DENIAL OF JUSTICE

Finally, government action that violates international standards of due process, including failure to implement a judicial decision protecting an alien, constitutes a denial of justice under traditional

principles of international law. NAFTA Article 1110 (c) refers specifically to "due process" and expressly incorporates Article 1105 (1).

Denial of justice occurs whenever an alien is denied an effective administrative or judicial remedy by action of any branch of government, judicial, executive or legislative. Charles L. Hyde, *International Law Chiefly as Interpreted by the United States*, vol. 1, 491 (1922); see also *Restatement*, §712, cmts. a and e and §712, cmt. j. In particular, "[i]t appears to be a well-established principle of international law that a denial of justice may be predicated on the failure of the authorities of a government to give effect to the decisions of its courts." H.G. Venable (U.S. v. Mex.) *Opinions of the Commissioners, United Nations, Reports of International Arbitral Awards*, Vol. IV, 219, 245-46 (1927) (citations omitted).

Denial of justice can also arise from arbitrary and contradictory actions by administrative officials.

The Investor has suffered harm as a result of the Government of Mexico's breach of its NAFTA investment chapter minimum standard of treatment obligation.

Mexico's actions in this case are tantamount to expropriation in violation of international law and NAFTA Article 1110, because they are arbitrary, discriminatory, and confiscatory.

State responsibility for denial of justice, the international law equivalent of a violation of due process, is a treaty obligation under NAFTA Article 1105 and is arbitrable under Article 1110(c). NAFTA provides that:

Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. (NAFTA, Art. 1105 (1))

Expropriation is to be effected in accordance with international law principles including non-discrimination, due process and full compensation:

- (2) No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party...or take a measure tantamount to nationalization or expropriation...except:
- (a) For a public purpose;
 - (b) on a non-discriminatory basis.
 - (c) In accordance with due process of law and Article 1105(1); and
 - (d) On payment of compensation in accordance with paragraph 2 through 6. (NAFTA, Art. 1110)

A state is responsible for economic injury to nationals of another state due to takings or other "arbitrary or discriminatory" actions that impair property or economic interests of foreign nationals. *Restatement (Third) of Foreign Relations Law of the United States ("Restatement")* §712 (A.L.I. 1987), and the words "tantamount to expropriation" in NAFTA Article 1110 cover indirect expropriations as in this case. In international law, the phrase "expropriation" is understood to apply "not only to avowed expropriations in which the government formally takes title to property, but also to other actions that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible for an expropriation of property...when it subjects alien property

to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property..." Restatement §712, cmt. G.

Thunderbird will establish its entitlement to, and hereby requests, a total arbitration award of approximately \$U.S.100,000,000 (One Hundred Million Dollars).

V. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

The Investor claims damages for the following:

1. Damages of not less than USDS100,000,000 as compensation for the damages caused by or arising out of Mexico's measures that are inconsistent with its obligations contained in Part A of Chapter 11 of the North American Free Trade Agreement;
2. Costs associated with these proceedings, including all professional fees and disbursements;
3. Fees and expenses incurred in relation to commencing business in Mexico and in opposing GOBERNACION in its actions to shut down such businesses;
4. Pre-award and post-award interest at a rate to be fixed by the Tribunal.
5. Tax consequences of the award to maintain the integrity of the award.
6. Such further relief that counsel may advise and that this Tribunal may deem appropriate.

Date of Issue: March 21, 2002

International Thunderbird Gaming Corporation



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I. AMENDMENT TO NOTICE

The Claimant hereby amends the following provisions of its **NOTICE OF INTENT TO SUBMIT CLAIM TO ARBITRATION UNDER SECTION B OF CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT DATED MARCH 21, 2002.**

II. AMENDMENT TO BREACH OF OBLIGATIONS

The Claimant adds an additional breach of obligations as follows: the Government of Mexico has breached its obligations under Chapter 11 of the NAFTA including, but not limited to the following provisions:

- (iv) Article 1110-Expropriation

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
6. On payment, compensation shall be freely transferable as provided in Article 1109.
7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).
8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

Expropriation is to be effected in accordance with international law principles including non-discrimination, due process and full compensation:

- (1) No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party...or take a measure tantamount to nationalization or expropriation...except:
 - (a) For a public purpose;
 - (b) on a non-discriminatory basis.
 - (c) In accordance with due process of law and Article 1105(1); and
On payment of compensation in accordance with paragraph 2 through 6.
(NAFTA, Art. 1110)

The Government's decision to unilaterally reverse its position of the legality of the business of the Investor in Mexico, without sufficient notice or comment, constitutes a severe and permanent interference with its investment. The Government has not offered to pay the Investor full, fair and effective compensation for this taking, which is accordingly a violation of the expropriation provision of the NAFTA (Article 1110).

THE MARCH 21, 2002 NOTICE OF INTENT TO SUBMIT CLAIM TO ARBITRATION UNDER SECTION B OF CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT SHALL IN ALL OTHER RESPECTS REMAIN THE SAME.

Date of Issue: March 22, 2002

International Thunderbird Gaming Corporation



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