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Atencion HF

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August 5, 2002

Secretaria de Comercio y Fomento Industrial
Direccion General de Inversion Extranjera
Avenida Insurgentes 1940, Colia Florida
Mexico D.F. 01030

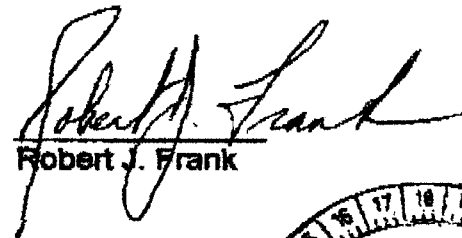
Dear Sir/Madam:

Re: Frank and the Government of the United Mexican States
Investor-State Dispute Pursuant to Chapter 11 of the NAFTA

Pursuant to Article 1121 (1)(a) of the North American Free Trade Agreement ("NAFTA"), I hereby consent to arbitration in accordance with the procedures set out in the NAFTA; and

Pursuant to Article 1121(1)(b) of the NAFTA, I waive my right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of the United Mexican States with respect to my investment in Baja California, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except of the costs of the action), before an administrative tribunal or court under the laws of the United Mexican States.

DATED: August 5, 2002


Robert J. Frank



**NOTICE OF ARBITRATION AND STATEMENT OF CLAIM
UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN

ROBERT J. FRANK,

Claimant/Investor

and

**THE GOVERNMENT OF THE UNITED MEXICAN STATES
("MEXICO")**

Respondent/Party

Pursuant to **Article 3** of the United Nations Commission on International Trade Law and the provisions of **Chapter 11** of the North American Free Trade Agreement ("NAFTA"), **ROBERT J. FRANK**, on behalf of himself, alone, files this Notice to initiate recourse to arbitration under the **UNCITRAL** rules of Arbitration (Resolution 31/98, adopted by The General Assembly on December 15, 1976).

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

Pursuant to Article 1120(1)(c) of the NAFTA, the Claimant hereby demands that the dispute between it and the Respondent be referred to arbitration under the UNCITRAL Rules of Arbitration.

B. NAME AND ADDRESS OF THE INVESTOR AND RESPONDENT

Claimant/Investor ROBERT J. FRANK
18075 Ventura Blvd.
Encino, CA 91316

Respondent/Party GOVERNMENT OF THE UNITED MEXICAN STATES
Direccion General de Inversion Extranger
Secretaria de Comercia y Fomento Industrial
Avenida Insurgentes 1940, Colia Florida
Mexico D.F. 01030

C. REFERENCE TO THE ARBITRATION CLAUSE OR THE SEPARATE ARBITRATION AGREEMENT THAT IS INVOKED

The Claimant invokes Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1120 and 1122 of the NAFTA, as authority for the arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions agreed concerning the settlement of disputes between a Party and an investor of another Party.

D. REFERENCE TO THE INVESTMENT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

The dispute is in relation to the Claimant's investment in Mexico, described in more detail below, and the damages that have arisen out of the breaches by the Government of the United Mexican States ("Mexico") of its obligations under Section A of Chapter 11 of the NAFTA.

E. THE GENERAL NATURE OF THE CLAIM AND AN INDICATION OF THE AMOUNT INVOLVED**Facts**

1. The investor is an citizen of the United States of America who resides in Los Angeles County, California.
2. The investment consists of a property occupying between 250 and 300 linear meters of a cliff overlooking the Pacific Ocean, about 60 kilometers south of the border in Baja California, Mexico. At the foot of the property is an expansive

beach that is virtually private.

4. *The Investor acquired rights to the property through a transaction with a U.S. citizen, Anna Jane Smith, in 1989. The property was under the authority of an agency of the Mexican government called the Federal Zone. Ms. Smith had acquired her rights, approved by that agency, from the Severance family (other Americans), who had occupied the property since the 1940's. Required documents approving the Investor's rights to the property were submitted and stamped "Received" by the Federal Zone in 1990.*
 5. *Between 1989 and 1992, the Investor spent more than \$100,000 on improvements to the property. During that time and until the property was expropriated in August, 1999, as discussed below, the Investor paid all expenses relating to the investment, including utility bills and Federal Zone fees required by that agency.*
 6. *In 1992, the Investor filed a Petition/Application with the Federal Zone to extend/annex the property adjacent and to the north of the existing one. As part of that Petition/Application, the Investor submitted plans to the Federal Zone for the intended development of the property that was annexed. Again, required documents approving the Investor's rights to the property were submitted and stamped "Received" by the Federal Zone in 1992.*
 7. *In 1992, pursuant to advice of Mexican counsel, the Investor fenced the annexed property and posted a sign that stated that it was private and, additionally, utilized it for beach access and other purposes. The Investor refrained from substantial development of the annexed site because there was no response to this second Petition/Application from the Federal Zone, notwithstanding that Mexican law required such response. From 1992 through August 26, 1999, the Investor continued to pay all Federal Zone fees, all utilities and other expenses relating to the investment and, additionally, expended another \$25,000 improving the investment during that time.*
 8. *In about 1996, the owner of Rancho La Burreta (the large property immediately to the south of the investment) gave rights to the northerly-most parcel of his property to his caretaker. Shortly afterwards, the caretaker died. His sister inherited the property and sold it to Jaime Cesar Lora, a Mexican national.*
 9. *In the beginning of the summer of 1998, the investor learned that Jaime Cesar Lora and others had torn down and disposed of the wrought iron fence running between the properties; had uprooted mature trees; and, had bulldozed the landscape around the two houses on the property. The Investor immediately went to Mexico and met with his attorneys, and Lora and his attorneys. Lora claimed that he owned all of the investor's property. Nonetheless, the respective attorneys then agreed that the Investor would remain in undisturbed possession until there was a legal determination of rights. The Investor accordingly continued in possession of the property.*
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10. In August, 1998, the Investor was advised that Federal Zone officials had slipped a Notice under his door in Mexico challenging his legal right to occupy the property. The Investor had never seen such a Notice in the 10 years that he had been in possession of the property. The Investor provided a timely response to this Notice in writing (English and Spanish translation), advising the Federal Zone of his history at the property and directing that any and all further notices be sent to him at the at his Encino address *and* to his attorneys in Mexico. The Investor also arranged a timely meeting with the Federal Zone, following the instructions contained within the Notice, and went to Mexico to appear for it. No one from the Federal Zone appeared for the meeting.
 11. From that time, until days before the expropriation of the investment approximately one year later, the Investor continued in possession and received no further communications from the Federal Zone. During that same time, however, the Investor did communicate with them many times. Apart from monthly payments made to the Federal Zone as required, the Investor caused a *third Petition/Application to be filed on his behalf on November 30, 1998 at the Federal Zone offices in Rosarito and in Mexico City. Again, this Petition/Application was stamped "Received" by the Federal Zone, but it was never responded as required under applicable Mexican law.*
 12. Additionally, about two months before the expropriation the Investor filed and obtained a permit signed by the head of the Federal Zone in Rosarito to build a wall between the investment property and Lora's property to the south. At around the same time, the investor and his representatives also met on several occasions with members of the Federal Zone in order to obtain necessary plans and permits to build another structure on the property.
 13. Around the time that this third Petition/Application was filed, The Investor learned that, pursuant to a constitutional amendment passed in 1992, the investment property could be removed from the jurisdiction of the Federal Zone and outright ownership of the investment could be obtained by the Investor since the investment is situated on a cliff having greater than 30 degrees slope. The Investor was preparing to take such action as soon as the Federal Zone approved the latest Petition/Application. As it had with the past petitions of the investor, the Federal Zone did absolutely nothing.
 14. On August 24, 1999, the Investor learned that another notice had been slipped under his door by the Federal Zone that, again, questioned his right to occupy the property. Although that Notice was dated August 20, 1999 and stated that the investor had 10 days in which to provide a Response (which the Federal Zone already had in its possession from the prior year), two days later (on August 28, 1999) and without further notification from the Federal Zone, Federal Zone officials seized the investment, forcibly removing investor's guests who were staying there, and took possession of the property, taping it with yellow tape and posting signs that it was now the property of the Federal Zone and that no one could enter under penalty of law. At or about the time of the seizure, the
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Investor's caretakers of the property witnessed Enrique Acosta (head of the Federal Zone at that time), Lora, a uniformed policeman and another Federal Zone official discussing how they would divide the property between themselves.

15. *Immediately after seizure of the property, substantial construction was conducted on the property by Lora and others, operating under the authority of the Federal Zone, to prepare it for private, commercial use. This included the destruction of many improvements, mature landscape, uprooting of boulders and dumping debris on the beach below. During this time, a sign was posted on the property stating that it was the property of the Federal Zone; yet, throughout that time, the property was being occupied and developed by private persons related to Lora and Acosta, in violation of Mexican laws.*
16. *The expropriation of the investment in the name of the Federal Zone occurred on August 26, 1999 – two days after the investor received the notification dated August 20, 1999 requesting a response from him within 10 days. The arbitrary seizure and confiscation of the investment was taken without due process of law and in breach of both international law and the applicable Mexican law.*
17. *Upon acquisition of the property in 1989, the investor engaged in extensive development of the investment, including the commissioning of architectural plans for further development. The property was used extensively for the entertainment of the investor's clientele by the investor, who, during the length of his possession of the property, maintained a permanent residence in the United States. Additionally, pursuant to an Amendment to the Mexican Constitution, the investment qualified to be removed from the jurisdiction of the Federal Zone, with rights of outright acquisition belonging to the investor who intended to exercise those rights at about the time of expropriation. As early as 1997, the investor planned to take advantage of such rights to further develop the investment and derive rental income from it.*
18. *In subsequent judicial and administrative proceedings, Respondent and Mexican Nationals were given highly preferential treatment, evidenced by, among other things, the disappearance of many of the Disputing Investor's filed, official documents*

Law

19. *The Claimant alleges that Mexico has breached its obligations under Chapter 11 of the NAFTA including the following provisions:*
 - (i) *Article 1102 – National Treatment;*
 - (ii) *Article 1103 – Most-Favored Nation Treatment;*
 - (iii) *Article 1105 – Minimum Standard of Treatment; and*
 - (iv) *Article 1110 – Expropriation.*

20. NAFTA Article 1102 provides that the NAFTA Parties must provide treatment to investors from other NAFTA Parties, and investments by such investors in their territory, that is no less favorable than the treatment that they provide to their own investors and investments. NAFTA Article 1103 requires the same level of treatment vis à vis other foreign investors and investments.
21. It is well established in international law that "treatment no less favorable" means the best treatment that is provided – in form or in result – that is provided to any other comparable investor or investment. The standard of comparison is objective and focused upon ensuring that an effective equality of competitive opportunity is provided to all protected investors and their investments.
22. NAFTA Article 1104 requires NAFTA Parties to provide the better of national treatment and MFN treatment, meaning that the best treatment being provided to any one of Thunderbird's competitors (or other comparable investors or investments) in Mexico is the same treatment that must be provided to Thunderbird.
23. NAFTA Article 1105 requires "treatment in accordance with international law, including fair and equitable treatment and full protection and security." Such treatment includes, but is not limited to, the obligation to act in good faith in exercise of sovereign regulatory authority, to provide treatment that is both procedurally and substantively fair, and in no case treatment any less than whatever is required under international law.
24. In the event that the statement of interpretation issued on July 31, 2001 by the NAFTA Free Trade Commission ("FTC") in any way lessens the character or quality of treatment that must be provided to an investment in accordance with NAFTA Article 1105, the investor hereby invokes NAFTA Article 1103 to require Mexico to accord to it treatment no less favorable than that which Mexico has agreed to provide to investors and their investments under Article 9-06(1) of the Chile-Mexico Free Trade Agreement.
25. NAFTA Article 1110 permits Mexico to impose measures which are tantamount to the expropriation of an "investment" in its territory, so long as such measures are imposed for a valid public purpose, are non-discriminatory, are in accordance with due process of law and all other requirements of Article 1105; and so long as full, fair and effective compensation is provided to the investor in accordance with the terms set out in the remainder of Article 1110. Regulatory treatment rises to the level of an expropriation when it substantially interferes with the ability of an investor to operate, or otherwise enjoy the benefits of, its investment.

Law Applied to the Facts

26. Under Articles 1102, 1103 and 1104, Mexico is required to provide the Claimant with treatment no less favorable than the best treatment that it is providing to any similarly situated investor. The best level of treatment being provided to at least

some other property holders such as the Investor is the ability to continue to operate and enjoy their investments without being subjected to arbitrary and unjust interference and with full protection of the law.

27. The Disputing Investor has been accorded less favorable treatment than that which is accorded to similarly situated property holders. Such discriminatory conduct is contrary to NAFTA Article 1102 (when such property holders are Mexican), 1103 (when such property holders are not Mexican) and 1104.
28. By failing to provide the Claimant with basic procedural fairness and due process rights, such as legitimate and unmolested access to effective dispute settlement mechanisms, in order to protect his investment against the wholly unmeritorious claims of individuals such as Jaime Cesar Lora, Mexico also failed to treat the Claimant's investment in a manner which is required under the customary international law minimum standard of treatment of aliens and the "fair and equitable treatment" standard included in NAFTA Article 1105. Moreover, by assisting individuals such as Jaime Cesar Lora in depriving the Claimant of his rights to enjoy his investment, Mexico has also failed to provide "full protection and security" to the Claimant and his investment, as required under NAFTA Article 1105.
29. By physically depriving the Investor of access to his property, and having failed to provide full, fair and effective compensation for this "taking," Mexico has expropriated the investment of the Investor contrary to NAFTA Article 1110. Because this effective expropriation was undertaken on a discriminatory basis, and without according due process or otherwise meeting the standards required under NAFTA Article 1105, Mexico has further violated NAFTA Article 1110.

F. Issues

30. The Claimant submits that the following issues arise out of this claim:
 - (i) Has the imposition of these measures had the effect of according less favorable treatment to the investor or his investment than that which is accorded to comparable investors from Mexico, in breach of NAFTA Article 1102?
 - (ii) Has Mexico's treatment of the Claimant's investment in Mexico fallen below the standards required under international law, including "fair and equitable treatment" and "full protection and security," in breach of NAFTA Article 1105?
 - (iii) Has Mexico expropriated the investment of the Investor in Mexico without paying the compensation stipulated under NAFTA Article 1110?
 - (iv) If the answer to any of the above questions is yes, what is the quantum of compensation that should be paid to the Investor as a result of the inconsistency of the measures with Mexico's obligations under the NAFTA?
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G. RELIEF OR REMEDY SOUGHT


31. *The Investor claims damages for the following:*

- (i) Damages of not less than \$1,500,000.00 (U.S. Dollars) as compensation for the fair market value of the confiscated investment as of the date of its taking;
- (ii) Costs associated with these proceedings, including all professional fees and disbursements;
- (iii) Fees and expenses incurred to maintain the investment in good standing and oppose interference with it, including its taking by the Government of Mexico;
- (iv) Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity;
- (v) Pre-award and post-award interest at a rate to be fixed by the Tribunal; and
- (vi) Such further relief as counsel may advise and that this Tribunal may deem appropriate.

H. APPOINTMENT OF ARBITRATORS

32. Pursuant to Article 1123 of the NAFTA, the Investor and the Party have agreed on the number of arbitrators, which shall be three, and on the procedure for appointment. One arbitrator is to be appointed by each of the disputing parties and the third, which is the presiding arbitrator, is appointed by agreement of the disputing parties.

DATE OF ISSUE: July 31, 2002


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**DIRECCIÓN GENERAL DE INVERSIÓN
EXTRANJERA**

**DIRECCIÓN GENERAL ADJUNTA DE ASUNTOS
INTERNACIONALES**

México, D.F. a 12 de agosto de 2002.

496.02

Lic. Hugo Perezcano Díaz
Director General de la Consultoría
Jurídica de Negociaciones
Secretaría de Economía
Presente

Estimado Lic. Perezcano:

Con la finalidad de asegurar que le sean remitidos los documentos recibidos en esta Unidad Administrativa, relativos a la Sección B del Capítulo XI del Tratado de Libre Comercio de América del Norte, anexo al presente le envío documentación, recibida el día de hoy, en la Dirección General de Inversión Extranjera, vía mensajería privada, con relación al promovente *Robert J. Frank*.

Sin otro particular, y en espera de que la información le sea de utilidad, me reitero a sus órdenes.

Atentamente,

p.a. *L.M.*



**SUBSECRETARIA DE NORMATIVIDAD Y
SERVICIOS A LA INDUSTRIA Y AL
COMERCIO EXTERIOR.**

**DIRECCION GENERAL DE INVERSION
EXTRANJERA**

**DIRECCION DE ASUNTOS JURIDICOS Y DE LA
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Para (To):

**LIC. HUGO PEREZCANO DIAZ
DIRECTOR GENERAL DE LA
CONSULTORIA JURIDICA DE
NEGOCIACIONES**

Fax:

57-29-93-10

De (From):

**LIC. MIGUEL FLORES BERNES
DIRECTOR GENERAL ADJUNTO
DE ASUNTOS INTERNACIONALES**

Fecha (Date):

12 de agosto de 2002

Hora (Time):

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