

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

ROBERT J. FRANK,

Investor

v.

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

Respondent



06 MAR 02 AM

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Investor, ROBERT J. FRANK, serves a Notice of Intent to Submit a Claim to Arbitration for breach of Mexico's obligations under the NAFTA.

I NAME AND ADDRESS OF THE INVESTOR AND RESPONDENT

**ROBERT J. FRANK
18075 Ventura Blvd.
Encino, CA 91316**

**GOVERNMENT OF THE UNITED MEXICAN STATES
c/o Dirreccion General de Inversion Extranjera
Secretaria de Economia (formerly the Secretaria de Comercio y Fomento Industrial)
Avenida Insurgentes 1940
Col. La Florida
Mexico, D.F. 01030**

II PROVISIONS FOR ARBITRATION OF DISPUTE

This dispute is subject to arbitration under provisions of Chapter 11 of NAFTA. By this document, the disputing investor consents to procedures set out in NAFTA, per Article 1121.3 thereof, and waives his rights pursuant to Article 1121.3 and Article 1121.2(b) thereof, except for proceedings of injunctive or other extraordinary relief not involving the payment of damages for breach before an administrative tribunal or court under the laws of Respondent.

III PERTINENT NAFTA PROVISIONS AND BREACH OF OBLIGATIONS

The Investor alleges that Mexico has breached its obligations under Section A of Chapter 11 of the NAFTA, including the following provisions:

- i) Article 1102 (National Treatment)**
- ii) Article 1105 (Treatment in Accordance with International Law); and**
- iii) Article 1110 (compensation for expropriation).**

The relevant provisions of the NAFTA are:

Article 1102: National Treatment

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.

Article 1105: Minimum Standard of Treatment

1. 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.

Article 1110: Expropriation

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.

Qualifications of "Investor" and "Investment"

Part Five, Chapter 11 of the NAFTA states that its provisions are applicable to measures relating to (1) investors of another party and to (2) investments of investors of another party in the territory of the Party.

Article 1139 of Chapter 11 defines "investor of a party" as ". . . a national or an enterprise of such party, that seeks to make, is making, or has made an investment. . . ." Article 1139 defines an "investment" as "(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes. . . ."

The investor is a national of the United States who has made substantial investment in acquiring, maintaining and improving real estate located in Mexico, with the expectation and use of that property for economic benefit and other business purposes.

III SUMMARY OF FACTUAL BASIS FOR THE CLAIM

1. The Investor is an individual who resides in Los Angeles County, California, in the United States.
2. The investment involves a property occupying approximately 250 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. 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.

3. 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 that the agency required.
4. 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 to and stamped "Received" by the Federal Zone in 1992.
5. 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.
6. In about 1996, the owner of Rancho La Burrita (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.
7. 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.
8. 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.

9. 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. 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.
10. 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.
11. 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 26, 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 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.

12. 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.
 13. 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.
 14. 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.
 15. The Investor has received treatment that falls below the customary international law minimum standard of treatment of aliens before both the administrative and the judicial arms of the Mexican Government. This arbitrary and discriminatory treatment has included a denial of basic due process rights and a shocking lack of transparency.
 16. In summary, in expropriating the Investor's investment Mexico has breached the NAFTA in the following ways:
 - a) The Investor has been accorded less favorable treatment than that which is accorded to Mexican property holders operating in like circumstances with the Investor and the Investment. Such discriminatory conduct is contrary to NAFTA Articles 1102;
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- b) Mexico has violated the international law principles of transparency, good faith and "fair and equitable treatment" in the manner in which it has deprived the Investor of the benefits of his investment and failed to provide effective domestic remedies for its recovery. This treatment constitutes an unreasonable, unjustified and arbitrary interference with the Investor's ability to establish, expand, manage, conduct or operate its investment, protected under NAFTA Article 1105, and modified, as necessary, by NAFTA Article 1103;
 - c) The measures have unfair and inequitable impact upon businesses such as that of the Investment, because they have been applied to the Investment in an arbitrary and capricious manner, without sufficient notice or consultation, and because they have been applied in a manner that will lead to a substantively unfair and inequitable result. Such treatment is contrary to the "fair and equitable" standard of treatment that Respondent has agreed to provide to foreign investments as required under international law, including NAFTA Articles 1105 and 1103;
 - d) In physically depriving the Investor of access to his property, and having failed to provide full, fair and effective compensation for this "taking," Mexico has directly expropriated the investment contrary to NAFTA Article 1110. By depriving the Investor of his right to enjoy the benefits of his property in an arbitrary and discriminatory manner, Mexico has further violated NAFTA Article 1110.
17. Implementation of these measures has and will continue to result in considerable losses and harm to the Investor, including - but not limited to - the following:
- a) loss to Investor of the full value of his investment, including improvements made over the years;
 - b) loss of returns on capital investments made by the Investor and the Investment; and
 - c) loss of out of pocket expenses, legal fees and other expenses relating to preserving the investment and fighting the actions taken by Respondent.

IV ISSUES

18. 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?
19. Has Mexico's treatment of the Investor's investment in Mexico fallen below the standards required under international law, including the "fair and equitable

treatment" standard, in breach of NAFTA Article 1105, as affected by the application of NAFTA Article 1103 and the principle of MFN treatment reflected in NAFTA Article 1102(1)?

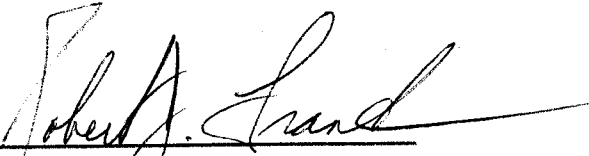
20. Has Mexico expropriated the investment of the Investor in Mexico within paying the compensation stipulated under NAFTA Article 1110?
21. If the answer to any of the above questions is yes, what is the quantum of compensation that should be paid to the Investor as a result of the inconsistency of the measures with Mexico's obligations under the NAFTA?

V RELIEF SOUGHT AND DAMAGES CLAIMED

The Investor claims damages for the following:

1. Damages of not less than \$1,500,000.00 (U.S. Dollars) as compensation for the damages caused by, or arising out of, Respondent's measures that are inconsistent with its obligations contained within Part A of NAFTA Chapter 11;
 2. Costs associated with these proceedings, including all professional fees and disbursements;
 3. Fees and expenses incurred to oppose the promulgation of the infringing measures;
 4. Pre-award and post-award interest at a rate to be fixed by the Tribunal;
 5. Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
 6. Such further relief as counsel may advise and that this Tribunal may deem appropriate.
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DATE OF ISSUE: February 12, 2002



ROBERT J. FRANK,
INVESTOR
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Served to:

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**DIRECCIÓN GENERAL DE INVERSIÓN
EXTRANJERA**

**DIRECCIÓN GENERAL ADJUNTA DE ASUNTOS
INTERNACIONALES**

México, D.F. a 6 de marzo de 2002.

Lic. Hugo Perezcano Díaz
Director General de la Consultoría
Jurídica de Negociaciones
Secretaría de Economía
P r e s e n t e

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 contendiente **Robert J. Frank**.

Asimismo, de conformidad con lo dispuesto en el artículo 17 A de la Ley Federal de Procedimiento Administrativo, contamos con un plazo de diez días hábiles a partir del 6 de marzo, fecha en que se notificó el escrito, para requerir información o documentación faltante al promovente. En virtud de lo anterior, le agradeceremos nos informe si considera necesario que esta Unidad Administrativa requiera al promovente la presentación de alguna información o documento.

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

Atentamente,

P.A. 

Lic. Miguel Flores Bernés
Director General Adjunto de Asuntos Internacionales

