

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE RULES OF
THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

BETWEEN:

CARLOS SASTRE AND OTHERS

Claimant

AND:

UNITED MEXICAN STATES

Respondent

ICSID CASE NO. UNCT/20/2

**NON-DISPUTING PARTY SUBMISSION OF THE
GOVERNMENT OF CANADA PURSUANT TO
NAFTA ARTICLE 1128**

December 17, 2021

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TABLE OF CONTENTS

I. Introduction.....1

II. NAFTA Articles 1116 and 11171

A. Dual National Claimants May Only Bring a NAFTA Claim if Their Dominant and Effective Nationality is Not of the Respondent State..... 1

1. NAFTA Articles 1116 and 1117 Do Not Permit an Investor of a Party to Bring a Claim Against the Same Party..... 1

2. The Tribunal Must Decide Issues in Accordance with Applicable Rules of International Law, Including Customary International Law Rules on Determining a Claimant’s Dominant and Effective Nationality..... 3

B. Investments Under the NAFTA Must Be Made in Accordance with the Applicable Domestic Laws of the Host State at the Time the Investment is Acquired or Established 6

III. NAFTA Article 11197

A. Claimants Must Comply with the Pre-requisites for Submitting a Claim to Arbitration in Order to Perfect the Consent of a NAFTA Party and Establish the Jurisdiction of the Tribunal..... 7

I. INTRODUCTION

1. The Government of Canada makes this submission pursuant to Article 1128 of the *North American Free Trade Agreement* (“NAFTA”), which authorizes non-disputing Parties to make submissions to a tribunal on a question of interpretation of the NAFTA.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada’s silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

II. NAFTA ARTICLES 1116 AND 1117

A. Dual National Claimants May Only Bring a NAFTA Claim if Their Dominant and Effective Nationality is Not of the Respondent State

3. NAFTA Chapter Eleven sets out specific nationality requirements to bring a claim. The requirements are set out in Articles 1116 and 1117.

1. NAFTA Articles 1116 and 1117 Do Not Permit an Investor of a Party to Bring a Claim Against the Same Party

4. According to Article 31(1) of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹ The terms of Articles 1116 and 1117 are clear. They provide, in relevant part, that “[a]n *investor of a Party*” may submit to arbitration a claim that “*another Party*” has breached an obligation under Section A of Chapter Eleven.²

¹ *Vienna Convention on the Law of Treaties*, 1969, C.T.S. 1980/37; 1156 U.N.T.S. 331, Article 31(1).

² *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M. 289, 605 (“NAFTA”), Article 1116(1) provides, “An *investor of a Party* may submit to arbitration under this Section a claim that *another Party* has breached an obligation under: (a) Section A [...]” (*emphasis added*). Similarly, Article 1117(1) provides, in relevant part, that “[a]n *investor of a Party*, on behalf of an enterprise of *another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this

5. Both provisions rely on the concepts of an “investor of a Party” bringing a claim against “another Party.” The term “another” makes clear that a claim can only be made by an investor of *one* Party against a *different* Party. This is supported by the dictionary definition of the term “another” which is “not the same”, “*different*”.³ The provisions therefore do not allow claims under NAFTA Chapter Eleven where an investor is a national of the Party against which they wish to bring a claim.⁴ Thus, a claimant, whether bringing a claim on their own behalf or on behalf of an enterprise that the claimant owns or controls, cannot be of the same nationality of the Party against which the claimant brings a claim (i.e. referred herein as “diversity of nationality”).

6. The context of Articles 1116 and 1117⁵ and the object and purpose of the NAFTA⁶ support this interpretation. The scope of NAFTA Chapter Eleven specifies that nearly all of the Chapter’s disciplines are in respect of a Party’s measures relating to investors of

Section a claim that the *other Party* has breached an obligation under: (a) Section A [...]” whereby, the term “*the other Party*” is referring back to the term “*another Party*”. (*emphasis added*).

³ As defined in the Oxford dictionary, the word “another” means “Not this, not the same, a different.” and “By giving prominence to the fact that this is *not* that already considered: A different.” See Oxford English Dictionary, available at: <https://www.oed.com/view/Entry/8102>; See also, Lexico, a collaboration between Dictionary.com and Oxford University Press, available at: <https://www.lexico.com/definition/another>: “Used to refer to a *different* person or thing from one already mentioned or known about.” (*emphasis added*).

⁴ Tribunals have also reasoned that the NAFTA was “clearly intended to protect investors of one Contracting Party against practices occurring in one of the other Contracting Parties [...]” See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Final Award, 26 June 2003 (“*Loewen – Final Award*”), ¶ 223. See also *GAMI Investments, Inc. v. Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶¶ 38, 122. The tribunal in *GAMI* noted that the majority shareholders of a Mexican corporation were Mexican nationals and, unlike the claimant (a U.S. national) did not have standing under Chapter Eleven of the NAFTA.

⁵ *NAFTA*, Preamble, recitals 3 and 5, provide that NAFTA is intended to “**Create** an expanded and secure market for the goods and services produced in their territories; [...] [and] **Ensure** a predictable commercial framework for business planning and investment”.

⁶ *NAFTA*, Article 102 (Objectives) “1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; [...] [and] (c) increase substantially investment opportunities in the territories of the Parties”.

another Party.⁷ As such, the NAFTA does not establish a domestic investment framework for domestic investors.

7. Moreover, the NAFTA's requirement for diversity of nationality in order for a claimant to have standing to bring a claim is consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State (i.e. the rule of non-responsibility).⁸

2. The Tribunal Must Decide Issues in Accordance with Applicable Rules of International Law, Including Customary International Law Rules on Determining a Claimant's Dominant and Effective Nationality

8. The situation where an investor of a Party possesses, at the same time, the nationality of a NAFTA Party (home State) and the nationality of the respondent/host State ("dual nationals") is not expressly addressed in the NAFTA. In the absence of guidance in the NAFTA, there can be no presumption that NAFTA establishes a *lex specialis* for claims by dual nationals or that such claims are necessarily permitted. It is well-recognized that "[a]n important principle of international law should [not] be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so."⁹ Articles 1116 and 1117 do not reflect such an intention but make clear that an investor may not bring a claim against its own State.

⁷ NAFTA, Article 1101(1) (Scope and Coverage): "This Chapter applies to *measures adopted or maintained by a Party* relating to: (a) *investors of another Party*; (b) *investments of investors of another Party* in the territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party" (*emphasis added*).

⁸ *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, Article 4; See Robert Jennings & Arthur Watts, "Oppenheim's International Law, Volume I: Peace", 9th edition, London: Longman, 1992, pp. 512-513. See also: Z.R. Rode, "Notes and Comments: Dual Nationals and the Doctrine of Dominant Nationality", *The American Journal of International Law* (1959) pp. 139, 141.

⁹ *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, Judgement, 20 July 1989, p.42, ¶ 50: "Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."; *Loewen – Final Award*, ¶¶ 160, 162: "It would be strange indeed if sub silentio the international rule were to be swept away."

9. NAFTA Article 1131 requires that the Tribunal decide issues in dispute “in accordance with the NAFTA” and “applicable rules of international law,” which include principles of customary international law.¹⁰ In the absence of specific language addressing claims by dual nationals, NAFTA and other investment tribunals have considered whether certain claims by dual nationals are allowed based on customary international law rules, depending on the investor’s predominant nationality.¹¹ Under customary international law, a dual national’s standing is determined on the basis of their *dominant and effective nationality*,¹² i.e. a claimant is prohibited from making a claim against their State of dominant and effective nationality.

10. Therefore, Canada agrees that:

the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States, Case No. A/18*, provides a rule of decision that governs [NAFTA] Chapter Eleven tribunals by virtue of Article 1131(1) (...) This rule in effect states that the principle of ‘non-responsibility’ must yield to the principle of

¹⁰ This provision may be used for “gap-filling” where the treaty might not specifically address an issue or where the treaty is otherwise silent, including on the issue of dual nationality. See *Methanex Corporation v. United States of America* (UNCITRAL) Final Award, 3 August 2005, Part IV, Chapter B, ¶ 29; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB (AF)/04/1) Decision on Responsibility, 15 January 2008, ¶ 76; *Archer Daniels Midland Company et al. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007, ¶ 195.

¹¹ Legal commentators have noted that a “general rule” has emerged in investor-State dispute settlement, whereby tribunals apply the dominant and effective nationality rule when the treaty is silent on the issue standing of dual national claimants. See Campbell McLachlan, Laurence Shore and Matthew Weiniger, “International Investment Arbitration: Substantive Principles”, 2nd ed. (Kluwer Law International, 2017) (“*McLachlan, Shore & Weiniger*”), §§ 5.89-5.96. See also Noah D. Rubins et.al, “Investor-State Arbitration” (Oxford University Press, 2008), p. 304; Zachary Douglas, “The International Law of Investment Claims” (Cambridge University Press, 2009), p. 321. Recent cases that have strayed from this general rule have both been overturned on appeal and are nevertheless interpreting specific language of a text that is not relevant to the NAFTA. See *Serafin Garcia Armas et al. v. Republic of Venezuela* (UNCITRAL) Decision on Jurisdiction, 15 December 2014; *Serafin Garcia Armas et al. v. Republic of Venezuela* (Cour d’appel de Paris) Decision, 3 June 2020.

¹² *Nottebohm Case (second phase)*, I.C.J. Reports 1955, Judgement of April 6th, 6 April 1955 (“*Nottebohm Case*”), pp. 23-24. *Mergé Case – Decision No. 55* (Italian-United States Conciliation Commission) Decision, 10 June 1955, ¶¶ 243-246. *Iran-United States Claims Tribunal, Case No. A/18-FT*, 5 Iran-U.S. CL. Tribunal Rep. 251 (1984-1), ¶ 510. See *Marvin Roy Feldman Karpa v. United Mexican State* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 30-32; *Manuel Garcia Armas et al. v. Republic of Venezuela* (UNCITRAL) Award, 13 December 2019, ¶ 741; *Enrique Heemsen and Jorge Heemsen v. Venezuela* (PCA Case No. 2017) Decision on Jurisdiction, 29 October 2019, ¶¶ 439-440.

‘dominant and effective’ citizenship which the claim is brought by or on behalf of a dual citizen whose ‘dominant and effective’ citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, *unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State*.¹³

11. Thus, when a potential NAFTA claimant with the nationality of one contracting State also has the nationality of the host/respondent State, the tribunal must determine the State to which the claimant is most closely attached by “his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future”.¹⁴ A claimant does not have standing to bring a NAFTA claim if their dominant and effective nationality is that of the respondent State.

12. This rule ensures that an investor of a NAFTA Party, who is a dual national of more than one NAFTA Party, is not placed at an advantage over other investors of that Party, all the while ensuring that the dual national is not denied the possibility of bringing a NAFTA claim altogether.

13. Furthermore, a claimant must not be a dominant and effective national of the respondent State at the points in time that diversity of nationality is required under the NAFTA. For example, the NAFTA expressly requires that the investor must be of another

¹³ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), United States 1128 Submission, 6 October 2000, ¶ 8 (*emphasis added*).

¹⁴ *See Nottebohm Case*, pp. 24 and 25. The International Court of Justice ultimately determined that there was an absence of bond of attachment between Liechtenstein and Mr. Nottebohm. As noted by the International Court of Justice in the *Nottebohm* decision at p. 24, the purpose of the inquiry is to determine whether the home State is sufficiently close, so that the nationality conferred upon him, compared to any other nationality, was *real and effective*.

Party at the time of the alleged breach¹⁵ and at the time of submitting its claim.¹⁶ Should the investor's dominant and effective nationality be determined to be that of the respondent State at those points in time, the claim may not proceed.

B. Investments Under the NAFTA Must Be Made in Accordance with the Applicable Domestic Laws of the Host State at the Time the Investment is Acquired or Established

14. Chapter 11 of the NAFTA defines “investors” and their “investments”,¹⁷ and includes substantive provisions outlining the protections for investors and their investments with respect to the establishment and acquisition of those investments.¹⁸ While the NAFTA does not expressly provide that protected investments are only those made “in accordance with the laws of the host state”,¹⁹ it would be contrary to the object and purpose of the agreement to expand the Agreement's protection to an investment that is in contravention of a host state's domestic law at the time that the investment is established or acquired. The absence of language expressly referring to the legality of the investment should not be interpreted to mean that the NAFTA's protections apply to all investments, such as those made contrary to the domestic law of the host state.

15. As investment tribunals have held, the requirement for an investment to be established in accordance with the domestic laws of the host state at the time the investment was made is a condition precedent for the investor to gain protection under an investment

¹⁵ See NAFTA, Article 1101(1) (Scope and Coverage): “This Chapter applies to *measures adopted or maintained by a Party* relating to: (a) *investors of another Party*; (b) *investments of investors of another Party* in the territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party” (*emphasis added*). Thus, in order to have standing to initiate a NAFTA Chapter 11 claim in the first place, the claimant must have been a protected investor (i.e. investor of another Party) *at the time of the breach* (i.e. when the Party adopts or maintains a measure). See also *Michael Ballantine and Lisa Ballantine v. Dominican Republic* (UNCITRAL) Submission of the United States of America, 6 July 2018, (“*Ballantine – Submission of the United States*”), ¶ 3.

¹⁶ The language of NAFTA Articles 1116 and 1117, set out above, provides that an “investor of a Party” can submit a claim under Chapter 11. This requires that a claimant be an “investor of a Party”, *on the date that the claimant initiates the claim* (*emphasis added*). See *Ballantine – Submission of the United States*, ¶ 4.

¹⁷ NAFTA, Article 1101(1) (Scope and coverage) and Article 1139 (Definitions).

¹⁸ See, for example, NAFTA, Article 1102 (National Treatment) and Article 1103 (MFN Treatment).

¹⁹ See NAFTA, Articles 1116 and 1117.

treaty even in the absence of express language in the treaties.²⁰ An investment that is found to be in violation of the domestic law of a Party at the time it is acquired or established can therefore not be an “investment” for the purposes of the treaty. Such a requirement is consistent with well-established principles of international law, including the principle of good faith,²¹ and the principle of *nemo auditur pro priam turpitudinem allegans* (i.e. no one shall be heard, who invokes his own guilt).²² Recognizing the existence of rights arising from illegal acts would violate the “respect for the law” which is a principle of international public policy.²³

III. NAFTA ARTICLE 1119

A. Claimants Must Comply with the Pre-requisites for Submitting a Claim to Arbitration in Order to Perfect the Consent of a NAFTA Party and Establish the Jurisdiction of the Tribunal

16. In order for a claimant to obtain the necessary consent to arbitrate pursuant to Article 1122(1) of the NAFTA, it must ensure that the claim is submitted to arbitration in

²⁰ *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24) Award, 27 August 2008, (“*Plama - Award*”), ¶ 138, Operating under the Energy Charter Treaty (ECT), which does not contain an “in accordance with host State law clause”, the tribunal noted that the lack of such a provision does not suggest that ECT’s protections would apply to “all kinds of investments, including those contrary to domestic or international law.”; *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 101, 138, Referring to the above approach with approval, the Tribunal stated that “it is the Tribunal’s view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT”; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, (ICSID Case No. ARB/07/24), Award, June 18, 2010, ¶¶ 123-124. The Tribunal stated that there “are general principles that exist independently of specific language to this effect in the Treaty”, including that:

[A]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; [] if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention [;] [or] if it is made in violation of the host State’s law.

²¹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, (ICSID Case No. ARB/03/26), Award, 2 August 2006, (“*Inceysa - Award*”), ¶ 231; *Plama - Award*, ¶¶ 141-143.

²² See *Inceysa - Award*, ¶¶ 240-242; *Plama - Award*, ¶¶ 141-143.

²³ *World Duty Free Company Limited v. The Republic of Kenya* (ICSID Case No. Arb/0017) Award, 4 October 2006, ¶¶ 139, 161.

“accordance with the procedures set out in this Agreement”.²⁴ Compliance by the claimant with each of the NAFTA’s prerequisites for submitting a claim to arbitration, including those set out in Articles 1116 to 1121, must be satisfied for a Chapter Eleven Tribunal to have jurisdiction over a claim. This has been confirmed by several NAFTA tribunals and has been the longstanding position of the three NAFTA Parties.²⁵

17. Article 1119 requires a claimant to provide the respondent NAFTA Party with a written notice of its intent (“NOI”) to submit a claim to arbitration at least 90 days before the submission of its claim to arbitration under Article 1120. In particular, Article 1119 requires that this written notice specify the identifying information of the claimant, the provisions of the NAFTA alleged to have been breached, the issues, the factual basis for the claim, and the relief sought and the approximate amount of damages claimed.²⁶ Together with the “cooling off” requirement in Article 1120(1), the notice requirements in

²⁴ NAFTA, Articles 1121 and 1122 provide that a State Party’s consent to arbitrate is conditional on the submission of a claim to arbitration in accordance with the procedures set out in the NAFTA and the investor’s corresponding consent to arbitrate in accordance with those procedures.

²⁵ *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, (“*Methanex – Partial Award*”), ¶ 120: “In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 and 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party’s consent to arbitration is established.”; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶ 229: “The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent...”; *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision on a Motion to Add a New Party, 31 January 2008, ¶¶ 28-29; *Canfor Corporation v. United States of America* (UNCITRAL) Decision of Preliminary Question, 6 June 2006, ¶ 171. This has been the longstanding position of the three NAFTA Parties - see e.g. *Resolute Forest Products Inc. v the Government of Canada* (UNCITRAL) Article 1128 Submission of the United States, 14 June 2017, ¶ 2: “Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is limited by the procedural conditions set out in Chapter Eleven.”; *MESA Power LLC v. Government of Canada* (UNCITRAL) Article 1128 Submission of Mexico, 25 July 2014, ¶ 4: “Mexico considers that by entering into the Agreement, the NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements stipulated in Articles 1116, 1117, 1118, 1119, 1120, and 1121.”; *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Article 1128 Submission of Canada, 30 July 2014, ¶ 3: “Under Article 1122(1), the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions are met at the time the claim is submitted to arbitration.”

²⁶ NAFTA, Article 1119(a) to (d)

Article 1119 afford a NAFTA Party time to identify and assess potential disputes, to coordinate among relevant government officials, and also provides an opportunity to redress the dispute before the claimant decides to submit the dispute to arbitration. These requirements are also iterated in the Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration, which set out one way for claimants to ensure that the requirements of Article 1119 are met.²⁷ Any claim for which a claimant has not provided notice is not submitted in accordance with Article 1119, and thus does not satisfy the requirements of consent contained in Article 1122(1). Every individual claimant must ensure that is has satisfied these requirements, including the provision of notice under Article 1119.

18. A claimant cannot bring itself into compliance with Article 1119 after it has submitted its claim to arbitration under Article 1120. Article 1119 requires that notice be given “at least 90 days *before* the claim is submitted”.²⁸ NAFTA and other international courts and tribunals have confirmed the general rule of international law that the jurisdiction of a tribunal is determined on the date on which the proceedings are instituted, not after.²⁹ As a result, a claimant cannot *ex post facto* create jurisdiction by giving notice

²⁷ On October 7, 2003, the Free Trade Commission also issued a suggested format for notices of intent. While use of this format is not obligatory, following it is one way for claimants to ensure that the requirements of Article 1119 are addressed.


²⁸ NAFTA, Article 1119 (emphasis added).

²⁹ See e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*) (ICSID Case No. ARB/97/3) Decision on Jurisdiction, 14 November 2005, ¶ 60: “[I]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for the purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted.”; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ¶ 26: “The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed.”; *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 2 April 2015, ¶ 321: “[T]he Tribunal does not consider that the submission of such documents could retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction but had some kind of potential existence that might have been realized if it had acquired jurisdiction at some subsequent date. The lack of a valid waiver precluded the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprived the Tribunal of the very basis of its existence.” See also Christoph H. Schreuer, “The ICSID Convention: A Commentary”, 2nd ed. (Cambridge: Cambridge University Press, 2009), p. 92: “Apart from specific rules about critical dates, the date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that

under Article 1119 after the proceedings have been instituted, unless the respondent Party provides its express consent to accept the claim regardless.³⁰ The agreement of all three NAFTA Parties on this point is clearly reflected in previous submissions of the Parties.³¹

Dated this 17th day of DECEMBER, 2021.

Respectfully submitted
on behalf of Canada,



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jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met.”

³⁰ *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 61: “[T]he Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied...”; *Methanex – Partial Award*, ¶ 93, where the challenge to the defective waiver submitted by the Claimant was amicably settled by the disputing parties.

³¹ See *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Submission of the U.S., 28 February 2018, ¶ 7; *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Submission of Canada, 28 February 2018, ¶¶ 8-9. *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3); *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Memorial on Jurisdictional Objections, 30 May 2017, ¶ 77.