

## Separate Dissenting Jurisdictional Statement of Michael Chertoff

1. While I agree with much of the analysis in the Tribunal decision on jurisdiction, I respectfully disagree with the determination that the Notice of Arbitration and the Washington litigation address the "same measures" so that the jurisdictional waiver requirement is not met. Although the lengthy and prolix pleadings make it difficult to separate the core measures at stake in the arbitration and the litigation respectively, I believe that in context there is a clear distinction between them so that the waiver is valid.
2. I agree with the premise that for jurisdiction to vest in an arbitration tribunal, there must be an effective waiver under Article 1121. For the waiver to be effective, Claimant must discontinue any parallel actions comprehended by the waiver. Contrary to Claimant's argument before this Tribunal, it is not incumbent on the Respondent to take affirmative steps to dismiss litigation in other courts. So, if the Washington action maintained by Claimant does not meet the standards of Article 1121, the Tribunal must dismiss the arbitration for want of jurisdiction.
3. I also agree with the Tribunal that if the measure at issue in the Washington litigation is the same as that in the arbitration, the exception for purely injunctive proceedings "before an administrative tribunal or court under the law of the disputing Party" cannot apply. For the reasons stated in the Tribunal decision, I believe that the exception applies to litigation in a court constituted under the law of the disputing Party (ie., Canada), not to a non-Canadian court that is merely applying Canadian law.
4. As the Tribunal observes, Article 1121 focuses on whether the Claimant has waived alternative claims regarding "the measure of the disputing Party that is alleged to be a breach" in the arbitration notice. "Measure" is defined as "any law, regulation, procedure, requirement or practice." The focus is on the government action that is the basis of Claimant's grievance, and not on the particular legal claim that is the basis for the challenge. So, for example, if a discriminatory license denial gives rise to distinct legal claims under NAFTA and under a domestic law, both claims relate to the same measure.
5. At the same time, a measure is a discrete act. The fact that multiple discriminatory acts may be part of a common plan or reflect a general discriminatory policy does not mean that they are all part of a single "measure." For example, if a State discriminates against a foreign investor by successively (1) denying a license; (2) imposing a special tax; and (3) subsidizing a domestic competitor, these would constitute separate measures, and need not be pursued in a single forum.
6. The dispositive issue then is whether the measures challenged in the notice of arbitration are the same as those in the Washington litigation. I believe it is appropriate to look to the second notice of arbitration (NOA) for two reasons. First, the parties seem to have acquiesced in the replacement of the first NOA with the second. Further, I believe a new pleading can cure deficiencies in a prior pleading on the theory that an earlier jurisdictional defect does not bar a refiling if a new, sufficient waiver is presented. See *Waste Management II*. At the time the second NOA was filed, the operative pleading in the Washington litigation was the Second Amended Complaint.
7. The second NOA sets forth five points at issue: whether Canada, Ontario, and/or the City of Windsor violated DIBC's franchise rights by (1) "precluding the construction of the New Span" adjoining the existing Ambassador bridge; (2) preventing or delaying "DIBC's ability to obtain Canadian approval to build the New Span"; (3) locating the "Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian-owned NITC/DRIC Bridge; (4) failing to provide road improvements on the Canadian side of the Ambassador Bridge; and (5) taking "traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge..." NOA paragraph 135. All of these points focus on measures undertaken by the Canadian government (or provincial or city governments) on the Canadian side of the border allegedly aimed at impairing the Ambassador

Separate Dissenting Jurisdictional Statement of Michael Chertoff

- Bridge or interfering with the construction of an adjacent New Span by DIBC. None of these address measures undertaken to permit and build the competing NITC/DRIC Bridge.
8. The Second Amended Complaint in the Washington litigation has lengthy factual allegations that overlap with the NOA to the extent that both allege a multi-year scheme by Canada to discriminate against DIBC. But the specific measures challenged in the Washington case are set forth in five counts which actually constitute the causes of action for which relief is sought. Counts One and Four address US government measures, which are obviously distinct from the Canadian government measures in the NOA. Count Two names US and Canadian defendants, but addresses measures undertaken to allow construction of the NITC/DRIC Bridge, which are not the measures listed in the NOA.
  9. Count Five alleges a taking of Claimant's property rights through, inter alia, "the conduct of Canada that seeks to construct the NITC/DRIC [Bridge], and/or that seeks to defeat the ability of plaintiffs to build the New Span *by accelerating the approval of the NITC/DRIC.*" [emphasis added] Here again the focus is on conduct relating the the NITC/DRIC bridge, although it is alleged that the *effect* will be on the economic viability of the New Span.
  10. The closest issue is presented by Count Three. Language in paragraph 303 seeks a declaration among other things that neither the US nor Canadian governments may delay regulatory approvals for the New Span. Claims that Canada in fact delayed the New Span by regulatory actions on the Canadian side are set forth in the NOA. But the only actual specific measures which are the subject of Count Three are in the request for injunctive relief against the State Department, the US Federal Highway Administration and the US Coast Guard for actions in the United States. Moreover, paragraphs 37-42 of the complaint assert that the actions which are the subject of the Washington litigation are restricted to commercial activity by the government of Canada, including efforts to solicit US official action in the United States to impede the New Span.
  11. Accordingly, I believe that Count Three does not challenge the actual measures that are the subject of the NOA, although it certainly rubs up against them. Of course, my respected colleagues' contrary view that there is overlap is understandable.
  12. For these reasons, I would find the waiver sufficient under Article 1121. Since the Tribunal has decided otherwise, however, I see no need to express an opinion on the statute of limitations question.

---

Michael Chertoff

