

**In the Arbitration under the North American Free
Trade Agreement and the UNCITRAL Arbitration Rules**

Between

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant,

and

THE GOVERNMENT OF CANADA,

Respondent.

PCA Case No. 2012-25

**DIBC'S COUNTER-MEMORIAL ON JURISDICTION AND
ADMISSIBILITY**

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TABLE OF ABBREVIATIONS

2002 MoU	Memorandum of Understanding between The Government of Canada and The Government of the Province of Ontario
BSTA	Bridge to Strengthen Trade Act
CEAA	Canadian Environmental Assessment Act
CTC	Canadian Transit Company
DDC	United States District Court for the District of Columbia
DIBC	Detroit International Bridge Company
DIBC SOC	Detroit International Bridge Company Statement of Claim
DRIC	Detroit River International Crossing
ESA	Ontario Endangered Species Act
FHWA	United States Federal Highway Administration
IBA	International Bar Association
ILC	International Law Commission
IBTA	International Bridges and Tunnels Act
LGWEM	Let's Get Windsor-Essex Moving
MDOT	Michigan Department of Transportation
MSF	Michigan Strategic Fund
MTO	Ontario Ministry of Transportation
NAFTA	North American Free Trade Agreement
NITC	New International Trade Crossing
OEAA	Ontario Environmental Assessment Act
VCLT	Vienna Convention on the Law of Treaties

The Detroit International Bridge Company (“DIBC”) and its subsidiary the Canadian Transit Company (“CTC”) (collectively, “Claimant”) respectfully submit this memorial in opposition to the June 15, 2013 Memorial On Jurisdiction And Admissibility (“Canada Memorial”) submitted by the Government of Canada (“Canada”).

PRELIMINARY STATEMENT

1. Claimant is an American business that owns and operates the Ambassador Bridge, which spans the Detroit River between Detroit, Michigan and Windsor, Ontario. The Ambassador Bridge is the single largest trade crossing between the United States and Canada. Claimant is the owner of the statutory franchise rights granted through concurrent and reciprocal legislation enacted by the United States Congress and the Canadian Parliament in 1921. The reciprocal statutes enacted by each country granted Claimant the right to “construct, maintain, and operate” this bridge crossing between Detroit and Windsor. That statutory franchise had no time limit when it was granted, and no time limit has ever been imposed by the United States Congress and the Canadian Parliament. Based on that statutory franchise, Claimant’s predecessor built what at the time was the longest suspension bridge in the world, and again based on that statutory franchise, Claimant has managed and maintained the bridge successfully for decades.

2. Based upon its statutory franchise, Claimant has been trying for several years to build a new twin span to its Ambassador Bridge (the “New Span”). Since the Claimant’s statutory franchise includes the right to “maintain” its bridge, and has no termination date, Claimant’s franchise rights include the right to build such a New Span. Indeed, the State Department of the United States confirmed in 2005 that the legislation creating Claimant’s franchise authorized Claimant “to expand (or twin)” its existing bridge, including by building the

proposed New Span, without obtaining any further Congressional approval (as would be required of a new bridge).¹

3. While traffic levels have actually declined quite dramatically over the past decade, Claimant seeks to build its proposed New Span in order to upgrade and improve the infrastructure of the Ambassador Bridge and to lower the costs and disruption of maintaining the existing bridge. Also, by virtue of an expanded number of lanes, the New Span would improve the efficiency with which passenger cars and commercial trucks can be funneled into the appropriate customs lane on each side of the border, thereby shortening the time it takes for vehicles to pass through customs. While the bridge is currently in excellent shape and is projected to remain as such for many years, it is over 80 years old and therefore Claimant desires to ensure that new infrastructure is put in place so as to preserve the longevity of a first class, reliable bridge franchise in perpetuity.

4. In addition to its efforts to build the New Span, for the past several years Claimant has also been working with the governments of the United States, Michigan, Ontario, and Canada to improve the highway connections to the Ambassador Bridge. Because it was built before the interstate highway system was created, the Ambassador Bridge originally was connected to the major highways in both the United States and Canada by local streets or thoroughfares that had limited capacity. Those local roads currently are festooned with traffic lights that prevent traffic from flowing efficiently and quickly from one country's major highway system to that of the other. Because a substantial portion of the traffic crossing the Ambassador

¹ Letter from Len Kusniz, Office of Canadian Affairs, U.S. Dep't of State, to David Coburn, Steptoe & Johnson LLP (Aug. 2, 2005), Exhibit C-18.

Bridge is commercial truck traffic travelling to destinations far away from Detroit or Windsor, the connections to the major highway systems in each country are of critical importance.

5. The Ambassador Bridge competes with other bridge and tunnel crossings between the United States and Canada, making the foregoing improvements of the bridge and highways of utmost importance to Claimant. Claimant has devoted hundreds of millions of dollars pursuing its efforts to build its New Span and to improving its highway connections. On the United States side of the bridge, the United States and Michigan governments agreed to fulfill commitments they made with Ontario and Canada to improve the American highway connections to the Ambassador Bridge. Claimant has spent millions of dollars joining in that effort, which has just recently (in 2012) culminated in a direct connection between the bridge and the major interstate highways on the United States side.

6. Claimant has been stymied and discriminated against in these efforts by the actions of Canada. Canada has exhibited ongoing hostility to the American ownership of both sides of the Ambassador Bridge. In the late 1970s and throughout the 1980s, Canada attempted to prevent the American owners of Claimant from acquiring control over both sides of the bridge, and attempted to expropriate the ownership of the Canadian side of the bridge without payment of just compensation. Claimant was able to defeat that measure through litigation in both the United States and Canada, which resulted in two different settlement agreements that were executed in 1990 and 1992—*i.e.*, during the very years when the NAFTA was being negotiated, and when Canada had an incentive to demonstrate to the United States that it would treat American investors fairly.

7. Unfortunately, the longstanding Canadian hostility to the American ownership of the Ambassador Bridge has resurfaced. First, as alleged in the Statement of Claim, Canada has

refused to improve the highway connections to the Ambassador Bridge. At the same time, Canada has committed to spending hundreds of millions (if not billions) of dollars to build a new highway to a non-existent and not yet approved bridge that Canada plans to build, own, and control right next to the Ambassador Bridge (*i.e.*, the “NITC/DRIC”).² Canada has confirmed its hostile intent by deciding to terminate its new highway only two miles from the Ambassador Bridge.

8. Second, as also alleged in the Statement of Claim, Canada has taken a series of measures to prevent Claimant from building its New Span. Those measures include lengthy delays in providing a required environmental approval for the New Span (a project that has minimal environmental impacts), and passing legislation that creates a discriminatory regulatory approval regime that favors the proposed Canadian-owned NITC/DRIC over the proposed American-owned New Span. This discriminatory legislation requires Claimant, as an American, to obtain special regulatory approval from the Canadian Governor in Council, but expressly exempts the Canadian-owned NITC/DRIC from seeking any such approval. The legislation also exempts the Canadian-owned bridge from complying with a host of other regulations that the American owners of the Ambassador Bridge must satisfy in order to build their New Span. These measures, including the discriminatory regulatory regime enacted to favor the Canadian-owned NITC/DRIC proposed bridge, have been specifically designed to discriminate against the American-owned Ambassador Bridge and to delay or prevent the Claimant from ever building its New Span.

² The “NITC/DRIC” refers to the proposed Canadian bridge that has been variously referred to as the “Detroit River International Crossing” (“DRIC”) or the “New International Trade Crossing” (“NITC”). Claimant uses the acronym “NITC/DRIC” to avoid any confusion between references to the “NITC” or the “DRIC,” as both refer to the same proposed bridge.

9. Claimant brought this NAFTA arbitration to challenge the foregoing measures. These measures violate Claimant's rights under the NAFTA to non-discriminatory treatment and to a minimum standard of fair treatment. As is clear from Claimant's Notice of Arbitration, Amended Notice of Arbitration, and Statement of Claim, Claimant does *not* seek compensation in this NAFTA arbitration based on any future construction of Canada's proposed NITC/DRIC. The NITC/DRIC has not received all of the approvals it is required to obtain, and the approvals it has received are currently the subject of ongoing litigation brought both by Claimant and by other entities in both the United States and Canada. Construction of the NITC/DRIC has not even begun, let alone been completed, and therefore it would be premature to seek damages based on such a measure under the NAFTA.

10. By contrast, Canada's discriminatory treatment of Claimant is ripe for challenge with respect to (a) Canada's refusal to make highway improvements to the American-owned Ambassador Bridge/New Span, even while it makes similar or even more expensive improvements to other, Canadian-owned bridges, including the non-existent and not-yet-approved NITC/DRIC (the "Roads Claim"), and (b) Canada's persistent effort to prevent Claimant from building its New Span, including by creating a discriminatory legal regime for the approvals needed for that New Span as compared with the proposed NITC/DRIC (the "New Span Claim").

11. Canada does not dispute that the Roads Claim and the New Span Claim are ripe. To the contrary, it argues that Claimant is *too late* to bring either claim. In addition, it argues that Claimant is barred from bringing both the Roads Claim and the New Span Claim because Claimant is simultaneously trying to *prevent* the NITC/DRIC from being constructed through litigation that seeks declaratory and injunctive relief in Canadian and United States domestic

courts—litigation which Canada asserts is inconsistent with the waiver required by NAFTA Article 1121. None of the ongoing domestic litigations are in any way inconsistent with the waiver required by Article 1121, and Canada’s waiver argument should therefore be rejected.

12. First, Claimant has fully complied with the waiver requirement of Article 1121. Claimant submitted the written waiver required by Article 1121 in both its Notice of Arbitration and its Amended Notice of Arbitration. Article 1121, however, does not require Claimant to waive claims based on different measures than those challenged in NAFTA. Here, Claimant’s domestic litigation seeks to obtain declaratory and injunctive relief to stop the NITC/DRIC from ever being fully approved or built. As stated above, this arbitration does not challenge the ultimate approval and construction of the NITC/DRIC, which has not even occurred. Similarly, the domestic lawsuits do not challenge the measures at issue in the Roads Claim and the New Span Claim.

13. Moreover, Article 1121 expressly excepts from the waiver requirement any claim that seeks declaratory or injunctive relief under the law of the disputing Party (*i.e.*, under Canadian law). The ongoing litigation Claimant is pursuing against Canada consists of claims by Claimant to obtain declaratory and injunctive under Canadian law to prevent the NITC/DRIC from being approved or constructed, and falls squarely within this exception.

14. It is true that in the Canadian domestic litigation Claimant advances one alternative damages claim for expropriation, but that claim is sought only in the alternative to its declaratory relief claim, and is expressly advanced *only* “in the event of the construction of a proposed new international border crossing in the vicinity of the Ambassador Bridge.” Thus, that expropriation claim is expressly based upon the ultimate construction of the NITC/DRIC, if all of Claimant’s pending declaratory and injunctive relief claims fail. It is therefore based on a different measure

from those challenged in this arbitration (*i.e.*, different from the measures at issue in the Roads Claim and the New Span Claim).

15. Canada's time bar argument should likewise be rejected. Article 1116(2) of the NAFTA provides that "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."³ The relevant date for Article 1116(2) is three years prior to the Notice of Arbitration. Claimant filed its Notice of Arbitration on April 29, 2011, so the relevant date for Article 1116(2) is April 29, 2008.

16. According to Canada, Claimant has known for years that Canada would never improve the highway connections to the American-owned Ambassador Bridge even while it would improve highway connections to other, Canadian-owned bridges, and that Canada would never let Claimant build its American-owned New Span. But Claimant could not possibly have known of these NAFTA breaches before they had actually occurred and been implemented. In the case of the Roads Claim, Canada (a) did not announce its plan to build the highway to the NITC/DRIC until May 1, 2008; (b) applied for and received regulatory approvals during 2009-2011; and (c) did not begin construction until August 2011. During the three-year period prior to the April 29, 2011 filing of Claimant's Notice of Arbitration, it remained uncertain whether the discriminatory highway would be built, and it remained uncertain whether that highway project (or some other highway project) might include an improved connection to the Ambassador Bridge/New Span, which would have avoided the discriminatory impact of which Claimant complains. The project at issue creates a highway connection that runs straight from Canada's

³ NAFTA, Art. 1116(2), Exhibit CLA-12.

Highway 401 (the major nationwide artery that is nearest to the Ambassador Bridge) toward the Ambassador Bridge, but which then, instead of completing the highway improvement all the way to the Ambassador Bridge, will deliberately veer off towards the non-existent and not-yet-fully-approved NITC/DRIC.⁴ With relatively minor modifications, these plans would allow Canada to complete the improvement all the way to the Ambassador Bridge. It only recently has become clear that Canada is unwilling even to consider making this modification, and is therefore committed to building a blatantly discriminatory highway.

17. Similarly, Canada has only recently consummated its creation of a blatantly discriminatory legal regime for the American-owned Ambassador Bridge and the proposed Canadian-owned NITC/DRIC. In 2012, Canada enacted the *Bridge To Strengthen Trade Act* (“BSTA”), which expressly exempted the NITC/DRIC from essentially all of Canada’s environmental and other regulatory requirements that would otherwise apply to such a project. In particular, the BSTA expressly exempted the NITC/DRIC from the requirements of the *International Bridges and Tunnels Act* (“IBTA”), which requires any new bridge to obtain special approval from the Canadian Governor in Council.⁵ By contrast, in 2009 and 2010, Canada took a series of aggressive actions to assert that Claimant was fully subject to the IBTA’s requirements, going so far as to initiate litigation to seek a judicial declaration that the IBTA trumped anything in the 1990 and 1992 settlement agreements entered into between Canada and Claimant. That lawsuit is ongoing, as is another lawsuit challenging a Ministerial Order issued by Canada in 2010 seeking to enforce portions of the IBTA against Claimant. These measures

⁴ See Map, C-127 (demonstrative exhibit showing map of relevant highways near Ambassador Bridge).

⁵ “‘Governor General in Council’ or ‘Governor in Council’ means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen’s Privy Council for Canada.” See *Interpretation Act* (R.S.C., 1985, c. I-21), § 35, Exhibit CLA-53.

all occurred within the three-year period prior to the Claimant's filing of its Notice of Arbitration.

18. Moreover, as explained in more detail below, both the Roads Claim and the New Span Claim are "continuing acts" or "composite acts" that continue to violate Claimant's rights under NAFTA and to injure Claimant up to and including the present day, and on into the future. Under established jurisprudence, both in NAFTA decisions and elsewhere, a claimant is entitled to challenge continuing acts or composite acts no matter when they might be said to have first commenced, so long as the breach continues within the limitations period and Claimant's damages are limited to those suffered within the limitations period and on into the future. In this case, therefore, Claimant is entitled to pursue its claims based on the continuing acts comprising the Roads Claim and the New Span Claim, so long as it does not seek damages from before April 29, 2008 (which Claimant does not seek).

19. For the foregoing reasons, and those explained in more detail below, the Tribunal should reject Canada's jurisdictional and limitations defenses, and should allow this arbitration to proceed to the merits.

STATEMENT OF FACTS

A. The Ambassador Bridge And Claimant's Franchise Rights

20. In 1909, the United States and the United Kingdom of Great Britain and Ireland (then responsible for Canada's foreign affairs) signed and ratified the Convention Concerning Boundary Waters Between the United States and Canada (the "Boundary Waters Treaty").⁶ The Boundary Waters Treaty prohibited the construction of new bridges over the boundary waters

⁶ Convention Concerning the Boundary Waters Between the United States and Canada, US.-UK., Jan. 11, 1909, 36 Stat. 2448, Exhibit C-4.

between the two countries except as provided for in the treaty. One of the ways in which the Boundary Waters Treaty permitted the construction of new bridges over the boundary waters was through a “special agreement” between the parties to the treaty, which was defined to include “any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.”⁷

21. In 1921, the U.S. Congress and Canadian Parliament each passed legislation granting DIBC and CTC,⁸ respectively, the right to construct, operate, and collect tolls on an international bridge between Detroit, Michigan and Sandwich (now part of Windsor), Ontario.⁹ These acts were later amended to expand and clarify CTC and DIBC’s rights.¹⁰ Collectively, these acts formed a special agreement as contemplated by the Boundary Waters Treaty (the “Special Agreement”).

22. The combined legislation granted Claimant a perpetual and/or exclusive right of franchise to build, operate, maintain, and collect tolls on a bridge across the Detroit River between Detroit and Windsor, subject to the conditions specified in the Special Agreement.

23. The Special Agreement, and each of the acts that make up the Special Agreement, also constituted a contractual offer to Claimant. The construction and opening of the Ambassador

⁷ *Id.* at Art. XIII, Exhibit C-4.

⁸ DIBC owns and controls the stock of CTC. DIBC and CTC, respectively, own the United States and Canadian sides of the Ambassador Bridge.

⁹ Act of Mar. 4, 1921, 66th Cong., ch. 167, 41 Stat. 1439, Exhibit C-5; Act of May 3, 1921, 11-12 Geo. V ch. 57 (Can.), Exhibit C-6. These rights were originally granted to predecessors in interest of DIBC and CTC. *See Detroit Int’l Bridge Co. v. Canada*, Statement of Claim, Jan. 31, 2013 (“DIBC SOC”), ¶ 22.

¹⁰ Act of June 28, 1922, 12-13 Geo. V ch. 56 (Can.), Exhibit C-7; Act of Apr. 17, 1924 68th Cong., ch. 125, 43 Stat. 103, Exhibit C-8; Act of Mar. 3, 1925, 69th Cong., ch. 448, 43 Stat. 1128, Exhibit C-9; Act of May 13, 1926, 69th Cong., ch. 292, 44 Stat. 535, Exhibit C-10; Act of Mar. 31, 1927, 17 Geo. V. ch. 81 (Can.), Exhibit C-11.

Bridge constituted acceptance of that contractual offer through performance. This offer and acceptance formed a binding contract among all four of the United States, Canada, DIBC, and CTC, in addition to the franchise right of the Special Agreement.

24. In reliance on the rights granted by the Special Agreement, DIBC undertook the enormous technical and engineering challenge of building a bridge span long enough to cross the river between Detroit and Windsor, which at the time of its construction was the longest suspension bridge in the world.

25. Claimant also assumed significant financial risk, including selling bonds, acquiring land and actually constructing the Ambassador Bridge and its accompanying facilities.

26. DIBC and CTC would not have undertaken to build the Ambassador Bridge if they had believed that their franchise rights were not exclusive, *i.e.*, that other entities would be permitted to build bridges between Detroit and Windsor in the vicinity of the Ambassador Bridge.

27. The Ambassador Bridge first opened for traffic on November 11, 1929. Since that time, it has become a major corridor for both passenger traffic and commercial trade between the United States and Canada. Commercial traffic crossing the Ambassador Bridge accounts for approximately one quarter of the \$750 billion in trade between the United States and Canada every year.¹¹

B. Canada Devoted Billions Of Dollars To Improve The Highway Connections To Other, Canadian-Owned Crossings, Including Its Nonexistent NITC/DRIC, But Has Not Built A Highway To The Ambassador Bridge/New Span

¹¹ Dave Battagello, *Preparations begin for DRIC bridge*, The Windsor Star, August 19, 2013, at 3, Exhibit C-123.

28. The Windsor gateway is the only crossing between Canada and the United States not connected to a major highway system.¹² This situation continues despite the great amount of traffic which crosses the Ambassador Bridge every day, and despite the bridge's critical importance in international trade. While Highway 401 in Canada was built in the vicinity of the bridge, it was not actually connected to the bridge during its construction.

29. Huron Church Road/Highway 3 is the primary access route to the Ambassador Bridge on the Canadian side. It was designated as a high capacity vehicular corridor by the City of Windsor, and was constructed with the intention of being a limited access route to the Ambassador Bridge.

30. The City of Windsor has significantly frustrated the use of Huron Church Road as an access route to the Ambassador Bridge. It has granted ongoing unlimited curb cuts and driveway connections, which has created local traffic on a road meant to carry commercial trucks across the border.

31. Furthermore, Windsor has installed and continues to operate seventeen unnecessary traffic lights along the route to the Ambassador Bridge. These traffic lights create delays for traffic crossing the bridge. There are more traffic lights along the 12 kilometers leading up to the Ambassador Bridge than along the rest of the highways from Toronto to Florida.¹³

32. Understanding that a highway-to-highway solution was necessary for such an important border crossing, beginning in the mid-1990s both Canada and the United States undertook projects to connect the Ambassador Bridge to their respective highway systems (the

¹² Windsor Gateway: An Action Plan for a 21st Century Gateway (Nov. 25, 2002) ("Action Plan"), at 6, Exhibit C-124.

¹³ "Windsor Gateway Short and Medium Term Improvements," Memorandum of Understanding between The Government of Canada and The Government of the Province of Ontario, with slide deck (Sept. 25, 2002), at 3 of slide deck, Exhibit C-126.

“Ambassador Bridge Gateway Project”). However, only the United States has followed through on this commitment.

33. The Ambassador Bridge Gateway Project was intended to include an improved highway connection to a new span to be built by DIBC next to the Ambassador Bridge. The U.S. Congress specifically noted in its appropriation of \$230 million dollars for construction of those connections that the Ambassador Bridge Gateway Project was to “accommodate” and “protect plans” for the New Span.¹⁴ Canada has refused to fulfill this commitment, and has chosen instead to build a new highway connection to its own bridge—even though that Canadian-owned bridge does not yet even exist.¹⁵

1. Beginning In The Late 1990s, Both Canada And The United States Committed To Improving The Connections Of The Ambassador Bridge To Their Respective Highway Systems

a. The U.S. Gateway Project

34. Understanding the critical importance of a highway connection to the Ambassador Bridge, in the 1990s authorities in the United States began the process of connecting the bridge to the U.S. highway system.

35. In 1995, the United States Congress officially designated the Ambassador Bridge a part of the national highway system. In 1998 and continuing thereafter, Congress appropriated more than \$230 million to connect the bridge to the Interstate Highway and State Highway Systems in Michigan. As a result, the U.S. side of the Ambassador Bridge is now directly

¹⁴ See H.R. Rep. 107-722 (Oct. 7, 2002), at p. 101, Exhibit C-17.

¹⁵ “Windsor Gateway Short and Medium Term Improvements,” Memorandum of Understanding between The Government of Canada and The Government of the Province of Ontario (Sept. 25, 2002), Exhibit C-29; “News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road,” (May 1, 2008), Exhibit C-125.

connected to I-75 and I-96, two of the three main interstates near the Ambassador Bridge, and indirectly connected to the third main interstate, I-94.

b. Canada Committed To A Highway Connection To The Ambassador Bridge

36. Canada and its provincial and local governments have periodically expressed support for the Ambassador Bridge Gateway Project. Starting in 1999, Canada made a number of commitments towards improving infrastructure to establish an end-to-end solution to and from the highway systems in each country in support of the Ambassador Bridge Gateway Project.

37. For example, in January 1999, the Ontario government and several Canadian municipalities, including the Cities of Windsor and Sarnia, took a position in support of the projects submitted by the Michigan Department of Transportation (“MDOT”) to the United States government under the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107. These projects included the Ambassador Bridge Gateway Project.¹⁶

i. The 2002 Canadian Memorandum Of Understanding Established A Framework To Connect Highway 401 To Existing Crossings

38. In keeping with the plan to connect both sides of the Ambassador Bridge to highway systems, on September 25, 2002 the governments of Canada and Ontario signed a memorandum of understanding (the “2002 MoU”) jointly committing up to C\$300M “in recognition that improvements are necessary to the existing border crossings and their approaches.”¹⁷ The primary existing border crossing was the Ambassador Bridge. A video slide presentation attached to the 2002 MoU discussing the existing border crossings noted that

¹⁶ See letters from Canadian Municipalities and Municipal Organizations to James Steele, FHWA (Jan. 1999), Exhibit C-59.

¹⁷ “Windsor Gateway Short and Medium Term Improvements,” Memorandum of Understanding between The Government of Ontario and The Government of the Province of Ontario (Sept. 25, 2002) (“2002 MoU”), at 2, Exhibit C-29.

“[t]here are more traffic lights on the 12 kilometers of Highway 3/Huron Church Road than all the rest of the Toronto-Windsor-Detroit-Florida trip combined (2,000 km).”¹⁸

39. The 2002 MoU authorized a Joint Management Committee to carry out its directives, and stated that “Potential projects to be considered by the Committee shall focus on improvements to existing border crossings and their approaches.”¹⁹ The 2002 MoU specifically held that “[n]ew border crossings shall be evaluated through the Canada – United States – Ontario – Michigan Bi-National Partnership,” not through the Joint Management Committee established by the 2002 MoU.²⁰

40. On December 20, 2002, the governments of Canada and Ontario released the Joint Management Committee’s Windsor Gateway Action Plan (the “Action Plan”).²¹ After considering numerous proposals, the Joint Management Committee identified a number of outcomes to achieve pursuant to the 2002 MoU, including “The elimination of all international truck traffic from Huron Church Road north of the EC Row Expressway,” and “A significant reduction in the volume of international truck traffic on Huron Church Road/Highway 3 south of the EC Row Expressway.”²² The EC Row Expressway is a major highway running east to west over Huron Church Road, approximately two miles south of the Ambassador Bridge (the

¹⁸ “Windsor Gateway Short and Medium Term Improvements,” Memorandum of Understanding between The Government of Canada and The Government of the Province of Ontario, with slide deck (Sept. 25, 2002), at 3 of slide deck, Exhibit C-126.

¹⁹ 2002 MoU at 2, Exhibit C-29.

²⁰ *Id.*

²¹ News Release, “Canada and Ontario Welcome Windsor Gateway Action Plan Recommendations” (Dec. 20, 2002), Exhibit C-30.

²² Action Plan at 19, Exhibit C-124.

Ambassador Bridge runs *south* from the United States into Canada, and therefore Huron Church Road runs *north* through Canada up to the Ambassador Bridge).²³

41. The Joint Management Committee proposed specific investments in “core infrastructure [that] would improve access to the existing crossings at the Ambassador Bridge and the Detroit-Windsor Truck Ferry” and recommended that the two governments “[w]ork with CTC/Ambassador Bridge ... to pursue the development of a dedicated truck route from Ojibway Parkway at EC Row Expressway to the Ambassador Bridge.”²⁴ This initiative, the Committee concluded, “would provide a secure, efficient truck route to the border crossing” that “would accommodate both the needs of industries that rely on cross-border trade, as well as the local tourist and business operations within the City of Windsor and surrounding areas.”²⁵

42. By May 2003, Transport Canada (the Canadian federal transportation ministry) secured funding for transportation infrastructure projects including the expansion of the EC Row Expressway, improvements to Huron Church Road, and the extension of Highway 401, a major limited-access trunk road in Ontario, through Windsor, to facilitate separate car and truck access to the Ambassador Bridge.²⁶

43. Later the same month, Canada and Ontario publicly announced the adoption of a nine-point “Windsor Gateway Action Plan” (the “2003 Canada-Ontario Action Plan”) based in substantial part on the recommendations of the Canada-Ontario Joint Management Committee.²⁷

²³ See Map, Exhibit C-127.

²⁴ Action Plan at 23, Exhibit C-124.

²⁵ *Id.* at 23-24, Exhibit C-124.

²⁶ See E-mail, Subject: “UNTD-0003: Report Minister Collenette’s visit” (May 2, 2003), Exhibit C-31.

²⁷ See “Canada and Ontario Announce Next Steps at Windsor Gateway,” Infrastructure Canada (May 27, 2003), Exhibit C-32.

A May 27, 2003 news release, issued jointly by Infrastructure Canada and Transport Canada, announced that Canada and Ontario had agreed:

- to “[w]ork together with the City of Windsor and Town of LaSalle on improvements to Highway 3/Huron Church Road,”²⁸ *i.e.*, the road to the Ambassador Bridge;
- to “[w]ork together with the Canadian Transit Company (Ambassador Bridge) ... in their efforts to build connections to the border crossing, concurrent with the Bi-National Planning Process”,²⁹ and
- to “work together with partner agencies to accelerate the Bi-National Planning Process, and work with all proponents of new border crossing capacity, including the Canadian Transit Company (Ambassador Bridge) ... in the context of this process.”³⁰

44. Canada appended to its press release a map showing the proposed truck-only road to the Ambassador Bridge that was incorporated into the 2003 Canada-Ontario Action Plan.³¹ The map showed that, as contemplated by the 2003 Canada-Ontario Action Plan, Highway 401 in Canada would be connected to the foot of the Ambassador Bridge.

45. A March 12, 2004 report of the Canadian government’s Business Transportation Task Force summarized the 2003 Canada-Ontario Action Plan as including “a new truck-only parkway linking Highway 401 with the EC Row Expressway, the expansion of the EC Row Expressway and improvements to Highway 3/Huron Church Road.”³²

²⁸ *Id.* at 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ Map, “Windsor Gateway Action Plan,” Exhibit C-33.

³² “Business Transportation Task Force Situational Analysis” (Mar. 12, 2004) at 2, Exhibit C-34.

ii. In 2004, Canada Renamed Its \$300m Commitment The “Let’s Get Windsor-Essex Moving Strategy”

46. On March 11, 2004, the “Let’s Get Windsor-Essex Moving Strategy” (the “LGWEM Strategy”) was announced, now with participation by the three governments of Canada, Ontario, and Windsor.³³ The LGWEM Strategy was a reformulation of the 2002 MoU, Action Plan, and 2003 Canada-Ontario Action Plan. All of these plans and strategies were predicated on the \$300m which was committed in 2002.³⁴

47. The three governments agreed that projects would “include consideration of, but not be limited to, improvements to Huron Church Road, EC Row Expressway, Lauzon Parkway and other options as they may be presented.”³⁵ Canada was thus still committed to creating a highway connection to existing crossings through the LGWEM Strategy, including Huron Church Road, which forms the access route to the Ambassador Bridge.

48. In reliance on Canada’s commitment to improve road connections to support the continued use and expansion of the Ambassador Bridge, Claimant has invested hundreds of millions of dollars into improvements to the Ambassador Bridge designed to take advantage of the Ambassador Bridge Gateway Project, including improvements to water, sewer, power generation, and lighting systems; expanded customs inspection facilities; and road connections on the Ambassador Bridge property.

³³ “A new solution for the Windsor Gateway endorsed by all three levels of government,” (Mar. 11, 2004), Exhibit C-128.

³⁴ “Business Transportation Task Force Situational Analysis” (Mar. 12, 2004) at 2, Exhibit C-34.

³⁵ “A new solution for the Windsor Gateway endorsed by all three levels of government,” (Mar. 11, 2004), at 3, Exhibit C-128.

2. From 2001 Through 2008, The NITC/DRIC Partnership Explored Potential New Crossings Over The Detroit River

49. At the same time that Canada was developing the highway connection to the existing Ambassador Bridge, Canada and the United States were jointly engaged in studying the broader transportation needs in the area. This process included consideration of building a new highway to a new bridge span directly adjacent to the Ambassador Bridge (the “New Span”).

50. In February 2001, Transport Canada, the U.S. Federal Highway Administration (“FHWA”), MDOT, and the Ontario Ministry of Transportation (“MTO”) formed a working group called the Ontario-Michigan Border Transportation Partnership.³⁶ This partnership eventually adopted a commitment to the construction of an economically unjustifiable Canadian bridge, which included a direct highway connection to the new Canadian-owned bridge, while also blocking the construction of a highway connection to the Ambassador Bridge/New Span and blocking the construction of the Ambassador Bridge New Span itself. For that reason, it is referred to here as the “DRIC Partnership” (or the “NITC/DRIC Partnership”).

a. The NITC/DRIC Partnership Originally Considered A Highway Connection To The Ambassador Bridge New Span

51. Initially, the construction of the New Span and the completion of the Canadian portion of the Ambassador Bridge Gateway Project had been on the DRIC Partnership’s agenda as a way to improve traffic flow and commerce in the Detroit-Windsor area.³⁷

52. In June 2005, the NITC/DRIC Partnership held a Public Information Open House to announce the initial alternatives it would analyze.³⁸ The NITC/DRIC Partnership recognized as

³⁶ “Ontario-Michigan Border Transportation Partnership Framework” (approved Feb. 7, 2001), Exhibit C-35.

³⁷ See Partnership Framework at 2, Exhibit C-35.

³⁸ “Welcome to the First Public Information Open House for the Detroit River International Crossing Environmental Assessment,” (June 2005), Exhibit C-129.

a “guiding principle[] for generating alternatives” that the Partnership should “[u]tilize existing infrastructure to the maximum extent – taking advantage of existing transportation and other linear corridors may improve usage of the transportation network and/or reduce impacts to other land uses.”³⁹ These alternatives included multiple different highway connections to crossing location X12, a crossing alternative at the site of the Ambassador Bridge/New Span. X12 was one of 15 different crossing alternatives being considered, and for each crossing alternative there were multiple different connecting route alternatives for linking the new or expanded crossing to Highway 401.⁴⁰

b. From 2005 To 2008, Canada Identified Areas Of “Continued Analysis”

53. The NITC/DRIC Partnership eventually narrowed the set of illustrative alternatives to an “area of continued analysis” in November 2005.⁴¹ This area of continued analysis limited the area in which a crossing and its highway connection would be considered. Canada argues that this is when the NAFTA limitations period began to run.⁴² However, no crossing or highway connection was decided at this time.

54. The purpose of the area of continued analysis was to narrow the “possible practical crossing, plaza and connecting route alternatives. These practical alternatives will be

³⁹ *Id.* at 9, Exhibit 129.

⁴⁰ *Id.* at 12, Exhibit 129.

⁴¹ “Welcome to the Second Public Information Open House for the Detroit River International Crossing Environmental Assessment,” (Nov. 29, 30 & Dec. 1, 2005) at 36 (“Second Open House Slides”), Exhibit C-130; Excerpt from Environmental Assessment Report, Illustrative Alternatives (“Illustrative Alternatives”) (Dec. 2008), Exhibit C-131, full text available at http://www.partnershipborderstudy.com/pdf/EA-Report/EARreport_FullDocument.pdf.

⁴² Government of Canada Memorial on Jurisdiction and Admissibility, June 15, 2013 (“Canada Memorial”), ¶ 238.

refinements of crossing alternatives X10 and X11, as well as possible alternatives connecting to the Ambassador Bridge Gateway and expanded plaza area on the U.S. side.”⁴³

55. The NITC/DRIC Partnership made clear that no decision had yet been made, and that on both sides of the border there were still numerous locations possible for the access route.

56. For example, on the Canadian side the area of continued analysis was “defined to provide sufficient area to enable a range of connecting route alignments and crossing alignments to be developed for continued analysis.”⁴⁴

3. On May 1, 2008, Canada Announced Its Plans For The Windsor-Essex Parkway

57. The main highway closest to the Detroit-Windsor border in Canada is Highway 401. On May 1, 2008, Canada announced its intent to build a Windsor-Essex Parkway (the “Parkway”), the “preferred alternative” for an access road extending Highway 401 to a new, undefined inspection plaza and river crossing in West Windsor.⁴⁵ The actual details of the Parkway were not presented to the public until June 2008.⁴⁶

58. In June 2008, Canada decided its preferred alternative for a new inspection plaza and river crossing in West Windsor, which it called the Detroit River International Crossing (“DRIC,” later renamed the New International Trade Crossing (“NITC”)).⁴⁷ The Parkway was to be connected to the NITC/DRIC bridge.

⁴³ Second Open House Slides, at 35, Exhibit C-130; Illustrative Alternatives, Exhibit C-131.

⁴⁴ *Id.*, Exhibit C-130, C-131.

⁴⁵ “News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road,” (May 1, 2008), Exhibit C-125; Canada Memorial, ¶ 44.

⁴⁶ “Executive Summary of the Detroit International River Crossing Environmental Assessment Report” (Dec. 2008) at p. iii, (“EA Executive Summary”), Exhibit C-132.

⁴⁷ *Id.*, Exhibit C-132.

59. The Parkway is designed to divert as much as 75% of the Ambassador Bridge's commercial truck traffic and 39% of its passenger traffic, to ensure that the Canadian NITC/DRIC Bridge succeeds at the Ambassador Bridge's expense.⁴⁸

60. Canada deliberately designed the Parkway to avoid improving the connection between the Ambassador Bridge and Highway 401.

61. Canada adopted a design that expanded and improved the roads connecting Highway 401 along a route that led to both the Ambassador Bridge and the proposed site of the NITC/DRIC. Canada deliberately stopped improving the connections just two miles short of the Ambassador Bridge, choosing instead to develop and improve its roads in a way that veered off the route to the Ambassador Bridge, towards the proposed site of the NITC/DRIC.

62. The Parkway is approximately 11 kilometers long in total; over this total length, approximately nine kilometers cover the route between Highway 401 and the Ambassador Bridge. The final section was then designed to turn away from the existing Ambassador Bridge and toward the site of the unauthorized NITC/DRIC.

4. From 2009 To The Present, Canada Has Sought Approvals, Financing, Permits, And Property Rights To Build The Windsor-Essex Parkway, Which Is Currently Under Construction

63. The announcement of the Parkway as the preferred alternative for the access route to the new crossing was only an interim step to actually finalizing the Parkway.

64. As discussed above, when the Parkway was announced the NITC/DRIC Partnership had not even decided on the crossing or plaza to which it would be connected.

⁴⁸ See excerpt from *Final Environmental Impact Statement and Draft Section 4(f) Evaluation: The Detroit River International Crossing Study*, U.S. Dep't of Transportation, FHWA, and MDOT (Dec. 2008) at 3-57 - 3-61, Exhibit C-85.

65. Following the decision regarding the preferred alternatives for the NITC/DRIC crossing and plaza, numerous other events were required before the Parkway could begin construction.

66. *Permits and approvals*: Canada and Ontario were required to seek numerous environmental approvals and permits before the Parkway could move forward. For example, in December 2008 MTO submitted the DRIC Environmental Assessment Report pursuant to the *Ontario Environmental Assessment Act* (“OEAA”), with the Parkway identified as the Recommended Plan for the access road.⁴⁹ Ontario received OEAA approval for the Parkway in August 2009.⁵⁰

67. A similar assessment required under Canadian federal law pursuant to the Canadian Environmental Assessment Act was submitted for public comment in July 2009. Approval was granted in December 2009.⁵¹

68. In September 2009, MTO applied for multiple permits under the Ontario *Endangered Species Act* (“ESA”).⁵² At least three different ESA permits were granted—the first in November 2009, the second in February 2010, and the third in 2011.⁵³

69. *Financing and procurement*: the Parkway required a lengthy process to secure financing and award the contract to design and build the road. This process began in October

⁴⁹ “The Rt. Hon. Herb Gray Parkway: A Chronology,” (Jan. 2013) at 1 (“Parkway Chronology”), Exhibit C-133.

⁵⁰ *Id.*, Exhibit C-133.

⁵¹ Canada Memorial, ¶ 45.

⁵² Parkway Chronology at 1, Exhibit C-133.

⁵³ *Id.*

2008, when the Parkway was assigned to Infrastructure Ontario to be completed under an alternative financing and procurement model.⁵⁴

70. In June 2009, Infrastructure Ontario issued a Request for Qualifications to pre-qualify and shortlist companies that would be invited to respond to the Request for Proposals to design, build, finance, and maintain the Parkway.⁵⁵ Three companies were identified to respond to the Request for Proposals in October 2009.⁵⁶ The actual Request for Proposals was then distributed in December 2009 by Infrastructure Ontario and MTO.⁵⁷

71. In November 2010, the Windsor-Essex Mobility Group was announced as the preferred company to design, build, finance, and maintain the Parkway.⁵⁸ That company reached commercial and financial close for the Parkway the next month, in December 2010.⁵⁹

72. *Land acquisition and property demolition:* the Parkway required a significant amount of property and land to be purchased or expropriated over a number of years. This process started in October 2008, when notices were sent to property owners whose properties had to be purchased and demolished for the Parkway to be built.⁶⁰ The expropriation process started in November 2009, and MTO began demolishing the properties purchased or expropriated to accommodate the Parkway in March 2010.⁶¹

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 2, Exhibit C-133.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1, Exhibit C-133.

⁶¹ *Id.* at 2, Exhibit C-133.

73. In April 2010, Ontario announced the acquisition of an additional 150 properties from the City of Windsor for the Parkway.⁶²

74. MTO officially took over jurisdiction of parts of Huron Church Road and EC Row Expressway in December 2010.⁶³

75. All of these steps were necessary before the Parkway could actually be built. The construction of the Parkway did not begin until August 2011, and one of the first permanent features of the Parkway (a multi-lane roundabout) did not open to traffic until November 2012.⁶⁴

76. Construction of the Parkway continues to this day.

77. Until the various approvals and permits were acquired, financing was secured, property was expropriated, etc., it was not established that the Parkway could proceed to construction.

78. Over the past five years and continuing today, Canada has undertaken to build this new highway that discriminates against the U.S. ownership of the Ambassador Bridge and its proposed New Span.

C. Since 2008, Canada Has Sought To Prevent Claimant From Building Its New Span

79. Both DIBC and Canada have plans to build a new bridge in the vicinity of the Ambassador Bridge. DIBC plans to build a new span to the Ambassador Bridge (the “New Span”). Canada has developed the NITC/DRIC bridge to discriminate against the Ambassador Bridge due to its American ownership.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 3-4, Exhibit C-133.

80. Given the level of traffic reasonably projected for the Detroit-Windsor crossing, there is not enough traffic at the crossing to support both the NITC/DRIC and the Ambassador Bridge's New Span. Canada is discriminating against the New Span because Canada is aware that construction of the New Span will make it economically infeasible to build the NITC/DRIC. Canada's discrimination against the U.S. owners of the Ambassador Bridge includes this deliberate effort to prevent the U.S. owners of the Ambassador Bridge from maintaining and improving the long-term viability of that bridge through the construction of the New Span.

1. DIBC Plans To Build The New Span

81. DIBC has undertaken to build the New Span as part of a plan to operate and maintain the bridge in a more cost-effective manner, and to improve the efficiency with which traffic is processed through the customs plaza. The New Span will adjoin the existing Ambassador Bridge, and will connect to the same approaches and customs plazas as the existing bridge. It will consist of six lanes (three in each direction), as opposed to the four lanes (two in each direction) on the existing bridge. This expanded number of lanes is not needed because of any increase in traffic volume. The New Span is designed to allow different kinds of traffic to be channeled more easily into different lanes in the customs plaza (most importantly, commercial trucking versus other kinds of traffic), thereby allowing for more efficient processing of the traffic through customs. In addition, the New Span will allow for easier and less expensive maintenance to be performed on both the existing bridge and the New Span.

82. Claimant has spent millions of dollars of its own funds to acquire the land for the New Span and on other expenditures related to the New Span and the Ambassador Bridge Gateway Project. CTC already owns all the land between the ramp and the Detroit River on the Canadian side. The ramps that would be used for the New Span connect directly to the

Ambassador Bridge's existing toll and customs plazas on both the U.S. side and Canadian side. The existing plazas have ample capacity to handle the expected traffic from the New Span.

83. For over a decade, DIBC and CTC have been trying to build the New Span to the Ambassador Bridge. As shown below, Canada has ultimately committed itself to blocking this effort.

2. Canada Unlawfully Eliminated The New Span Location From Consideration In The NITC/DRIC Partnership Process

84. During the course of its consideration of a possible new bridge between Detroit and Windsor, the DRIC Partnership ostensibly considered many possible locations and solutions to that proposal, including (in theory) using the New Span of the Ambassador Bridge. Ultimately, Canada instead insisted that an entirely new, Canadian-owned bridge be built right next to the Ambassador Bridge.

85. Initially, the DRIC Partnership identified fifteen potential crossing sites across the Detroit River for the location of a possible new bridge. These were designated X1 through X15, with "X" standing for "crossing."⁶⁵

86. At the outset of its consideration of alternatives, the DRIC Partnership professed to be open to various ownership structures. In an official position statement regarding the ownership of a new crossing issued in August 2005, the DRIC Partnership stated that the additional border crossing would be "subject to appropriate public oversight in both countries," and the alternative governance models included, but were "not limited to: Government ownership ... ; a concession agreement in which the private sector designs, builds, finances, and operates the facilities under a long-term lease arrangement with the governments; [and] other

⁶⁵ "Area of Focus Based on Weighted Performance Analysis," Figure S-5 to DRIC Final Environmental Impact Statement (showing location of X1 through X15), Exhibit C-38.

options that may be appropriate and developed by the partners.”⁶⁶ FHWA, at least initially, recognized the benefits of private ownership, as the minutes of a May 2006 DRIC Partnership Steering Committee meeting describe James Steele of FHWA asking “why spend government money if the private sector is willing to spend money to solve the problem?”⁶⁷

87. The FHWA noted in its Draft Environmental Impact Statement analyzing the different alternatives that it had received four alternatives proposed by private companies, and it included among them the X12 location proposed by DIBC, which would have been a twin or new span for the existing Ambassador Bridge (*i.e.*, the New Span).⁶⁸

88. Canada thereafter acted in the United States to persuade U.S. agencies to block DIBC’s right to build the New Span solely to advance Canadian commercial interests and on the basis of Canada’s longstanding hostility to the existence of a privately owned bridge between Detroit and Windsor.

89. Documents show that in 2004 Canada began discussing internally that it would not allow DIBC and CTC to own any new crossing, whether or not it was a twin of the existing Ambassador Bridge.⁶⁹ In a series of internal emails drafted by Andrew Shea, a Policy Advisor for Transport Canada, Mr. Shea described Canada’s position, as endorsed by the MTO, as

⁶⁶ “Statement of the Border Transportation Partnership on Governance of the New/Expanded Detroit River International Crossing” (Aug. 30, 2005), Exhibit C-39.

⁶⁷ DRIC Steering Committee Meeting Notes (May 3, 2006), at 3, Exhibit C-22.

⁶⁸ Excerpt from *Draft Environmental Impact Statement and Draft Section 4(f) Evaluation: The Detroit River International Crossing Study*, U.S. Dep’t of Transportation, FHWA, and MDOT (Feb. 2007) at 2-1,2-5, Exhibit C-40.

⁶⁹ This animosity towards the American owners of the Ambassador Bridge is part of a long history of discrimination by Canada and against DIBC. In the 1970s, Canada implemented numerous policies and legislation designed to interfere with Claimant’s rights; the most extreme policy would have required that the Canadian portion of the Ambassador Bridge be conveyed without cost to Canadian or Ontario governmental authorities immediately upon any change in status of CTC, such as an acquisition of control of its parent company DIBC, subject to a 25-year lease-back. See DIBC Statement of Claim, ¶¶ 74-87.

follows: “regardless of where the new crossing is located, there will, implicitly, be public control of that crossing. Therefore this would not preclude a twinned Ambassador Bridge from [being] chosen under the [DRIC Partnership process], except that the Ambassador Bridge wouldn’t control it”⁷⁰

90. Mr. Shea also wrote in an internal email in 2004 that Canada’s position “implicitly precludes the Ambassador Bridge from owning/operating a new or expanded international crossing What the principle means, is that regardless of where the new crossing is located, the incumbent owner will not be controlling the crossing.”⁷¹

91. Mr. Shea, describing his communications with the MTO, also described in 2005 “a desire for public ownership of the crossing” as one of the Ministry’s “key points.”⁷²

92. By contrast to the internal discussions, the U.S. Federal Highway Administration ranked X12, the New Span of the Ambassador Bridge proposed by DIBC, very high among the various alternatives under consideration. X12 was recognized as having one of the lowest environmental impacts on the United States side of the border of all proposed sites, and a far lower U.S. environmental impact than the site eventually chosen by Canada for the Canadian-owned NITC/DRIC Bridge.⁷³

⁷⁰ Email from Andrew Shea, “Windsor-Detroit Crossing Governance Principles” (Dec. 13, 2004 at 10:25 AM) at 2, Exhibit C-42.

⁷¹ Email from Andrew Shea, “Windsor-Detroit Crossing Governance Principles” (Dec. 13, 2004 at 10:25 AM) at 5, Exhibit C-42.

⁷² Email from Andrew Shea to Sean O’Dell and Helena Borges (June 29, 2005 at 11:12 AM), Exhibit C-43.

⁷³ See “Evaluation of Studied Alternatives and Determination of Practical Alternatives,” FHWA, Appendix C to DRIC Final Environmental Impact Statement, Exhibit C-44, (“One alternative, the twinning of the Ambassador Bridge (X-12), ranked very high on the U.S. side due to its minimal direct environmental impacts “); “Detroit River International Crossing Study Talking Points,” Exhibit C-45; Email from James Steele, “Briefing on Bi-National Partnership - Selection of Practical Alternatives” (Nov. 4, 2005), Exhibit C-46.

93. Canada realized that even if the new crossing were to be publicly owned, selection of a site at the location of the Ambassador Bridge (*i.e.*, X12) would necessarily result in the new crossing sharing a highway connection with the Ambassador Bridge. Moreover, any environmental or other regulatory approvals obtained by the DRIC Partnership for a new bridge at the X12 site would equally support an application for approval of DIBC and CTC's privately owned option at the same site.

94. For these reasons, the Canadian government at some point resolved internally, without DIBC's knowledge, to reject site X12 as an alternative, though it recognized that it did not have any justification for rejecting that site within the stated criteria governing the NITC/DRIC project. In an email reporting on a DRIC Partnership Working Group Meeting held September 28, 2005, Tim Morin, a Transport Canada project engineer, observed that "X12 ranks high on the US side and not so high on Canadian side," but recognized that "in order to maintain the integrity of the environmental assessment X12 will most likely have to remain based on the technical data at the moment"⁷⁴ Reporting on a DRIC Steering Committee meeting held in October 2005, a Transport Canada official, Sean O'Dell, recounted that Canada had "argued strongly that the twinning option was not acceptable," while acknowledging FHWA's arguments that "eliminating this option could not be done on the basis of the strict [environmental] analysis" and that the DRIC Partnership "would be better off to delay a likely court challenge from the twinning proponents by keeping [X12] on the short list and strengthening the case for dropping it through further analysis"⁷⁵

⁷⁴ Email from Tim Morin to Sean O'Dell (Oct. 3, 2005) at 2, Exhibit C-47.

⁷⁵ Email from Sean O'Dell, "DRIC Steering Committee Debrief - October 6, 2005" (Oct. 6, 2005) at 1-2, Exhibit C-48.

95. Canada’s own technical consultants and the MTO took the position that X12 should be given further consideration. As recounted by Mr. O’Dell in an October 2005 email, “Both MTO and our consultants were strongly of the opinion that X12 could not be ruled out at this point on the basis of the technical criteria used in the assessment of the alternatives.”⁷⁶ This conclusion was compelled by the fact that none of the objections raised by Canada to X12 formed “part of the terms of reference of the accepted criteria for this phase of the assessment,” and left Canada “as the sole partner arguing that [X12] should be dropped now.”⁷⁷ Yet, Mr. O’Dell sent an email to FHWA objecting to the publication of a FHWA study on the NITC/DRIC because Canada did “not agree that X12 should proceed.”⁷⁸

96. In response to the position taken by MTO and its own consultants that X12 could not be eliminated based on technical criteria, unknown to DIBC Canada pressured its consultants in a discussion held on October 28, 2005 to “‘carefully review’ all of the material, in light of all of the concerns that have been raised, so that they can be confident in making a recommendation.”⁷⁹ A supplemental report prepared the next week altered key findings about the impact of the X12 crossing, including increasing the projected number of homes to be displaced by the project, purporting to find new deficiencies with respect to impacts on the natural environment and regional mobility, and increasing the projected price tag of the crossing by C\$200,000,000.⁸⁰

⁷⁶ Email from Sean O’Dell to Helena Borges and Kristine Burr (Oct. 26, 2005 at 8:39 PM), Exhibit C-49.

⁷⁷ Email from Sean O’Dell to Helena Borges and Kristine Burr (Oct. 26, 2005 at 8:39 PM), Exhibit C-49.

⁷⁸ Email from Sean O’Dell to Susan Mortel and Jim Steele (Oct. 24, 2005 at 1:09 PM), Exhibit C-50.

⁷⁹ Email from Kaarina Stiff to Helena Borges and Sean O’Dell (Oct. 28, 2005), Exhibit C-51.

⁸⁰ Compare “DRIC Selected Slides,” MDOT (Oct. 2005) at 8, Exhibit C-52, (showing showing 160 residences displaced, low impact on natural environment, high benefits to Regional Mobility, and a total cost of C\$1.3 billion)

97. Canada also falsely assumed that X12 would require a new 120-acre plaza on the Canadian side, and used the community impacts under that (false) assumption as the basis for rejecting X12 as an alternative.⁸¹ A New Span or other facility owned by DIBC did not require any additional plaza construction on the Canadian side because it could use the existing Ambassador Bridge plaza, to which the Ambassador Bridge New Span was designed to connect. Even the Canadian Border Services Agency, which would be responsible for customs operations at the plaza, had indicated that no more than 40 acres would be needed.⁸²

98. In rejecting the X12 site as a practical alternative for a new crossing, Canada also argued that building a highway connection to the new crossing would cause unacceptable negative environmental impacts on Windsor.⁸³ This impact was not unique: any landing site would require additional highway infrastructure. The preferred alternative crossing ultimately chosen by NITC/DRIC proponents itself requires the construction of a new highway. That new highway to the Canadian-owned NITC/DRIC Bridge also imposes numerous community and environmental impacts, including (according to Canada) the displacement of approximately 360 homes, changes to cohesion and character in some neighborhood communities, the displacement

with “Analysis Results-Crossing X12 Ambassador Bridge” (Nov. 2005), Exhibit C-53, (showing 426 homes displaced; emphasizing risks to the natural environment; stating with respect to Mobility that X12 did not provide a new river crossing with new connections to the freeway systems; and estimating a total cost of CDN\$1.5 billion). See also Steele Nov. 4, 2005 email, Exhibit C-46.

⁸¹ See Steele Nov. 4, 2005 email, Exhibit C-46.

⁸² See Email from James Kirschensteiner to Mohammed S. Alghurabi (May 23, 2007), Exhibit C-54.

⁸³ See Steele Nov. 4, 2005 email, Exhibit C-46.

of over fifty businesses, the displacement of a church, a school, and other cultural institutions, the displacement of wildlife, and potential mortality to species at risk.⁸⁴

99. For these reasons and others, Canada chose its assumptions regarding the impacts of the X12 location to manufacture a pretext for insisting that the other (United States) members of the DRIC Partnership accept its rejection of the X12 location.

100. In June 2008, having been pressured by Canada to reject the X12 solution that would twin the Ambassador Bridge, the members of the DRIC Partnership ultimately selected location X10B, the site of the planned NITC/DRIC.

101. The new customs and toll plaza for the NITC/DRIC on the U.S. side is planned nearly to abut the existing plaza for the Ambassador Bridge. On the Canadian side, the planned site for the NITC/DRIC is less than two miles from the Ambassador Bridge.⁸⁵

102. The decision to reject location X12 was designed solely to block the Ambassador Bridge New Span.

3. Canada Has Implemented Legislation And Regulations To Prevent Construction Of The New Span And To Ensure Construction Of The NITC/DRIC

103. Canada has also taken steps to discriminate in favor of its proposed Canadian-owned NITC/DRIC Bridge and against the U.S.-owned New Span through legislative enactments that were driven by the desire to promote the NITC/DRIC and to oppose the New Span.

⁸⁴ See Chapter 10, "Environmental Effects and Mitigation of the Recommended Plan," DRIC Ontario Environmental Assessment Report (Dec. 2008) at 10-8, Exhibit C-55.

⁸⁵ See Map, Exhibit C-127.

104. In 2007, Canada enacted the *International Bridges and Tunnels Act*, S.C. 2007, ch. 1 (the “IBTA”).⁸⁶ The IBTA states that its provisions should “prevail” in the event of “any inconsistency or conflict” between the IBTA and other statutes, including the 1921 CTC Act, which forms part of the Special Agreement.⁸⁷

105. The United States Congress has not consented to abrogation of any part of the Special Agreement, and has never enacted any legislation that is either concurrent or reciprocal to the IBTA. Thus, the IBTA is not part of any special agreement that can authorize the construction of a bridge in a manner that complies with the Boundary Waters Treaty.

106. Claimant strongly objected to the passage of the IBTA and/or its application to the Ambassador Bridge/New Span. Claimant made known to Canada, even before the IBTA was passed, that it would violate settlement agreements between the parties if applied to the Ambassador Bridge.⁸⁸ For these reasons, Claimant maintained the position that the IBTA could not lawfully apply to the Ambassador Bridge/New Span.

107. Despite DIBC’s objections, the IBTA was enacted on February 1, 2007. Among other things, the IBTA purports to give the Canadian government authority to set tolls on privately owned international bridges.⁸⁹ The IBTA purports to establish new requirements for

⁸⁶ *International Bridges and Tunnels Act*, S.C. 2007, ch. 1 (“IBTA”), Exhibit C-94.

⁸⁷ See IBTA § 4 & Schedule item 34, Exhibit C-94.

⁸⁸ House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1st Sess., 39th Parliament, Tuesday (May 30, 2006), at 7, Exhibit C-134 (Mr. Dan Stamper of DIBC/CTC testifying that the IBTA would be an “undoing” of “what the settlement of 1992 accomplished”). Canada and Claimant entered into a settlement agreement in 1990 and a subsequent facilities agreement in 1992 to settle multiple litigations arising from Canadian policies and legislation enacted to prevent foreign ownership of Canadian companies and force the sale of the Canadian half of the Ambassador Bridge upon a change of control of CTC (actions which would have been impermissible under the soon-to-be-completed NAFTA). See “Agreement in Principle,” Canada and DIBC (Nov. 29, 1990), Exhibit C-27; “Agreement,” Canada and CTC (Jan. 31, 1992), Exhibit C-28.

⁸⁹ IBTA, § 15.1, Exhibit C-94.

approval for alterations of existing bridges, even if proposals were submitted to departments and agencies before the passage of the IBTA.⁹⁰ If alteration occurs without such approval, the owner may be ordered to “remove and destroy the bridge” or to forfeit ownership to Canada.⁹¹ The IBTA also purports to limit the change of ownership of international bridges, requiring government approval to purchase, operate, or acquire control of an entity that owns and operates an international bridge.⁹²

108. The IBTA also authorizes the Minister of Transport to issue regulations with respect to maintenance and repair, operation and use, and security and safety of bridges and tunnels, among other things.⁹³

109. Because the IBTA could not lawfully apply to the Ambassador Bridge/New Span, DIBC has never sought an approval for the New Span under the IBTA.

110. In January 2009, Canada adopted the International Bridges and Tunnels Regulations (the “IBTA Regulations”) which listed the Ambassador Bridge in a schedule of bridges and tunnels subject to the IBTA Regulations.⁹⁴

111. Unlike the IBTA, which did not require any action from bridge or tunnel owners unless they sought an IBTA approval, the IBTA Regulations require all bridge and tunnel owners to meet certain ongoing obligations. For example, the IBTA Regulations require bi-yearly

⁹⁰ *Id.* at § 6, Exhibit C-94.

⁹¹ *Id.* at §§9, 11, Exhibit C-94.

⁹² *Id.* at § 23, Exhibit C-94.

⁹³ *Id.* at §§ 14, 15, 16, Exhibit C-94.

⁹⁴ International Bridges and Tunnels Regulations, P.C. 2009-117 (“IBTA Regulations”), Schedule (Subsection 2(1)), Exhibit C-112.

inspections according to specified criteria, and detailed reports regarding these inspections.⁹⁵

The IBTA Regulations also require detailed bi-yearly reports on the operations and use of the bridge or tunnel.⁹⁶

112. Most recently, the Minister of Transport issued the Administrative Monetary Penalties Regulations pursuant to the IBTA in July 2012.⁹⁷ These regulations specify the fines which the Minister of Transport will impose for violations of the IBTA or IBTA Regulations.

113. Despite DIBC's arguments to the contrary, Canada ultimately adopted the position that the IBTA applies to the Ambassador Bridge/New Span. In November 2009, Canada filed an application in Ontario Superior Court seeking a declaration that the two agreements between Canada and DIBC entered into in the early 1990s did not bar the application of the IBTA to the Ambassador Bridge.⁹⁸ This was the first time that Canada attempted to force the application of the IBTA on Claimant and the Ambassador Bridge/New Span.

114. Canada continued to attempt to force the application of the IBTA on the Ambassador Bridge/New Span the next year. In July 2010, Canada sent a letter to CTC demanding that CTC show cause why the Minister of Transport should not issue an order prohibiting work on the New Span until IBTA approvals were received.⁹⁹ This letter was soon followed by a Ministerial Order in October 2010 ordering CTC to refrain from work on the New

⁹⁵ IBTA Regulations at Part 1, §§ 5, 6, 8-10, Exhibit C-112.

⁹⁶ IBTA Regulations at Part 2, §§ 14-16, Exhibit C-112.

⁹⁷ Administrative Monetary Penalties Regulations (International Bridges and Tunnels), SOR/2012-149, Exhibit C-135.

⁹⁸ Notice of Application, *Canada v. Canadian Transit Co.*, Superior Ct. Ontario, No. 09-46882 (Nov. 18, 2009), Exhibit C-95.

⁹⁹ Letter from Mary Komarynsky (Transport Canada) to Dan Stamper (DIBC/CTC) dated July 19, 2010, Exhibit C-136.

Span until IBTA approval was received.¹⁰⁰ CTC filed an application for judicial review of the Ministerial Order in November 2010.¹⁰¹ Both Canada's litigation seeking to apply the IBTA to Claimant, and Claimant's challenge of the Ministerial Order, are ongoing.

115. Canada has implemented the IBTA to give Canada the purported authority to interfere with the Ambassador Bridge expansion plans, including the New Span, to interfere with Claimant's rights to operate the bridge under the Special Agreement, and to promote Canada's long-term goal of limiting the value of Claimant's rights in order to coerce DIBC and CTC to transfer their rights in the Ambassador Bridge only to Canada on Canada's terms.

116. Canada has passed additional legislation in its effort to discriminate against the New Span and in favor of the NITC/DRIC. In October 2012, as part of an omnibus budget bill called the Jobs and Growth Act, 2012, legislation was proposed in the Canadian Parliament called the "*Bridge to Strengthen Trade Act*" (the "BSTA") to exempt the NITC/DRIC from a number of Canadian regulatory approval requirements, either by granting the NITC/DRIC automatic approval or by explicitly exempting the NITC/DRIC from the requirement. This legislation was passed in December 2012.¹⁰² The BSTA exempts the planned Canadian-owned NITC/DRIC Bridge (but not the U.S. owned Ambassador Bridge New Span, a mere two miles away) from environmental and safety regulations such as the *Canadian Environmental Assessment Act*, the Canadian Port Authority Environmental Assessment Regulations, and the

¹⁰⁰ Ministerial Order: Construction or Alteration: International Bridges and Tunnels, dated October 18, 2010, Exhibit C-137.

¹⁰¹ *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC) (Nov. 18, 2010), Exhibit C-138.

¹⁰² *Jobs and Growth Act, 2012*, S.C. 2012, c. 31, art. 179 (Can.), Exhibit C-1.

Statutory Instruments Act, as well as numerous other statutes and regulations.¹⁰³ The Act further provides that after the NITC/DRIC is constructed, all relevant construction permits and authorizations shall be “deemed to have been issued.”¹⁰⁴

117. A Canadian Member of Parliament, Jeff Watson (Essex), stated that the purpose of the legislation was to “insulate” the NITC/DRIC “from any future lawsuit on the Canadian side” from DIBC, CTC, or their American owners the Moroun family.¹⁰⁵

118. Thus, the BSTA furthers the effort Canada is making to prevent DIBC and CTC from exercising their right to build the New Span and to ensure that the Canadian-owned NITC/DRIC Bridge is built before the U.S.-owned New Span can be built.

4. In June 2012, The NITC/DRIC Partners Sign The Crossing Agreement

119. In June 2012, Canada’s actions culminated in an agreement with the Michigan Governor, MDOT, and the Michigan Strategic Fund to “design, construct, finance, operate and maintain” the NITC/DRIC (the “Crossing Agreement”).¹⁰⁶

120. The execution of the Crossing Agreement was a major step towards the construction of the Canadian-owned NITC/DRIC Bridge. It establishes a framework for the NITC/DRIC project and addresses issues including toll collection, financial responsibilities, and governance.

¹⁰³ *Id.* at § 4-6, Exhibit C-1.

¹⁰⁴ *Id.* at § 3, 6, Exhibit C-1.

¹⁰⁵ “Canada Fires Back at Moroun,” *The Windsor Star* (Oct. 18, 2012), Exhibit C-2.

¹⁰⁶ Crossing Agreement (June 15, 2012), Exhibit C-64.

121. Under the terms of the Crossing Agreement, if the NITC/DRIC is constructed, it will be operated for the foreseeable future by a Canadian-controlled authority. Under the status quo, Canada will also collect all tolls from the NITC/DRIC.

5. Over The Past Several Years, Canada Has Delayed Granting Permits For The New Span

122. DIBC has undertaken to build its New Span as soon as it receives all regulatory approvals, and has been injured and impaired in this effort by the inequitable Canadian actions that discriminate against the U.S. ownership of the Ambassador Bridge.

123. Canada has delayed and obstructed the construction of the New Span by, for example, delaying approval under the *Canadian Environmental Assessment Act* for the New Span.

124. Claimant submitted an environmental impact statement to Transport Canada for the Ambassador Bridge New Span on December 4, 2007 and an updated environmental impact statement in April 2011.¹⁰⁷ Because the Ambassador Bridge New Span will be constructed directly alongside the existing span and will connect to the existing Ambassador Bridge plaza, any environmental impact will be insignificant or nonexistent. However, no decision has been received to this date, over five years later. The Federal Screening Report under the *Canadian Environmental Assessment Act* was just released in April 2013,¹⁰⁸ and approval has still not been received.

125. By way of contrast, the agencies constructing the NITC/DRIC submitted their Ontario Environmental Assessment Report in December 2008 and received a Notice of Approval

¹⁰⁷ See Cover Page, Ambassador Bridge Enhancement Project Environmental Impact Statement (Apr. 2011), Exhibit C-89.

¹⁰⁸ “Draft Environmental Assessment Screening Report,” (April 2013), (“Draft EA”), Exhibit C-139.

from the Ontario Minister of the Environment in August 2009, just nine months later, despite serious concerns about the impact of the NITC/DRIC on the surrounding community, wetlands, and species-at-risk in Canada.¹⁰⁹ The Federal Screening Report under the *Canadian Environmental Assessment Act* for the Canadian NITC/DRIC and plaza was released in July 2009 and approved just four months later in December 2009.¹¹⁰

ARGUMENT

I. CLAIMANT HAS COMPLIED WITH THE NAFTA WAIVER REQUIREMENT

A. Summary Of Claimant's Position

126. Claimant has complied with the requirements of Article 1121, which governs the waiver of rights investors are required to make pursuant to the NAFTA.

127. Article 1121 requires investors to deliver with their notice of arbitration a waiver of their right to bring any claims related to the same measures being challenged in the NAFTA arbitration, except for claims for declaratory or injunctive relief under the law of the country being sued (*i.e.*, Canada in this case). Claimant delivered the required waiver with both its April 29, 2011 Notice of Arbitration and with its January 15, 2013 Amended Notice of Arbitration, and has thus complied with Article 1121.

128. Contrary to Canada's assertions, the waiver provision in the NAFTA does not require (or empower) the NAFTA tribunal to police Claimant's actions to ensure that they are consistent with the Claimant's required waiver. Rather, the Claimant is required to provide the

¹⁰⁹ DRIC Environmental Assessment Report, DRIC Study (Dec. 2008) at title page, Exhibit C-90, available at <http://www.partnershipborderstudy.com/pdf/12-5-09/Appendix%20J%20-%20Provincial%20EA.pdf>; "Environmental Assessment Act Section 9 Notice of Approval to Proceed with the Undertaking," Ministry of Transportation (Aug. 21, 2009), Exhibit C-91.

¹¹⁰ Canadian Environmental Assessment Act Screening Report, DRIC Study (Nov. 2009), Exhibit C-92; News Release, "Detroit River International Crossing Project Receives Environmental Approval" (Dec. 3, 2009), Exhibit C-93.

waiver, and the respondent country (here, Canada) is then able to use that waiver to seek dismissal of any claims brought by the Claimant in other courts or tribunals that the respondent believes are inconsistent with the waiver. The Claimant can then make its argument to that court or tribunal that its claims are not inconsistent with the waiver, and the local court or tribunal can resolve any such dispute. The NAFTA does not assign to the NAFTA arbitration panel the responsibility or power to resolve any such dispute, and this NAFTA Tribunal's jurisdiction does not depend upon the resolution of any such dispute.

129. In any event, none of Claimant's existing lawsuits violate the NAFTA waiver requirement. As stated above, NAFTA does not require investors to waive claims regarding different measures, or to waive claims for declaratory or injunctive relief under the law of the disputing Party (in this case, Canada).

130. The Washington Litigation (as defined in Canada's Memorial) is consistent with the waiver required by Article 1121 for two independent reasons: first, it challenges different measures from those challenged in this arbitration; second, the claims against Canada in the Washington Litigation seek only injunctive relief based on violations of Canadian law.

131. The *CTC v. Canada* Litigation (as defined in Canada's Memorial) is also consistent with the Article 1121 waiver: it is principally a claim for injunctive relief under Canadian law; it seeks damages only as an alternative claim and *only* for a measure that is expressly *not* a measure challenged in this arbitration (*i.e.*, it seeks damages only in the event of the actual construction of the NITC/DRIC, which is not challenged in this arbitration). It therefore does not violate the waiver provision, because the only claims which overlap with those brought in this arbitration are for declaratory and injunctive relief pursuant to Canadian law.

132. The Windsor Litigation (as defined in Canada’s Memorial) similarly seeks declaratory relief pursuant to Canadian law, and does not challenge the same measures as in this arbitration. It therefore does not violate the NAFTA waiver provision.

133. Thus, Canada has failed to satisfy its burden of proof with respect to its waiver defense.¹¹¹

134. Finally, even if the Tribunal does find that any of the domestic claims impermissibly overlap with claims made in this arbitration, each such claim should be considered individually, rather than triggering an absolute bar to jurisdiction over any and all claims, as Canada argues.

B. The Requirements Of The NAFTA Waiver Provision

1. Investors Must Submit A Written Waiver With The Notice Of Arbitration

135. One of the prerequisites to arbitration under the NAFTA is delivery of a written waiver to the respondent with the investor’s notice of arbitration.¹¹² The investor must waive certain rights to pursue damages in other courts or tribunals for the measures they are challenging under the NAFTA. Article 1121 (in relevant part) reads:

“1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or

¹¹¹ See UNCITRAL Arbitration Rules, Art. 27(1) (“Each party shall have the burden of proving the facts relied on to support its claim or defence”), Exhibit CLA-3; *Pope & Talbot Inc. v. Government of Canada*, Award in Relation to Preliminary Motion, ¶ 11 (Feb. 24, 2000), Exhibit CLA-14 (burden of proof on moving party to prove affirmative defense).

¹¹² This applies to arbitrations under the UNCITRAL rules. The procedure is slightly different under the ICSID and/or Additional Facility rules. See NAFTA, Art. 1137(1), Exhibit CLA-12.

continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”¹¹³

136. Article 1121(3) defines the requirements for a valid waiver. They are (1) the waiver shall be in writing; (2) it shall be delivered to respondent; and (3) it shall be included in the submission to arbitration.

137. The purpose of the waiver requirement is to give the respondent documentary evidence that the investor waived their rights under Art. 1121(1)(b) and/or 1121(2)(b). Article 1121 ensures that investors understand the rights they must waive, and that respondents have written confirmation of this waiver.

2. Claimant Fulfilled The Requirements Of Article 1121

¹¹³ NAFTA, Art. 1121, Exhibit CLA-12.

138. Claimant delivered a written waiver to Canada with its Notice of Arbitration that waived its rights except as specifically excepted under Art. 1121. Under the plain meaning of the NAFTA, this waiver satisfied the requirements of Art. 1121.¹¹⁴

139. Canada does not dispute that Claimant satisfied the conditions of Art. 1121(3) in the waiver it submitted on April 29, 2011.¹¹⁵ Claimant submitted a written waiver to Canada with its April 29, 2011 Notice of Arbitration and its January 15, 2013 Amended Notice of Arbitration. *See* Exhibits C-140 (the “First NAFTA Waiver”) and C-116 (the “Second NAFTA Waiver”). While Claimant excluded from both waivers certain domestic proceedings, as discussed in more detail below, these excluded claims fall within the exceptions to Article 1121.

140. Canada claims that the Second NAFTA Waiver is facially deficient because it does not include the phrase “before an administrative tribunal or court under the law of the disputing Party.”¹¹⁶ Canada does not explain what effect the Second NAFTA Waiver has on this Tribunal’s jurisdiction. In any event, the omission does not and was not intended to deviate from the requirements of Article 1121, and Claimant has not changed its position in reliance on the omission. Claimant has no objection to including the omitted language in the waiver or construing the waiver to include the language. Further, the First NAFTA Waiver did track the language of Article 1121 word-for-word, and Canada has not contested this First NAFTA Waiver as in any way facially deficient.

141. Claimant has thus delivered the necessary written waiver to Canada and has complied with Article 1121.

¹¹⁴ NAFTA, Art. 1121(3), Exhibit CLA-12.

¹¹⁵ Canada Memorial, ¶ 108.

¹¹⁶ Canada Memorial, ¶¶ 119-121.

3. Enforcement Of The Waiver Occurs In Other Courts Or Tribunals

142. Once the respondent receives the written waiver, it can use it in any other court or tribunal if it believes the investor is pursuing a claim in violation of the waiver. The written waiver confirms that the investor has waived the claims that the NAFTA requires it to waive by initiating its NAFTA arbitration, allowing the other court or tribunal to assess whether that waiver bars the claims brought by the investor in domestic court or before any other tribunal.

143. Article 1121 requires the delivery of a written waiver of rights. It does not require or authorize the NAFTA tribunal to police whether other lawsuits have been abandoned. The Tribunal's authority here relates to the matters before it, and not other litigations.

144. This approach has been followed by numerous previous tribunals. One example is *Waste Management v. Mexico* ("WM I").¹¹⁷ The *WM I* tribunal addressed Mexico's argument that the tribunal had a duty to police Waste Management's other cases, and held that they did not:

"However, this Tribunal is unable to agree with the assertions put forth by the Mexican Government to the effect that the purported function of the Arbitral Tribunal, in view of Article 1121, is to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding, in order to comply with the procedure established under NAFTA Chapter XI Section B, and, in this manner, validate or perfect the consent to said Treaty. This Tribunal cannot but reject such an interpretation, since it lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.

In this case, it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals."¹¹⁸

¹¹⁷ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award (June 2, 2000) ("WM I Award"), Exhibit CLA-15.

¹¹⁸ *WM I Award* at ¶ 15, Exhibit CLA-15.

145. The tribunal in *Waste Management v. Mexico II* confirmed *WMI*'s understanding of Article 1121:

“As an aspect of its power to determine its jurisdiction, the first Tribunal had to determine both that the waiver conformed to NAFTA requirements and that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged. This did not mean that the Tribunal was entitled or required to ensure actual compliance with the waiver. That would be a matter for the Respondent to plead in any Mexican court before which proceedings were brought contrary to the terms of the waiver.”¹¹⁹

146. The *Vanessa Ventures* tribunal came to the same conclusion under a similar provision in a bi-lateral investment treaty between Canada and Venezuela: “In view of the fact that the question of the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts, this Tribunal considers that the Supreme Court of Venezuela is best qualified to interpret Venezuelan law.”¹²⁰

a. Canada Has Not Shown That This Tribunal Should Police Other Proceedings

147. Canada argues that this Tribunal should determine whether Claimant has failed to withdraw claims that, according to Canada, overlap with claims made in this NAFTA arbitration and are inconsistent with Claimant's waiver.¹²¹ But Canada has not provided support for its assertion that this Tribunal should police whether Claimant's other litigation claims are consistent with its NAFTA waiver.

¹¹⁹ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal regarding Mexico's Preliminary Objection, ¶ 10 (June 26, 2002), Exhibit CLA-16 (footnotes omitted).

¹²⁰ *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, ¶ 3.4.4 (Aug. 22, 2008), Exhibit CLA-17.

¹²¹ Canada Memorial, § III.

148. Canada does not explain what purpose a written waiver would serve if the NAFTA actually required the Tribunal to determine whether investors have affirmatively withdrawn their claims.

149. Canada's interpretation is unsupported by the text of the NAFTA. There is no reference in the treaty to an affirmative obligation of investors to withdraw other claims. If the NAFTA contemplated an arbitration tribunal having the authority to order the cessation of other litigation, it would have said so. There is also no reference in the Treaty to this Tribunal's jurisdiction being predicated on its policing of Claimant's actions in other proceedings.

150. Furthermore, Canada's argument would mean investors would be forced to be overinclusive in dismissing lawful claims or risk their NAFTA case being dismissed. This goes against the NAFTA principles which are meant to incentivize dispute resolution and protect investors.¹²²

151. Under Canada's interpretation, this decision of whether to withdraw claims would be necessary before the NAFTA case had been fully developed. Canada argues that investors must abandon their claims simultaneously with the Notice of Arbitration.¹²³ However, the Notice of Arbitration only requires "[a] brief description of the claim and an indication of the

¹²² See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Preamble, Dec. 17, 1992 ("The [NAFTA Parties] resolved to: . . . REDUCE distortions to trade . . . ENSURE a predictable commercial framework for business planning and investment . . . ENHANCE the competitiveness of their firms in global markets"), Exhibit CLA-18; North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 1, Art. 102(1), Dec. 17, 1992 ("The objectives of this Agreement . . . are to: eliminate barriers to trade, and facilitate the cross-border movement of, goods and services . . . promote conditions of fair competition . . . increase substantially investment opportunities"), Exhibit CLA-51. See also *The Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶ 53 (Jan. 5, 2001), Exhibit CLA-19 (the text and purpose of Chapter 11 support "an interpretation which provides protection and security for the foreign investor and its investment").

¹²³ Canada Memorial, ¶108.

amount involved, if any.”¹²⁴ It does not require the NAFTA measures to be fully defined. It is only in the Statement of Claim that investors must provide “[a] statement of the facts supporting the claim . . . [t]he points at issue . . . [t]he relief or remedy sought . . . [and] [t]he legal grounds or arguments supporting the claim.”¹²⁵ Under Canada’s interpretation, investors would abandon claims before the NAFTA case is developed enough to know with certainty whether the cases overlap. Because Canada argues that investors must dismiss their claims with prejudice,¹²⁶ Canada’s requirement would have serious consequences on investors’ ability to vindicate their rights. *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Highet Dissent (June 2, 2000), ¶ 44, Exhibit CLA-20 (“Indeed, it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims. This could not have been the reasonable intent of the NAFTA Parties”).

152. None of these results can or should be read into Article 1121 or to prejudice NAFTA’s goal of protecting investors. The plain meaning of Article 1121(3) is that investors are required to deliver a written waiver, which respondents can then use in other proceedings as evidence of a waiver of rights. It is then the responsibility of these other courts or tribunals to enforce the waiver and to determine if the waiver bars the claims brought before those other courts or tribunals.

¹²⁴ UNCITRAL Arbitration Rules, Art. 3, Exhibit CLA-3.

¹²⁵ UNCITRAL Arbitration Rules, Art. 20(2), Exhibit CLA-3.

¹²⁶ Canada Memorial, ¶ 112.

153. Moreover, Claimant expressly confirms here that the reference to other litigations in its waivers was simply intended to confirm that, in Claimant’s view (as explained below), the waiver required by Article 1121 does not preclude those cases from proceeding.

4. Exceptions To The Article 1121 Waiver Requirement

154. Article 1121 does not require investors to waive their rights to all claims. First, it only requires a waiver of claims with respect to *the same measures* being challenged in the NAFTA arbitration. Second, it does not require investors to waive claims for declaratory or injunctive relief under the law of the disputing Party, even if those claims relate to the same measures being challenged in the NAFTA arbitration.

a. The Waiver Only Applies To The Same Measures

155. Subject to the exception for declaratory and injunctive proceedings discussed below, investors must waive their rights to “any proceedings with respect to the measure of the disputing Party that is alleged to be a breach” of the NAFTA.¹²⁷ The ordinary meaning of this provision is that investors must waive their rights only with respect to the same measures being challenged in the NAFTA arbitration, but do not have to waive their right to bring claims relating to other measures. It is not enough that the NAFTA arbitration and a domestic proceeding are alleged to be somehow related—the waiver only governs “any proceedings with respect to **the measure** of the disputing Party **that is alleged to be a breach.**”¹²⁸

156. A measure is defined in the NAFTA as “any law, regulation, procedure, requirement or practice.”¹²⁹ A measure is an identifiable government action or series of actions.

¹²⁷ NAFTA, Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

¹²⁸ *Id.* (emphasis added), Exhibit CLA-12.

¹²⁹ North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 2, Article 201(1), Dec. 17, 1992, Exhibit CLA-21.

For claims to overlap, they must be challenging the same government action. As previous tribunals have noted, cases may coexist which do not challenge the same measures. For example, the tribunal in *WMI* explained that “proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA.”¹³⁰

157. The *Feldman* tribunal also explained that related measures could coexist in domestic cases and NAFTA arbitrations, even if their outcomes may affect each other. The tribunal explained that “an action determined to be legal under Mexican law by Mexican courts [is not] necessarily legal under NAFTA or international law. At the same time, an action deemed to be illegal or unconstitutional under Mexican law may not rise to the level of a violation of international law.”¹³¹ Despite the fact that “[a]ny decision by this Arbitral Tribunal thereon is bound to have, under the terms of NAFTA Article 1136(1), a direct bearing upon any domestic litigation (pending or final) on the entitlement to tax rebates,” the *Feldman* tribunal did not object to the investor’s concurrent proceedings for the purposes of Article 1121.¹³²

158. In a similar context, the tribunal in *Genin v. Estonia* held that factual overlap alone was not enough to preclude jurisdiction. In that case, Estonia argued that the investor had violated a “fork-in-the-road” provision which prevented the investor from bringing an arbitration under the bi-lateral investment treaty if it had already brought the same claim elsewhere. The

¹³⁰ *WMI* Award, ¶ 27, Exhibit CLA-15.

¹³¹ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 78 (Dec. 16, 2002) (“*Feldman* Award”), Exhibit CLA-22.

¹³² *Feldman* Award, ¶ 88, Exhibit CLA-22.

tribunal agreed the prior domestic case was factually related, but did not agree this violated the provision:

“It is quite obvious that [the previous] matter had to be litigated in Estonia; there was no other jurisdiction competent to deal with the restoration of the status quo. The ‘investment dispute’ submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT. Although certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the ‘investment dispute’ itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism.”¹³³

159. Canada suggests that the waiver applies not only to the same measures, but also any other claims which may be related to the NAFTA case in some way, even if only indirectly. Canada argues that the phrase “with respect to the same measure” means that a court “making determinations of facts” that relate in any way to the NAFTA measures being challenged can create an impermissible overlap between the two cases.¹³⁴

160. Canada cites *WMI* to support this argument.¹³⁵ The *WMI* tribunal only said that the domestic measures must “consist[] of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA.”¹³⁶ The tribunal did not hold that factually related measures could create an impermissible overlap; it held that the measures had to be the same.

161. Canada eventually confirms this correct interpretation of Article 1121 in its Memorial. Canada argues that Claimant cannot pursue domestic cases with respect to the “*same*

¹³³ *Alex Genin, Eastern Credit Limited, Inc. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, ¶¶ 332, 334 (June 25, 2001), Exhibit CLA-23.

¹³⁴ Canada Memorial, ¶ 95.

¹³⁵ Canada Memorial, ¶ 94.

¹³⁶ *WMI Award* at ¶ 27, Exhibit CLA-15. See also Canada Memorial at ¶ 105 n.146, quoting *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, March 22, 2010, ¶ 28, RLA-11 (waiver provisions “prevent claimants from exploiting legal process to harass another party by seeking to litigate the **same measures** or actions through multiple instances”) (emphasis added).

measures” at least 20 times.¹³⁷ Canada used this language because it conforms to the plain meaning of Article 1121: investors must waive their rights with respect to the *same measures* as those in the NAFTA case. Other lawsuits or proceedings which challenge different measures do not need to be waived.

- b. The Waiver Does Not Apply To “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party”

162. Certain types of cases are specifically excepted from the waiver requirement. Investors are allowed to challenge the same measure they challenge in a NAFTA proceeding through a separate “administrative tribunal or court” so long as the non-NAFTA challenge does not seek monetary damages and is brought “under the law of the disputing Party.”¹³⁸ Disputing Party “means a Party against which a claim is made under Section B”; in this case, Canada.¹³⁹

163. The waiver exception allows investors to bring declaratory or injunctive claims in other courts or tribunals, even if they challenge the same measure as in the NAFTA arbitration, so long as they are brought “under the law of the disputing Party.”¹⁴⁰ In this case, “under the law of the disputing Party” means under Canadian law. Thus, Claimant may bring declaratory or injunctive claims before another administrative tribunal or court based on the same measures challenged in the NAFTA arbitration, so long as they are brought under Canadian law.

¹³⁷ Canada Memorial at ¶¶ 4, 77 (twice), 79, 105, 105 n.146 (twice), 106, 125, 144, 146, 151, 155, 158, 162, 164, 165, 166, 173, 312, 313 (emphasis added).

¹³⁸ NAFTA, Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

¹³⁹ NAFTA, Art. 1139, Exhibit CLA-12.

¹⁴⁰ NAFTA, Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

164. Canada argues that “before an administrative tribunal or court under the law of the disputing Party” means that the exception only applies to “the jurisdiction of the respondent State,”¹⁴¹ meaning declaratory or injunctive claims can only be brought *in Canadian courts*. There is nothing in the text of Article 1121 or elsewhere in the NAFTA that requires this result. Canada’s only support for this interpretation is a submission by Mexico in another case.¹⁴²

165. Canada argues that it was the intention of the NAFTA Parties to limit the exception for declaratory and injunctive claims to courts within the physical borders of the disputing Party.¹⁴³ The plain language of Article 1121, however, does not support this reading: it uses the phrase “under the law of the disputing Party,” *not* “under the jurisdiction of” or “in the courts of” the disputing Party.

166. To the extent the Tribunal finds this provision ambiguous, the *travaux préparatoires* (preparatory works, or drafting history) of the NAFTA contradict Canada’s argument.¹⁴⁴

167. An August 4, 1992 draft of the NAFTA waiver provision demonstrates that there was debate over whether the waiver exception for claims seeking declaratory or injunctive relief should apply to claims brought under the law of the disputing Party, or claims brought in the

¹⁴¹ Canada Memorial, ¶ 100.

¹⁴² Canada Memorial, ¶ 101 (citing Mexican statement in *The Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Article 1128 Submission of Mexico, ¶ 7 (Oct. 16, 2000)). Elsewhere, however, Mexico has described the Article 1121 waiver in terms that are not limited to the courts or jurisdiction of the disputing Party, but instead has stated that under Article 1121 an investor “waives his right to initiate or continue court or administrative tribunal proceedings for damages *under domestic law*.” See *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Respondent’s Counter-Memorial on Preliminary Questions, ¶ 206 (Sept. 8, 2000) (emphasis added), Exhibit CLA-34.

¹⁴³ Canada Memorial, ¶¶ 100-102.

¹⁴⁴ See Vienna Convention of the Law of Treaties (1969), Art. 32, Exhibit CLA-25 (if a term is ambiguous, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty”).

domestic courts of the disputing Party. The August 4, 1992 draft excepted injunctive or declaratory claims “before an administrative tribunal or court [under the domestic law] of the disputing Party.” INVEST.810, Watergate Daily Update (Aug. 4, 1992) 15, Art. 2126(4), Exhibit CLA-24 (brackets and bracketed text in original). A footnote to this section explained that the drafters had not yet decided which version of the provision to use: “[c]hoice between reference to administrative tribunal or court, on the one hand, or ‘under the domestic law’, on the other to be made during scrubbing.”¹⁴⁵

168. The drafters were choosing between two options: (1) injunctive or declaratory claims before an administrative tribunal or court of the disputing Party, or (2) injunctive or declaratory claims under the domestic law of the disputing Party.

169. A draft on September 4, 1992 included the same language and the same footnote.¹⁴⁶

170. A nearly completed draft (also dated September 4) shows that the NAFTA drafters chose the second option—that the exception would apply to claims “before an administrative tribunal or court under the domestic law of the disputing Party”—with the reference to the domestic courts of the disputing Party having been *removed*.¹⁴⁷

171. The *travaux préparatoires* shows the NAFTA Parties made a conscious decision between limiting the waiver exception to claims brought in the courts of the disputing Party, or to claims brought under the law of the disputing Party. They chose the latter. Canada’s interpretation would violate the principle of interpretation of *effet utile*, which requires all parts

¹⁴⁵ *Id.* at Art. 2126(4) n. 23, Exhibit CLA-24.

¹⁴⁶ INVEST1.904 (Sept. 4, 1992) 13-14, Art. 1121(4), Exhibit CLA-26.

¹⁴⁷ INVEST-F.904 (Sept. 4, 1992, 1:30 a.m.) 3-4, Art. 1121, Exhibit CLA-27. The word “domestic” was apparently taken out in a later version.

of a treaty to be given effect, by reading out “under the law of” and rewriting Article 1121 to mean what the drafters rejected. Instead, the plain meaning of the provision as shown by the drafters’ intent is that injunctive and declaratory claims need not be waived as long as they proceed under the law of the disputing Party (in this case, Canadian law)—without any requirement as to the court or administrative tribunal in which such claims must be brought.

C. The Washington Litigation Is Consistent With The Article 1121 Waiver Because It Involves Different Measures Than This Arbitration, And Because It Seeks Only Declaratory And Injunctive Relief Under Canadian Law

172. As discussed in Section I(B)(3) above, this Tribunal need not consider whether measures in domestic cases overlap with this NAFTA arbitration. Canada is free to attempt to enforce Claimant’s Article 1121 waiver in the domestic cases themselves. However, to the extent the Tribunal does engage in an analysis of Claimant’s existing domestic lawsuits, it should conclude that none of them are inconsistent with the Claimant’s Article 1121 waiver.

173. For two independent reasons, the litigation in the U.S. District Court for the District of Columbia entitled *Detroit Int’l Bridge Co. v. U.S. Dep’t of State* (the “Washington Litigation”) does not violate the NAFTA waiver requirements. First, the Washington Litigation challenges different measures than those challenged in this NAFTA arbitration, and therefore the NAFTA waiver does not apply. Second, the Washington Litigation seeks only declaratory and injunctive relief against Canada (not damages), and the claims brought against Canada are brought under Canadian law.

1. The Washington Litigation Involves Different Measures Than The NAFTA Arbitration

a. Measures Challenged In NAFTA Arbitration

174. The measures being challenged in this NAFTA arbitration—meaning the actual acts which violated the NAFTA—are different from the measures at issue in the Washington

Litigation. The measures in this arbitration are divided between (a) measures taken by Canada to discriminate against Claimant vis-à-vis non-American bridge owners by refusing to improve the highway connections to the Ambassador Bridge/New Span even while improving the highway connections to other, Canadian-owned crossings (the “Roads Claim”), and (b) measures taken by Canada to discriminate against the Ambassador Bridge by blocking or delaying the Claimant’s construction of its proposed New Span, and by seeking to preempt that construction with the approval of the Canadian-controlled NITC/DRIC (the “New Span Claim”).

175. The specific measures at issue in the Roads Claim are:

- (1) Canada’s decision to locate the Windsor-Essex Parkway so as to bypass the American-owned Ambassador Bridge and to steer traffic to the planned Canadian-owned NITC/DRIC, despite prior commitments to improve the connections to the Ambassador Bridge;¹⁴⁸
- (2) Canada’s failure to provide comparable improvements in road access to the Ambassador Bridge as it is currently providing to the non-existent NITC/DRIC and has previously provided to other crossings that are not owned on the Canadian side by American businesses;¹⁴⁹ and
- (3) Canada taking traffic measures with respect to Huron Church Road to divert traffic from the American-owned Ambassador Bridge to other crossings that are not wholly owned and controlled by American businesses.¹⁵⁰

¹⁴⁸ Detroit International Bridge Company, Statement of Claim, January 13, 2013 (“DIBC SOC”), ¶ 215.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

176. The specific measures with respect to the New Span Claim are:

- (1) Canada's passage of laws and regulations and application of those laws and regulations to Claimant's subsidiary enterprise CTC in such a way as to block or delay Claimant's building of the New Span, and to unfairly favor the NITC/DRIC over the Claimant's New Span,¹⁵¹
 - (a) Alternatively, passage and application of each of the individual domestic laws and regulations which constitute this measure, including the IBTA, the IBTA Regulations, and the BSTA; and
- (2) Canada's domestic actions to prevent or delay Claimant's ability to obtain Canadian approval to build the New Span.¹⁵²

b. Measures Challenged In Washington Litigation

177. The measures challenged in the Washington Litigation are different from the measures challenged in this NAFTA arbitration. Most importantly, the NAFTA arbitration challenges Canada's measures that discriminate against Claimant *in Canada*, whereas the Washington Litigation challenges Canada's unlawful actions *within the United States* (or specifically directed towards the United States). In other words, the NAFTA arbitration challenges Canada's interference with the free trade rights of an American business doing business in Canada; by contrast, the Washington Litigation seeks to enjoin Canada's efforts to take actions in the United States that are inconsistent with Claimant's franchise rights as established under Canadian law.

¹⁵¹ *Id.* at ¶¶ 173-186.

¹⁵² *Id.* at ¶ 215.

178. In paragraph 43 of the operative complaint in the Washington Litigation, DIBC and CTC specifically itemize the Canadian measures which are the basis for DIBC and CTC's claims against Canada in that case, as follows:

“(a) The planned construction and preparation for construction of the NITC/DRIC, approximately one-half of which will be within the territory of the United States;

(b) The planned construction and preparation for construction of the NITC/DRIC's U.S. plaza and the other associated structures wholly within the territory of the United States;

(c) Canada's involvement as a shareholder and partner in the operation, direction, planning, and design of the U.S. portion of the NITC/DRIC;

(d) Meeting with U.S. officials and others and other preparatory activities that have taken place in the United States in connection with the planned constructions and operation of the NITC/DRIC, or in connection with the review of plaintiffs' proposed New Span of the Ambassador Bridge, including an October 19, 2005 meeting in Detroit at which David Wake from the Ontario Ministry of Transportation, representatives from the U.S. Army Corps of Engineers and the Coast Guard, and possible other U.S. and Canadian officials formed an agreement that if Canada rejected the Ambassador Bridge New Span, the U.S. would drop it from consideration;

(e) The negotiation of a proposed \$550 million investment to finance construction of U.S. highway approaches to the NITC/DRIC, as set forth in an April 2009 letter from minister John Baird to Governor Jennifer Granholm and elaborated upon in a meeting between Baird and Michigan Officials;

(f) The hiring of lobbyists and consultants within the United States;

(g) The promotion of the NITC/DRIC and hindrance of the Ambassador Bridge New Span through publications in the United States and by sending Canadian officials to speak to the Michigan legislature, Congressional staffers, administrative agency officials, and the public within the United States;

(h) The execution of the Crossing Agreement with the Governor of Michigan, MDOT, and MSF, to further implement the plans referenced above for the construction of the NITC/DRIC, including the promise of Canadian financing for the construction of the U.S. portion of the NITC/DRIC; and

(i) The issuance of letters patent for the incorporation of the Windsor-Detroit Bridge Authority to carry out the plans articulated in the Crossing Agreement for the construction of the NITC/DRIC, including its U.S. portions.”¹⁵³

179. Thus, the measures at issue in the Washington Litigation are different from the measures at issue in this NAFTA arbitration. In this NAFTA arbitration, DIBC is challenging various laws, regulations, and decisions Canada has made within its own borders which unfairly discriminate against Claimant with respect to highway connections and Claimant’s New Span. By contrast, the measures challenged in the Washington Litigation are Canada’s actions in the United States that seek to secure United States and Michigan approval of the NITC/DRIC.

180. As the tribunals in *WMI*, *Genin*, and *Feldman* made clear, just because two proceedings are factually related does not mean they challenge the same measures. Furthermore, even if both proceedings are at some high level of generality challenging Canada’s broad policy of favoring the NITC/DRIC and discriminating against the Ambassador Bridge and the New Span, that does not mean they necessarily challenge *the same measures* taken by Canada to further that policy. It is the actual measures that matter, and the measures are different.

c. Canada Fails To Show That The NAFTA Measures And Washington Litigation Measures Overlap

181. Canada principally argues that because the Washington Litigation mentions some of the same facts as the NAFTA arbitration, it is necessarily challenging the same measures.¹⁵⁴ Canada also argues that because the Washington Litigation references actions taken by Canada

¹⁵³ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Third Amended Complaint, No. 10-cv-476-RMC (D.D.C. May 29, 2013) (“Washington Third Amended Complaint”), ¶ 43, Exhibit C-141.

¹⁵⁴ Canada Memorial, ¶ 122.

in Canada, those actions must be the same measures as those challenged in the NAFTA arbitration.¹⁵⁵

182. Claimant explained in its Response to Canada’s Brief Statement on Jurisdiction and Admissibility, filed March 15, 2013, that this arbitration challenges actions taken by Canada in Canada, while the Washington Litigation challenges actions taken by Canada in the United States.¹⁵⁶

183. Canada relies in its Memorial on the fact that one of the several arguments made in the Washington Litigation for why Canada is not immune from suit in that case is that Canada engaged in “acts outside the territory of the United States in connection with a commercial activity of Canada within the territory of Canada.”¹⁵⁷ But Canada’s quotation of the complaint in the Washington Litigation is incomplete: it omits the operative phrase that follows the foregoing assertion—*i.e.*, that Canada engaged in commercial activity in Canada “*causing a direct effect in the United States.*”¹⁵⁸ This operative phrase confirms that the Washington Litigation challenges activity that either occurred in the United States or caused a direct effect in the United States. By contrast, the NAFTA arbitration challenges activity taken in Canada that had a direct effect that harmed Claimant *in Canada: i.e.*, the discriminatory refusal to improve the highways *in Canada*, and the discriminatory treatment intended to delay or block the New Span, even while exempting the Canadian NITC/DRIC from any need to obtain Canadian regulatory approvals.

¹⁵⁵ *Id.* at ¶ 124.

¹⁵⁶ DIBC’s Response to Canada’s Brief Statement on Jurisdiction and Admissibility, March 15, 2013, ¶¶ 43-44.

¹⁵⁷ Canada Memorial, ¶ 124; *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Second Amended Complaint, 10-cv-476-RMC (D.D.C. Feb. 13, 2013) (“Washington Second Amended Complaint”), ¶ 37, Exhibit C-117; Washington Third Amended Complaint, ¶ 39, Exhibit C-141.

¹⁵⁸ Washington Third Amended Complaint, ¶ 39(c) (emphasis added), Exhibit C-141.

184. Canada also ignores the fact that DIBC has argued that Canada is not immune from suit in the Washington Litigation because that suit “is based upon (a) a commercial activity carried on *in the United States* by Canada [and] (b) an act performed *in the United States* in connection with commercial activity of Canada within the territory of Canada.”¹⁵⁹ These assertions make clear that the Washington Litigation is based on Canadian action taken “in the United States.” By definition, the measures in the Washington Litigation are different from this NAFTA arbitration, which challenges actions taken by Canada in Canada, causing harm to Claimant in Canada.

185. This distinction has been expressly stated in the Washington Litigation. The Washington Litigation states “It does not challenge any official conduct of Canada taken within Canada.”¹⁶⁰ By contrast, the NAFTA arbitration challenges official conduct taken by Canada in Canada – including in particular the discriminatory legal and regulatory measures that discriminated against Claimant by (a) refusing to improve the highways to the Claimant’s American-owned bridge, even while improving the highways to bridges that were controlled by Canada (at least on the Canadian side, if not on both sides); and (b) delaying or attempting to block Claimant’s effort to build its New Span, and choosing instead to create a biased and discriminatory approval regime that favored its own, Canadian-controlled NITC/DRIC.

186. Canada also alleges that in July 2010 Claimant sought discovery in the Washington Litigation relating to the measures at issue in this arbitration, and argues this must

¹⁵⁹ Washington Third Amended Complaint, ¶ 39, Exhibit C-141.

¹⁶⁰ *Id.*

mean the measures being challenged in the two cases overlap.¹⁶¹ Canada is wrong for multiple reasons.

187. First, at the time these July 2010 document requests were served, Claimant had not yet filed its Notice of Arbitration. It therefore had not yet been required to submit its waiver, and it was free to pursue any claims it wished against Canada.

188. Second, the document requests which Canada cites were preliminary and used for the purposes of discussion regarding the scope of discovery between the parties in the Washington Litigation. The requests plainly say “WITHOUT PREJUDICE” and “Plaintiff’s Draft” on the top of the first page, and include placeholders such as “[DATE]”, showing they were never binding or took effect.¹⁶² In fact, the document requests which DIBC eventually sought in a request for discovery to the Court in the Washington Litigation were far more limited, and did not include the requests related to the Parkway or IBTA that Canada references in its Memorial.¹⁶³

189. Third, Claimant’s requests for discovery from Canada in the Washington Litigation were denied.¹⁶⁴ Discovery requests from *before* the date this arbitration was even filed, and that were in any event *denied*, cannot have any possible relevance to whether this Tribunal now has jurisdiction over this arbitration.

¹⁶¹ Canada Memorial, ¶¶ 144-46.

¹⁶² Plaintiffs’ First Request for Production of Documents Directed to the Defendant the Government of Canada (July 2, 2010), at 1, Exhibit C-142.

¹⁶³ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Exhibit A to Plaintiff’s Motion for Discovery, Plaintiffs’ First Request for Production of Documents and First Interrogatory to All Defendants in Relation to Jurisdiction and Venue, No. 10-cv-476-RMC (D.D.C. July 20, 2010), Exhibit C-143.

¹⁶⁴ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Order, No. 10-cv-476-RMC (D.D.C. Aug. 20, 2010), Exhibit C-144.

190. Finally, Canada does not explain what relevance document requests in the Washington Litigation have on whether the measures in the two cases are the same. Canada does not even allege the document requests define what measures were being challenged in the Washington Litigation. Discovery in U.S.-based litigation is broad, and “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.”¹⁶⁵ Thus, for example, discovery with respect to the IBTA may be relevant to corroborating Canada’s discriminatory intent in the Washington Litigation, even if the IBTA itself is not being challenged.

i. The “Highway 401 Measures” Do Not Overlap

191. Canada argues that three categories of claims in the Washington Litigation and NAFTA overlap.¹⁶⁶ The first category is called the “Highway 401 Measures.” With respect to the “Highway 401 Measures,” Canada argues that because Claimant recounts the background facts relating to the 2002 MoU and the Parkway in the Washington Litigation, they must be challenging those measures in the Washington Litigation.¹⁶⁷ That is not accurate. Claimant does not challenge Canada’s “Highway 401 Measures” (as that phrase is used by Canada in its Memorial) in the Washington Litigation. Canada does not (and cannot) cite to a single count in the Washington Litigation that mentions anything with respect to the Roads Claim or the “Highway 401 Measures.” It is simply inaccurate for Canada to allege that the court adjudicating the Washington Litigation would “have to determine that Canada’s Highway 401

¹⁶⁵ Fed. R. Civ. Proc. 26(b)(1), Exhibit C-145.

¹⁶⁶ Canada Memorial, § III(D)(1)(c).

¹⁶⁷ Canada Memorial, ¶¶ 126-133.

measures are in fact discriminatory.”¹⁶⁸ DIBC does not ask that Court to make any such determination.

192. The reason the “Highway 401 Measures” are mentioned in the Washington Litigation is to corroborate Canada’s intent with respect to the measures that are at issue in the Washington Litigation (listed in detail above). Furthermore, they are mentioned to give the Court the full picture of what has occurred with respect to the Ambassador Bridge/New Span and the NITC/DRIC. Without this information, the Court adjudicating the Washington Litigation might not fully appreciate the background and context of Canada’s actions. Including these facts, however, does not mean DIBC and CTC have challenged them as measures in the Washington Litigation. DIBC and CTC hereby expressly confirm and represent that these “Highway 401 Measures” are *not* being challenged in the Washington Litigation.

ii. Canada Fails To Identify Any “Franchise Measures” Being Challenged By Claimant In Both The Washington Litigation And This NAFTA Arbitration

193. Canada claims that both the Washington Litigation and this NAFTA arbitration challenge what Canada describes as the “Franchise Measures.”¹⁶⁹ But Canada does not provide a clear definition for these “Franchise Measures.” Canada argues that:

“DIBC alleges that Canada is violating its ‘exclusive franchise rights’ under a *Boundary Waters Treaty* Article XIII ‘special agreement’ through its efforts to build the DRIC Bridge and by enacting the *International Bridges and Tunnels Act* and the *Bridge to Strengthen Trade Act* (collectively the ‘Franchise Measures’).”¹⁷⁰

¹⁶⁸ Canada Memorial, ¶ 133.

¹⁶⁹ Canada Memorial, § III(D)(1)(c)(2).

¹⁷⁰ Canada Memorial, ¶ 5.

194. It is true that Claimant asserts that it has certain franchise rights that Canada is violating. However, Canada is violating those rights through several different actions, some of which are official Canadian actions taken in Canada that discriminate against Claimant because it is an American-owned business, and that are properly brought under the NAFTA. Those actions include principally the Roads Claim discussed above, the application of the IBTA to prevent or delay Claimant's ability to build its New Span, and the *Bridge to Strengthen Trade Act*, which discriminates against Claimant and in favor of the Canadian-controlled NITC/DRIC by exempting the latter from all of the Canadian regulatory approvals that Claimant is required to obtain, and that are being used to prevent Claimant from building its New Span. None of the foregoing measures are being challenged in the Washington Litigation.

195. Canada appears to be arguing that because Claimant argues in the Washington Litigation that its franchise rights have been violated in both cases, it must be claiming that the *same measures* violated these rights.¹⁷¹ But that is not correct. In the Washington Litigation, Claimant argues that Canada is violating its franchise rights by taking actions in the United States to lobby Michigan and United States officials to block the New Span from obtaining *United States* regulatory approvals, and by offering to pay Michigan's share of the NITC/DRIC in order to promote the approval of the NITC/DRIC and thereby attempting to prevent construction of Claimant's New Span. These are different measures from those challenged in this NAFTA arbitration.

196. A measure is a government action. Claimant's franchise rights are not a measure. Thus, even if the franchise rights are asserted in both cases, this does not establish that the two proceedings are challenging the same measures. Canada's argument that the "Franchise

¹⁷¹ Canada Memorial, ¶¶ 134-138.

Measures” overlap therefore fails because Claimant’s franchise is not a measure, so it is irrelevant whether the franchise pertains to both cases. Canada must point to the actual government actions which overlap, not that Claimant’s rights are the same in both cases.

197. Canada argues that the IBTA is claimed to violate Claimant’s franchise rights in both cases.¹⁷² To support this assertion, Canada relies on a December 2010 affidavit by DIBC General Counsel Mr. Patrick Moran.¹⁷³ While this affidavit did say that the IBTA was “at issue” in the Washington Litigation as it existed 2010,¹⁷⁴ that was *before* any Notice of Arbitration had been filed, and long before the Amended Notice of Arbitration was filed that first challenged the IBTA and its application to Claimant in this NAFTA arbitration. The IBTA was not a part of this arbitration until 2013, and by that time the IBTA claim had been removed from the Washington Litigation.¹⁷⁵ Thus, Mr. Moran’s affidavit was accurate at the time it was made, but because no Notice of Arbitration had been filed and because the IBTA was not a part of the NAFTA case at that time, it does not establish that the two cases overlap.

iii. The “New Span Measures” Do Not Overlap

198. Canada also vaguely claims that Claimant is challenging certain “New Span Measures” in both the Washington Litigation and the NAFTA arbitration, but again fails to

¹⁷² Canada Memorial, ¶ 136.

¹⁷³ *Id.*

¹⁷⁴ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Complaint, No. 10-cv-476-RMC (D.D.C. Mar. 22, 2010), at p. 38, Exhibit C-146.

¹⁷⁵ *See, e.g.*, Amended Notice of Arbitration, January 15, 2013, ¶¶ 101-108 (first adding the IBTA to the arbitration claims). As of December 1, 2011, Canada had been dismissed as a defendant in the Washington Litigation (without prejudice). *See Detroit Int’l Bridge Co. v. Canada*, Memorandum Opinion, No. 10-476-RMC (D.D.C. Dec. 1, 2011), Exhibit C-156. When Canada was later rejoined as a defendant in the Washington Litigation, through the Second Amended Complaint that was filed in February 2013, DIBC did not bring a count against Canada based specifically on the IBTA (though it did mention the IBTA as a background fact). *See* Washington Second Amended Complaint, ¶¶ 273-317.

define the actual measures with precision, relying instead on the general proposition that if Claimant is complaining about obstacles to its New Span, the measures at issue must be the same.¹⁷⁶ But they are not. As previously stated, the Washington Litigation challenges the Canadian measures taken in the United States to promote the NITC/DRIC and to thwart the New Span, principally by lobbying Michigan and U.S. government officials to promote the NITC/DRIC, and by offering to pay for the Michigan portion of the NITC/DRIC bridge. By contrast, the NAFTA arbitration challenges Canadian measures taken in Canada to discriminate against Claimant by refusing to improve the Canadian highways to the Ambassador Bridge/New Span and by discriminating against the New Span and in favor of the NITC/DRIC with respect to Canadian government approvals for each bridge.

199. Canada argues that because the *Bridge to Strengthen Trade Act* (“BSTA”) is mentioned in both cases, it must be a measure that is being challenged in both cases.¹⁷⁷ The BSTA is mentioned in the Washington Litigation in a section titled “Canada’s and FHWA’s Proposed NITC/DRIC; Lack of Public Need for the NITC/DRIC.”¹⁷⁸ The “Lack of Public Need” section opens by stating “Each of the reasons cited by Canada and FHWA for pursuing the NITC/DRIC and refusing to support the Ambassador Bridge New Span is merely a pretext and lacks any reasonable or rational basis.”¹⁷⁹ DIBC cites the BSTA as one example of how Canada’s explanations with respect to the measures being challenged in the Washington Litigation are pretext. This is not the same as actually challenging the BSTA as a measure in the

¹⁷⁶ Canada Memorial, § III(D)(1)(c)(3).

¹⁷⁷ Canada Memorial, ¶ 142.

¹⁷⁸ See Washington Third Amended Complaint at pp. 52, 63, Exhibit C-141.

¹⁷⁹ Washington Third Amended Complaint, ¶ 216, Exhibit C-141.

Washington Litigation. Claimant does not challenge the BSTA in the Washington Litigation. It challenges it only in this NAFTA arbitration.

200. Canada also argues that the Washington Litigation must be about actions taken in Canada, and therefore must be about the NAFTA measures. They argue that DIBC and CTC cannot be challenging actions Canada has taken in the United States because “Canada is incapable of allegedly accelerating approvals for the DRIC Bridge and/or delaying approval for the New Span anywhere else other than in Canada.”¹⁸⁰ Contrary to Canada’s assertions, the measures in the Washington Litigation with respect to Canada deal with exactly this issue—Canadian actions in the United States to interfere with the U.S. decision-making processes to favor the NITC/DRIC and harm DIBC in the United States, as discussed above.¹⁸¹

201. For all of these reasons, the Washington Litigation measures and the NAFTA measures do not overlap.

2. The Washington Litigation Is Also Consistent With The Waiver Because It Seeks Only Declaratory And Injunctive Relief Under Canadian Law

202. An independent reason why the Washington Litigation is fully consistent with the waiver required by Article 1121 is that the Washington Litigation seeks only declaratory and injunctive relief against Canada based upon Canadian law.

203. The original complaint in the Washington Litigation and the first amended complaint did seek damages against Canada.¹⁸² However, these complaints sought damages

¹⁸⁰ Canada Memorial, ¶ 143.

¹⁸¹ For example, the U.S. Coast Guard delayed consideration of a New Span navigational permit because of Canadian opposition. Washington Third Amended Complaint, ¶ 168, Exhibit C-141.

¹⁸² *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Complaint, No. 10-cv-476-RMC (D.D.C. Mar. 22, 2010), Exhibit C-146; *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, First Amended Complaint, No. 10-cv-476-RMC (D.D.C. June 6, 2011) (the “Washington First Amended Complaint”), Exhibit C-147.

against Canada for measures that were *not yet involved* in this arbitration; namely, the IBTA. At the time the Washington Litigation included an IBTA claim against Canada for damages, there was no claim regarding the IBTA in this arbitration. Only after the IBTA damages claim was removed from the Washington Litigation was it added to the NAFTA case. As such, at no time did Claimant have a damages claim against Canada in the Washington Litigation that overlapped with any claim in the NAFTA arbitration.

204. Canada argues that DIBC and CTC are currently seeking damages in the Washington Litigation.¹⁸³ This is contradicted by the pleadings in that case. DIBC and CTC are not seeking *any damages* in the Washington Litigation, and Canada does not cite to any current prayer for relief in that case which seeks damages. Canada also does not explain how the Court adjudicating the Washington Litigation could award damages even though DIBC does not ask for them.

205. Canada relies on a request in the Washington Litigation for a declaratory judgment that there has been a “taking” of Claimant’s property rights as “involv[ing] the payment of damages.”¹⁸⁴ First, that is incorrect because a claim for declaratory relief is not the same as a claim for damages, and the takings claim plainly seeks *only* declaratory relief. Second, the Takings claim is *not being brought against Canada*.¹⁸⁵

¹⁸³ Canada Memorial, ¶ 149.

¹⁸⁴ Canada Memorial, ¶¶ 149-50.

¹⁸⁵ Washington Third Amended Complaint, ¶¶ 332-339, Exhibit C-141. This declaratory judgment claim may originally have named Canada as well as the United States, but it no longer does, and Canada has not established that it is still relevant to any inquiry into whether Claimant is pursuing claims inconsistent with the Article 1121 waiver.

206. Thus, there should be no dispute that the Washington Litigation seeks only declaratory and injunctive relief against Canada. Moreover, the claims advanced against Canada in the Washington Litigation are based upon Canadian law.

207. Specifically, in the Washington Litigation DIBC and CTC seek a declaration of their legal, statutory, and contractual rights which arise pursuant to Canadian law, and also seek to prevent Canada from infringing those rights.¹⁸⁶ As is made clear on the face of the complaint in the Washington Litigation, these rights arise (and Canada's obligations are defined) pursuant to the Boundary Waters Treaty and the CTC Act, both of which are part of Canadian law.¹⁸⁷

208. In its motion to dismiss the Washington First Amended Complaint, Canada explicitly said DIBC and CTC were bringing claims against Canada "arising under Canadian law."¹⁸⁸ Canada argued that for this reason, the Washington Litigation claims against Canada should be dismissed. Now, Canada argues that the Washington Litigation is *not* "arising under Canadian law" in an effort to get this arbitration dismissed. Canada cannot have it both ways. As it has already admitted, the Washington Litigation claims against Canada arise under Canadian law. Thus, since these claims seek only declaratory and injunctive relief under Canadian law, they are excepted from the waiver requirement of Article 1121.

D. The *CTC v. Canada* Litigation Seeks Declaratory Relief In Canadian Court Under Canadian Law, And Seeks Damages Only With Respect To A Measure Not Challenged In This NAFTA Arbitration

¹⁸⁶ See, e.g., Washington Second Amended Complaint, ¶ 288, Exhibit C-117 ("Under Canadian law, plaintiffs' statutory and contractual franchise rights under the special agreement are exclusive"); Washington Third Amended Complaint at p. 113, Exhibit C-141 ("A declaratory judgment against Canada that, under Canadian law, plaintiffs own an exclusive franchise..."); *id.* at p. 114 ("A declaratory judgment against Canada declaring that, under Canadian law, plaintiffs own a statutory and contractual franchise right...").

¹⁸⁷ Washington Third Amended Complaint, ¶ 4, Exhibit C-141.

¹⁸⁸ *Detroit Int'l Bridge Co. v. U.S. Dep't of State*, Motion to Dismiss, 10-cv-476-RMC (D.D.C. June 24, 2011), at p. 1, Exhibit C-148.

209. Canada asserts that Claimant is pursuing damages in the *CTC v. Canada* Litigation (as defined in Canada’s Memorial) based on challenges to the same measures that are being challenged in this arbitration.¹⁸⁹ That is inaccurate. The *CTC v. Canada* Litigation principally seeks only declaratory and injunctive relief under Canadian law, which Canada agrees is specifically excepted from the Article 1121 waiver. While Claimant does not agree that all of these declaratory and injunctive claims are based on the same measures as those brought in this NAFTA arbitration, it is not necessary to debate that point, because there is no disagreement that Claimant is entitled to bring claims for declaratory relief with respect to the same measures that are challenged in this arbitration so long as they are brought “under the law of the disputing Party.” Canada does not dispute that the declaratory claims in the *CTC v. Canada* Litigation are brought “under the law of the disputing Party.”

210. Thus, the only dispute regarding the *CTC v. Canada* Litigation is that Canada asserts Claimant is advancing a damages claim in that litigation based on a measure that is also being challenged in this NAFTA arbitration.¹⁹⁰ But both the original Statement of Claim and the Amended Statement of Claim in the *CTC v. Canada* Litigation have expressly described CTC’s alternative damages claim as follows (clarifying revisions in strikethrough and underline are from the Amended Statement of Claim):

“In the alternative and in the event of the construction of a proposed new international border crossing in the vicinity of the Ambassador Bridge, CTC must be compensated for economic loss caused by the violation of its rights and loss of its goodwill:

- (a) pursuant to the *Expropriation Act*, R.S.C., 1985, c. E-21; and/or

¹⁸⁹ Canada Memorial, § III(D)(3)(b).

¹⁹⁰ Canada Memorial, ¶ 165.

(b) for the de facto ~~taking~~ expropriation of its the rights granted to CTC pursuant to the CTC Act, the Special Agreement, and the Implied Agreement, as the Canadian Government will have acquired the beneficial interest in CTC's rights, including the right to charge tolls for traffic crossing the Detroit River near Windsor, and will have rendered useless these rights of the Ambassador Bridge."¹⁹¹

211. Thus, the *only measure* that could lead to a damages award in the *CTC v. Canada* Litigation is the *actual construction* of the NITC/DRIC, which CTC alleges in that case would be an expropriation requiring the payment of damages. Claimant has been equally clear that it is *not* bringing an expropriation claim in this arbitration, and is *not* seeking any compensation based on the *actual construction* of the NITC/DRIC.¹⁹² The Statement of Claim states: "Thus, when the NITC/DRIC is built, the viability of the Ambassador Bridge will be jeopardized (which would give rise to a separate and additional claim for damages and expropriation, which is not currently part of this NAFTA claim)."¹⁹³ In short, it is demonstrably inaccurate for Canada to argue that the damages claim in the *CTC v. Canada* Litigation is with respect to a measure that is also challenged in this arbitration.

212. Canada quotes a portion of the original Statement of Claim in the *CTC v. Canada* Litigation stating that CTC "must be compensated for economic loss caused by the violation of

¹⁹¹ *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Amended Statement of Claim (Feb. 19, 2013), ¶ 112, Exhibit C-119; *see also Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Statement of Claim (Feb. 15, 2012), ¶ 112, Exhibit C-118.

¹⁹² *See* DIBC SOC, ¶ 215.

¹⁹³ DIBC SOC, ¶ 9.

its rights and loss of its goodwill.”¹⁹⁴ But this statement refers specifically to the alternative claim for expropriation, and asserts a claim for compensation *only if* the NITC/DRIC is actually constructed, and seeks that compensation based *solely* on that actual, final construction of the NITC/DRIC. As further stated in the *CTC v. Canada* Litigation Amended Statement of Claim, CTC only seeks damages based on the NITC/DRIC interfering with its rights “if constructed.”¹⁹⁵ No compensation is sought in this NAFTA arbitration based on the actual or potential construction of the NITC/DRIC, and therefore these measures do not overlap.

213. Moreover, Canada’s position in this arbitration is internally inconsistent. On the one hand, it argues that Claimant’s claims in this arbitration are brought too late, and must be dismissed based upon the three-year limitations period. On the other hand, Canada equates Claimant’s claims in this arbitration with those being made in the Washington Litigation, in which Claimant does not seek any damages because damages *could not even accrue* on those claims unless and until the NITC/DRIC bridge is actually built (*i.e.*, unless and until Claimant’s claims for injunctive relief are defeated). Thus, by equating the claims in this arbitration with claims that could not even be brought for damages yet because a damages claim is not yet ripe, Canada has contradicted itself and taken inconsistent positions that should both be rejected.

214. Canada does not and cannot argue that an investor should be required to waive its right to claim damages with respect to *different measures* that are not being challenged in the NAFTA arbitration. Canada also fails to explain how a lawsuit with respect to a different measure could lead to double recovery or an inconsistent judgment. Thus, because CTC seeks

¹⁹⁴ Canada Memorial, ¶ 165.

¹⁹⁵ *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Amended Statement of Claim (Feb. 19, 2013), ¶ 111.B, Exhibit C-119.

damages only with respect to a potential, future expropriation that would be caused by the actual construction of the NITC/DRIC, and because that potential measure is not being challenged in this NAFTA arbitration, the *CTC v. Canada* Litigation is fully consistent with Article 1121.

E. The Windsor Litigation Involves Different Measures Than This Arbitration And Seeks Declaratory Relief In Canadian Court

215. Canada alleges that Claimant “Has Clarified That Measures Taken By The City Of Windsor With Respect To The New Span And Favouring The DRIC Bridge Are Not At Issue In This NAFTA Arbitration.”¹⁹⁶ Canada bases this assertion on a statement by DIBC that the “discrete actions” taken by Windsor “to delay or block the construction of the New Span” are not at issue in this arbitration.¹⁹⁷ That is correct with respect to the measures specifically challenged in the Windsor Litigation—*i.e.*, the specific Windsor by-laws challenged in that litigation. However, that does not mean that DIBC is precluded from relying on measures taken by Windsor in support of its claims in this arbitration. Windsor has taken other measures, not challenged in the Windsor Litigation, which evidence Canada’s consistent discrimination against Claimant. In addition, the specific actions taken by Windsor that are listed by Canada in its Memorial¹⁹⁸ were (a) not the specific measures challenged in the Windsor Litigation (*i.e.*, the by-laws), and (b) in any event, may be relevant background to this arbitration.

¹⁹⁶ Canada Memorial, § III(D)(4).

¹⁹⁷ Canada Memorial, ¶ 175.

¹⁹⁸ Canada Memorial, ¶ 176.

216. On February 24, 2010 and June 21, 2010, CTC initiated two lawsuits in the Canadian courts against the City of Windsor, the Mayor of Windsor, and members of the Windsor City Council (collectively, the “Windsor Litigation”).¹⁹⁹

217. CTC challenged numerous Windsor city by-laws, which it argued were unlawful, invalid, and enacted in bad faith and for an unlawful purpose. CTC argued that the defendants in the Windsor Litigation enacted and implemented by-laws which prevented CTC from demolishing properties on its own land. CTC sought declaratory relief as well as related monetary damages.²⁰⁰

218. The Windsor Litigation has been stayed since 2010 in favor of a substantially identical case that had its claims dismissed (and which CTC abandoned on appeal).²⁰¹ Thus, the Claimant had understood the Windsor Litigation to be effectively terminated, and is certainly not intending to seek damages in that litigation now. To the extent any submissions to the court in which the Windsor Litigation was docketed are necessary to make that clear, Claimant undertakes to do so.

219. In any event, contrary to Canada’s assertions, the measures at issue in this arbitration are different than those in the Windsor Litigation. Canada claims that any measure which has been undertaken to favor the NITC/DRIC and prejudice the New Span is by definition

¹⁹⁹ *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim (June 21, 2010), Exhibit C-121.

²⁰⁰ *See Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim, ¶ 1 (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim, ¶ 1 (June 21, 2010), Exhibit C-121.

²⁰¹ *Payne v. City of Windsor*, Notice of Abandonment of Appeal (Aug. 13, 2012), Exhibit C-122.

the same measure.²⁰² A measure is a government action, and Canada has not shown that DIBC challenges the same government actions in this arbitration and in the Windsor Litigation. As the description of the measures in the Windsor Litigation makes clear, the by-laws at issue in that case have never been mentioned in this arbitration.

220. Furthermore, in the Windsor Litigation Claimant has not challenged the measures Windsor has taken with respect to Huron Church Road/Highway 3 (including unnecessary traffic lights and driveway connections). Canada does not cite in its Memorial a single instance in the Windsor Litigation where CTC even referenced the traffic lights or driveway connections, and the fact of the matter is that Windsor's installation of traffic lights and driveway connections on Huron Church Road is mentioned in only one paragraph of one of CTC's statements of claim, and is referenced there purely as context, not as the basis for any of the claims being brought.²⁰³

221. As such, the claims in the Windsor Litigation do not violate the NAFTA waiver provision because they challenge different measures than those challenged in this arbitration.

F. If The Tribunal Finds That A Claim Does Impermissibly Overlap, It Should Only Dismiss That Claim

222. As shown above, Claimant has complied with the NAFTA waiver requirement of Article 1121. Moreover, as also shown above, if the Tribunal has any doubts as to whether any claims currently being pursued by Claimant in other venues are consistent with the required Article 1121 waiver, then the Tribunal should permit those other courts to adjudicate that issue based upon Canada's assertion that the Article 1121 waiver precludes those claims. Accordingly, the Tribunal should deny Canada's jurisdictional challenge based on Article 1121.

²⁰² Canada's Memorial, ¶174 n.243.

²⁰³ *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim, ¶9 (Feb. 24, 2010), Exhibit C-120.

223. Even if the Tribunal disagrees with the foregoing, it should at most abstain from adjudicating those claims which challenge measures that it concludes are being improperly challenged in domestic court. Claimant submits that there are no such measures, but if the Tribunal disagrees, it should limit its jurisdictional ruling to specific claims, not to the entire arbitration. Claimant has *delivered the written waiver* and therefore satisfied the condition precedent to this Tribunal's jurisdiction. Thus, if the Tribunal decides that any of the NAFTA claims impermissibly overlap with domestic claims, it should consider each measure individually, and allow or reject each claim accordingly.

II. CLAIMANT'S ROADS CLAIM AND NEW SPAN CLAIM ARE BOTH TIMELY

A. Summary Of Claimant's Position

224. Article 1116(2) of the NAFTA provides that "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."²⁰⁴ The relevant date for Article 1116(2) is three years prior to the Notice of Arbitration. Claimant filed its Notice of Arbitration on April 29, 2011, so the relevant date for Article 1116(2) is April 29, 2008. It was only after April 29, 2008 when Claimant first could have acquired knowledge of the alleged breaches of which it complains and knowledge of the loss or damage that it has suffered as a result of those breaches. Moreover, Claimant is bringing claims based on *ongoing breaches*, and based on breaches with *ongoing harm*, both of which allow Claimant to challenge at least the violation of its rights that has occurred within and after the limitations period.

²⁰⁴ NAFTA, Art. 1116(2), Exhibit CLA-12.

225. Specifically, DIBC has brought claims in this arbitration with respect to (1) the discriminatory favoring of the highways to Canadian-owned bridges, including the non-existent NITC/DRIC, and the discriminatory prejudice *against* improving the access route to the American-owned Ambassador Bridge New Span (the “Roads Claim”), and (2) Canada’s discriminatory conduct in seeking to prevent and/or delay the construction of the American-owned Ambassador Bridge/New Span, including through the application of the *International Bridges and Tunnels Act*, and through the discriminatory favoring of the Canadian-controlled NITC/DRIC, including by providing regulatory approvals and immunities to that bridge, as was done in the blatantly discriminatory *Bridge To Strengthen Trade Act*, which effectively immunized the NITC/DRIC from all regulatory requirements that Canada is using to prevent Claimant from building its New Span (the “New Span Claim”). Both of these claims involve *ongoing* actions that violate Claimant’s rights under the NAFTA. For these and other reasons explained in more detail below, both of these claims are timely and this Tribunal has jurisdiction *ratione temporis* over the claims.

226. The Roads Claim is timely. First, the principal measure complained of in the Roads Claim is Canada’s decision *not* to expand and improve the highway connection to the American-owned Ambassador Bridge, even while improving the connections to Canadian-controlled bridges. Canada has never formally committed to *never* improve the highway connections to the Ambassador Bridge, and it certainly did not make such a commitment more than three years prior to the date Claimant filed this arbitration. Instead, what became clear within the three years before Claimant filed this arbitration (but not before), was that Canada was fully committed to improving the highway connections to the Canadian-controlled NITC/DRIC,

and was not making any effort to make any similar improvements to the American-owned Ambassador Bridge — thus giving rise to a claim for discrimination under NAFTA.

227. The earliest possible date Canada could be said to have adopted a formal measure with respect to the Roads Claim is when it announced its commitment to the Windsor-Essex Parkway (the “Parkway”),²⁰⁵ which did not happen until May 1, 2008²⁰⁶—after the time bar date of April 29, 2008 and thus within the applicable limitations period. Until May of 2008, the limitations period could not have begun because no measure had been adopted, meaning there could be no breach. Indeed, even after the May 1, 2008 announcement, it was not yet clear that Canada could actually build the Parkway or that Canada was committed to refusing to make commensurate improvements to the highway connections to the Ambassador Bridge, and therefore the three-year period arguably did not start to run until after May 1, 2008.

228. Further, Canada has engaged in numerous acts with respect to the Roads Claim since April 29, 2008 which have caused injury to Claimant. The Statement of Claim identifies numerous acts of Canada within the limitations period which have caused damage to DIBC arising from this claim and which may only be resolved during a merits proceeding. This includes beginning construction on the Parkway in *August 2011*, which is four months *after* the Notice of Arbitration was filed (*i.e.*, the Notice of Arbitration was filed on April 29, 2011).

229. Second, the actions of Canada specified in the Roads Claim are continuing acts which under established arbitral law constitute a continuing breach that has caused harm within

²⁰⁵ The Windsor-Essex Parkway is now known as the Rt. Hon. Herb Gray Parkway.

²⁰⁶ “News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road,” (May 1, 2008), Exhibit C-125.

the limitations period. Accordingly, Canada is liable for all damages incurred within the limitations period from its continuing acts.

230. Third, the Roads Claim is a composite act. The Roads Claim is premised on a series of acts which, in the aggregate, violate the NAFTA. This breach did not occur until the final act which consummated the composite act. As explained above, that final act could not have occurred before the date that Canada announced its commitment to the Windsor-Essex Parkway as the preferred alternative to a new crossing in May 2008. This announcement was within the limitations period, and thus the Roads Claim is timely as a composite act. Indeed, the final act in the composite set of acts is more properly identified as the last date on which Canada made its final decision to refuse to consider improving the highway connections to the Ambassador Bridge. The limitations period cannot run before Claimant had actual or constructive knowledge of that decision and that it had suffered harm from that decision, and that cannot have occurred until some time after May 1, 2008.

231. The New Span Claim is also timely. The Statement of Claim alleges specific acts within the limitations period showing that Respondent has violated the NAFTA with respect to the New Span Claim. For the majority of these claims, Canada does not dispute the fact that they occurred within the three year period prior to the filing of the Notice of Arbitration.

232. Canada's principal argument on the New Span Claim is that it is too late for Claimant to challenge the application of the IBTA, which was enacted in 2007. That is not correct.

233. First, the limitations period could not begin until Claimant suffered loss or damage. Loss or damage did not occur pursuant to the IBTA until 2009 at the earliest, when Canada sued Claimant trying to apply the IBTA to the Ambassador Bridge/New Span. Until that

time, the IBTA had not been applied to Claimant in any concrete way, so loss or damage could not have occurred. Alternatively, loss or damage did not occur until passage of the IBTA Regulations, also in 2009. This was the first time Claimant incurred any affirmative obligation pursuant to the IBTA. Without any obligation, Claimant could not have suffered loss.

234. Numerous events related to the IBTA allegations occurred within the limitations period, including passage of the IBTA Regulations and a letter and Ministerial Order from Canada in 2010 to cease and desist construction of the New Span. Furthermore, to the extent it is applied to Claimant, the IBTA is a continuing breach of Canada's international obligations, and causes harm to Claimant during the limitations period. For both reasons, the IBTA measure is a continuing act and Claimant's challenge of the IBTA is timely.

235. Third, the IBTA is part of a composite act. Claimant challenges Canada's practice of passing laws which favor the NITC/DRIC and prejudice the Ambassador Bridge/New Span. These laws include the IBTA, IBTA Regulations, and BSTA. The composite act was not complete until (at the earliest) the BSTA was passed in 2012, as that is when the aggregate breach was revealed. As such, the IBTA is part of a timely composite act.

B. The NAFTA Limitations Provision Relies Upon A Two-Part "Knowledge" Test

236. Art. 1116(2) operates as a statute of limitations in the NAFTA.²⁰⁷ It says:

“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”²⁰⁸

²⁰⁷ Section 1117(2) has a substantially similar provision; for ease of reference, they will be treated interchangeably.

²⁰⁸ The event that generally must occur within three years of the investor learning of the breach and the harm it has suffered is the filing of a Notice of Arbitration. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶¶ 43, 47 (Dec. 6, 2000), Exhibit CLA-28. In this case, the Notice of Arbitration was submitted on April 29, 2011, so the three-year period reaches back to April 29, 2008.

In general, therefore, the three-year period begins to run only once the investor both (1) acquires knowledge of the breach alleged to be a violation of the NAFTA and (2) acquires knowledge that it has incurred loss or damage as a result of that breach.

237. The first prong of the “knowledge” test is that the investor acquired knowledge that a breach of the NAFTA has occurred. The investor must have knowledge that an actual breach occurred—not that a breach was likely or imminent. As the International Court of Justice has explained:

“Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offense is frequently preceded by preparatory actions which are not to be confused with the act or offense itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which ‘does not qualify as a wrongful act.’”²⁰⁹

238. The text of the NAFTA confirms that actions must be final before they become “measures” which can breach the treaty. Article 1101, which governs the scope and coverage of NAFTA Chapter 11, says “[t]his Chapter applies to measures *adopted or maintained* by a Party.”²¹⁰ For a measure to be adopted or maintained, it must be complete. The measure cannot be merely planned, or considered, or contemplated, or intended; it must be adopted or maintained, and therefore final.

239. The second prong of the “knowledge” test is that the investor acquired knowledge that it has *actually incurred* loss or damage as a result of the breach. Knowledge that damage may or will occur in the future is not enough to start the limitations period—the investor must

²⁰⁹ *Gabcikovo-Nagymaros Project*, (Hungary/Slovakia), Judgment, I.C.J. Reports 1997 (Sept. 25, 1997), ¶ 79, Exhibit CLA-29.

²¹⁰ NAFTA, Art. 1101(1) (emphasis added), Exhibit CLA-12.

have actually been harmed and have specific knowledge of that harm for the limitations period to run.

240. For example, in *Pope & Talbot* the investor claimed economic loss as a result of a Canadian regulatory regime which limited supply and eventually increased prices on wood chips, a base material for claimant's pulp and paper business. Canada argued that the NAFTA three-year period began to run immediately upon implementation of the regulations, because the claimant must have known at that time that their costs would increase. The claimant argued that it only incurred loss when they were actually forced to purchase the more expensive wood chips. The *Pope & Talbot* tribunal agreed with claimant, holding "[i]t is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase more expensive wood chips, except that it can only have arisen at some stage after implementation of the Export Control Regime. The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur."²¹¹

C. The Application Of The NAFTA Limitations Provision Depends Upon Whether The Breach Was A One-Time Act, A Continuing Act, Or A Composite Act

1. Continuing Courses Of Conduct Generally

241. In order to determine when an investor knew or should have known that a government measure has breached the investor's rights under NAFTA and has resulted in injury to the investor, it is often critical to determine what exactly the measure consisted of, and when it took place. In some instances, the breach consists of a measure that is a single act that occurs

²¹¹ *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada, ¶ 12 (Feb. 24, 2000), Exhibit CLA-14.

and is fully complete as of a single point of time. In other instances, the breach consists of a measure that is a continuing act that is ongoing in nature. In yet other instances, the breach consists of a series of different actions that together form a “composite act” which, taken together, constitute the measure being challenged.

242. The tribunal in *Pac Rim Cayman*²¹² summarized the issue:

“In any particular case, three different situations can arise: (i) a measure is a ‘one-time act’, that is an act completed at a precise moment, such as, for example, a nationalization decree which is completed at the date of that decree; or (ii) it is a ‘continuous’ act, which is the same act that continues as long as it is in violation of rules in force, **such as a national law in violation of an international obligation of the State**; or, (iii) it is a ‘composite’ act, that is an act composed of other acts from which it is legally different. These important and well-established distinctions under customary international law are considered in the Commentaries of the ILC Articles on State Responsibility.”²¹³

243. These principles are found in the articles on the Responsibility of States for Internationally Wrongful Acts (the “Articles on Responsibility”). The Articles on Responsibility were established by the International Law Commission and are widely cited as general principles of international law in NAFTA and other international arbitrations.²¹⁴ The relevant articles in this context are Articles 14 and 15:

“Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

²¹² *Pac Rim Cayman* was a case under the Dominican Republic – Central America – United States Free Trade Agreement (*i.e.*, CAFTA), which has a statute of limitations provision nearly identical to Art. 1116(2).

²¹³ *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections, ¶ 2.67 (June 1, 2012) (emphasis added), Exhibit CLA-30.

²¹⁴ See, *e.g.*, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 58 (Oct. 11, 2002), Exhibit CLA-31; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections, ¶ 2.67 (June 1, 2012), Exhibit CLA-30.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

...

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in the aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.²¹⁵

a. One-Time Acts

244. A one-time act is characterized as “a specific and identifiable governmental measure that effectively terminated the investor’s rights at a particular moment in time (*i.e.* the termination of a permit or license, denial of an application, etc.).”²¹⁶

245. Although one-time acts are discrete measures, their effects may continue over time. The comments to the Articles on Responsibility explain that “In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue

²¹⁵ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (“ILC Commentaries”), Yearbook of the International Law Commission, 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), Art. 14, 15, Exhibit CLA-32.

²¹⁶ *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections, ¶ 3.43 (June 1, 2012), Exhibit CLA-30.

even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution...²¹⁷

246. What differentiates a one-time act from a continuous course of conduct is that the wrong itself has stopped—the wrongdoer has taken an isolated action which began and ended, and is no longer violating international law even if the effect of the act continues to cause harm.²¹⁸

b. Continuing Acts

247. Continuing acts differ from one-time acts because they continue to breach: “In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time . . . conduct which has commenced some time in the past, and which constituted . . . a breach at that time, can continue and give rise to a continuing wrongful act in the present.”²¹⁹

248. A continuing act may originate outside the limitations period but continue into the limitations period as an ongoing breach of international obligations that causes harm during the limitations period.

249. One example of a continuing act is “the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State.”²²⁰ For example, the Human Rights Committee has found that the continuing application of Canadian legislation which stripped a woman of her status as an Indian because of her marriage was a continuing

²¹⁷ ILC Commentaries at 60, Exhibit CLA-32.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

wrongful act. Because the legislation continued to deprive the woman of her rights, when the legislation was passed or how long it had been applied did not prevent the tribunal from hearing the claim.²²¹

250. The plain meaning of the NAFTA confirms this approach. The NAFTA “applies to measures adopted *or maintained* by a Party.”²²² To “maintain” is to “cause or enable (a condition or situation) to continue.”²²³ The use of the phrase “or maintained” shows that Chapter 11 was meant to apply to measures that are continued over a period of time and continue to breach NAFTA obligations.

251. The *Feldman* case involved a continuing act. In that case, claimant argued that Mexico’s refusal to pay tax rebates constituted a breach of Mexico’s NAFTA obligations. The tribunal held that the denial of tax rebates within the limitation period could be a NAFTA violation even though the practice itself started six years before the arbitration began, because the wrongdoing constituted a “a pattern of official action (or inaction) over a number of years.”²²⁴

252. The *UPS* tribunal also held that continuing acts are recognizable under the NAFTA. In that case, UPS claimed that Canada engaged in a variety of behavior that was unfair to UPS and unlawfully favorable to Canada Post. Canada argued that the measures at issue were implemented well before the limitations period, and were thus time-barred under Art. 1116(2). UPS argued (among other things) that Canada’s actions were on-going and constituted

²²¹ *Sandra Lovelace v. Canada*, Human Rights Committee Decision, Views Under Article 5(4) of the Optional Protocol, 1981, U.N. Doc. CCPR/C/DR(XIII)/R.6/24, ¶¶ 10-13.2, Exhibit CLA-33.

²²² NAFTA, Art. 1101(1) (emphasis added), Exhibit CLA-12.

²²³ See “maintain,” Oxford Dictionaries, Exhibit C-155.

²²⁴ *Feldman* Award, ¶¶ 187-88, Exhibit CLA-22.

continuous acts not barred by the limitations provision. UPS further argued that “on-going conduct constitutes a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day.”²²⁵

253. Canada responded that the continuing acts principle did not apply in NAFTA arbitrations. The tribunal disagreed:

“UPS’ response to this argument draws on logic and on precedent. Its argument on the basis of logic is that an investor cannot know whether a NAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct. Its argument from precedent is that under international law generally, and also under prior NAFTA decisions, continuing acts are treated as continuing violations of international law obligations (and of NAFTA obligations) such that time bars do not begin until the conduct has concluded.

...

We agree with UPS that its claims are not time-barred. We put aside for the moment the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term “first acquired” is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss. The Feldman tribunal’s conclusion on this score buttresses our own.”²²⁶

254. The *UPS* tribunal confirmed what is widely accepted in international law—that continuing courses of conduct are not barred by limitations provisions if they remain ongoing.

²²⁵ *United Parcel Service of America v. Government of Canada*, UNCITRAL, Award on the Merits (“*UPS Award*”), ¶ 24 (May 24, 2007), Exhibit CLA-13.

²²⁶ *UPS Award*, ¶¶ 26, 28, Exhibit CLA-13.

255. For a continuing act that starts before the limitations period but continues thereafter, the limitations provision controls the portion of the continuing act for which the tribunal has authority to award damages.²²⁷ The *UPS* tribunal explained:

“Although we find that there is no time bar to the claims, the limitation period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2).”²²⁸

See also Pac Rim Cayman, Decision on Respondent’s Jurisdictional Objections, ¶ 2.104, Exhibit CLA-30 (“Where there is an alleged practice characterized as a continuous act (as determined above by the Tribunal) which began before 13 December 2007 and continued thereafter, this Tribunal would have jurisdiction *ratione temporis* over that portion of the continuous act that lasted after that date.”).

256. While the tribunal can only award damages incurred after the limitations period began (*i.e.*, after the date three years before the filing of the Notice of Arbitration), acts occurring prior to that time can still be considered. *See Pac Rim Cayman*, Decision on Respondent’s Jurisdictional Objections, ¶ 2.105, Exhibit CLA-30 (“The Tribunal considers that such materials [pre-dating the bar date] could still be received as evidence of the factual background to the

²²⁷ Given this interpretation, there is no violation of the principle of *effet utile* as Canada claims. Canada Memorial, ¶ 211. The principle of *effet utile* only requires all parts of a treaty to be given effectiveness, but this principle does not require “that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.” *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶114 (Dec. 30, 2010), Exhibit CLA-35. Nothing in Claimant’s interpretation of 1116(2) or 1117(2) would render any part of the NAFTA meaningless, as the *UPS* Award confirms.

²²⁸ *UPS* Award, ¶ 30, Exhibit CLA-13.

Parties' dispute."); *M.C.I. Power Group L.C. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, ¶ 93 (July 31, 2007), Exhibit CLA-36 (pre-time bar acts and omissions considered "for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred...").

c. Composite Acts

257. Composite acts are another form of continuing breaches. The commentaries to the Articles on Responsibility explain this as follows:

"Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is 'a series of acts or omissions defined in the aggregate as wrongful'... Composite acts may be more likely to give rise to continuing breaches [than simple acts]..."²²⁹

258. The Report for the Thirtieth Session of the ILC explained that "the distinctive common characteristic of State acts of the type here considered is that they comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content, and effects, although relating to different specific cases."²³⁰

One example of a composite act is "systematic acts of discrimination prohibited by a trade agreement."²³¹

259. A composite act is not complete until the last act which makes the aggregate conduct wrongful:

"A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will

²²⁹ ILC Commentaries at 62, Exhibit CLA-32.

²³⁰ Report of the International Law Commission on the work of its Thirtieth session, 8 May – 28 July 1978, A/33/10, p. 93, Exhibit CLA-48.

²³¹ ILC Commentaries at 62, Exhibit CLA-32.

the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in the aggregate as wrongful.”²³²

Thus a composite act “lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”²³³ *See also Chevron Corporation v. Republic of Ecuador*, UNCITRAL, Interim Award, ¶ 301 (Dec. 1, 2008), Exhibit CLA-37 (the comments to Article 15 “merely clarif[y] that the alleged breach commenced upon the occurrence of the action or inaction that *consummated* the [breach]”) (emphasis added).

260. The acts or omissions which form the composite act may be unlawful individually. This means that each act or omission in a series could serve as a basis for relief, while together also constituting a composite act: “While composite acts are made up of a series of actions or omissions defined in the aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation...Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.”²³⁴

2. Acts v. Omissions

261. Omissions, like overt acts, can be continuing acts under general principles of international law.

262. Mr. Gaetano Arangio-Ruiz, Special Rapporteur to the fortieth session of the International Law Commission, remarked as follows: “The Special Rapporteur is inclined to believe that omissive wrongful acts may well fall (as well as, and perhaps more frequently than,

²³² ILC Commentaries at 63, Exhibit CLA-32.

²³³ ILC Commentaries at 62, Exhibit CLA-32.

²³⁴ ILC Commentaries at 63, Exhibit CLA-32.

commissive wrongful acts) into the category of wrongful acts having a continuing character. As long as it protracted beyond the date within which such an obligation is due to be performed, non-compliance with an *obligation de faire* is a wrongful act of continuing character.”²³⁵

263. The tribunal in *Pac Rim Cayman* agreed:

“The Tribunal also bears in mind that the Claimant pleads that the alleged unlawful practice by the Respondent is a negative practice not to grant any mining application...[I]t is difficult to give a precise date for such omissions (compared to a specific positive act). Once an act takes place, it affects the parties’ legal position; but, in contrast, an omission to act does not necessarily affect the parties as long as it is not definitive; and an omission can remain non-definitive throughout a period during which it could be cured by a positive act...In the Tribunal’s view...an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law. The legal nature of the omission did not change over time: the permits and the concession remained non-granted. The controversy began with a problem over the non-granting of the permits and concession; and it remained a controversy over a practice of not granting the mining permits and concession.”²³⁶

See also SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 167 (Jan. 29, 2004), Exhibit CLA-38 (failure to pay a debt is an omission constituting a continuing breach).

3. Canada Is Incorrect That The Continuing Act Principle Does Not Apply In NAFTA Arbitrations

264. Canada argues that the continuing courses of conduct principle “fails as a matter of law,” but cites virtually no law to support its position.²³⁷ Canada also disregards *UPS*, the only

²³⁵ G. Arangio-Ruiz, “Preliminary Report on State Responsibility,” Yearbook of the International Law Commission, 1988, Vol. II, Part One, ¶ 42, U.N. Doc. A/CN.4/416 and Add.1, Exhibit CLA-39.

²³⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections, ¶¶ 2.91-92 (June 1, 2012), Exhibit CLA-30.

²³⁷ Canada Memorial, ¶ 206.

NAFTA tribunal which has squarely addressed the issue (and ruled in accordance with Claimant's position).²³⁸

265. The only case Canada cites is *Grand River*, which is not relevant to the continuing courses of conduct principle.²³⁹ The *Grand River* tribunal did not discuss continuing courses of conduct in its decision. The claimant in that case argued that because each individual state had to implement a master settlement agreement which applied throughout the United States regarding the treatment of cigarettes, "the limitations periods . . . applied separately to each contested measure taken by each state implementing the MSA. Hence, [claimants] maintained, there is not one limitations period, but many."²⁴⁰ The Tribunal explained that the claimants had not actually pleaded their case in this way, but instead only raised this argument at the hearing. Because the claimant pleaded the claim as a breach of the more general master settlement agreement, it could not then "base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."²⁴¹

266. Canada also claims that its interpretation has been confirmed by "other international case law," but does not cite any cases.²⁴² As discussed above, NAFTA and other international case law adopts Claimant's position with respect to continuing courses of conduct. This principle is not contrary to the *lex specialis* in the NAFTA, as there is no evidence that Article 1116 or Article 1117 specifically meant to abrogate the continuing acts principle.

²³⁸ Canada Memorial, ¶¶ 210-11.

²³⁹ Canada Memorial, ¶ 209.

²⁴⁰ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, ¶ 81 (July 20, 2006), Exhibit CLA-40.

²⁴¹ *Id.*

²⁴² Canada Memorial, ¶ 211.

D. The Roads Claim Is Timely

1. Summary Of Claimant's Position

267. Canada first challenges as untimely Claimant's claim with respect to Canada's failure to improve the highway connections to the American-owned Ambassador Bridge, while at the same time building a brand new highway to the Canadian-controlled, but as-yet unbuilt NITC/DRIC, as well as to other international crossings between Canada and the United States which are owned and controlled on the Canadian side by Canadian entities.²⁴³ Canada's argument fails to recognize the nature of this Roads Claim: the claim could not ripen until it became clear that Canada was discriminating against Claimant by building a highway to a Canadian-owned bridge, and *not* improving the highway connections to the American-owned Ambassador Bridge. The fact of this blatant discrimination, which is a breach of NAFTA, could not have been known by Claimant until very recently, well within the limitations period. Thus, Canada did not adopt a measure with respect to the Roads Claim until after the limitations period began, and therefore the Roads Claim is timely. Furthermore, the Roads Claim is a continuing act that continues to the present day, which also confirms that it is timely. The Roads Claim is also a composite act, with the final measures being taken within the limitations period. In short, under any analysis, the Roads Claim is timely.

2. Canada Did Not Adopt A Measure With Respect To The Roads Claim Until After The Limitations Period Began

268. The Roads Claim is timely because the earliest conceivable date for any measure that is being challenged in the Roads Claim is May 1, 2008, the date that Canada announced its plans for the Windsor-Essex Parkway. That date is after the April 29, 2008 date that is the

²⁴³ Canada Memorial, § IV(D).

beginning of the three-year limitations period (since the original Notice of Arbitration was filed April 29, 2011).

269. The test for when the limitations period begins to run is when Claimant had knowledge of the breach of a NAFTA obligation and knowledge that it had actually incurred loss as a result of that breach. Neither of these could have occurred before Canada made a final decision with respect to the Windsor-Essex Parkway. Indeed, neither of these could have occurred until *long after* the May 1, 2008 announcement of Canada's plans to build the Parkway. At the time of the May 1, 2008 announcement, at least the following issues remained uncertain: (a) whether the Windsor-Essex Parkway would be built to the site of an approved NITC/DRIC, which could not have been known in May of 2008 because the NITC/DRIC *had not yet been approved*; thus, whether the Parkway was a discriminatory measure that would benefit a Canadian bridge rather than the American-owned Ambassador Bridge was not known in May 2008; (b) whether Canada would actually follow through on its plans to construct the Parkway, or would change those plans, as governments often do; and (c) whether Canada, in addition to building the Windsor-Essex Parkway, would improve the highway connections to the Ambassador Bridge, or expand the Parkway to run to the Ambassador Bridge, thereby avoiding the discriminatory breach of Claimant's NAFTA rights. None of these facts could have been known at the time of the May 1, 2008 announcement of the Windsor-Essex Parkway, and therefore the Claimant could not have had knowledge of the breach of its NAFTA rights and knowledge of its injury from that breach until *after* the May 1, 2008 announcement of Canada's plans to build the Parkway. Thus, Claimant's knowledge could not have occurred until well within the three year period that began on April 29, 2008.

270. Canada's own description of the "Highway 401 Measures" shows that the Claimant could not have had knowledge of its Roads Claim until after the limitations period began. Canada describes the Roads Claim as being based on allegations that "Canada reneged on a promise to spend \$300 million to connect the Ambassador Bridge with Ontario Highway 401 and manipulated the DRIC EA to ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge."²⁴⁴ A NAFTA breach could only arise once *both* of these actions were final. Claimant could not have known that Canada had taken actions to "ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge" until sometime *after* Canada announced its plan to finalize the Parkway. The earliest this could have occurred was on May 1, 2008, when the Parkway was announced as the preferred alternative to the new crossing.²⁴⁵ Even then, however, it was not clear that the Parkway would run only to the NITC/DRIC. Indeed, the NITC/DRIC did not receive its environmental approvals from the United States *until January 2009*,²⁴⁶ did not receive its environmental approvals from Ontario until *August 2009*,²⁴⁷ and did not receive its environmental approvals from Canada until *December 2009*.²⁴⁸ Until these approvals were granted, there could not have been any knowledge that the NITC/DRIC would go to the location of the not-yet-approved NITC/DRIC. Indeed, even after that date, Claimant and other parties challenged the United States environmental approval of the NITC/DRIC in U.S. federal court, in

²⁴⁴ Canada Memorial, ¶ 126 (emphasis added).

²⁴⁵ "News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road," (May 1, 2008), Exhibit C-125.

²⁴⁶ See Cover Page, Record of Decision, Federal Highway Administration (Jan. 14, 2009), Exhibit C-149.

²⁴⁷ News Release, "Detroit River International Crossing Project Receives Environmental Approval" (Dec. 3, 2009), Exhibit C-93.

²⁴⁸ *Id.*

a litigation that remains ongoing to this day.²⁴⁹ Thus, the date on which Claimant knew or should have known that Canada was building the Parkway to the location of the NITC/DRIC, which was not determined and approved until December 2009 and which is still the subject of litigation, cannot plausibly be said to have occurred before the time bar date of April 29, 2008.

271. Indeed, no matter what Canada may have done before April 29, 2008, Canada has indisputably taken the following actions *after* April 29, 2008 that demonstrate that Claimant could not have known of Canada’s discriminatory breach or the injury suffered from that breach until long after April 29, 2008:

- May 2008: the Parkway was announced as the Technically and Environmentally Preferred Alternative for the highway to the new crossing.²⁵⁰
- October 2008: the Parkway was assigned to Infrastructure Ontario to be completed under an alternative financing and procurement model.²⁵¹
- October 2008: notices were sent to property owners whose properties must be purchased and demolished for the Parkway to be built.²⁵²
- December 2008: the Ontario Ministry of Transportation (“MTO”) submitted the DRIC Environmental Assessment Report pursuant to the *Ontario Environmental Assessment Act* (“OEAA”), with the Parkway identified as the Recommended Plan for the access road.²⁵³

²⁴⁹ See *Latin Americans for Social and Economic Development v. FHWA*, Complaint, Case No. 10-10082 (D.D.C. Jan. 11, 2010), Exhibit C-150; *Latin Americans for Social and Economic Development v. FHWA*, Decision and Order, Case No. 10-10082 (E.D. Mich. Apr. 4, 2012), Exhibit C-151; Docket, *Latin Americans for Social and Economic Development v. FHWA*, Case No. 12-1558 (6th Cir.), Exhibit C-152.

²⁵⁰ Parkway Chronology at 1, Exhibit C-133.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

- June 2009: Infrastructure Ontario issued a Request for Qualifications to pre-qualify and shortlist companies who will be invited to respond to the Request for Proposals to design, build, finance, and maintain the Parkway.²⁵⁴
- August 2009: Ontario announced OEAA approval for the Parkway.²⁵⁵
- September 2009: MTO applied for permits under the Ontario *Endangered Species Act* (“ESA”).²⁵⁶
- September 2009: the first utility relocations (the raising of two hydro towers) were made to accommodate the Parkway.²⁵⁷
- October 2009: Infrastructure Ontario announced three companies short-listed to respond to the Request for Proposals.²⁵⁸
- November 2009: MTO began the expropriation process to acquire lands for the Parkway.²⁵⁹
- November 2009: MTO received the first permit under the ESA.²⁶⁰
- December 2009: Infrastructure Ontario and MTO released the Request for Proposals.²⁶¹
- February 2010: MTO received the second permit under the ESA.²⁶²
- March 2010: MTO began demolishing properties purchased or expropriated to accommodate the Parkway.²⁶³

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 2, Exhibit C-133.

²⁶⁰ *Id.* at 1, Exhibit C-133.

²⁶¹ *Id.* at 2, Exhibit C-133.

²⁶² *Id.* at 1, Exhibit C-133.

²⁶³ *Id.* at 2, Exhibit C-133.

- April 2010: Ontario announced the acquisition of approximately 150 properties from the City of Windsor for the Parkway.²⁶⁴
- November 2010: the Windsor-Essex Mobility Group was announced as the preferred company to design, build, finance, and maintain the Parkway.²⁶⁵
- December 2010: the Windsor-Essex Mobility Group reached commercial and financial close.²⁶⁶
- December 2010: MTO took over jurisdiction of parts of Huron Church Road and E.C. Row Expressway.²⁶⁷
- August 2011: MTO received the third permit under the ESA.²⁶⁸
- August 2011: construction on the Parkway began.²⁶⁹
- November 2012: one of the first permanent features of the Parkway (a multi-lane roundabout) opened to traffic.²⁷⁰

272. In other tribunals, Canada has expressly asserted that its actions must be final before they can be challenged. In an August 2011 brief filed in the Washington Litigation, Canada moved to dismiss DIBC’s claims with respect to the building of the NITC/DRIC because “Plaintiffs allege that Canada will design, finance, construct, and operate the DRIC Bridge and associated facilities. But this is simply speculation, as none of these activities has yet occurred . . . most of the allegations made by Plaintiffs . . . have not yet happened, and *may never happen*. It

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1, Exhibit C-133.

²⁶⁹ The Windsor Essex Parkway, Construction – The Next Six Months (November 2011), Exhibit C-154.

²⁷⁰ Parkway Chronology at 4, Exhibit C-133.

is impossible to tell, at this point, exactly when the DRIC bridge will be built, or by whom.”²⁷¹

Canada relied on the “list of variables that come into play before one shovel of dirt is turned for the DRIC Bridge” as evidence that DIBC’s complaint is premature.²⁷² Applying this same standard here, Claimant could not possibly have had knowledge that Canada was discriminating against Claimant in its construction of highways to its own bridge rather than to the American-owned Ambassador Bridge “before one shovel of dirt” was turned for either the Parkway itself or the NITC/DRIC bridge to which it is eventually going to be built, assuming the NITC/DRIC survives its various legal challenges, which are ongoing.

273. Moreover, the three year limitation period cannot start to run until the date that Claimant knew it had *suffered loss or damage* from Canada’s breach of its NAFTA rights—*i.e.*, from Canada’s discriminatory conduct. Here, the date that Claimant knew that it had suffered actual loss or damage as a result of Canada’s discriminatory conduct cannot be until the date that Claimant believed Canada’s discriminatory decisions were inalterable and irrevocable, and until such date that Claimant believed that Canada, but for its discriminatory conduct, would and should have completed the improved highway connections to the Ambassador Bridge. That date of injury is necessarily *after* the date that Claimant learned that Canada had decided to build a highway to its own (non-existent, and not yet approved) NITC/DRIC, and had chosen *not* to build an improved highway to the Ambassador Bridge. Thus, Claimant could not have any knowledge of injury until long after the May 1, 2008 announcement by Canada of its “plans” to build the Parkway. Indeed, given that numerous permits and other requirements were necessary

²⁷¹ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Reply in Support of Motion to Dismiss, No. 10-cv-476-RMC (D.D.C. Aug. 12, 2011), at 5, 8, Exhibit C-153 (emphasis added).

²⁷² *Id.* at 8.

before the Parkway was ready for construction, and given the uncertainty over whether highway improvements would still be made to the Ambassador Bridge (and the uncertainty over when such improvements would have been made but for Canada's discriminatory conduct), the date that Claimant knew that it had suffered injury could only have been after the time bar date. The quantification of loss, including the determination of when that loss was first incurred, is more appropriately considered at the merits stage. At this stage, it is enough to say that the April 29, 2011 filing of the Roads Claim could not have violated the limitations provision because Claimant could not have known of Canada's discriminatory breach and the damage it would cause Claimant until sometime after April 29, 2008.²⁷³

3. The Roads Claim Is A Continuing Act

274. Even if the Tribunal concluded that certain acts with respect to the Roads Claim happened before April 29, 2008, the Roads Claim is nonetheless an example of a continuing act which, even if it may have origins before the time bar, nonetheless continues throughout the limitations period and through to the present. There can be no dispute that Canada has continued to take actions during the limitations period that discriminate in favor of a highway to the NITC/DRIC and against an improved highway to the Ambassador Bridge, and that it continues to take such actions to this day.

275. These actions all happened after the time bar date, even if they are related to actions which pre-date the limitations period. This is the type of claim which is a continuing act.

²⁷³ Moreover, the way in which Canada chose to build the Parkway further delayed the date on which Claimant could have known that the NAFTA breach had occurred. Instead of building the Parkway from the location of the proposed NITC/DRIC to Highway 401, Canada chose to build from Highway 401 toward the Detroit River. Thus, *even after* construction of the Parkway began in August 2011, the Parkway was being built directly towards the Ambassador Bridge, and there was therefore at least some basis to believe that Canada would make a rational decision to complete the highway improvement all the way to the Ambassador Bridge, rather than choosing to veer the highway project off in a different direction, towards the location of the un-built and not yet approved NITC/DRIC. *See* Map, Exhibit C-127.

276. The Roads Claim also continues to be in breach of Canada's international obligations. Even if Canada is correct that the measure happened before the limitations period, that measure is ongoing and continuing to breach and cause harm. Canada is engaging in the overt act of unfairly building the road to the NITC/DRIC, while also refusing to give the same, non-discriminatory treatment to Claimant by building a comparable road.

277. Both the act and the omission have not stopped, and thus Canada has not stopped breaching. Canada continues to build, and there is no indication that the construction will connect to the Ambassador Bridge.

278. This is not a case where Canada engaged in a discrete act which is now having mere after-effects. The violations themselves are active and ongoing—they literally continue every day as a road is constructed to the un-built NITC/DRIC and not to the Ambassador Bridge. Thus even if the Roads Claim did begin before the limitations period, it is a continuing wrongful act in violation of the NAFTA.

4. Alternatively, The Roads Claim Is A Composite Act

279. The Roads Claim could alternatively be classified as a composite act.

280. The Roads Claim is premised on a series of actions (as listed above). First, the city of Windsor allowed unlimited curb cuts and driveway connections on Huron Church Road, and built seventeen unnecessary traffic lights along the route to the Ambassador Bridge, which frustrated the purpose of Huron Church Road as an access route to the Ambassador Bridge.²⁷⁴ Second, Canada committed to a highway connection for the Ambassador Bridge, but reneged.²⁷⁵

²⁷⁴ DIBC SOC, ¶¶ 205-209.

²⁷⁵ DIBC SOC, ¶¶ 190-196.

Third, Canada chose to design the Parkway within two miles of the Ambassador Bridge but only connect it to the NITC/DRIC.²⁷⁶

281. While these acts may each be violations of the NAFTA, in the aggregate they also combine to form a breach of the NAFTA—that is, the entire series of acts and omissions constitute a systematic practice of unfair and discriminatory treatment against Claimant, a paradigmatic example of a composite act. The earliest a “final act” could have occurred to consummate the composite act was the date when it became finally known that Canada would definitely build the Parkway to the location of the NITC/DRIC (which could not possibly have been before the NITC/DRIC received environmental approvals between January and December 2009, or before the May 1, 2008 announcement of the Parkway), *and* when it became finally known that Canada would definitely *not* build the Parkway or any other highway improvement to the Ambassador Bridge. These final acts certainly did not occur before April 29, 2008.

5. Canada Argues The Limitations Period Began Before The Roads Claim Measure Was Adopted And Ignores Its Continuing Nature

282. Canada argues that the limitations period for the Roads Claim began on two different dates: March 11, 2004, when Canada announced the renaming of the Windsor Gateway Action Plan/Nine Point Plan,²⁷⁷ and November 14, 2005, when Canada and the Bi-National Partnership announced its area of continued analysis.²⁷⁸ Canada is wrong for (at least) one fundamental reason: at neither point in time had Canada publicly adopted a measure that is claimed to be a breach of the NAFTA, and thus Claimant could not have had knowledge of the

²⁷⁶ DIBC SOC, ¶ 6.

²⁷⁷ Canada Memorial, ¶ 226.

²⁷⁸ Canada Memorial, ¶ 234.

breach or knowledge of damage or loss as a result of the breach. Canada is also wrong because the Roads Claim is a continuing and/or composite act. Either way, the limitations provision has not been violated.

283. Canada cites numerous documents which purport to show Claimant's knowledge of a NAFTA breach and knowledge of loss or damage from that breach. These documents actually show that the discriminatory measures challenged in the Roads Claim had not yet been adopted; or at most, if they had been adopted, they were still continuing (and the later, final acts in the composite act of discrimination had not yet occurred). The language in the documents relied upon by Canada shows that no decision had been made at the time that Canada claims the limitations period began. The Windsor Gateway Action Plan/Nine Point Plan and the Bi-National Partnership announcement contain statements such as the following: "the Project Team *intends* to develop specific alternatives"²⁷⁹; "The *plan* for the government-proposed bridge"²⁸⁰; "Public Information Open House #4 set out further information about the *planned* Highway 401 access road"²⁸¹; "Transport Canada refuses to build a 2km connection from the *proposed* DRIC highway connection."²⁸² None of these documents indicate that a measure had been finally adopted—let alone that such a measure included the *discriminatory omission* of refusing to build a similar highway improvement to the American-owned Ambassador Bridge. Instead, these documents merely show that Canada was engaging in preparatory conduct which would not be finalized and consummated until many years later.

²⁷⁹ Canada Memorial, ¶ 234 (emphasis added).

²⁸⁰ *Id.* (emphasis added).

²⁸¹ *Id.* (emphasis added).

²⁸² *Id.* at ¶ 235 (emphasis added).

284. Canada argues Claimant acquired knowledge of a NAFTA breach when the 2002 MoU was replaced by the Let's Get Windsor-Essex Moving Strategy on March 11, 2004.²⁸³ This could not be true, for several reasons. First, this 2004 LGWEM Strategy did not and could not finalize a commitment by Canada to build an improved highway to a Canadian-controlled bridge (the NITC/DRIC), since no such bridge had been approved (and the Canadian approvals for such a bridge were not received until December 2009, and U.S. environmental approval was not received until January 2009, and is still in dispute and in litigation). Moreover, the 2004 LGWEM Strategy did not eliminate building the Parkway or otherwise improving the highway connections to the Ambassador Bridge.²⁸⁴ In addition, a route to the Ambassador Bridge could still have been developed at some later stage. On March 11, 2004, Claimant would thus not have known if a highway connection would be built to the Ambassador Bridge or not, and therefore would not have known if its rights under the NAFTA had been violated or if it had suffered injury as a result of such violation.

285. Canada also argues Claimant acquired knowledge of a NAFTA breach when the route to the Ambassador Bridge was eliminated from the area of continued analysis in the NITC/DRIC Partnership process on November 14, 2005.²⁸⁵ This could not be true for at least three reasons: (1) this act was merely preparatory, as no final decision had been made; (2) Claimant still would not have known that Canada would build a discriminatory highway to the NITC/DRIC; and (3) Claimant could not have known whether Canada would nonetheless still build an improved highway connection to the Ambassador Bridge—especially since the final

²⁸³ *Id.* at ¶ 226.

²⁸⁴ “A new solution for the Windsor Gateway endorsed by all three levels of government,” (Mar. 11, 2004), Exhibit C-128.

²⁸⁵ Canada Memorial, ¶ 234.

Parkway design has the Parkway running all the way to within *two miles* of the Ambassador Bridge, making it eminently achievable to extend the improvements all the way to the Ambassador Bridge, thereby eliminating any discriminatory conduct.²⁸⁶ While the Parkway is far from complete, Canada has thus far refused to make that extension of the Parkway's improvements to Huron Church Road all the way to the Ambassador Bridge. It is that "omission," most of all, that constitutes the act of discriminatory conduct giving rise to the Roads Claim.

286. Both of the dates on which Canada relies also ignore the ongoing nature of the Roads Claim. Construction on the Parkway did not even begin until August 2011. And as shown above, the Parkway project consists largely of improving Huron Church Road/Highway 3, but the current plans terminate those improvements a mere two miles before the Ambassador Bridge, and instead call for a brand new branch of the Parkway to be built toward the as yet unapproved and unbuilt, but Canadian-owned, NITC/DRIC. Thus, Canada would have the Tribunal hold that the limitations period began to run *seven years earlier* than construction began. Indeed, Canada would have the Tribunal hold that the limitations period began to run *before* the Canadian Parkway plans were finalized (May 1, 2008), *before* the Parkway was even designed (after May 1, 2008), *before* the NITC/DRIC received any of its approvals (beginning between January and December 2009), *before* any contract had been awarded for the Parkway's construction (November 2010), *long before* the construction on the Parkway even began (August 2011), and before Claimant could have known that there was no chance of the Parkway or any other highway improvements being made for the final two miles to the Ambassador Bridge (arguably still an open question, but certainly some time after April 29, 2008). Canada fails to

²⁸⁶ See Map, Exhibit C-127.

explain how Claimant could have suffered loss or damage before these events occurred. While it will be Claimant's burden on the merits to show the damages caused by the Roads Claim, at this stage it is enough to say that the Roads Claim does not violate the NAFTA limitations provision and is timely.

E. The New Span Claim Is Timely

287. Canada does not argue that Claimant's entire New Span Claim is untimely. Canada only argues that Claimant's allegations with respect to the IBTA are untimely.²⁸⁷ But Canada does not (and cannot) disagree that for the three-year limitations period to begin, the investor must have suffered loss or damage, and must have known that it suffered loss or damage. Claimant did not suffer loss or damage pursuant to the IBTA until 2009 at the earliest, because that is when Canada promulgated regulations and initiated a lawsuit to apply the IBTA to Claimant. Furthermore, the IBTA is both a continuing act and part of a composite act. Under any of these theories, Claimant's challenge to the IBTA measures is timely.

1. Claimant Did Not Suffer Loss Or Damage Pursuant To The IBTA Prior To 2009, At The Earliest

288. As discussed above, the limitations period does not begin until the investor has knowledge of the breach and knowledge of loss or damage arising from the breach. Even if Canada is right that the breach with respect to the IBTA happened immediately upon its passage on February 1, 2007,²⁸⁸ this does not mean Claimant suffered loss or damage as of that date.

²⁸⁷ Canada Memorial, § IV(E).

²⁸⁸ DIBC does not concede that the breach with respect to the IBTA occurred immediately upon the IBTA's passage. Indeed, as explained below, the IBTA became discriminatory only after Canada passed the *Bridge To Strengthen Trade Act* ("BSTA") in December 2012, which exempted the NITC/DRIC from the IBTA's requirements, even while Canada was using the IBTA as one way of stopping or delaying Claimant's ability to build its New Span.

289. When it was enacted in 2007, the IBTA did not require Claimant to do anything, and did not cause any immediate harm to Claimant. Indeed, the IBTA did not require any owners of international bridges to affirmatively do anything unless and until they were in position to build an enlargement or new span for their existing bridges, at which time they were required under the IBTA to seek approval from the Canadian Governor in Council. But in 2007, Claimant had not yet received the environmental approvals needed for its New Span, and hence was not yet in position to build its New Span, and therefore was not yet in a position where the IBTA's requirement of seeking consent from the Governor in Council could even be ripe. Moreover, as explained below, Claimant believed and asserted that the IBTA's requirement of seeking permission from the Governor in Council was inapplicable to Claimant—a belief which later caused Canada to file a lawsuit against Claimant which remains unresolved. Thus, at the time the IBTA was passed, Claimant could not know of any injury that it suffered as a result of the IBTA.

290. On February 18, 2009, Canada promulgated regulations pursuant to the IBTA (the “IBTA Regulations”). Under the IBTA Regulations, Claimant is required to perform inspections pursuant to the terms of the IBTA Regulations every two years, and to submit reports on those inspections and on operation and use.²⁸⁹ Thus, once the IBTA Regulations were passed, Claimant actually incurred an obligation. Arguably, this obligation was a loss arising out of the IBTA, but it was not a loss that Claimant has ever raised in this NAFTA arbitration. Moreover, this loss occurred only when Claimant first performed a required inspection, which is within two years after February 2009, and hence within the limitations period.

²⁸⁹ IBTA Regulations, §§ 8-10, 14-15, Exhibit C-112.

291. In November 2009, Canada filed a lawsuit against Claimant seeking a declaration that, contrary to Claimant's view, the IBTA applied to Claimant, and Claimant was not exempted from the IBTA based on prior agreements entered into between Claimant and Canada.²⁹⁰ Prior to the lawsuit, Claimant made known to Canada that the IBTA could not apply to the Ambassador Bridge or its New Span. This was because Claimant asserted that the 1990 and 1992 agreements entered into between Canada and Claimant prevented the IBTA from lawfully applying to the Ambassador Bridge.²⁹¹ Thus, prior to the filing of that lawsuit, Claimant had not suffered any harm with respect to the IBTA, because the IBTA had not been applied to Claimant in any concrete way. Canada's lawsuit sought declarations that would make clear that Claimant would not be able to move forward with the New Span until the lawsuit was resolved in CTC's favor or IBTA approval was obtained. As such, the limitations period for the IBTA could not begin before Canada's lawsuit was filed in November 2009, which is within the limitations period. Indeed, the mere filing of the lawsuit could not itself have resulted in Claimant's knowledge of having suffered an injury. Rather, the lawsuit could not result in injury unless Claimant lost the lawsuit, which has not happened. The lawsuit is currently still pending and unresolved.

292. The earliest date Claimant could plausibly be said to have had knowledge that the IBTA was causing harm to it was October 18, 2010. On that date, a Ministerial Order was issued *ordering Claimant to refrain from work on the New Span until IBTA approval is received.*²⁹² That Ministerial Order was immediately challenged by Claimant a month later in court, and that

²⁹⁰ See *Canada v. Canadian Transit Co.*, Notice of Application, Superior Ct. Ontario, No. 09-46882 (Nov. 18, 2009), Exhibit C-95.

²⁹¹ See FN 88 above.

²⁹² Ministerial Order: Construction or Alteration: International Bridges and Tunnel dated October 18, 2010, Exhibit C-137.

challenge is still pending. Thus, the direct impact of the IBTA on Claimant is subject to litigation, and the time that Claimant knew that it had suffered injury from the IBTA cannot be said to have occurred prior to April 29, 2008.

293. In short, all of the following events occurred within the limitations period, and it is not until the Ministerial Order of October 18, 2010, at the earliest, that Claimant can be said to have knowledge that the IBTA was both a NAFTA breach and causing injury to Claimant:

- January 29, 2009: the IBTA Regulations were passed.²⁹³
- November 17, 2009: Canada filed a lawsuit against Claimant seeking a declaration that the IBTA applied to Claimant and was not barred by previous settlement agreements.²⁹⁴ The filing of this lawsuit is significant: in it, Canada sought a judicial declaration that the 1990 and 1992 settlement agreements with Claimant did not preclude application of the IBTA to Claimant. In other words, as late as November 17, 2009 (and indeed through to the present day, as this lawsuit has not been resolved), Canada has implicitly acknowledged that a judicial declaration was necessary before it could apply the IBTA to Claimant.
- July 19, 2010: Canada sent a letter to Claimant demanding Claimant show cause why the Minister of Transport should not issue an order prohibiting work on the New Span until IBTA approvals were received.²⁹⁵
- October 18, 2010: a Ministerial Order issued ordering Claimant to refrain from work on the New Span until IBTA approval is received.²⁹⁶
- November 18, 2010: CTC filed an application for judicial review of the October 18 Ministerial Order.²⁹⁷

²⁹³ IBTA Regulations, Exhibit C-112.

²⁹⁴ *Canada v. Canadian Transit Co.*, Notice of Application, Superior Ct. Ontario, No. 09-46882 (Nov. 18, 2009), Exhibit C-95.

²⁹⁵ Letter from Mary Komarynsky (Transport Canada) to Dan Stamper (DIBC/CTC) dated July 19, 2010, Exhibit C-136.

²⁹⁶ Ministerial Order: Construction or Alteration: International Bridges and Tunnel dated October 18, 2010, Exhibit C-137.

²⁹⁷ *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), November 18, 2010, Exhibit C-138.

- July 9, 2012: the IBTA Administrative Monetary Penalties Regulations are passed, establishing fines for IBTA violations.²⁹⁸

2. The IBTA Is A Continuing Act

294. The Claimant's challenge to the IBTA measure also does not violate the NAFTA limitations period because the IBTA is a continuing act.

295. The IBTA is a continuing act which originates outside the limitations period but is related to events occurring within the limitations period. Most importantly, the IBTA is still the law, and is therefore a continuing act. Unless Claimant succeeds in one of its legal challenges to the enforcement and applicability of the IBTA to Claimant, the IBTA will apply to Claimant and, as shown by the October 2010 Ministerial Order, will require Claimant to obtain approval from the Governor in Council before Claimant can proceed to build its New Span. This injures Claimant on *a continuing basis*. Moreover, that ongoing injury is especially acute when the IBTA is combined with the effects of the 2012 BSTA, which expressly exempts the NITC/DRIC from the requirements of the IBTA—thereby creating a discriminatory impact between the Canadian-controlled NITC/DRIC (exempt from IBTA) and the American-owned Ambassador Bridge (subject to IBTA).

296. The IBTA is also a continuing act because it has been followed by all of the itemized events listed above (the IBTA Regulations, the Ministerial Order, etc.). These events form a continuing act which culminates in injury to Claimant to the extent the IBTA is held to be applicable to Claimant.

297. As the Articles on Responsibility adopted by the International Law Commission discuss, “the maintenance in effect of legislative provisions incompatible with treaty obligations

²⁹⁸ Administrative Monetary Penalties Regulations (International Bridges and Tunnels), SOR/2012-149, Exhibit C-135.

of the enacting State”²⁹⁹ is a continuing act. In this case, the IBTA violates the NAFTA because it unlawfully discriminates against Claimant and falls short of the minimum standard of treatment. Each day the IBTA continues in place (unless it is declared inapplicable to Claimant), the breach and the injury attributable to the breach exists. This means the allegations with respect to the IBTA are timely, even if Claimant can only recover damages incurred since the date of the time bar (April 28, 2009), and going forward.

3. The IBTA Is One Component Of A Composite Act

298. An independent reason why the Claimant’s claims based on the IBTA are timely is that the IBTA, the October 2010 Ministerial Order, and the 2012 BSTA are all components of an overall composite act that constitutes a breach of the NAFTA. While those different components may be individual breaches of the NAFTA, it is only when all of these laws are *considered together* that the true nature and full extent of the breach is revealed. The breach that exists as a result of this complete, composite act is that Canada has passed laws that discriminate between the American-owned Ambassador Bridge and its New Span, and that favor the Canadian-owned and Canadian-controlled NITC/DRIC. Canada’s laws act together to prevent fair competition between the Ambassador Bridge and the NITC/DRIC by requiring the owners of the Ambassador Bridge to obtain special approval from the Governor in Council to build their New Span, while allowing the NITC/DRIC to be built without any need for any regulatory approvals. In addition, by imposing these unfair and discriminatory requirements onto Claimant in breach of the franchise rights it was granted under Canadian law and under the Boundary Waters Treaty, these laws deny the minimum standard of treatment to Claimant, in violation of NAFTA. While Claimant was disadvantaged by the IBTA and the October 2010 Ministerial Order because it was

²⁹⁹ ILC Commentaries at 60, Exhibit CLA-32.

purportedly required to seek Governor in Council approval of any change to its bridge, it was not until passage of the BSTA that the NITC/DRIC got its corresponding (and discriminatory) advantage, by being exempted from various permitting requirements which Claimant is still required to satisfy. As such, it was not until the passage of the BSTA in 2012 that the composite act was consummated.

299. Canada’s description of the claims at issue here effectively admits that Claimant is challenging the IBTA and the BSTA as one composite measure. Canada explains that it is alleged to have violated Claimant’s rights “by enacting the *International Bridges and Tunnels Act* and the *Bridge to Strengthen Trade Act*.”³⁰⁰ Canada also explains that it is alleged to have violated Claimant’s rights with respect to the New Span “through the *IBTA* and *BSTA*.”³⁰¹ As these statements confirm, Claimant objects to Canada simultaneously treating the bridges differently—delaying Claimant while expediting the NITC/DRIC. The IBTA is part of that composite measure, but the measure was not complete until the passage of the BSTA.

4. Even If The IBTA Allegations Are Untimely, Claims With Respect To The IBTA Regulations, The Ministerial Order And BSTA Are Timely

300. Should the Tribunal find all claims with respect to the IBTA untimely, the IBTA Regulations, the Ministerial Order, and the BSTA are all measures that fall clearly within the limitations period. As such, the Tribunal should at a minimum permit claims challenging those measures to proceed.

5. Canada’s Argument That The Limitations Period Began Immediately Upon Passage Of The IBTA Fails

³⁰⁰ Canada Memorial, ¶ 5 (underlining added).

³⁰¹ *Id.* (underlining added).

301. Canada’s only argument with respect to the IBTA is that the limitations period started the moment the IBTA was passed on February 1, 2007.³⁰² In support of this argument, Canada cites a number of statements by Claimant purporting to show Claimant’s knowledge.³⁰³ However, Canada does not explain how Claimant suffered loss or damage the day the IBTA was passed. The statements show at most that Claimant understood that the IBTA was a breach of the NAFTA (or a potential breach, if the Canadian courts held it applicable to Claimant and its New Span). This is not enough to start the limitations period—some loss or damage has to have occurred. As discussed above, this did not happen until the IBTA was actually applied in some concrete way. As such, Canada’s argument fails. Moreover, as explained above, even if Canada could show that loss or damage occurred on February 1, 2007, the IBTA is both a continuing act and part of a composite act, both of which extend into the limitations period. Either way, the IBTA measure is timely.

F. Canada’s General Arguments With Respect To The Limitations Provision

302. Canada makes a number of general arguments in support of its limitations defense. None of these arguments has any merit.

1. Canada’s Blanket Assertion That The Limitations Period Is Rigid

303. Canada relies heavily on a statement by the *Feldman* tribunal, which held that the statute of limitations is “not subject to any suspension..., prolongation or other qualification,”³⁰⁴ as evidence that any limitations question must be strictly construed. The *Feldman* tribunal made this statement in the context of the claimant arguing for (1) a tolling of the limitations period

³⁰² Canada Memorial, ¶ 268.

³⁰³ Canada Memorial, ¶¶ 252-55.

³⁰⁴ Canada Memorial, ¶ 190 (citing *Feldman* Award, ¶ 63). The *Grand River* tribunal, cited by Canada at Canada Memorial, ¶ 197, cites the same passage from the *Feldman* Award.

and/or (2) that respondent was estopped from raising the limitations defense at all. Claimant in that case argued that Mexican authorities had given him certain assurances regarding resolution of their dispute, which persuaded him to delay filing his NAFTA claims. The “suspension” or “prolongation” was in respect to *tolling*—entirely unrelated to continuing courses of conduct or any other limitations argument.³⁰⁵ Canada has explained this distinction in its submissions in the *Bilcon* case: “the [*Feldman*] tribunal considered whether state action short of ‘formal and authorized recognition’ of a claim could ‘either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense.’”³⁰⁶ Neither tolling nor estoppel is at issue in this case, and thus (as Canada admits in *Bilcon*) *Feldman* is inapplicable here.

304. *Grand River* is similarly inapplicable. Canada cites *Grand River* for the proposition that the limitations period does not begin to run until the investor has knowledge of the breach and loss or damage arising from the breach.³⁰⁷ Claimant does not contest this. *Grand River* does not establish that the limitations period runs as soon as the investor has any suspicion of potential future loss.

305. The issue in *Grand River* was the application of escrow statutes on the sale of cigarettes, where companies that sold cigarettes were required to deposit funds into escrow depending on sales volume. The claimant argued that they did not suffer damage or loss until they actually paid the funds into escrow. The tribunal disagreed, finding that the investor suffered loss or damage when it became “subject to a clear and precisely quantified statutory

³⁰⁵ *Feldman* Award, Exhibit CLA-22.

³⁰⁶ *Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Government of Canada Counter-Memorial, ¶ 246 n.512 (Dec. 9, 2011), Exhibit CLA-41.

³⁰⁷ Canada Memorial, ¶¶ 196-98.

obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance,” even if the investor had not yet actually transferred funds.³⁰⁸ The limitations period thus began to run when the “clear and precisely quantified statutory obligation” arose, because that quantified obligation made known that damage had in fact occurred.

306. Claimant in this case could not have had any statutory obligation until the October 2010 Ministerial Order was issued. Even then, because the Ministerial Order was (and is) subject to litigation, it is far from clear that the application of the IBTA to Claimant is legally certain enough to commence the limitations period. Moreover, the 2010 Ministerial Order was the earliest date that Claimant’s obligation under the IBTA could be said to be precisely “quantified” as in *Grand River*. Regardless, it is clear that because the mere passage of the IBTA itself did not impose any affirmative obligations on Claimant, the limitations period could not have run immediately upon its passage.

2. Canada Misconstrues The Purposes And Effect Of The Limitations Provision

307. Canada references only a single purpose of the NAFTA as evidence that the limitations provision should be strictly construed. They claim that because the objective of the NAFTA is “to create effective procedures for the resolution of disputes,”³⁰⁹ the limitations period begins to run the moment investors sense their rights are in danger. This ignores almost all of the other NAFTA objectives and purposes, which are primarily to protect investors.³¹⁰ It also misapplies the “effective procedures” objective. If the purpose of the NAFTA is to resolve

³⁰⁸ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction, ¶ 82 (July 20, 2006), Exhibit CLA-40.

³⁰⁹ Canada Memorial, ¶ 204.

³¹⁰ See FN 122 above.

disputes, investors should not be excluded from arbitration by unduly strict interpretation of the limitations provision. Furthermore, it would not make sense to incentivize investors to bring claims before they are certain if a NAFTA breach has occurred and loss has been sustained, which would be the result of accepting Canada's arguments in this case.

308. Canada also claims that one of the purposes of the limitations provisions is to “ensure that relevant evidence, such as witness testimony and the production of documents, will be available which otherwise might be lost with the passage of time.”³¹¹ But Canada notably does not argue that there is any danger that such evidence will be lost in this case. The NITC/DRIC and New Span processes are ongoing and will not be completed any time soon, so there is no risk that documents or testimony will be lost. Furthermore, Canada cites a number of documents from as far back as 1927.³¹² Loss of documents is therefore not a real concern.

3. Canada Falsely Alleges The NAFTA Has Been Amended By A Subsequent Agreement

309. Canada repeatedly alleges that the three NAFTA Parties have “agreed” on various issues via their pleadings in other cases, including the interpretation of the limitations provision.³¹³ Canada claims that the NAFTA Parties have come to a “subsequent agreement” regarding the interpretation of the NAFTA pursuant to Vienna Convention on the Law of Treaties (“VCLT”) Article 31(3)(a) because they have each individually “endorsed” Canada's

³¹¹ Canada Memorial, ¶ 204.

³¹² See Canada Memorial, ¶¶ 278-285.

³¹³ See Canada Memorial, ¶ 212.

position.³¹⁴ Canada does not explain what a “subsequent agreement” is and whether it includes legal arguments made in independent State submissions.³¹⁵

310. A “subsequent agreement” requires a mutual intention to be bound.³¹⁶ Under Article 1131 of the NAFTA, the Free Trade Commission (which includes representatives of the three NAFTA Parties) may interpret NAFTA, and their interpretation is binding on NAFTA tribunals.³¹⁷ The *Methanex* tribunal had “no difficulty” determining that a Free Trade Commission interpretation was what was meant by a “subsequent agreement” under VCLT 31(3)(a).³¹⁸ Memorials from the NAFTA parties in arbitrations are not negotiated, mutual interpretations like those from the Free Trade Commission, and indeed the Free Trade Commission would be superfluous if “subsequent agreements” were so informally made.

311. Professor Reisman, whom Canada cites in its Memorial, has agreed that a subsequent agreement cannot result from unilateral interpretations. As he explained, while “other instruments prepared by **both** parties to a treaty [are] probative of their shared intention, an instrument prepared by solely one of them is not.”³¹⁹ The United States has adopted a similar interpretation, indicating that Article 31(3)(a) refers to “voluntary joint interpretations” and

³¹⁴ Canada Memorial, ¶ 199.

³¹⁵ Under U.S law, interpretations made by government agencies during litigation are generally given little deference. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988), Exhibit CLA-52.

³¹⁶ See, e.g., *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Ch. B, ¶ 20 (Aug. 3, 2005), Exhibit CLA-42.

³¹⁷ NAFTA, Art. 1131(2). Exhibit CLA-12.

³¹⁸ See, e.g., *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Ch. B, ¶ 21 (Aug. 3, 2005), Exhibit CLA-42.

³¹⁹ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, Professor W. Michael Reisman, ¶ 34 (Mar. 22, 2010) (emphasis in original), Exhibit CLA-43.

grants States “the discretion to agree mutually to a joint interpretation, or ‘subsequent agreement,’ if they wish...”³²⁰ Canada has not presented any evidence that meets these requirements.

III. DIBC IS NOT BRINGING ITS CLAIM UNDER THE BOUNDARY WATERS TREATY

312. Canada argues that this Tribunal has no jurisdiction “with respect to claims based on the Boundary Waters Treaty.”³²¹ But Claimant does not ask the Tribunal to rule on violations of the Boundary Waters Treaty. Instead, Claimant asks the Tribunal to rule on alleged violations of the NAFTA. In determining whether Canada has violated the NAFTA, this Tribunal has the authority to consider the Boundary Waters Treaty, the Special Agreement, and other authorities to the extent they may be relevant to determining whether Canada has violated the NAFTA. That is the only reason those authorities are mentioned in any of Claimant’s operative submissions.

A. Claimant Is Not Alleging A Breach Of The Boundary Waters Treaty

313. DIBC has not asked this Tribunal to find a breach of the Boundary Waters Treaty. As the Statement of Claim makes clear, this Tribunal is only asked to determine whether Canada’s actions breach Articles 1102, 1103, and 1105 of the NAFTA.³²²

314. Claimant’s right to the minimum standard of treatment under NAFTA may be informed by the specific background relating to Claimant’s franchise to own and operate the Ambassador Bridge, including the specific legislation passed in Canada pursuant to the

³²⁰ *The Republic of Ecuador v. United States of America*, UNCITRAL, PCA Case No. 2012-5, Memorial of Respondent United States of America on Objections to Jurisdiction, pp. 36-37, 44 (April 25, 2012), Exhibit CLA-44.

³²¹ Canada Memorial at § V.

³²² DIBC SOC, ¶ 216.

Boundary Waters Treaty. The background relating to the franchise rights granted to Claimant is relevant to determining whether Canada is affording Claimant a minimum standard of treatment, just as the existence of private contract between a claimant and a third party would be relevant to determining a claim that Canada violated NAFTA by appropriating or confiscating a claimant's rights under such a contract. Even if the NAFTA claim depends upon the existence of another, underlying right, that does not mean that is the underlying right that is being enforced. Thus, for Claimant to point to the Boundary Waters Treaty as potentially relevant information regarding its NAFTA claims does not mean that Claimant is asking this Tribunal to hold that Canada has breached the Boundary Waters Treaty.

B. The Tribunal May Interpret Non-NAFTA Law

315. Canada appears to suggest that this Tribunal may not interpret any law aside from the NAFTA.³²³ This is incorrect as a matter of law.

316. Canada cites *Bayview* to suggest that a NAFTA tribunal does not have jurisdiction to consider any other treaty in its analysis.³²⁴ In that case, the parties disputed whether Bayview held an “investment” in Mexico. The tribunal analyzed Mexican constitutional law, Mexican domestic law, and a 1944 boundary waters treaty to determine whether Bayview had property rights to water in Mexico.³²⁵ The *Bayview* tribunal did precisely what Canada claims this Tribunal is prohibited from doing: it determined what rights the claimant had under a boundary waters treaty.

³²³ Canada Memorial, ¶ 292.

³²⁴ *Id.* at ¶ 291.

³²⁵ *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, ¶¶ 118-121 (June 19, 2007), Exhibit CLA-45.

317. Canada also cites *Methanex* to argue that this Tribunal cannot consider a non-NAFTA breach.³²⁶ In *Methanex*, the claimant specifically alleged violations of the General Agreement on Tariffs and Trade (“GATT”) in its submissions.³²⁷ The tribunal noted that they could not grant relief with respect to the GATT, but could only rule on those breaches alleged to be in violation of the NAFTA.³²⁸ The tribunal did not hold that it was prohibited from ruling on a violation that was *both* a violation of the GATT and the NAFTA. Nor did it hold that it was prohibited from looking at the GATT as potentially relevant to a determination of whether NAFTA had been violated.

318. Canada similarly misconstrues the meaning of *Grand River*.³²⁹ The *Grand River* tribunal merely held that it would not consider interpretations of provisions from other treaties as persuasive evidence of how to interpret NAFTA provisions if the treaty provisions were substantially different.³³⁰ It did *not* hold that other treaties could never be considered. Instead, the *Grand River* tribunal discussed whether a breach of U.S. law and/or an international treaty gave rise to a NAFTA breach, and thereby considered other sources of law in determining whether a NAFTA violation occurred.³³¹

319. There are numerous other examples of tribunals considering rights and obligations under non-NAFTA law to determine if the respondent’s actions breached the NAFTA. In *WM*

³²⁶ Canada Memorial, ¶ 290.

³²⁷ See, e.g., *Methanex Corp. v. US*, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Ch. B, ¶ 5 (Aug. 3, 2005), Exhibit CLA-42.

³²⁸ *Id.*

³²⁹ Canada Memorial, ¶ 289.

³³⁰ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, ¶ 71 (Jan. 12, 2011), Exhibit CLA-46.

³³¹ *Id.* at ¶ 141.

II, the tribunal noted that while it could not rule on a breach of contract claim itself, “[t]his does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117.”³³²

320. Similarly, the *Feldman* tribunal explained “this Arbitral Tribunal may well examine both Mexican domestic laws and the conduct of Mexican tax authorities to determine whether they meet minimum standards of international law . . . as incorporated by NAFTA.”³³³

321. As these decisions (and many others) make clear, Canada’s argument that this Tribunal must only consider the NAFTA in its analysis is incorrect. While Claimant does not believe there is any genuine basis for dispute with respect to the existence of its franchise rights under the legislation that was enacted pursuant to the Boundary Waters Treaty, the Tribunal is free to consider the scope of those franchise rights to the extent it is disputed, and to the extent it may be relevant to determining any breach of the NAFTA.

C. Canada’s Argument That Claimant Has Alleged A Violation Of The Boundary Waters Treaty Is Based On An Inoperative Submission

322. Canada contends that Claimant has alleged a breach under the Boundary Waters Treaty.³³⁴ It bases this allegation almost entirely on a Notice of Intent to Arbitrate which was never pursued. The “First NAFTA NOI,” which Canada cites extensively in its argument

³³² *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 73 (Apr. 30, 2004), Exhibit CLA-47.

³³³ *Feldman* Award, ¶ 67, Exhibit CLA-22.

³³⁴ Canada Memorial, ¶ 273.

relating to the Boundary Waters Treaty, was sent to Canada in January 2010.³³⁵ Claimant never pursued a NAFTA arbitration on the basis of this Notice of Intent. The effective Notice of Intent was sent in March 2010,³³⁶ and included no references to an “Ambassador Bridge Treaty.”

D. Whether There Is A Special Agreement Is Not A Jurisdictional Question

323. Canada argues in its Memorial that the legislation passed in the 1920s by Canada and the United States did not form the Special Agreement.³³⁷ Claimant addresses this argument in its Statement of Claim and explains that there is a Special Agreement pursuant to the Boundary Waters Treaty, and also explains the rights which accrued to DIBC and CTC pursuant to this Special Agreement.³³⁸ This is clearly a merits issue, not a jurisdictional issue.

Accordingly, because the Tribunal is not being asked (and could not be properly asked) at this stage of the proceedings to determine whether a special agreement under the Boundary Waters Treaty was or was not created by the reciprocal and concurrent legislation enacted by the United States and Canada in 1921, Claimant will not address that issue here—other than to register its substantial disagreement with the position set forth by Canada.

IV. JURISDICTIONAL DISCOVERY

A. Canada Has Not Shown Any Need For Jurisdictional Discovery

324. Annex A to Canada’s Memorial lists six document requests which Canada claims are necessary for this jurisdictional phase of the proceeding, and in particular are necessary to “complete the evidentiary record” for Canada’s limitations defense (*i.e.*, the three-year time bar

³³⁵ Canada Memorial, ¶¶ 271-274.

³³⁶ *Detroit Int’l Bridge Co. v. Canada*, Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, March 23, 2010.

³³⁷ Canada Memorial, § V(B).

³³⁸ DIBC SOC, § V(A).

defense).³³⁹ Specifically, Canada allegedly seeks documents relating to what “DIBC knew, or should have known” as of various dates before the three-year limitations period began (*i.e.*, before April 29, 2008).³⁴⁰ The Tribunal should deny this request.

325. First, discovery into what Claimant knew before April 29, 2008 is unnecessary and irrelevant because (as shown above) the measures being challenged in this arbitration are acts within the limitations period and continuing and composite acts that have continued through to the present. For example, Canada is currently building the Windsor-Essex Parkway to the Canadian-owned NITC/DRIC, and failing to extend that Parkway or otherwise improve the highway connections to the American-owned Ambassador Bridge. Similarly, Canada is still thwarting and delaying the ability of Claimant to build its New Span, including by applying the IBTA’s requirements to Claimant even while it exempts the Canadian-owned NITC/DRIC from those requirements through the BSTA. This conduct has taken place within the limitations period and is ongoing, and Claimant is therefore entitled to pursue its NAFTA arbitration to seek any damages incurred during the period beginning three years before its Notice of Arbitration was filed, and continuing into the future. As a result, there is by definition no need for any discovery into what Claimant “knew” or “should have known” as of any prior time period.

326. Second, Canada has no need for discovery because Claimant could not possibly have known something before it became true. As explained above, no matter what Claimant may have said publicly or in its internal documents, it could not have known definitively that Canada would build a highway to the non-existent NITC/DRIC *and also* would refuse to improve the highway to the Ambassador Bridge before the final contracts were signed to

³³⁹ Canada Memorial, Annex A; Canada Memorial, ¶ 302.

³⁴⁰ Canada Memorial, ¶ 304.

commence construction on the Parkway, before ground was broken on that construction, and before Canada even received approval for its proposed NITC/DRIC bridge. Similarly, Claimant could not possibly have known that Canada would exempt the Canadian-owned NITC/DRIC from the IBTA (and from numerous other regulations) until Canada actually passed the legislation that accomplished that discriminatory result (*i.e.*, the BSTA). Thus, Claimant's internal documents cannot establish the basis for Canada's limitations defense.

327. Third, Canada argues that it has proffered sufficient evidence to prove its limitations defense. It even argues that certain of its evidence should "automatically render DIBC's claim time barred."³⁴¹ Canada's only argument for needing jurisdictional discovery is that it is entitled to evidence which "further demonstrates" Claimant's knowledge.³⁴² Evidence which only "further demonstrates" what Canada alleges it has already shown is merely cumulative and thus unnecessary. Canada's requests are not material and relevant to the jurisdictional phase, as required by the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"),³⁴³ because they only seek documents which are duplicative of what Canada already alleges it has shown, and are thus not necessary for this Tribunal to rule on Canada's limitations defense.

328. In short, Claimant contends that the nature of the evidence Canada relies on is immaterial to the limitations period issue; Canada argues that it already has sufficient evidence. Either way, further evidence of the nature that Canada has offered would not be helpful to the Tribunal.

³⁴¹ Canada Memorial, ¶ 302.

³⁴² Canada Memorial, ¶ 301.

³⁴³ IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), Exhibit CLA-49. The IBA Rules govern document discovery in this case. *See* Procedural Order No. 3, ¶ 33.

B. Any Possible Discovery On The Limitations Issue Should Be Joined To Discovery On The Merits

329. Even if the Tribunal does find a possible basis for allowing discovery on Canada's limitations defense, that discovery should not delay the proceedings but instead should proceed at the same time as discovery on the merits. This is a more efficient way to proceed, because the parties could engage in a single period of discovery rather than two different periods of discovery. Moreover, it will eliminate any potential dispute as to whether any of the discovery on the limitations defense is inappropriate or relevant solely to merits or damages issues. There is a necessary overlap between the discovery Canada believes is relevant to its limitations defense, and the discovery that is likely to be relevant to the merits and to damages. This overlap between Canada's limitations period argument and the merits is shown by Canada's proposed discovery requests, which are the same requests that Canada would likely make during the merits phase.³⁴⁴

C. Canada's Requests Are Overbroad, Are Based On Documents Already In Canada's Possession, And Are Not Related To Canada's Limitations Defense

330. Even if this Tribunal does find that Canada has shown a need for discovery on the limitations defense, and that such discovery should proceed now as a separate phase of discovery, Canada's requests do not meet the requirements of the IBA Rules and should be denied.

331. Article 3 of the IBA Rules says document requests must contain "a description of each requested Document sufficient to identify it" or "a description in sufficient detail (including

³⁴⁴ DIBC does not concede the requests meet the requirements of the IBA Rules, and reserves the right to challenge them if they are joined to the merits.

subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist.”³⁴⁵

332. Canada’s requests are not sufficiently specific. For example, in Request No. 3 Canada requests “[d]ocuments . . . concerning Canada/Ontario/Windsor’s plans to construct a direct road connection between Highway 401 and the Ambassador Bridge and/or the proposed DRIC Bridge in the context of the DRIC EA, including, but not limited to, documents relating to Option X12 and/or the Parkway.”³⁴⁶ This does not identify a “narrow and specific category” of documents. Instead, it seeks a broad category of documents relating to a variety of sub-issues. Furthermore, by seeking “documents between [dates which are several years apart] concerning” various topics, Canada has not identified with particularity what documents it seeks. Even if this Tribunal does find that Canada has shown a need for discovery on the limitations defense, and that such discovery should proceed now as a separate phase of discovery, Canada’s requests do not meet the requirements of the IBA Rules and Canada should be denied the documents it seeks. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. United States*, Procedural Order, ¶ 3 (May 14, 2007), Exhibit CLA-50 (“Regarding the Claimants’ ‘Document Request’ contained in items 1 to 22 of ‘Claimant’s First Request for Production of Documents’, the Tribunal rules that the Request to Produce as formulated in each such item (seeking ‘all documents concerning’ 22 separate subject matters) is not in conformity with Article 3 of the IBA Rules, and the Request to Produce is declined”).

³⁴⁵ IBA Rules, Art. 3(3)(A), Exhibit CLA-49.

³⁴⁶ Canada Memorial, Annex A, at 3.

333. Canada also does not provide a statement that the documents it requests are not already in its possession, as required by Article 3 of the IBA Rules.³⁴⁷ Rather, the requests are based on documents which Canada plainly already has. For example, Canada seeks documents with respect to the Roads Claim on the basis of public statements made by DIBC/CTC executives.³⁴⁸ Canada is already in possession of these statements. Canada also seeks documents regarding the IBTA, and bases its request on letters which *Canada sent DIBC and CTC*.³⁴⁹ Canada does not explain why letters it sent to Claimant create a reasonable probability that Claimant has materially relevant documents not already in Canada's possession.

334. Lastly, at least one of Canada's requests does not relate to its limitations defense. Request No. 6 seeks "Documents between April 24, 2006 and December 31, 2009 concerning the IBTA and its applicability to and/or impact upon the existing Ambassador Bridge, the New Span, the Special Agreement, the *Boundary Waters Treaty*, the *Ambassador Bridge Treaty* and/or the CTC Act."³⁵⁰ Canada claims this request is relevant and material because "Claimant alleges that Canada enacted the IBTA to interfere with its franchise rights under the Special Agreement, *Boundary Waters Treaty*, *Ambassador Bridge Treaty*, including its right to build the New Span."³⁵¹ But this request is plainly related to the merits of this case and not Canada's limitations defense. Whether the IBTA interfered with Claimant's rights is a merits question, not a jurisdictional question, and certainly not a limitations period question. Moreover, the request

³⁴⁷ IBA Rules, Art. 3(3)(c)(i), Exhibit CLA-49.

³⁴⁸ Canada Memorial, ¶ 303.

³⁴⁹ *Id.* at ¶ 305.

³⁵⁰ Canada Memorial, Annex A, at 5.

³⁵¹ *Id.*

extends to December 31, 2009, which is past the time bar date, and thus could be relevant to the limitations issue only if Canada accepted the continuing act doctrine, or otherwise accepted that the limitations period began to run in 2009, which would confirm that all of the claims are timely.

D. If Discovery Is Granted, Fairness Dictates That Claimant Should Be Granted Limited Discovery

335. Canada argues that because DIBC does not believe any jurisdictional discovery is necessary, it has automatically waived its right to discovery even if Canada's requests are granted.³⁵² It would be manifestly unfair to allow Canada to bolster its case without giving Claimant an opportunity to do the same. Moreover, if Canada's non-meritorious arguments for discovery are accepted, those same arguments would require reciprocal discovery.

336. As a threshold matter, DIBC acknowledges and confirms that it does not believe that discovery by either side is necessary to resolve the jurisdictional and limitations defenses lodged by Canada. As shown above, DIBC has demonstrated that both the Roads Claim and the IBTA allegations with respect to the New Span Claim are timely.

337. Assuming Canada's discovery arguments are meritorious, pursuant to Procedural Order No. 4 and in the format specified by Procedural Order No. 3 paragraphs 34 and 35, DIBC has attached as Annex A its document requests (the "Requests"). DIBC's Requests are limited to Canada's limitations period defense, and are material and relevant to objecting to that defense.

338. If the Tribunal permits discovery by Canada, then it should permit discovery by Claimant of documents that are in Canada's possession and that will strengthen and confirm the position of Claimant with respect to the limitations defense. Specifically, there are documents in

³⁵² Canada Memorial, ¶ 308.

the possession or under the control of Canada demonstrating that Canada did not adopt any final measure with respect to the Roads Claim or the IBTA until within the limitations period, and also demonstrating that Canada has engaged in a continuing course of conduct that continues to breach Claimant's rights under the NAFTA.

339. With respect to the Roads Claim, Canada alleges that it adopted a measure to build a highway connection to the NITC/DRIC and not to build a comparable highway connection to the Ambassador Bridge/New Span at some time before its May 1, 2008 announcement that the Windsor-Essex Parkway was the preferred alternative for the new highway, before the Parkway or the NITC/DRIC had received environmental approval, and before Canada had started construction on the Parkway. Canada very likely has documents in its possession showing the nature of its plans and actions with respect to the Parkway, and its deliberations over whether or not to build a highway connection to the Ambassador Bridge/New Span. Those documents almost certainly exist from both before and after the time bar date of April 29, 2008, and hence are material and potentially relevant to confirming Claimant's position on the limitations defense.

340. It is reasonable to assume that Canada is in possession of such documents. As shown above, Canada has taken a continuous series of actions relating to both the Roads Claim and the New Span Claim, both of which have involved numerous policy judgments, reviews, deliberations, approvals, and actions. Thus, there necessarily must be an administrative paper trail with respect to all of these relevant decisions. For example, Canada announced in May 2008 that it had selected the Parkway as the preferred alternative to a new crossing,³⁵³ and it is

³⁵³ "News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road," (May 1, 2008), Exhibit C-125.

reasonable to assume that Canada is in possession of documents showing whether this constituted a final measure which could proceed to construction without any further action, or whether Canada understood that further actions and approvals were necessary. Further, it is reasonable to assume that Canada is in possession of documents that show its deliberations and decisions with respect to building (or deciding not to build) a highway connection to the Ambassador Bridge/New Span, which Canada alleges took place in either 2004 or 2005 (but which likely was also a source of discussion for several years after that).³⁵⁴ As these documents relate to government measures which Canada has taken, the documents requested are not in DIBC's possession or control.

341. With respect to the IBTA allegations relating to the New Span Claim, Canada does not specify what damage DIBC could have suffered before the IBTA was applied in any way to DIBC, or before DIBC incurred any obligations pursuant to the IBTA. Documents showing when Canada attempted to apply the IBTA to Claimant, when Canada considered attempting to apply the IBTA to Claimant, the extent to which Canada recognized uncertainty over the application of the IBTA to Claimant, or the extent to which Canada recognized that the effect of the BSTA combined with the IBTA was to create a discriminatory measure against Claimant sometime in late 2012, are all material and potentially relevant to confirming Claimant's position on the limitations defense.

342. It is reasonable to assume such documents exist. In 2010, Canada sent a show cause letter to CTC and subsequently issued a Ministerial Order prohibiting CTC from working on the New Span until it received Governor in Council approval pursuant to the IBTA, which

³⁵⁴ Canada Memorial, ¶¶ 228, 238.

shows that Canada has paid careful attention to the application of the IBTA to Claimant.³⁵⁵ As these documents relate to government measures which Canada has taken, the documents requested are not in DIBC's possession or control.

343. In sum, if Canada is permitted to engage in discovery on the limitations defense (which discovery necessarily overlaps with merits issues), then Claimant should also be permitted discovery into the topics described in the Requests, which (notwithstanding their potential relevance to the merits) are also potentially relevant to Claimant's position in opposing Canada's limitations defense.

V. COSTS

344. Under UNCITRAL Articles 40 and 42,³⁵⁶ a tribunal may in its discretion award both arbitration costs and legal fees.

345. Claimant requests that the Tribunal order Canada to pay the arbitration costs for this NAFTA arbitration and award DIBC its legal fees and costs. Should the Tribunal so order, DIBC could provide a detailed submission on costs at that time.

346. In the alternative, should the Tribunal rule predominantly in favor of Canada on its jurisdictional defenses, DIBC requests this Tribunal to apportion arbitration costs equally between the parties and order that the parties are responsible for their own legal fees. DIBC submits that even if the Tribunal rules in favor of Canada at this stage, "taking into account the circumstances of the case,"³⁵⁷ Canada should not be entitled to costs and fees. DIBC respectfully

³⁵⁵ Letter from Mary Komarynsky (Transport Canada) to Dan Stamper (DIBC/CTC) dated July 19, 2010, Exhibit C-136; Ministerial Order: Construction or Alteration: International Bridges and Tunnels, dated October 18, 2010, Exhibit C-137.

³⁵⁶ UNCITRAL Arbitration Rules, Art. 40, 42, Exhibit CLA-3. Under NAFTA Art. 1135, the applicable arbitration rules govern the award of costs. *See* Exhibit CLA-12.

³⁵⁷ UNCITRAL Arbitration Rules, Art. 42(1), Exhibit CLA-3.

requests the opportunity to more fully brief this issue should the Tribunal consider granting Canada's requests with respect to costs.

VI. RELIEF REQUESTED

347. Claimant respectfully requests the Tribunal dismiss Canada's defenses with respect to jurisdiction and admissibility and award costs to Claimant and grant such further relief as is appropriate.

Dated: August 23, 2013

Respectfully submitted,

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