

**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**

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**DIBC'S REPLY TO THE SUBMISSIONS OF THE UNITED STATES AND  
MEXICO**

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Dated: March 3, 2014

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1. The Detroit International Bridge Company, on its own behalf and on behalf of its enterprise The Canadian Transit Company (collectively, “DIBC” or “Claimant”), respectfully submits this Reply to the interpretive submissions made by the Government of the United States of America (“United States”) dated February 14, 2014 (the “US Submission”), and the Government of Mexico (“Mexico”) dated February 14, 2014 (the “Mexico Submission”), under NAFTA Article 1128 and the directions of this Tribunal.

2. The issues raised by the United States and Mexico are largely addressed in DIBC’s Counter-Memorial on Jurisdiction and Admissibility (“DIBC Counter-Memorial”) and Rejoinder Memorial on Jurisdiction and Admissibility (“DIBC Rejoinder”).

3. Accordingly, this Reply will address only those few points not previously addressed by DIBC; specifically, any new points with respect to:

- a. The argument by the United States and Mexico that Article 1121 includes an affirmative obligation for claimants to dismiss all potentially overlapping domestic proceedings;<sup>1</sup>
- b. The argument by the United States and Mexico that Article 1121 applies not only to domestic cases challenging the same measures as the NAFTA arbitration, but also requires waiver of any domestic cases challenging different but possibly related measures;<sup>2</sup>
- c. The argument by the United States and Mexico that the exception in Article 1121 which allows declaratory or injunctive claims challenging the same measure applies only to proceedings in the physical courts of the

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<sup>1</sup> US Submission ¶ 5; Mexico Submission ¶ 18.

<sup>2</sup> US Submission ¶ 6; Mexico Submission ¶¶ 6-9.

respondent State, and not to claims under the law of the respondent State;<sup>3</sup>  
and

- d. The argument by the United States and Mexico that the continuing acts doctrine is barred by Articles 1116 and 1117.<sup>4</sup>

As set forth below, these arguments are unsupported by the plain text of the NAFTA and would not further its object or purpose.

4. In addition, the United States argues that NAFTA tribunals constituted under Chapter Eleven only have jurisdiction to consider alleged breaches of Section A of Chapter Eleven and certain subparts of Chapter Fifteen.<sup>5</sup> DIBC does not allege otherwise and does not allege in this arbitration any breaches other than breaches of Section A of Chapter Eleven.

5. DIBC has met the NAFTA jurisdictional requirements, and this Tribunal should proceed to the merits phase of this arbitration.

## **I. THE UNITED STATES' AND MEXICO'S ARGUMENTS WITH RESPECT TO THE ARTICLE 1121 WAIVER PROVISIONS ARE INCORRECT.**

### **A. Article 1121 Does Not Require A Claimant To Proactively Dismiss Claims That Have The Potential To Overlap With Claims In Arbitration.**

6. As set forth in DIBC's Counter-Memorial and Rejoinder, nothing in the text of Article 1121 of the NAFTA requires a NAFTA claimant to proactively dismiss all claims with any potential for overlap with the claims in arbitration. Nor does a claimant's failure to do so divest a tribunal of jurisdiction.<sup>6</sup>

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<sup>3</sup> US Submission ¶ 7; Mexico Submission ¶¶ 15-17.

<sup>4</sup> Mexico Submission ¶¶ 19-21; US Submission ¶ 3.

<sup>5</sup> US Submission ¶ 2.

<sup>6</sup> DIBC Counter-Memorial §§ I(B)(1), (3); DIBC Rejoinder §§ II(B)(1)-(3).

7. The United States' argument to the contrary relies solely on the *Commerce Group* decision.<sup>7</sup> DIBC responded to a similar argument by Canada at DIBC Rejoinder ¶¶ 54, 58.

8. Mexico does not argue that the text of the NAFTA directly requires claimants to affirmatively dismiss domestic proceedings, but instead argues that failure to do so “demonstrate[s] that the waiver has not actually been provided. . . .”<sup>8</sup> This argument is contrary to the plain language of Article 1121, which requires delivery only of an enforceable, written waiver that can be used in a domestic proceeding.<sup>9</sup> Mexico makes no effort to explain how the delivery of such a written document is rendered invalid merely because a NAFTA Party might have to make use of it in a domestic proceeding. Mexico's silence on this point further supports DIBC's argument that the purpose of Article 1121 is to provide respondent States with the ability to seek dismissal of potentially overlapping claims and avoid duplicative money judgments without forcing claimants to forgo rights in proceedings that might not actually overlap with the NAFTA proceeding out of fear of dismissal of their NAFTA claims.<sup>10</sup>

**B. Article 1121 Does Not Apply To Proceedings Challenging Measures Other Than Those That Are The Subject Of Arbitration.**

9. Article 1121 requires waiver of claimant's “right to initiate or continue . . . any proceedings with respect to the measure of the disputed Party that is alleged to be a breach[.]” The United States and Mexico argue that the phrase “with respect to” requires an expansive reading of Article 1121 that applies to not only “the measure of the disputed Party that is alleged to be a breach,” but also to *different* measures that bear some legal or factual relationship to the

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<sup>7</sup> US Submission ¶ 5 (citing *Commerce Group Corp et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (March 14, 2011), Exhibit RLA-6).

<sup>8</sup> Mexico Submission ¶ 18.

<sup>9</sup> DIBC Counter-Memorial §§ I(B)(1), (3); DIBC Rejoinder §§ II(B)(1)-(3).

<sup>10</sup> *Id.*

measure at issue.<sup>11</sup> This argument is incorrect for the reasons set forth in DIBC’s Counter-Memorial and Rejoinder.<sup>12</sup>

10. The United States and Mexico each rely upon the decision of the *Softwood Lumber* tribunal as additional support for this argument.<sup>13</sup> The *Softwood Lumber* decision is unpersuasive, however, because Article 1121 was not at issue.<sup>14</sup> The meaning of “with respect to” also did not impact the tribunal’s decision. That dispute centered on NAFTA Article 1901(3), which discharges any “obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.” The claimants challenged the application of the United States’ antidumping and countervailing duty laws, and argued this was permissible under Article 1901(3) because they did not challenge the laws themselves. The parties disputed whether “with respect to” modified “antidumping law or countervailing duty law” to include the laws’ application. The tribunal found that the meaning of “with respect to” did not determine how to interpret the “laws” covered by Article 1901(3); instead, the definition of “the Party’s antidumping law or countervailing duty law” itself determined whether application of those laws fell within the scope of Article 1901(3). The same logic applies here—“with respect to” does not determine how to interpret “the measure” being arbitrated; instead, it is the meaning of “measure” which is decisive. “Measure” means “any law, regulation, procedure, requirement or

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<sup>11</sup> Mexico also argues that claimants may not challenge the same measure in different fora even if the legal bases for the claims are different. Mexico Submission ¶¶ 4-5. DIBC does not (and has not) disputed that claimants may not bring any domestic claim challenging the same measure regardless of the legal grounds for the claim, subject to the exceptions provided in Article 1121.

<sup>12</sup> DIBC Counter-Memorial I(B)(4)(a); DIBC Rejoinder II(B)(4).

<sup>13</sup> US Submission ¶ 6; Mexico Submission ¶¶ 7-8.

<sup>14</sup> *Consolidated Lumber*, UNCITRAL, Decision on Preliminary Question ¶ 201 (June 6, 2006), Exhibit RLA-12 (interpreting the meaning of “with respect to” in Article 1901(3), which reads “Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law”).

practice.”<sup>15</sup> Therefore, it is only “any law, regulation, procedure, requirement or practice” “that is alleged to be a breach” which must be waived, and “with respect to” does not broaden the scope to include different measures that may be legally or factually related.

11. The United States also cites the portion of the *Commerce Group* decision finding that “the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are ‘separate and distinct’ and the measures can be ‘teased apart.’”<sup>16</sup> As previously explained by DIBC, the *Commerce Group* tribunal found that unless the different actions being challenged constituted a *single measure*, there could be no waiver violation.<sup>17</sup> *Commerce Group* thus supports DIBC’s argument that Article 1121 requires waiver only with respect to the *same measures* at issue in arbitration, and permits concurrent domestic proceedings relating to different measures.

### **C. The “Purpose” Of Article 1121 Cited By Mexico Does Not Support Its Interpretation Of The Waiver Provision.**

12. Mexico argues that the purpose of Article 1121 is to ensure that “a claimant cannot pursue monetary compensation in two different *fora* relating to the *same measures*.”<sup>18</sup> DIBC agrees with this statement, but disagrees with Mexico’s apparent conclusion that, to provide such protection, it is necessary for claimants to waive their rights to claims relating to *different* measures. By definition, a claim based on a *different* measure would not result in double recovery with respect to the “same measures.”

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<sup>15</sup> NAFTA, Art. 201(1), Exhibit CLA-21.

<sup>16</sup> US Submission ¶ 6.

<sup>17</sup> DIBC Rejoinder ¶ 71.

<sup>18</sup> Mexico Submission ¶ 11 (second emphasis added).

**D. An Exception In Article 1121 Allows Domestic Claims For Declaratory Or Injunctive Relief Brought Pursuant To The Disputing Party's Own Law.**

13. The United States and Mexico argue that the Article 1121 exception for domestic 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” is restricted to proceedings in the domestic courts of the respondent State.<sup>19</sup> This argument generally is incorrect for the reasons set forth in DIBC’s Counter-Memorial and Rejoinder.<sup>20</sup>

14. The United States argues that the NAFTA Parties “intended this exception to be limited to proceedings before an administrative tribunal or court *constituted* under the law of the disputing Party.”<sup>21</sup> The NAFTA does not use the word “constituted” or any similar phrasing, such as “formed” or “located in.” Indeed, the text of the NAFTA makes no reference to the *physical* jurisdiction or the respondent State, but refers only to the “law” applied. The NAFTA Parties could have included phrasing specifying the physical location of relevant proceedings, but did not do so.

15. The United States also argues that the negotiating history of the NAFTA illustrates the NAFTA Parties’ “intention to limit the waiver exception to administrative tribunals or courts *of the disputing Party*.”<sup>22</sup> The United States refers to a draft that provides an exception for “proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party.” Footnotes to the draft explained that a choice to refer to “administrative tribunal or court” or “under the domestic law” would be made during scrubbing but the “final drafting must make clear that . . . [the article]

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<sup>19</sup> US Submission ¶ 7; Mexico Submission ¶¶ 15-17.

<sup>20</sup> DIBC Counter-Memorial § I(B)(4)(b); DIBC Rejoinder § II(B)(6).

<sup>21</sup> US Submission ¶ 7 (emphasis added).

<sup>22</sup> US Submission ¶ 7 n.10 (emphasis in original).

addresses domestic law other than the NAFTA.”<sup>23</sup> The United States argues that because “administrative tribunal or court” and “of the disputing Party” were not in brackets, this evidences the NAFTA Parties’ intent to limit the exception to the courts of the disputing Party, presumably because a lack of brackets shows these were the only words intended to be included in the final draft. This ignores that the NAFTA Parties were debating whether to include reference to domestic law, ignores that the drafters included a footnote specifically identifying their intention to do so, and ignores the final text of Article 1121, which explicitly includes the previously bracketed reference to the law of the disputing Party (which the United States disregards).<sup>24</sup>

16. As a fallback, the United States argues that this Tribunal “should not presume that the NAFTA Parties intended to make important substantive changes during this *‘toilette finale,’*” or final cleaning.<sup>25</sup> This argument is meritless because the NAFTA Parties made the appropriate interpretation clear in the drafts: “final drafting must make clear that . . . [the article] addresses *domestic law other than the NAFTA.*”<sup>26</sup> This explanation – in particular the phrasing “other than the NAFTA” – makes clear that the drafters were concerned with substantive law, not physical location. In addition, the United States’ reading of Article 1121 is a clear departure from the plain language of the article itself. In contrast, DIBC’s reading is fully consistent with Article

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<sup>23</sup> DIBC Rejoinder ¶ 84.

<sup>24</sup> DIBC’s position on the negotiating history of Article 1121 can be found at DIBC Counter-Memorial ¶¶ 166-71 and DIBC Rejoinder ¶¶ 84-85.

<sup>25</sup> US Submission ¶ 7 n.10.

<sup>26</sup> DIBC Rejoinder ¶ 84 (emphasis added).

1121<sup>27</sup> and suggests a much lesser substantive change in the final cleaning than does the United States' interpretation.

17. The United States also asserts that the purpose of the waiver exception is to “allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration,” and that “It would not be consistent with this purpose to allow a claimant in a NAFTA proceeding to bring a claim for extraordinary relief in one NAFTA Party ‘under the law of’ a different NAFTA Party.”<sup>28</sup> The United States fails to explain how DIBC’s interpretation does not preserve investor’s rights. The purpose of protecting investor’s rights is better served by DIBC’s interpretation, which permits investors to seek relief, *irrespective of venue*, where the respondent fails to comply with *its own laws*.

18. Finally, Mexico argues only that, if a case is brought in the United States, it is *de facto* brought pursuant to United States law. This argument misapprehends the judicial system in the United States, which permits a case to be brought procedurally in the United States, but pursuant to the substantive law of another jurisdiction.<sup>29</sup> As explained in the DIBC’s Rejoinder Memorial, it is the *substantive law* of a proceeding that determines whether a case has been brought “under the law of the disputing Party.”<sup>30</sup>

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<sup>27</sup> Indeed, DIBC submits that the language of the NAFTA is unambiguous and that it therefore is inappropriate even to look at drafting history.

<sup>28</sup> US Submission ¶ 7.

<sup>29</sup> *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152, 154 (2d Cir. 1955), Exhibit CLA-78 (“In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law, but will follow its own rules of procedure”) (citations omitted); *City of Harper Woods Employees' Retirement System v. Olver*, 589 F.3d 1292 (D.C. Cir. 2009), Exhibit CLA-79 (applying English substantive law but U.S. procedural law).

<sup>30</sup> DIBC Rejoinder ¶ 119.

19. Mexico also uses its Article 1128 submission to dispute DIBC's characterization in its Rejoinder Memorial of Mexico's submission in *Feldman*.<sup>31</sup> In Canada's Reply Memorial, Canada argued that because Mexico claimed the Article 1121 exception applied to the courts of the respondent State in a submission in the *Loewen* proceeding, this was evidence that Canada's interpretation was correct.<sup>32</sup> On Rejoinder, DIBC argued that Mexico made a conflicting statement in *Feldman*, wherein Mexico stated that an investor "waives his right to initiate or continue court or administrative tribunal proceedings for damages *under domestic law*."<sup>33</sup> Mexico now states that "the content of that paragraph [of its *Feldman* submission] has no relation to the issue of whether a claimant may maintain a domestic law proceeding seeking injunction relief in a country other than that of the respondent nation."<sup>34</sup>

20. Mexico's concern is misplaced. DIBC cited Mexico's *Feldman* submission as evidence that Mexico did not take a definitive stance on the issue in that proceeding, and therefore has not consistently advocated a position on the Article 1121 exception, regardless of whether it was squarely presented by *Feldman*. DIBC's assessment of Mexico's position appears to be correct. Indeed, even here, Mexico does not join in most arguments set forth by Canada and the United States, but instead asserts only the single argument regarding United States law discussed above.

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<sup>31</sup> *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Respondent's Counter-Memorial on Preliminary Questions (Sept. 8, 2000), Exhibit CLA-34.

<sup>32</sup> Canada Reply ¶ 91.

<sup>33</sup> DIBC Rejoinder ¶ 83.

<sup>34</sup> Mexico Submission ¶ 17.

## II. THE UNITED STATES' AND MEXICO'S ARGUMENTS WITH RESPECT TO THE LIMITATIONS PERIODS IN ARTICLES 1116 AND 1117 ARE MISPLACED.

### A. The NAFTA Recognizes The Doctrine Of "Continuing Acts."

21. The United States and Mexico argue that NAFTA Articles 1116 and 1117 displaced the well-recognized doctrine of continuing acts, which extends limitations periods until such time as a respondent State ceases its harmful conduct.<sup>35</sup> DIBC has previously explained in its submissions why this is incorrect, and has explained why the generally accepted doctrine of continuing acts is fully consistent with the text of the NAFTA.<sup>36</sup> DIBC also explained why the doctrine of composite acts is consistent with the text of the NAFTA, which the United States and Mexico do not dispute.<sup>37</sup>

22. The United States argues that the phrase "first acquired" in Articles 1116 and 1117<sup>38</sup> means that knowledge of breach and loss occurs "at a particular moment and time" and cannot be acquired on multiple dates or on a recurring basis.<sup>39</sup> This position is clearly incorrect because knowledge of breach can occur at a different time than knowledge of loss, so Articles

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<sup>35</sup> Mexico Submission ¶¶ 19-21; US Submission ¶ 3. The United States refers to its submission in the *Merrill & Ring* case as representing its position on continuing acts (the "US *Merrill & Ring* Submission"), and DIBC will assume that submission has been incorporated by reference. DIBC has specifically discussed many of the arguments raised in the US *Merrill & Ring* Submission in its prior briefing and will not restate its position with respect to those arguments here. US *Merrill & Ring* Submission ¶¶ 4, 9; DIBC Counter-Memorial ¶ 239; DIBC Rejoinder ¶ 172-73 (agreeing that a claimant need not know the entire extent of their loss before the time bar begins to run but noting that the loss must be actual and concrete before the knowledge required by Articles 1116 and 1117 can be acquired). US *Merrill & Ring* Submission ¶¶ 6-7, 16; DIBC Counter-Memorial ¶ 265; DIBC Rejoinder ¶ 156 (explaining that the *Grand River* decision does not bar the continuing acts doctrine or have any relevance to continuing acts because that tribunal did not discuss continuing acts and declined to address whether multiple acts could give rise to multiple limitations periods because the claimant did not plead the issue). US *Merrill & Ring* Submission ¶ 14; DIBC Counter-Memorial ¶ 266; DIBC Rejoinder ¶¶ 146-51 (Articles 1116 and 1117 did not create a *lex specialis* that displaced customary international law).

<sup>36</sup> DIBC Counter-Memorial §§ II(C)(1)(b), (C)(3); DIBC Rejoinder §§ III(B)(2), (5).

<sup>37</sup> DIBC Counter-Memorial § II(C)(1)(c); DIBC Rejoinder § III(B)(1).

<sup>38</sup> "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." NAFTA, Art. 1116(2). Article 1117 includes substantially the same provision.

<sup>39</sup> US *Merrill & Ring* Submission ¶ 5.

1116 and 1117 plainly contemplate knowledge being acquired on “multiple dates.” Second, the NAFTA’s inclusion of the word “date” does not preclude continuing acts as a logical matter. For a one-time act, the claimant will acquire knowledge on a specific date. For a continuing act, the claimant does not acquire new knowledge of a past breach each day, but instead acquires new knowledge each date that its rights *continue to be breached*. The *UPS* tribunal recognized this distinction and held that “continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly.”<sup>40</sup> The continuing acts doctrine has similarly been applied to federal statutes of limitation in the United States which otherwise begin to run on a particular “date,” which is further evidence that this language does not preclude continuing acts.<sup>41</sup>

23. The United States argues that *UPS* is wrongly decided because the decision’s reasoning allegedly would transform the “first acquired” language of the NAFTA into “last acquired,” and would allow the limitations period to run until the state’s final transgression instead of the first.<sup>42</sup> This argument proves too much, and suggests that the limitations period should expire even where a respondent State has not completed its breach and therefore *no time has passed* between the breach and the arbitral claim.<sup>43</sup> The *UPS* tribunal implicitly recognized

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<sup>40</sup> DIBC Counter-Memorial ¶ 253.

<sup>41</sup> *Postow v. Oriental Bldg. Ass'n*, 390 F. Supp. 1130, 1137 n.9, 1139 (D.D.C. 1975), Exhibit CLA-80 (“Defendant’s nondisclosure, therefore, constituted a continuing violation . . . [and] is not barred by Section 130(e) of the [Consumer Credit Protection] Act, 15 U.S.C. § 1640(e),” which provided that “Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation”).

<sup>42</sup> US *Merrill & Ring* Submission ¶ 10.

<sup>43</sup> DIBC Rejoinder ¶¶ 174-75. The claimant in *UPS* explained 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.” *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits ¶ 26 (May 24, 2007), Exhibit CLA-13. This argument is particularly salient in this case given that the respondent notified DIBC of its willingness to cease breaching DIBC’s rights after the time bar allegedly began.

that such a result is inconsistent with the purpose of the NAFTA limitations period, and correctly held that as long as the respondent State continues to breach its legal obligations, a claim remains timely.<sup>44</sup>

24. The United States next argues that its interpretation of the NAFTA limitations periods is consistent with “ensuring the availability of sufficient and reliable evidence” and providing “legal certainty” with respect to “long-forgotten claims.”<sup>45</sup> The United States is incorrect. Where an act is continuing in nature, new evidence is likely to be created continuously, not destroyed. Nor is a continuing act likely to be “long-forgotten” while still in existence.<sup>46</sup>

25. The United States and Mexico dispute whether the *Feldman* decision supports the doctrine of continuing acts.<sup>47</sup> The United States argues that the *Feldman* tribunal did not discuss the “first acquired” language and thus the decision is inapplicable.<sup>48</sup> Mexico similarly argues

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Letter from Bruce McCuaig (Ontario Ministry of Transportation) to Dan Stamper (DIBC/CTC) (April 23, 2009), Exhibit C-160 (indicating the Ministry’s commitment to work with municipal partners on improvements to the road connections to the Ambassador Bridge).

<sup>44</sup> *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits ¶ 28 (May 24, 2007), Exhibit CLA-13.

<sup>45</sup> US *Merrill & Ring* Submission ¶ 16 and n.21 (citation omitted).

<sup>46</sup> The United States defines continuing acts as “subsequent transgressions by the state arising from a continuing course of conduct.” US *Merrill & Ring* Submission ¶ 17. The doctrine of continuing acts *also* encompasses a single transgression of the state that remains in effect and continues to do harm, such as “the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State,” a key aspect of the claims in this arbitration. DIBC Counter-Memorial ¶ 249 (citation omitted).

<sup>47</sup> Mexico argues that the basis for the investor’s claim in *Feldman* was not a continuing course of conduct, but instead discrete actions which all occurred within the limitations period, and thus the continuing acts doctrine did not apply. Mexico Submission ¶¶ 19-20. This is squarely contradicted by the jurisdictional decision of the *Feldman* tribunal, which held that the “measures complained of by the Claimant practically extend over the whole period starting in the years 1990 or 1991” (five years before the time bar date), as well as Mexico’s own submissions in that case, which asserted that Mexico was raising a limitations defense because the claimant alleged breaches which occurred before the time bar. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 43 (Dec. 6, 2000), Exhibit CLA-28; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Respondent’s Counter-Memorial on Preliminary Questions ¶¶ 194-95 (Sept. 8, 2000), Exhibit CLA-34.

<sup>48</sup> US *Merrill & Ring* Submission ¶ 13.

that *Feldman* did not address continuing breaches.<sup>49</sup> These arguments miss the point of DIBC’s argument. Regardless of the *Feldman* tribunal’s parsing of the NAFTA, it made the considered decision to permit a claim to go forward despite the fact that the conduct in issue arguably predated the time bar.<sup>50</sup>

26. The United States also misreads the *Feldman* tribunal’s analysis of continuing acts in the context of the date of the NAFTA’s entry into force.<sup>51</sup> The *Feldman* tribunal decided that “if there had been a ‘permanent course of action’ which began prior to the NAFTA’s entry into force, the tribunal would have retained jurisdiction over the ‘post-[NAFTA entry into force] part’ of the alleged activity.”<sup>52</sup> The United States argues that this analysis is inapplicable because it arose in the context of entry into force and not the limitations period. There is no evidence in *Feldman* or elsewhere, however, that similar reasoning should not apply—*i.e.*, if a permanent course of action began prior to the time bar date but continued thereafter, the tribunal has jurisdiction over the post-time bar date part of the alleged activity. This is exactly what the *UPS* tribunal held.<sup>53</sup>

27. Mexico argues that the continuing acts doctrine violates the “principle of effectiveness” because it fails to give meaning to the term “first acquired” in Articles 1116 and 1117 and eliminates the operation of the three-year limitation period.<sup>54</sup> This is incorrect, as the *UPS* tribunal explained: “the limitation period does have a particular application to a continuing

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<sup>49</sup> Mexico Submission ¶ 20.

<sup>50</sup> DIBC Rejoinder ¶ 159.

<sup>51</sup> US *Merrill & Ring* Submission ¶ 12.

<sup>52</sup> *Id.*

<sup>53</sup> *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits ¶¶ 24, 28, 30 (May 24, 2007), Exhibit CLA-13.

<sup>54</sup> Mexico Submission ¶ 21.

course of conduct . . . 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.*”<sup>55</sup>

Articles 1116 and 1117 thus limit *damages* to those suffered within the applicable three-year period and thereafter, even if the measure itself originated earlier but continued past the time bar date. This interpretation gives full effectiveness to the text of the limitations provisions.

**B. There Is Not A “Subsequent Agreement” Between The NAFTA Parties That Is Authoritative Regarding The Interpretation Of The Limitations Provisions.**

28. Mexico argues that the three NAFTA Parties have agreed that the term “first acquired” supersedes the doctrine of continuing acts, and this “unanimity of opinion” constitutes a “subsequent agreement” and/or a “practice” regarding interpretation of the NAFTA under the Vienna Convention on the Law of Treaties (“VCLT”).<sup>56</sup> Mexico argues that pursuant to the VCLT, these alleged “shared views should be considered authoritative on a point of interpretation,” and this Tribunal “should be loathe to diverge from such shared interpretations.”<sup>57</sup>

29. Even if legal arguments in miscellaneous briefs from unrelated cases qualified as a subsequent agreement on a matter of interpretation, that interpretation would still not be authoritative under the VCLT. At most, the VCLT provides that such subsequent agreements or practices “shall be taken into account, together with the context.”<sup>58</sup>

30. However, DIBC has already explained that Mexico’s argument that individual state submissions can qualify as a “subsequent agreement” is wrong because they are not jointly

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<sup>55</sup> DIBC Counter-Memorial ¶ 255 (citation omitted) (emphasis added).

<sup>56</sup> Mexico Submission ¶¶ 22-23.

<sup>57</sup> *Id.*

<sup>58</sup> Vienna Convention of the Law of Treaties (1969), Art. 31(3), Exhibit CLA-25.

issued interpretations which express the shared intent of the NAFTA Parties.<sup>59</sup> This argument has been soundly rejected by previous NAFTA tribunals.<sup>60</sup>

Dated: March 3, 2014

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<sup>59</sup> DIBC Counter-Memorial ¶¶ 309-11; DIBC Rejoinder ¶¶ 161-65.

<sup>60</sup> DIBC Rejoinder ¶ 164.