

**ARBITRATION UNDER  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE 2010 UNCITRAL ARBITRATION RULES**

Between

**DETROIT INTERNATIONAL BRIDGE COMPANY**

(on its own behalf and on behalf of its enterprise The Canadian Transit Company)

*Claimant*

and

**THE GOVERNMENT OF CANADA**

*Respondent*

(and together with the Claimant, the “*disputing parties*”)

**PCA Case No. 2012-25**

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**AWARD ON JURISDICTION**

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**Arbitral Tribunal**

Mr. Yves Derains (Chairman)

The Hon. Michael Chertoff

Mr. Vaughan Lowe, Q.C

### Table of Abbreviations

BSTA	Bridge to Strengthen Trade Act
CTC	Canadian Transit Company
DDC	United States District Court for the District of Columbia
DIBC	Detroit International Bridge Company
DRIC	Detroit River International Crossing
DRIC EA	DRIC Environmental Assessment
FCC	Federal Court of Canada
FHWA	United States Federal Highway Administration
IBTA	International Bridges and Tunnels Act
IJC	International Joint Commission
ILC	International Law Commission
LGWEM	Let's Get Windsor-Essex Moving Strategy
MDOT	Michigan Department of Transportation
MTO	Ontario Ministry of Transportation
NAFTA	North American Free Trade Agreement
NEPA	National Environmental Policy Act
NIT	New International Trade Crossing
ONSC	Ontario Superior Court
The Parkway	The Windsor-Essex Parkway
TC	Transport Canada
VCLT	Vienna Convention on the Law of Treaties

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### ANNEX I – Separate Jurisdictional Opinion by The Hon. Michael Chertoff

## I. THE PARTIES

### A. CLAIMANT

1. The Claimant, Detroit International Bridge (“DIBC or Claimant”)<sup>1</sup>, is a United States company, duly incorporated and existing under the laws of the State of Michigan. DIBC’s principal place of business is 12225 Stephens Road, Warren, Michigan 48089, United States of America.
2. DIBC owns and controls the stock of The Canadian Transit Company (“CTC”), a Canadian company established by a Special Act of Parliament. CTC’s principal place of business is at 4285 Industrial Drive, Windsor, Ontario, N9C 3R9, Canada.
3. DIBC and CTC, respectively, own the United States and Canadian sides of the Ambassador Bridge. They operate the Ambassador Bridge in cooperation with each other pursuant to a joint cooperation agreement.
4. This arbitration is brought by DIBC on its own behalf and on behalf of CTC.<sup>2</sup>
5. Claimant is represented in this arbitration by:

Mr. Jonathan D. Schiller  
BOIES, SCHILLER & FLEXNER LLP  
575 Lexington Avenue  
7<sup>th</sup> Floor  
New York, NY 10022  
United States of America  
Tel: +1 212 446 2300  
Fax: +1 212 446 2350  
E-mail: [jschiller@bsflp.com](mailto:jschiller@bsflp.com)

and

Mr. William A. Isaacson  
Mr. Hamish P.M. Hume  
Ms. Heather King  
Ms. Amy L. Neuhardt

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<sup>1</sup> Claimant is the successor in interest to the entities that received the statutory rights to construct and own the Ambassador Bridge. For the sake of simplicity, this award refers to the Claimant and its predecessors-in-interest collectively as “Claimant” or “DIBC”.

<sup>2</sup> DIBC’s Statement of Claim, ¶ 1.

Mr. Ross P. McSweeney  
BOIES, SCHILLER & FLEXNER LLP  
5301 Wisconsin Avenue, NW  
8<sup>th</sup> Floor  
Washington, DC 20015  
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[rmcsweeney@bsfllp.com](mailto:rmcsweeney@bsfllp.com)

B. RESPONDENT

6. The Respondent is the Government of Canada (hereinafter “Canada”, “Respondent” or “disputing Party”), which is a State Party to the North American Free Trade Agreement (“NAFTA”).
7. Respondent is represented in this arbitration by:

Ms. Sylvie Tabet  
Mr. Mark A. Luz  
Mr. Adam Douglas  
Mr. Reuben East  
Ms. Heather Squires  
Trade Law Bureau (JLT)  
Foreign Affairs and International Trade Canada  
Government of Canada  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
E-mail: [mark.luz@international.gc.ca](mailto:mark.luz@international.gc.ca)  
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[reuben.east@international.gc.ca](mailto:reuben.east@international.gc.ca)  
[heather.squires@international.gc.ca](mailto:heather.squires@international.gc.ca)

8. In accordance with the practice in NAFTA Article 1139, the (capitalized) terms “Party” and “Parties” refer to the States Parties to NAFTA. The term “disputing parties” refers to the

disputing investor (i.e., the Claimant) and the disputing Party (i.e., the Respondent) in this case.

## **II. THE ARBITRAL TRIBUNAL**

9. Co-Arbitrator appointed by Claimant:

The Hon. Michael Chertoff  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401  
U.S.A.  
Tel.: 00 1 202 662 5060  
E-mail: [mchertoff@cov.com](mailto:mchertoff@cov.com)

10. Co-Arbitrator appointed by Respondent:

Mr. Vaughan Lowe, Q.C.  
Essex Court Chambers  
24 Lincoln's Inn Fields  
London WC2A 3EG  
United Kingdom  
Tel.: 00 44 20 7813 8000  
E-mail: [vlowe@essexcourt.net](mailto:vlowe@essexcourt.net)

11. Presiding Arbitrator jointly appointed by the disputing parties:

Mr. Yves Derains  
Derains & Gharavi  
25, rue Balzac  
75008 – Paris – France  
Tel.: 00 33 (0) 1 40 555 972  
E-mail: [yderains@derainsgharavi.com](mailto:yderains@derainsgharavi.com)

## **III. THE APPLICABLE LAW**

12. Pursuant to paragraph 11 of Procedural Order No. 1, the governing law for this arbitration is the NAFTA and applicable rules of international law.

13. The applicable arbitration rules are the 2010 UNCITRAL Arbitration Rules, pursuant to the disputing parties' agreement, except to the extent that they are modified by Section B of Chapter 11 as per NAFTA Article 1120(2).

#### **IV. FACTUAL BACKGROUND**

14. This arbitration arises from a dispute between DIBC and Canada related to DIBC's ongoing investment in the Ambassador Bridge, a privately owned international toll bridge that connects Detroit, Michigan and Windsor, Ontario.
15. Since the Ambassador Bridge opened for service on November 11, 1929, Claimant has owned the Bridge, including the associated toll-collection rights. Claimant directly owns the relevant rights with respect to the U.S. side of the bridge, and Claimant's wholly owned subsidiary CTC owns the relevant rights with respect to the Canadian side of the bridge.
16. The Ambassador Bridge includes a bridge span, customs and toll plazas, approach roads, duty-free shops, and other associated facilities on both sides of the border. The Ambassador Bridge is the busiest crossing between the United States and Canada, facilitating approximately one quarter of the USD 750 billion in trade between the two countries.<sup>3</sup>
17. The U.S. side of the Ambassador Bridge is connected to I-75 and I-96, two of the three main interstates roads near the Ambassador Bridge, and indirectly connected to the third main interstate road, I-94. On the Canadian side the Huron Church Road is the primary access route to the Ambassador Bridge. In the 1950's, urban planners ended Highway 401 – today one of the busiest highways in North America and a vital link in Canada's transportation infrastructure – outside the city limits of Windsor. There is today no direct highway connection between the Ambassador Bridge and Highway 401. Instead, on the Canadian side traffic must exit Highway 401 and traverse local Windsor roads, including the Huron Church Road.
18. From 2001 to 2005, governments got together in a Bi-National Partnership (the "Partnership") - i.e., The U.S. Federal Highway Administration ("FHWA"), Transport Canada ("TC") which is a federal ministry in charge of promoting an efficient and environmentally responsible transportation system in Canada, the Michigan Department of Transportation ("MDOT"), and

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<sup>3</sup> Exhibit C-123.

the Ontario Ministry of Transportation (“MTO”)- with the purpose of improving the safe and efficient movement of people, goods and services across the U.S./Canadian border at the Detroit and St. Clair Rivers, including improved connections to national, provincial and regional transportation systems, such as I-75 and Highway 401.<sup>4</sup> The Partnership was to evaluate and identify long-term trans-border transportation infrastructure (the Detroit River International Crossing or ‘DRIC’) improvements by means of an integrated planning and environmental study process which should result in a single product (“end-to-end solution”), which should meet the requirements of all members of the Partnership (“DRIC process”, “DRIC EA” or “DRIC study”).<sup>5</sup>

19. On September 25, 2002, the Governments of Canada and Ontario signed a Memorandum of Understanding (the “2002 MOU”) whereby they “*jointly commit[ted] up to three hundred million dollars (\$300M) investment in the Windsor Gateway over five years, commencing in 2002/03. [...] This investment is[w]as being made in recognition that improvements are[were] necessary to the existing border crossings and their approaches in advance of the completion of the Canada-United States-Ontario-Michigan Bi-National Partnership process currently underway.*”<sup>6</sup> According to the 2002 MOU, a Canada-Ontario Joint Management Committee should be appointed to identify potential transportation projects, consult with the public and report back on a short and medium term action plan for investment in transportation infrastructure.<sup>7</sup> The action plan recommended by such committee should be coordinated with the long term strategies being developed by the DRIC study.<sup>8</sup>
20. On December 20, 2002, the Governments of Canada and Ontario released the Joint Management Committee’s Windsor Gateway Action Plan (the “Action Plan”) to relieve congestion and improve traffic flow at the existing border crossings. The Action Plan included among its objectives, *inter alia*, “*work with the Canadian Transit Company (CTC)/Ambassador Bridge, in collaboration with the City of Windsor and the local*

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<sup>4</sup> Exhibit C-35, p. 3.

<sup>5</sup> Exhibit C-35, p. 2.

<sup>6</sup> Exhibit C-126, ¶ 1.

<sup>7</sup> Exhibit C-126, ¶4.

<sup>8</sup> Exhibit C-126, ¶ 17.



*community, to pursue the development of a dedicated truck route from Ojibway Parkway at EC Row Expressway to the Ambassador Bridge.”*<sup>9</sup>

21. On May 27, 2003, the Governments of Canada and Ontario published a press release announcing the steps in the implementation of a nine-point “*Windsor Gateway Action Plan*”, also known as the Nine Point Plan, based in substantial part on the recommendations of the Canada-Ontario Joint Management Committee. In that press release, the Governments of Canada and Ontario announced that they had agreed, *inter alia*, to “[Point N° 4] *work together with proponents, the Canadian Transit Company (Ambassador Bridge) and the Detroit River Tunnel Partnership in their efforts to build connections to the border crossings, concurrent with the Bi-National Planning Process [DRIC study]*”.<sup>10</sup>
22. On March 11, 2004, the Governments of Canada, Ontario and the City of Windsor announced in a press release new measures that were part of the joint \$300 million federal-provincial investment to help improve the Windsor Gateway, called the “*Let’s Get Windsor-Essex Moving strategy*” (“LGWEM”), which replaced the Nine-Point Windsor Gateway Action Plan.<sup>11</sup> The LGWEM strategy included, *inter alia*, improvements to the Windsor-Detroit Tunnel Plaza and to the Industrial Road/Huron Church Road intersection to support the development of a pre-processing facility on Industrial Road.<sup>12</sup>
23. In May 2004, the DRIC Environmental Assessment Terms of Reference (“DRIC EA Terms of Reference”) were released, providing a framework to guide the preparation of the DRIC EA, because the bi-national aspect of the border transportation improvements would require several environmental assessment studies to be completed and submitted for approvals to the various Canadian and U.S. authorities. The DRIC EA Terms of Reference established seven key factors to be considered in the evaluation of the bridges, bridges options, customs plaza options and highway options: i.e., (i) changes in air quality; (ii) protection of community/neighborhood characteristics; (iii) consistency with existing and planned land use;

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<sup>9</sup> Exhibit C-30, p. 15, item 2(a).

<sup>10</sup> Exhibit C-32, p. 1.

<sup>11</sup> Exhibit R-34.

<sup>12</sup> Exhibit R-34, p. 4-5.

(iv) protection of cultural resources; (v) protection of the natural environment; (vi) improvement of regional mobility; and (vii) constructability and minimization of cost.<sup>13</sup>

24. In June 2005, a Public Information Open House was held to announce the 15 initial crossing alternatives (*i.e.*, X1 to X15) that the DRIC study would analyze. The option called X12 referred to an assessment of whether or not the option of a twinned Ambassador Bridge, consisting of two spans together with a larger customs plaza and highway connections, was a feasible alternative.<sup>14</sup> For each crossing alternative there were multiple different connecting route alternatives for linking the new or expanded crossing to Highway 401.<sup>15</sup>
25. On November 14, 2005, a press release announced that the governments of Canada, United States, Ontario and Michigan had made significant progress towards developing a new river crossing at the Detroit-Windsor Gateway. The press release announced, *inter alia*, that “*twinning the existing Ambassador Bridge was determined to not be practical based on the community impacts of the proposed plaza and access road in Canada.*”<sup>16</sup>
26. On November 15, 2005, DIBC wrote to MTO and MDOT stating that:

*“We have participated with the Detroit River International Crossing Study (DRIC) throughout the past several years. During this time, we have raised numerous questions regarding the methodology and the results that we find at times absurd and not based on historic data or current border realities. [...]*

*[...] DRIC has lost its focus and has become purely a political exercise to achieve a pre-determined result. Therefore, with true frustration and regret, we are withdrawing from further participation in the DRIC process and ask that you disassociate us from that process. We have commissioned our own engineers and consultants and will continue independently of the DRIC to forward our plans to improve the Windsor/Detroit corridor”*<sup>17</sup>

27. On November 29, 30 and December 1, 2005, a Second Public Information Open House was held for discussions regarding the DRIC EA, where the set of alternatives was narrowed to an “area of continued analyses”. At page 35 of the presentation made on that occasion, the recommendations of the Partnership with respect to option X12 were the following:

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<sup>13</sup> Exhibit R-50.

<sup>14</sup> Exhibit C-129; R-47, p. 6-11.

<sup>15</sup> Exhibit C-129, p. 12.

<sup>16</sup> Exhibit R-13, pp.1-2; See also Exhibit R-54, pp. 1-2.

<sup>17</sup> Exhibit R-35.

*“The disadvantages of the Crossing X12 alternative outweighed the advantages. The U.S. plaza of the Ambassador Bridge with the improved connections to the interstate freeway system will be carried forward within the Area for Continued Analysis as a possible U.S. plaza site for a new crossing.”<sup>18</sup>*

28. On the same page of the slide presentation, the following advantages and disadvantages were set forth with respect to option X12:

Advantages:

*“Relatively low negative impacts on the U.S. side in terms of benefits provided to mobility. The alternative provides improved regional mobility for the border transportation network on both sides of the river”*

Disadvantages:

*“Relatively high negative impacts on the Canadian side [...] High community impacts to the residential area impacted by the expansion of the Canadian bridges plaza and the expansion of Huron Church Road to a freeway facility, and the potential for disruption to border traffic during construction.”<sup>19</sup>*

29. In early 2006, parallel to the DRIC process, CTC submitted a project description to regulatory authorities in Canada and the United States based on the addition of a second span to the existing Ambassador Bridge (“The New Span”).<sup>20</sup>
30. On February 1, 2007, the International Bridges and Tunnels Act (“IBTA”) was enacted in Canada. It entered into force on April 25, 2007.<sup>21</sup> Article 6 of the IBTA determines that “no person shall construct or alter an international bridge or tunnel without the approval of the Governor in Council”.<sup>22</sup>
31. On May 24, 2007, in an article published in the Daily Commercial News, MTO declared that it had no plans to provide a direct connection to the Ambassador Bridge.<sup>23</sup>

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<sup>18</sup> Exhibit C-130, p. 35.

<sup>19</sup> Exhibit C-130, p. 35.

<sup>20</sup> Canada’s Brief Statement on Jurisdiction, ¶ 46.

<sup>21</sup> Exhibit C-94, p. 1 and 23.

<sup>22</sup> Exhibit C-94, p. 2.

<sup>23</sup> Exhibit R-154.

32. On July 30, 2007, Canada wrote to DIBC's legal counsel Mr. Patrick Moran stating that the "*Crown's view is that the International Bridges and Tunnels Act applies [sc., to] Centra, Inc. and the related companies [i.e. CTC and DIBC] in accordance with its terms [...].*"<sup>24</sup>
33. On August 24, 2007, Mr. Patrick Moran replied to Canada's letter mentioned in the previous paragraph maintaining its disagreement with Canada on the IBTA and other issues addressed in such letter.<sup>25</sup>
34. According to the Witness Statement of Ms. Helena Borges, an Associate Deputy Minister of Transport, Infrastructure and Communities at Transport Canada, Ms. Borges "[...] *along with other Transport Canada officials held several meetings with DIBC representatives in April, July and October 2007, at DIBC's request. At those meetings, ... DIBC demanded that Canada build a complete highway connection between Highway 401 and the Ambassador Bridge, but Canada did not agree to this demand.[...]*"
35. On October 3, 2007, the Canadian Minister of Transport, Mr. Lawrence Cannon, wrote to the president of CTC, Mr. Dan Stamper, where he stated *inter alia* that:
- "[...] Contrary to what is stated in your letter, the [\$300million] funding was not solely targeted to improve Huron Church Road or to extend Highway 401 to the Ambassador Bridge. Rather, projects are being selected in cooperation with local governments, with a focus on improving road safety and traffic flow [...].*
- [...] further to your request earlier this year, I would be pleased to meet with the Ambassador Bridge representatives at the earliest convenient opportunity to discuss these and other issues that, I understand, have already involved various discussions with Transport Canada officials. [...]"*<sup>26</sup>
36. On October 30, 2007, Transport Canada wrote to CTC regarding CTC's "*major works close to the existing Ambassador Bridge*". In the same letter, Transport Canada informed CTC that:

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<sup>24</sup> Exhibit R-39.

<sup>25</sup> Exhibit R-111.

<sup>26</sup> Exhibit C-110, p. 3.

*IBTA or the NWPA in relation to the work identified above, Transport Canada would like to ensure that the work has not inadvertently been undertaken without the necessary regulatory approval [...]*<sup>27</sup>

37. On the same day, CTC respondent to Transport Canada stating, *inter alia*, that: “[...] *the work that is now complete on the Windsor plaza was properly undertaken in accordance with our agreements and with the proper permits.*”

38. On November 23, 2007, Canada wrote back to CTC stating, *inter alia*, that:

*“[...] I am aware that the Canadian Transit Company (CTC) has initiated an environmental assessment process with regulatory authorities in Canada and the United States to construct a new span adjacent to the existing Ambassador Bridge. [...] I wish to confirm that Transport Canada is committed to and will continue to fulfil all of its legal responsibilities under the various legislation it is charged with administering in respect of your project, including the International Bridges and Tunnels Act, the NWPA and CEAA, in a diligent, objective, reasonable and effective manner.”*<sup>28</sup>

39. On December 4, 2007, Claimant submitted an environmental impact statement to Transport Canada for the Ambassador Bridge New Span and an updated environmental impact statement in April 2011.<sup>29</sup> The environmental assessment is ongoing.

40. On May 1, 2008, the DRIC study team announced The Windsor-Essex Parkway (the “Parkway”), as “*the technically and environmentally preferred alternative for the access road extending Highway 401 to a new [at the time undefined] inspection plaza and river crossing in West Windsor*”.<sup>30</sup>

41. In June 2008, the preferred location for the international bridge crossing and the Canadian plaza were announced. At the occasion of the announcement, the DRIC study team presented a broad review of the study, as well as the analysis and evaluation process leading to the selection of the Parkway, Plaza B1, and Crossing X-10B (the site of the planned NITC/DRIC) as the technically and environmentally preferred alternative.<sup>31</sup>

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<sup>27</sup> Exhibit R-122.

<sup>28</sup> Exhibit R-123.

<sup>29</sup> Exhibit C-89.

<sup>30</sup> Exhibit C-125.

<sup>31</sup> Exhibit R-10, pp. 1-3 and 1-4.

42. By letter of April 23, 2009, the Deputy Ministry of Transportation of Ontario wrote to DIBC informing it that:

*“As we discussed at our meeting of January 16, 2009 and reiterated in Minister Bradley’s letter to you of January 30, 2009, the Ministry of Transportation recognizes the important role played by the Ambassador Bridge as part of a larger cross border transportation network. We see that role continuing into the future. Given that important role, the Ministry indicated its willingness to explore, with our municipal partners, what improvements could be made to roadways leading to the border facilitating the efficient movement of people and goods across the Detroit River. [...]*

*As agreed, ministry staff sought out the City of Windsor’s willingness to explore possible improvements to Huron Church Road north of the EC Row Expressway. Ministry staff was advised the City of Windsor was not prepared to participate. The ministry commits to approaching the City of Windsor again, in the future, and should their position change we will advise you accordingly.”<sup>32</sup>*

43. On May 14, 2009, DIBC challenged the DRIC EA in the United States under the National Environmental Policy Act. DIBC’s claims were dismissed by the United States District Court for the Eastern District of Michigan on April 5, 2012.<sup>33</sup>
44. The DRIC EA<sup>34</sup> was approved by Ontario and Canada in August 2009 and December 2009<sup>35</sup>, respectively.
45. On December 31, 2009, CTC filed an application at the Federal Court of Canada for judicial review of the DRIC EA.<sup>36</sup>
46. On January 25, 2010, DIBC filed its First NAFTA Notice of Intent to Arbitrate against Canada (“First NAFTA NOI”).<sup>37</sup>
47. On February 24, 2010, CTC filed a Statement of Claim in the Ontario Superior Court of Justice against the Corporation of the City of Windsor, Edgar Francis et al (“Windsor

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<sup>32</sup> Exhibit C-160.

<sup>33</sup> Exhibit R-2.

<sup>34</sup> DRIC EA Report, Exhibit R-47.

<sup>35</sup> Exhibit C-93.

<sup>36</sup> Exhibit R-14.

<sup>37</sup> Exhibit R-44.

Litigation”).<sup>38</sup> In its Statement of Claim in the Windsor Litigation, CTC requested the following relief:

*“(a) a declaration that By-law Nos. 22-2009, 23-009, 24-2009, 27-2009, 28-2009, 29-2009, and 30-2009 (“By-laws”) of the City of Windsor are unlawful and invalid;*

*(b) a declaration against all of the Defendants that the By-laws were enacted in bad faith and for an unlawful purpose;*

*(c) such interim or interlocutory relief as the Plaintiff may request and this Honourable Court may deem just to ensure that justice is done and rights are preserved pending the final outcome of this litigation;*

*(d) as against the personal Defendants, jointly and severally: (i) damages in the amount of \$125,000 for: (A) misfeasance in public office; (B) unlawful interference with economic interests; and (C) conspiracy;*

*(d) pre-judgment and post-judgment interest on the above amounts calculated in accordance with the Courts of Justice Act, R.S.O. 1990, c.C.43, as amended;*

*(f) costs of this action on a substantial indemnity basis; and*

*(g) such further and other relief as may be requested and this Honourable Court may deem just.”*

48. On March 22, 2010, both DIBC and CTC commenced litigation in the United States District Court for the District of Columbia (“DDC”) by filing a complaint (the “Washington Complaint”)<sup>39</sup> against Canada, the United States, and various US government agencies (the “Washington Litigation”). In the Washington Complaint, DIBC and CTC requested the following relief:

*“(1) A declaratory judgment against the FHWA Defendants and Canada under 28 U.S.C §§2201-2202 that the construction and operation of the planned DRIC Bridge across the Detroit River would violate the obligations of Canada and the United States to DIBC and CTC;*

*(2) A declaratory judgment against the FHWA Defendants, the Coast Guard Defendants and Canada under 28 U.S.C. §§2201-2202 that DIBC and CTC have a right to continue to own and operate the Ambassador Bridge, and a right to build a second span of the Ambassador Bridge across the Detroit River without interference by Canada or the United States, subject only to the conditions set forth in the Special Agreement;*

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<sup>38</sup> Exhibit R-29.

<sup>39</sup> Exhibit R-17.

(3) A declaratory judgment against the Coast Guard Defendants under 28 U.S.C. §§2201-2202 that DIBC has satisfied all the requirements for a Finding of No Significant Impact and a bridge permit for the Ambassador Bridge New Span;

(4) A declaratory judgment against Canada under 28 U.S.C. §§2201-2202 that (a) DIBC and CTC have a right to determine the level of tolls to be charged on the Ambassador bridge, subject only to the conditions set forth in the Special Agreement, and (b) DIBC and CTC have a right to transfer their corporate ownership or ownership of any of their property rights;

(5) A judgment against the FHWA Defendants under 5 U.S.C. § 706(2) setting aside all decisions by the FHWA to proceed with the construction of the DRIC bridge or to select its location;

(6) A judgment against the Coast Guard Defendants under 5 U.S.C. § 706(2) setting aside the Coast Guard's decision to terminate consideration of DIBC's applications for a permit to construct the Ambassador Bridge New Span and a Finding of No Significant Impact;

(7) A judgment in the nature of mandamus against the Coast Guard Defendants under 5 U.S.C. § 706(1), directing them (a) to process promptly DIBC's application for a permit to construct the Ambassador Bridge New Span and, if necessary, a Finding of No Significant Impact, and (b) to grant such permit and, if necessary, Finding of No Significant Impact;

(8) An injunction against the FHWA Defendants and Canada prohibiting each such defendant from taking any steps to construct, prepare for construction of, or arrange for construction of the planned DRIC bridge or any other bridge across the Detroit River between Canada and the United States;

(9) Damages against Canada in an amount to be determined in trial;

(10) Costs, attorney's fees and expenses of this litigation to the extent permitted by law or rule;

(11) Interest on all amounts awarded; and

(12) Any other appropriate relief."<sup>40</sup>

49. On March 23, 2010, DIBC filed its Second Notice of Intent to Arbitrate under the NAFTA ("Second NAFTA NOI").

50. On June 22, 2010, CTC filed a Second Statement of Claim in the Windsor Litigation,<sup>41</sup> where CTC requested the following relief:

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<sup>40</sup> Exhibit R-17, pp. 458-47.



*“ (a) an order quashing City of Windsor By-law Nos. 22-2009, 23-2009, 24-2009, 27-2009, 28-2009, 29-2009 and 30-2009 (the “By-laws”), Interim Control By-law 19-2007 (the “Interim By-law”) and Demolition Control By-law 20-2007 (the “Demolition Control By-law”);*

*(b) a declaration that the By-laws, the Interim Control By-law and the Demolition Control By-law are unlawful and invalid, enacted in bad faith and/or for an improper purpose;*

*(c) in the alternative to the relief sought in paragraphs 1(a) and (b), a declaration that the By-laws, the Interim Control By-law and the Demolition Control By-law are unlawful and invalid to the extent that they affect the properties owned by the plaintiff;*

*(d) such interim or interlocutory relief as the plaintiff may request and this Honourable Court may deem just;*

*(e) damages as against the defendant in the amount of \$ 250,000;*

*(f) pre-judgment and post-judgment interest in accordance with the Court of Justice Act, R.S.O. 1990, c.C. 43, as amended;*

*(g) costs of this action on a substantial indemnity basis; and*

*(h) such further and other relief as the plaintiff may request and this Honourable Court may deem just.”<sup>42</sup>*

51. On September 21, 2010, CTC joined the litigation initiated by other plaintiffs, challenging the Windsor By-laws. The Court stayed CTC’s February and June 2010 complaints pending outcome of the By-law challenge.<sup>43</sup>

52. On October 18, 2010, the Canadian Minister of Transport issued a ministerial order containing the following order:

*“... the Minister of Transport, pursuant to section 9 of the International Bridges and Tunnels Act, hereby orders the Canadian Transit Company to refrain from proceeding with the construction in Canada of its new proposed international bridge between the City of Windsor, Ontario and the City of Detroit, Michigan until such time as Governor in Council approval is obtained for the construction of this new proposed international bridge under section 8 of the International Bridges and Tunnels Act.”<sup>44</sup>*

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<sup>41</sup> Exhibit R-30.

<sup>42</sup> Exhibit R-30, p. 3, ¶ 1.

<sup>43</sup> Exhibit R-87.

<sup>44</sup> Exhibit C-137.

53. On April 29, 2011, DIBC initiated this arbitration against Canada under NAFTA Chapter Eleven by filling the Notice of Arbitration (“First NAFTA NOA”) together with a waiver (“First NAFTA Waiver”). In its First NAFTA NOA, Claimant indicated that this arbitration arises from the decisions by Canada, the Province of Ontario, and the City of Windsor:

*“(a) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge,*

*(b) to fail to provide comparable improvements in road access to the Ambassador Bridge, because of its ownership by a United States investor; and*

*(c) to take traffic measures with respect to the Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge.*

*49. The points raised in this arbitration are (a) whether those measures are inconsistent with Canada’s obligations under Chapter 11 of NAFTA, including national treatment under Article 1102, most-favored-nation treatment under Article 1103 and the minimum standard of treatment under Article 1105; and (b) if so, what is the appropriate amount of damages.”<sup>45</sup>*

54. The First NAFTA Waiver submitted by DIBC and CTC reads as follows:

*“[...] [DIBC and CTC] 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 in the foregoing Notice of Arbitration to be a breach referred to in Article 1116 or Article 1117, namely the decisions by Canada, the Province of Ontario, and the City of Windsor to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Detroit River International Crossing (“DRIC”) Bridge, and to take traffic measures with respect to the Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge, 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. For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of the claims included in the Complaint filed on or about March 22, 2010, in the action titled Detroit International Bridge Company et al. v. The Government of Canada et al., in the United States District Court for the District of Columbia.” (Emphasis added)*

55. On May 4, 2011, the Federal Court of Canada reviewed the DRIC EA’s decision to drop option X12 and concluded that “*an informed person viewing the matter realistically would*

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<sup>45</sup> Exhibit C-140, ¶ 48-49.

not have a reasonable apprehension of bias regarding the Partnership's decision to eliminate the X-12 Option".<sup>46</sup> CTC appealed that decision to the Federal Court of Appeal. The appeal was dismissed.<sup>47</sup>

56. On June 6, 2011, DIBC filed its First Amended Complaint against Canada in the Washington Litigation ("Washington First Amended Complaint").<sup>48</sup> In the Washington First Amended Complaint, DIBC and CTC requested the following relief:

*"(1) Against Canada and the FHWA Defendants, a permanent injunction prohibiting each of them from taking any steps to construct, prepare for construction of, or arrange for construction of the planned DRIC Bridge or any other bridge across the Detroit River between Canada and the United States;*

*(2) Against the Coast Guard Defendants, a judgment in the nature of mandamus:*  
*(a) setting aside the Coast Guard's decision to deny DIBC's application for a permit to construct the Ambassador Bridge New Span;*  
*(b) ordering the Coast Guard defendants to process promptly DIBC's application for a permit to construct the Ambassador Bridge New Span and, if necessary, a Finding of No Significant Impact; and*  
*(c) ordering the Coast Guard to grant such permit and, if necessary, a Finding of No Significant Impact;*

*(3) Against Canada, damages in an amount to be determined in trial; and*

*(4) Against all defendants:*  
*(a) appropriate preliminary injunctive relief or other interim relief;*  
*(b) appropriate declaratory relief;*  
*(c) costs, attorney's fees and expenses of this litigation to the extent permitted by law or rule;*  
*(d) interest on all amounts awarded; and*  
*(e) any other appropriate relief."<sup>49</sup>*

57. On September 6, 2011, CTC's By-law challenge was dismissed by the Court in the Windsor Litigation.<sup>50</sup>

58. On October 3, 2011, Canada wrote to DIBC alleging that DIBC's First NAFTA Waiver was defective and inconsistent with the requirements of NAFTA Articles 1121(1)(b) and 1121(2)(b).<sup>51</sup>

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<sup>46</sup> Exhibit R-9, ¶ 108.

<sup>47</sup> Exhibit R-15.

<sup>48</sup> Exhibit R-18.

<sup>49</sup> Exhibit R-18, pp. 67-68.

<sup>50</sup> Exhibit R-31.

59. On November 29, 2011, DIBC withdrew the Washington First Amended Complaint against Canada without prejudice and reserved its right to file again.<sup>52</sup>
60. On February 15, 2012, CTC filed its Statement of Claim against the Attorney General of Canada before the Ontario Superior Court (the “CTC Litigation”), whereby it requested the following relief:

*“(a) A declaration that CTC was granted, pursuant to its enabling legislation, An Act to incorporate the Canadian Transit Company, 11-12 George V., 1921, c. 57, as amended (the “CTC Act”), a perpetual and exclusive right to own, operate and collect tolls from the Canadian half of an international bridge crossing in the vicinity of the Ambassador Bridge;*

*(b) A declaration that CTC was granted, pursuant to special agreement (the “Special Agreement”) entered into in accordance with the Boundary Waters Treaty Act of 1909 (the “Boundary Waters Treaty”), a perpetual and exclusive right to own, operate and collect tolls from the Canadian half of an international border crossing in the vicinity of the Ambassador Bridge;*

*(c) A declaration that CTC and the Attorney General of Canada (the “Canadian Government”) are parties to an implied agreement (the “Implied Agreement”) granting CTC a perpetual and exclusive right to own, operate and collect tolls from the Canadian half of an international border crossing in the vicinity of the Ambassador Bridge;*

*(d) A declaration that, pursuant to the terms of the November 29, 1990 agreement entered into between the Canadian Government, CTC and others (the “1990 Settlement Agreement”), the issue of CTC’s perpetual and exclusive right to own and operate the Canadian half of an international border crossing in the vicinity of the Ambassador Bridge was finally determined with prejudice in favour of CTC;*

*(e) A declaration that, pursuant to the terms of the 1990 Settlement Agreement and the January 31, 1992 agreement entered into between the Canadian Government and CTC (the “1992 Agreement”), the parties agreed to maintain the Ambassador Bridge as the model international border crossing between Canada and the U.S.;*

*(f) A declaration that the Canadian Government is estopped from challenging CTC’s rights as granted under the CTC Act, the Special Agreement and the Implied Agreement, and as finally determined pursuant to the 1990 Settlement Agreement, including but not limited to being estopped from acting as proponent for the*

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<sup>51</sup> Exhibit R-21.

<sup>52</sup> Exhibit R-24.

*construction of a new international border crossing that is located in the vicinity of the Ambassador Bridge and/or that would disturb the right of CTC;*

*(g) If the declarations in (a) to (f), or any of them, are granted:*

*(i) A declaration that the construction of a new bridge in the vicinity of the Ambassador Bridge, of which the Canadian Government is a proponent, is an unlawful breach of the rights granted to CTC pursuant to the CTC Act and a breach of the terms of the Special Agreement;*

*(ii) A declaration that the International Bridges and Tunnels Act, S.C. 2007, c. 1 (the "IBTA") does not derogate from any rights that were granted to CTC pursuant to the CTC Act, the Special Agreement and the Implied Agreement;*

*(iii) A declaration that CTC has the right and/or duty under the CTC Act, the Special Agreement and the Implied Agreement to maintain an international border crossing in the vicinity of the Ambassador Bridge for public benefit, including a right and/or duty to construct and maintain a second span to the existing Ambassador Bridge ("Second Span");*

*(iv) A declaration that steps taken by the Canadian Government to prevent or hinder CTC from building a Second Span constitute a breach of the rights granted to CTC pursuant to CTC Act, Special Agreement and the Implied Agreement;*

*(h) In the alternative and in the event of the construction of a proposed new international border crossing in the vicinity of the Ambassador Bridge,*

*(i) a declaration that CTC is entitled to compensation for de facto expropriation of the rights granted to it pursuant to the CTC Act, the Special Agreement and the Implied Agreement; and*

*(ii) compensation from the Canadian Government for loss of income in an amount to be proved in trial for: (A) nuisance; (B) trespass to land including interference with property rights; (C) breach of contract; and/or (D) negligent misrepresentation;*

*(i) prejudgment interest in accordance with section 128 of the Courts of Justice Act, R.S.O. 1990, c.C.43, as amended;*

*(j) postjudgment interest in accordance with section 129 of the Courts of Justice Act;*

*(k) the costs of this proceeding, plus applicable taxes; and*

*(l) such further and other relief as this Honourable Court may deem just."<sup>53</sup>*

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<sup>53</sup> Exhibit R-20, ¶ 1, pp. 3-6.

61. On June 12, 2012, Canada and Michigan signed an agreement (“Crossing Agreement”) to construct the DRIC Bridge by a private-public-partnership (“P3”) whereby a private sector concessionaire would build, finance and operate the DRIC Bridge and associated facilities under the oversight of a joint Canada-Michigan public authority akin to another crossing authorities which own and operate international bridges and tunnels along the Canada-U.S. border.<sup>54</sup>
62. On August 13, 2012, CTC abandoned its appeal in the Windsor Litigation, but the February and June 2010 complaints remained pending.<sup>55</sup>
63. On September 6, 2012, CTC was ordered to pay Windsor’s legal costs in the Windsor Litigation.<sup>56</sup>
64. On November 9, 2012, DIBC filed its Second Amended Complaint in the Washington Litigation (the “Washington Second Amended Complaint”) and a Motion to re-join Canada to the Washington Litigation.<sup>57</sup> In the Washington Second Amended Complaint, DIBC and CTC requested the following relief:

*“(a) A declaratory judgment against the Secretary of State, the State Department, and Canada declaring that the IBA does not constitutionally delegate to the Secretary of State the power to approve the Crossing Agreement, and declaring the Crossing Agreement to be void and unenforceable;*

*(b) An injunction against the Secretary of State and State Department precluding those defendants from approving the Crossing Agreement;*

*(c) A declaratory judgment against all defendants declaring that plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor, or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent a special agreement under the Boundary Waters Treaty authorizing such an additional bridge, and declaring that no such special agreement currently exists;*

*(d) An injunction against the Secretary of State and State Department precluding those defendants from approving any aspect of the NITC/DRIC Application;*

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<sup>54</sup> Exhibit C-64.

<sup>55</sup> Exhibit R-33.

<sup>56</sup> Exhibit R-32.

<sup>57</sup> Exhibit R-19.

*(e) A declaratory judgment against all defendants declaring that plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by any defendant that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or to delay the regulatory approvals of the New Span;*

*(f) As an alternative to the injunction request in paragraph (d), an injunction against the State Department and the Secretary of State precluding them from approving the NITC/DRIC Application unless and until the Application is able to demonstrate that the NITC/DRIC is necessary even after the New Span is built;*

*(g) A declaratory judgment declaring that the Coast Guard defendants have acted contrary to law and arbitrarily and capriciously in returning DIBC's application for a navigational permit under the 1906 Bridge Act to construct the New Span; or, in the alternative, a judgment declaring that the Coast Guard defendants have unlawfully or unreasonably withheld their decision on whether to issue a navigational permit to allow DIBC to construct the New Span;*

*(h) An injunction requiring the Coast Guard to issue a navigational permit under the 1906 Bridge Act to allow DIBC to construct the new Span;*

*(i) An injunction preventing the FHWA from taking any further action to approve the NITC/DRIC, or to construct, prepare for construction, or support construction of the NITC/DRIC or its related approaches, unless and until the New Span has been fully approved and unless and until the NITC/DRIC satisfies all regulatory requirements based on the assumption that the New Span will be constructed first;*

*(j) A declaratory judgment that defendants' actions in supporting the construction of the NITC/DRIC, and in preventing plaintiffs from exercising their right to build the New Span, constitute a taking of plaintiffs' private property rights without payment of just compensation, in violation of the Taking Clause of the Fifth Amendment and of international law;*

*(k) Any and all other injunctive relief necessary to prevent defendants from taking any action that infringes upon plaintiffs' exclusive statutory and contractual franchise rights under their Special Agreement; and*

*(l) Any such other and further relief as may be just and proper;<sup>58</sup>*

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<sup>58</sup> Exhibit R-19, pp. 90-92.

65. In December 2012, Canada enacted the Bridge to Strengthen Trade Act (“BSTA”). The BSTA expressly exempted the NITC/DRIC from the requirements of the IBTA, which requires any new bridge to obtain special approval from the Canadian Governor in Council.<sup>59</sup>
66. On January 15, 2013, DIBC submitted an amendment to its First NAFTA NOA against Canada under the NAFTA (“Second NAFTA NOA”) along with its Second NAFTA Waiver. In its Second NAFTA NOA, Claimant indicated that this arbitration arises from the decisions by Canada, the Province of Ontario, and the City of Windsor:

*“(1) to discriminate against DIBC, violating Claimant’s exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant’s franchise rights by precluding the construction of the New Span;*

*(2) to prevent or delay DIBC’s ability to obtain Canadian approval to build the New Span;*

*(3) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian-owned NITC/DRIC Bridge, in breach of prior commitments and agreements to improve the connections to the Ambassador Bridge through the Ambassador Bridge Gateway Project;*

*(4) to fail to provide comparable improvements in road access to the Ambassador Bridge as was previously provided to the Blue Water Bridge and is currently being provided to the non-existent NITC/DRIC Bridge, because the Ambassador Bridge is owned by a United States investor; and*

*(5) to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and other crossings not owned by a U.S. investor.*

*136. The points raised by this arbitration are (a) whether those measures are inconsistent with Canada’s obligations under Chapter 11 of NAFTA, including national treatment under Article 1102, most-favored-nation treatment under Article 1103, and the minimum standard of treatment under Article 1105; and (b) if so, what is the appropriate amount of damages.”<sup>60</sup>*

67. The Second NAFTA Waiver submitted by DIBC and CTC reads as follows:

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<sup>59</sup> Exhibit CLA-53, §35.

<sup>60</sup> Exhibit C-116, ¶¶ 135-136.



“[...] [DIBC and CTC] 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 in the foregoing Notice of Arbitration to be a breach referred to in Article 1116 or Article 111, namely the decisions by Canada, the Province of Ontario, and the City of Windsor to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Detroit River International Crossing (“DRIC”) Bridge, to take traffic measures with respect to the Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge, and to block and delay the approval and construction of the Ambassador Bridge New Span. Consistent with NAFTA’s waiver requirements, the only exception from this waiver is for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of (a) the claims included in the action titled Detroit International Bridge Company et al. v. United States Coast Guard et al. in the United States District Court for the District of Columbia (including all claims contained in the Second Amended Complaint plaintiffs are currently seeking to file in that action), which seeks only declaratory and injunctive relief, or (b) the claims contained in CTC v. Attorney General of Canada, Court File No. CV-12-446428, pending in the Ontario Superior Court of Justice (Toronto).” (Emphasis added)

68. On February 19, 2013, CTC filed its Amended Statement of Claim in the CTC Litigation. In its Amended Statement of Claim, CTC added the following request for relief at paragraph 1, item h(ii):

“(h) In the alternative and in the event of the construction of the proposed new international border crossing in the vicinity of the Ambassador Bridge: [...]

(ii) compensation from the Canadian Government for loss of income in an amount to be proved in trial for the de facto expropriation of the rights granted to CTC pursuant to the CTC Act, the Special Agreement, and the Implied Agreement; [...]<sup>61</sup>  
(highlighted in the original)

69. On May 29, 2013, DIBC filed its Third Amended Complaint in the Washington Litigation (“Washington Third Amended Complaint”) Washington Litigation.<sup>62</sup> In the Washington Third Amended Complaint, DIBC and CTC requested the following relief:

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<sup>61</sup> Exhibit C-119, p. 5.

<sup>62</sup> Exhibit C-141.

*“(a) A declaratory judgment declaring that the State Department defendants have acted contrary to the standards set forth in 5 U.S.C § 706(2) in granting the NITC/DRIC proponents a Presidential Permit, and setting aside that Presidential Permit as invalid, unlawful, void, and of no legal effect;*

*(b) A declaratory judgment declaring that the State Department defendants have acted contrary to the standards set forth in 5 U.S.C § 706(2) in granting approval of the Crossing Agreement, and setting aside that approval as invalid, unlawful, void, and of no legal effect;*

*(c) A injunction requiring the State Department defendants to terminate the Presidential Permit and revoke any and all approvals given to the NITC/DRIC or the Crossing Agreement;*

*(d) A declaratory judgment against the Secretary of State and the State Department declaring that the IBA [i.e., the (US) International Bridge Act of 1972] does not constitutionally delegate to the Secretary of State the power to approve the Crossing Agreement, and declaring the Crossing Agreement to be void and unenforceable;*

*(e) An injunction against all of the United States defendants precluding those defendants from taking any further action based on any purported approval of the Crossing Agreement;*

*(f) A declaratory judgment against the U.S. defendants that, under U.S. law, plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor; or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent a special agreement under the Boundary Waters Treaty authorizing such an additional bridge, and declaring that no such special agreement currently exists;*

*(g) A declaratory judgment against the U.S. defendants that, under U.S. law, plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor; or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent express Congressional legislation specifically authorizing a new bridge between Detroit and Windsor and expressly modifying the plaintiff’s statutory and contractual franchise;*

*(h) A declaratory judgment that the general 1972 IBA does not authorize the approval of any new bridge between Detroit and Windsor and does not impliedly repeal or otherwise modify plaintiffs’ statutory and contractual franchise rights to operate the Ambassador Bridge and to build the New Span to the Ambassador Bridge;*

*(i) A declaratory judgment against Canada that, under Canadian law, plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor; or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent a special agreement under the*

*Boundary Waters Treaty authorizing such an additional bridge, and declaring that no such special agreement currently exists;*

*(j) An injunction against the Secretary of State and State Department precluding those defendants from providing any purported future approvals of any aspect of the NITC/DRIC or any future NITC/DRIC application;*

*(k) A declaratory judgment against the U.S. defendants declaring that, under U.S. law, plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by any of the U.S. defendants that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or to delay the regulatory approvals of the New Span, or otherwise to discriminate in favor of the NITC/DRIC and against the New Span;*

*(l) A declaratory judgment against Canada declaring that, under Canadian law, plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by Canada that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or to delay the regulatory approvals of the New Span, or otherwise to discriminate in favor of the NITC/DRIC and against the New Span;*

*(m) As an alternative to the injunction requested in paragraph (f), an injunction against the State Department and the Secretary of State precluding them from approving any future NITC/DRIC Application unless and until such application is able to demonstrate that the NITC/DRIC is necessary even after the New Span is built;*

*(n) A declaratory judgment declaring that the Coast Guard defendants have acted contrary to law and arbitrarily and capriciously in returning DIBC's application for a navigational permit under the 1906 Bridge Act to construct the New Span; or, in the alternative, a judgment declaring that the Coast Guard defendants have unlawfully or unreasonably withheld their decision on whether to issue a navigational permit to allow DIBC to construct the New Span;*

*(o) An injunction requiring the Coast Guard to issue a navigational permit under the 1906 Bridge Act to allow DIBC to construct the New Span;*

*(p) An injunction preventing the FHWA from taking any further action to approve the NITC/DRIC, or to construct, prepare for construction, or support construction of the NITC/DRIC or its related approaches, unless and until the New Span has been fully approved and unless and until the NITC/DRIC satisfies all regulatory requirements based on the assumption that the New Span will be constructed first;*

*(q) A declaratory judgment that U.S. defendants' actions in supporting the construction of the NITC/DRIC, and in preventing plaintiffs from exercising their right to build the New Span, constitute a taking of plaintiffs' private property rights*

*without payment of just compensation, in violation of the Taking Clause of the Fifth Amendment and of international law;*

*(r) A declaratory judgment declaring that the U.S. defendants have violated plaintiffs' rights under the Equal Protection Clause and an injunction precluding them from taking any further action to promote the NITC/DRIC and to discriminate against the New Span;*

*(s) Any and all other injunctive relief necessary to prevent defendants from taking any action that infringes upon plaintiff's exclusive statutory and contractual franchise rights under their Special Agreement; and*

*(t) Any such other and further relief as may be just and proper.”<sup>63</sup>*

70. On March 20, 2014, during the Hearing on Jurisdiction in this arbitration, Claimant submitted a Supplemental Waiver and Consent (“Third NAFTA Waiver”)<sup>64</sup> in order to address Canada’s allegations that the Second Waiver was defective because it did not include the term “*not involving the payment of damages*”, which was present in the First NAFTA Waiver. The Third NAFTA Waiver is worded as follows:

*“SUPPLEMENTAL WAIVER AND CONSENT*

*Pursuant to Articles 1121.1 and 1112.2 of the North American Free Trade Agreement (“NAFTA”), Detroit International Bridge Company and The Canadian Transit Company each hereby consent to arbitration in accordance with the procedures set out in NAFTA, and 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 in the Notice of Arbitration dated January 15, 2013 to be a breach referred to in Article 1116 or 1117 including, but not limited to, the decisions by Canada, the Province of Ontario, and the City of Windsor to locate the Windsor-Essex-Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian NITC/DRIC Bridge, to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned NITC/DRIC Bridge, and to block and delay the Detroit-Windsor Tunnel and the planned NITC/DRIC Bridge, and to block and delay the approval and construction of the Ambassador Bridge New Span. Consistent with NAFTA’s waiver requirements, the only exception from this waiver is 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. For the avoidance of doubt, this waiver does not and*

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<sup>63</sup> Exhibit C-141, pp. 112-116.

<sup>64</sup> Exhibit C-171.

*shall not be construed to extend to or include any of (a) the claims included in the action entitled Detroit International Bridge Company et al. v. United States Coast Guard et al in the United States District Court for the District of Columbia (including all claims contained in the Third Amended Complaint filed on May 29, 2013), which seeks only declaratory and injunctive relief, or (b) the claims contained in CTC v. Attorney General of Canada, Court File No. CV-12-446428, pending in the Ontario Superior Court of Justice (Toronto).”*

## **V. PROCEDURAL BACKGROUND**

71. Claimant served Canada with Notices of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of NAFTA on January 25, 2010 and on March 23, 2010.
72. On April 29, 2011, Claimant submitted to Canada a Notice of Arbitration (“NOA”) under the UNCITRAL Rules and the NAFTA. Claimant proposed that the seat of the arbitration be Washington D.C. and that the proceedings be conducted in the English language.
73. By e-mail of October 29, 2012, the disputing parties jointly appointed Mr. Yves Derains as chairman of the Arbitral Tribunal. The disputing parties also informed that Claimant named The Hon. Michael Chertoff as party-appointed arbitrator, and that Respondent named Mr. Vaughan Lowe Q.C. as party-appointed arbitrator.
74. By e-mail of November 2, 2012, Canada stated to the Arbitral Tribunal that DIBC and CTC had been engaging in long-standing efforts to simultaneously pursue monetary damages against Canada in domestic courts with respect to the same measures that are alleged to constitute a violation of NAFTA Chapter 11. Canada stated that in doing so, DIBC and CTC were in continuing material non-compliance with the conditions precedent to submission of a claim to arbitration set out in NAFTA Articles 1121(1)(b) and (2)(b), which vitiates Canada’s consent to arbitrate. Canada agreed to participate in the constitution of the Tribunal without prejudice so that the Tribunal might promptly deal with this jurisdictional objection.
75. By e-mail of November 8, 2012, the Tribunal informed the Parties that a telephone conference would be held with the disputing parties on December 13, 2012 to discuss the organization of these proceedings.
76. By e-mail of December 6, 2012, the Tribunal sent to the disputing parties a draft of Procedural Order No. 1 to facilitate the discussions during the telephone conference.

77. By e-mail of December 10, 2012, the disputing parties jointly informed the Tribunal that they agreed, *inter alia*: (i) to having these proceedings administered by the Permanent Court of Arbitration (“PCA”); (ii) that the arbitration shall be divided into three phases, i.e. issues of jurisdiction, merits and damages shall be heard separately; (iii) that English shall be the language of this arbitration; and (iv) to having Ms. Ana Paula Montans acting as Assistant to the Presiding Arbitrator as proposed by the Arbitral Tribunal.
78. On December 13, 2012, the Tribunal and the disputing parties held a telephone conference to discuss the organization of this arbitration. Claimant informed the Tribunal that it would file an Amended Notice of Arbitration by January 8, 2013.
79. On December 20, 2012, the Tribunal issued Procedural Order No. 1, wherein the procedural timetable was established as follows:

*14. The sequence and timing of the proceedings shall be as follows:*

<i>No.</i>	<i>Date</i>	<i>Party</i>	<i>Description</i>
<i>(a)</i>	<i>January 15, 2013</i>	<i>disputing parties</i>	<i>Simultaneous submission on the place of the arbitration</i>
<i>(b)</i>	<i>By end of January 2013</i>	<i>Arbitral Tribunal</i>	<i>Decision on the place of the arbitration</i>
<i>(c)</i>	<i>By end of January 2013</i>	<i>disputing parties</i>	<i>The disputing parties are to attempt to reach agreement on terms and propose a draft of a confidentiality order to the Arbitral Tribunal</i>
<i>(d)</i>	<i>February 15, 2013</i>	<i>Respondent</i>	<i>Brief statement on jurisdiction and admissibility</i>
<i>(e)</i>	<i>February 28, 2013</i>	<i>Claimant</i>	<i>Brief answer to Respondent’s statement on jurisdiction and admissibility</i>
<i>(f)</i>	<i>March 20, 2013 At 5:00 p.m.</i>	<i>All</i>	<i>Meeting in New York City, NY, for further organization of the proceedings</i>

80. By e-mail of January 8, 2013, Claimant informed the Tribunal that Canada consented to a one week time extension for the filing of the Amended Notice of Arbitration and accordingly Claimant would file its Amended Notice of Arbitration by January 15, 2013.

81. On January 15, 2013, the disputing parties filed their respective Submissions on the Place of the Arbitration. On the same day, Claimant also submitted its Amended Notice of Arbitration (“Amended NOA”).
82. By e-mail of January 28, 2013, the Arbitral Tribunal issued Procedural Order No. 2 determining Washington D.C., in the United States, as the place of arbitration in this matter.
83. By e-mail of January 31, 2013, the disputing parties requested the Tribunal an extension of time to submit a joint draft confidentiality order until February 8, 2013, which was granted by the Tribunal.
84. By e-mail of February 8, 2013, pursuant to Procedural Order No. 1, the disputing parties jointly submitted a draft Confidentiality Order and draft Procedural Order No. 3, the latter reflecting the parties’ agreement with respect to procedural issues not already covered in Procedural Orders Nos. 1 and 2. The unresolved issues between the disputing parties were highlighted therein. In the same e-mail, the disputing parties informed the Tribunal of their agreement that Canada would submit its Statement on Jurisdiction and Admissibility on February 22, 2013 and that DIBC would submit its answer to that statement on March 8, 2013.
85. By e-mail of February 21, 2013, co-arbitrator Judge Chertoff sent to the disputing parties a disclosure statement informing that his law firm’s (i.e. Covington & Burling) was advising Eli Lilly & Company on a new matter related to Canada’s patentability requirements for pharmaceutical inventions, in which the Government of Canada is an adverse party. Related to that representation, Eli Lilly has filed a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 with the Government of Canada, but no arbitration had been commenced to date.
86. By e-mail of February 22, 2013, Canada submitted its Brief Statement on Jurisdiction and Admissibility.
87. By e-mail of March 6, 2013, Claimant requested the Tribunal to approve an extension of time until March 15, 2013 to file its response to Canada’s Brief Statement on Jurisdiction and Admissibility. The request was granted by the Tribunal.

88. By e-mail of March 8, 2013, in reply to Judge Chertoff's disclosure statement, Canada informed that

*"[...] From your disclosure statement and from Canada's current understanding of the Eli Lilly matter, your law firm is not acting adverse to Canada in that NAFTA Chapter Eleven arbitration (Eli Lilly is represented by a different law firm in respect of the NOI), nor has arbitration been commenced to date. In light of this, and in light of your confirmation that you will not participate in Covington & Burling's engagement in this Eli Lilly matter, Canada has no objection to your continued role as arbitrator in this DIBC v. Canada arbitration and is confident that you will remain impartial and independent notwithstanding these disclosed facts. [...]"*

89. By e-mail of March 15, 2013, Claimant submitted its Response to Canada's Brief Statement on Jurisdiction and Admissibility.

90. By e-mail of March 18, 2013, Canada submitted a corrected page 39 of its Brief Statement on Jurisdiction and Admissibility making minor amendments at footnotes 138 and 139.

91. On March 20, 2013, a procedural hearing took place in New York with the Tribunal and the disputing parties ("Procedural Hearing").

92. By e-mail of March 27, 2013, the Tribunal issued Procedural Orders Nos. 3 and 4, as well as the Confidentiality Order, which had been discussed with the disputing parties at the Procedural Hearing. In Procedural Order No. 4, the Tribunal established the following procedural timetable:

*"1. The Respondent shall file its Memorial on Jurisdiction and admissibility by June 15, 2013 with all available documents, Witness Statements and Experts Reports relied upon, if any and, as the case may be, a request for production of documents on jurisdiction and admissibility;*

*2. The Claimant shall file its Counter-memorial on Jurisdiction by August 23, 2013 with all available documents, Witness Statements and Experts Reports, if any, relied upon in rebuttal and, as the case may be, a request for production of documents on jurisdiction and admissibility;*

*3. The Arbitral Tribunal shall convene with the disputing parties for a telephone conference on September 17, 2013 to discuss a schedule for further written submissions on jurisdiction and admissibility and the possibility of having a round of document production on jurisdiction and admissibility.*



*4. The Arbitral Tribunal expects the above time limits to be respected and requests for extension will be disfavored.*

*5. When deciding the further schedule after the September 17, 2013 telephone conference, the Arbitral Tribunal will provide a time frame for Applications for leave to file amicus curiae briefs and for the presentation of submissions by other NAFTA parties as contemplated in article 28 and 30 of Procedural Order n°3 issued on March 27, 2013.”*

93. By e-mail of March 28, 2013, Respondent’s Counsel submitted to the Tribunal the Confidentiality Order duly signed by the disputing parties in acknowledgement of the obligation to abide by it.
94. By e-mail of June 15, 2013, Canada submitted its Memorial on Jurisdiction and Admissibility (“Canada’s Memorial on Jurisdiction”), together with its Document Production Request #1.
95. By e-mail of July 9, 2013, Canada submitted a public version of its Memorial on Jurisdiction with redactions agreed by Canada and DIBC.
96. By e-mail of August 23, 2013, Claimant submitted its Counter-Memorial on Jurisdiction and Admissibility (“DIBC’s Counter-Memorial”), as well as Claimant’s responses to Canada’s Document Production Request #1 and Claimant’s Document Production Request #1.
97. On September 17, 2013, a conference call was held with the disputing parties and the Arbitral Tribunal, pursuant to paragraph 3 of Procedural Order No. 4.
98. By e-mail of September 20, 2013, the disputing parties requested the Tribunal that the hearing on jurisdiction and admissibility be held on the week of March 17, 2014. As for the location of the hearing the disputing parties deferred to the preference of the Tribunal as to whether Toronto, New York or Washington D.C would be more convenient and cost effective.
99. By e-mail of September 27, 2013, the Tribunal issued Procedural Order No. 5 wherein it decided as follows:

*“1. After hearing the disputing parties, the Tribunal decides that a document production phase is not necessary at this point of the proceedings.*

*2. The following procedural calendar was agreed by the disputing parties and the Arbitral Tribunal:*

<i>Date</i>	<i>Actions</i>	<i>Party/Parties</i>
<i>November 22, 2013</i>	<i>Reply to DIBC's Counter-Memorial on Jurisdiction and Admissibility</i>	<i>Canada</i>
<i>January 10, 2014</i>	<i>DIBC's Rejoinder to Canada's Reply to DIBC's Counter-Memorial on Jurisdiction and Admissibility</i>	<i>DIBC</i>
<i>January 24, 2014</i>	<i>NAFTA Art. 1128 submissions and/or amicus curiae submissions (if any)</i>	
<i>February 14, 2014</i>	<i>Reply to eventual NAFTA Art. 1128 submissions and/or amicus curiae submissions</i>	<i>DIBC / Canada</i>
<i>March 20 and 21, 2014</i>	<i>Hearing on Jurisdiction and Admissibility</i>	<i>All</i>

*3. The Tribunal decides that the Hearing on Jurisdiction and Admissibility will take place in Washington D.C. The disputing parties will jointly make all necessary arrangements for the selection and booking of the hearing room and break-out rooms, as well as court reporting. They will timely, and at the latest 3 months before the scheduled hearing, inform the Arbitral Tribunal of the arrangements made.”*

100. By letter of September 26, 2013, further to his disclosure statement of February 21, 2013, co-arbitrator Judge Michael Chertoff informed the disputing parties that his law firm, Covington & Burling LLP, had served Canada with a notice of arbitration under UNCITRAL Rules, on behalf of Eli Lilly & Company. Judge Michael Chertoff stated that he remained screened out of any involvement on the Eli Lilly matter and confirmed that he remained impartial and independent of the disputing parties in respect of this matter.

101. By letter of October 2, 2013, in reply to Judge Chertoff letter mentioned above, Canada stated that the situation disclosed was of sufficient gravity that Canada would like to confirm Judge Chertoff's willingness to take further steps to ensure that his duties as arbitrator in this matter were not compromised by the interests of his law firm in simultaneous adverse representation against Canada. Canada noted Judge Chertoff's assurance that he would not participate in Covington & Burling's engagement in the Eli Lilly arbitration and requested that he takes

additional steps to establish an ethical screen at his law firm by, *inter alia*, confirming that he would not discuss the DIBC or Eli Lilly arbitrations with other lawyers and support staff at his law firm.

102. By letter of October 8, 2013, arbitrator Judge Michael Chertoff replied to Canada’s e-mail of October 2, 2013 confirming that the ethical screen requested by Canada has been in place since the Eli Lilly matter arose.
103. By letter of October 10, 2013, further to Judge Chertoff’s letter mentioned above, Canada informed that it had no further questions or concerns and appreciated Judge Chertoff’s openness in this regard.
104. By letter of November 18, 2013, the disputing parties jointly requested the Tribunal to approve a modification to the procedural timetable as set out in Procedural Order No. 5, as follows:

<i>Submission</i>	<i>Current Deadline</i>	<i>Proposed Deadline</i>
<i>Canada’s Reply</i>	<i>November 22, 2013</i>	<i>December 6, 2013</i>
<i>DIBC’s Rejoinder</i>	<i>January 10, 2014</i>	<i>January 24, 2014</i>
<i>Art. 1128/amicus briefs</i>	<i>January 24, 2014</i>	<i>February 7, 2014</i>
<i>Replies to Art. 1128/amicus briefs</i>	<i>February 14, 2014</i>	<i>February 28, 2014</i>

105. By e-mail of November 20, 2013, the Tribunal approved the modifications to the procedural timetable jointly proposed by the disputing parties above.
106. By e-mail of December 6, 2013, Canada submitted its Reply Memorial on Jurisdiction and Admissibility (“Canada’s Reply Memorial on Jurisdiction”) with the accompanying witness statement of Ms. Helena Borges.
107. By letter of January 23, 2014, the disputing parties jointly requested the Tribunal to approve a modification to the procedural timetable as set out in Procedural Order No. 5 and modified by the approval of the Tribunal on November 20, 2013, as follows:

<i>Submission</i>	<i>Current Deadline</i>	<i>Proposed Deadline</i>
<i>DIBC's Rejoinder</i>	<i>January 24, 2014</i>	<i>January 31, 2014</i>
<i>Art. 1128/amicus briefs</i>	<i>February 7, 2014</i>	<i>February 14, 2014</i>
<i>Replies to Art. 1128/amicus briefs</i>	<i>February 28, 2014</i>	<i>March 3, 2014</i>

108. By e-mail of January 24, 2014, the Tribunal approved the modifications to the procedural timetable jointly proposed by the disputing parties above.
109. By e-mail of January 31, 2014, Claimant submitted its Rejoinder Memorial on Jurisdiction and Admissibility (“DIBC’s Rejoinder Memorial on Jurisdiction”).
110. By e-mail of February 12, 2014, the Tribunal informed the parties that a pre-hearing conference call would take place on March 12, 2014 at 6pm (Paris time).
111. By e-mails of February 14, 2014, Mexico and United States made their respective submissions in accordance with NAFTA Article 1128.
112. By e-mails of March 3, 2014, Claimant and Canada submitted their respective Replies to the United States and Mexico Article 1128 Submissions.
113. By letter of March 6, 2014, the disputing parties jointly submitted a timetable for the hearing on jurisdiction and admissibility scheduled for March 20-21, 2014. Claimant informed that it opted not to cross-examine the Respondent’s fact witness Ms. Helena Borges.
114. By e-mail of March 11, 2014, the Tribunal submitted to the disputing parties an agenda with topics to be discussed at the pre-hearing conference call scheduled to take place on March 12, 2014.
115. By e-mail of the same day, the disputing parties informed the Tribunal that they had reviewed the agenda and believed all major issues had already been organized and resolved. They stated that if the Tribunal was satisfied that there was no other issues to discuss, the disputing parties would be agreeable to cancelling the pre-hearing conference call.
116. By e-mail of March 12, 2014, the Arbitral Tribunal cancelled the pre-hearing conference call.

117. On March 15, 2014, the Secretariat of the PCA informed the Chairman of the Arbitral Tribunal that by e-mail of March 14, 2014 the U.S. Department of State had inquired about the possibility for representatives of the U.S. to attend the Hearing on Jurisdiction on March 20-21, 2014 as a non-disputing NAFTA Party.
118. By e-mail of March 16, 2014, the Tribunal forwarded the correspondence mentioned above from the U.S. Department of State to the disputing parties and invited them to submit their comments thereon by March 17, 2014.
119. By e-mail of the same day, Canada informed the Tribunal that it had no objections to the attendance at the Hearing on Jurisdiction by representatives of the United States.
120. By e-mail of March 17, 2014, DIBC informed the Tribunal that pursuant to paragraph 14 of the Confidentiality Order, all hearings should be held *in camera* and therefore it did not consent to attendance by non-disputing NAFTA Parties at the Hearing on Jurisdiction.
121. By e-mail of the same day, Canada replied stating, in summary, that the Tribunal should authorize attendance at the Hearing on Jurisdiction by the non-disputing Parties on the grounds of NAFTA Articles 1120(2) and 1128. It submitted that even if UNCITRAL Rule Article 28(3) could form a basis for the exclusion of the non-disputing Parties from a hearing, that rule was modified by NAFTA Article 1128, which gives the NAFTA Parties the right of participation on questions of interpretation of the NAFTA. Canada submitted that Claimant had no legitimate objection to the attendance of the United States and Mexico, especially in light of the fact that they both had made written submissions in this arbitration.
122. On March 18, 2014, the Arbitral Tribunal issued Procedural Order No. 6, in which it decided as follows:

*“1. The Tribunal first notes that NAFTA Article 1128 mentions that “on written notice to the disputing parties, a [non-disputing] Party may make submissions to a Tribunal on a question of interpretation of this Agreement [NAFTA]”. However, such provision does not mention anything about the physical participation of a non-disputing Party at hearings.*

*2. The Tribunal further notes that, pursuant to paragraph 14 of the Confidentiality Order dated March 27, 2013, “[a]t the request of the Claimant and in accordance with Article 28(3) of the UNCITRAL Arbitration Rules all hearings shall be held in*

*camera”. At the time this decision was taken the Tribunal and the disputing parties were aware of the NAFTA Chapter Eleven rules.*

*3. As a consequence, the Confidentiality Order shall be respected and the attendance at the Hearing on Jurisdiction by non-disputing NAFTA Parties is not permitted.”*

123. By e-mail of March 19, 2014, the U.S. Department of State requested the Tribunal to reconsider its decision in Procedural Order No. 6 and to allow the non-disputing Parties to attend oral hearings in this arbitration. In summary, the U.S. Department of State alleged that that such decision is (i) inconsistent with the NAFTA; (ii) contrary to the unanimous practice of other NAFTA tribunals; and (iii) prejudicial to the treaty rights of the non-disputing Parties. According to them, depriving non-disputing Parties of the ability to attend oral hearings is to deprive them of an important aspect of their right to make submissions under NAFTA Article 1128.
124. By e-mail of March 19, 2014, Claimant objected to the U.S. Department of State’s request that the Tribunal reconsider its decision in Procedural Order No. 6.
125. By e-mail of March 19, 2014, Mexico informed the Tribunal of its concerns regarding Procedural Order No. 6 and requested the Tribunal to reconsider its decision. It submitted that a refusal to allow non-disputing Parties to participate in an oral hearing is a systemic concern that transcends any effective participation of Mexico in these proceedings.
126. On March 20-21, 2014, the Hearing on Jurisdiction and Admissibility (“Hearing on Jurisdiction”) took place with the presence of the disputing parties and the Arbitral Tribunal at the ISCID offices in Washington D.C., located at 1818 H Street, NW, MSN J2-200.
127. At the beginning of the Hearing on Jurisdiction on March 20, 2014, the Tribunal heard the disputing Parties’ submissions concerning the non-disputing Parties’ request for reconsideration of Procedural Order No. 6. After deliberation, the Tribunal informed the disputing parties that it had decided to maintain the decision in Procedural Order No. 6 and, therefore, not to allow participation of non-disputing Parties at the Hearing on Jurisdiction. The Tribunal summarized the reasons for its decision and informed the disputing parties that it would send the decision in writing to them following the Hearing on Jurisdiction.

128. On March 25, 2014, the Tribunal issued Procedural Order No. 7, in which it decided as follows:

*“a) Articles 14 and 16 of the Confidentiality Order are enforceable with respect of the non-disputing NAFTA Parties, as already decided by the Arbitral Tribunal in Procedural Order No. 6.*

*b) The non-disputing NAFTA Parties may request to have access to the transcripts of hearings or part of it in order to be able to make written or oral submissions on issues of interpretation of the NAFTA.”*

129. By e-mail of March 31, 2014, Claimant notified Canada and the Arbitral Tribunal of its intent to designate certain information as confidential information in the transcripts of the Hearing on Jurisdiction, pursuant to paragraph 3 of the Confidentiality Order.

130. By e-mail of April 8, 2014, Claimant requested an extension of the twenty-day period to submit redactions of confidential information in the transcripts of the Hearing on Jurisdiction. According to Claimant, because the Hearing on Jurisdiction was held *in camera* pursuant to paragraph 14 of the Confidentiality Order and Procedural Order No. 6, and because paragraph 16 of the Confidentiality Order states that transcripts of the hearings shall be kept confidential, the entirety of the transcript of that hearing is confidential and no redactions were necessary. Claimant further indicated that it understood that, pursuant to Procedural Order No. 7, however, the United States and Mexico could in the future request the Tribunal to grant access to the transcript. Although Claimant opposed any such motion by United States or Canada, in the event that the Tribunal would grant such a motion, Claimant requested an additional twenty (20) days after issuance of such an order to submit appropriate redactions under the terms of Confidentiality Order and Procedural Order No. 7. Claimant reserved all its rights notwithstanding this request, including under paragraph 16 of the Confidentiality Order which states that transcripts of the hearings shall be kept confidential.

131. By e-mail of April 8, 2014, Canada made reference to Claimant’s e-mail above and stated that it was in the midst of preparing a letter to the Tribunal on this and other issues and would present its views in the near future.

132. By e-mail of April 10, 2014, the Tribunal clarified to the disputing parties that, should the non-disputing Parties request the Tribunal for access to the transcripts of the Hearing on

Jurisdiction, the disputing parties would be granted a reasonable period of time to submit their comments thereon.

133. By letter dated April 17, 2014, Canada requested the Arbitral Tribunal to amend paragraphs 14 and 16 of the Confidentiality Order and paragraph 31 of Procedural Order No. 3 so as to allow the attendance of the non-disputing NAFTA Parties to any future hearings and allow them unrestricted access to the transcripts of the Hearing on Jurisdiction and any future transcripts generated in these proceedings.
134. By e-mail of April 18, 2014, the Tribunal invited DIBC to submit its comments on Canada's request above by May 2, 2014.
135. By e-mails of April 29, 2014, Mexico and the United States requested the Tribunal to have access to the transcripts of the Hearing on Jurisdiction, pursuant to Procedural Order No. 7, in order to be able to make submissions on issues of interpretation of the NAFTA.
136. By e-mail of April 30, 2014, the Tribunal acknowledged receipt of Mexico's and the United States' requests above and determined the following:

*“(i) Claimant is to submit its comments on Mexico's and US' requests by May 12, 2014. Claimant is also requested to submit its proposed redactions to the transcripts under the terms of the Confidentiality Order within the same deadline, in case the tribunal decides to give access to the transcripts to the non-disputing Parties.*

*“(ii) Respondent is to submit its comments on Claimant's submission of May 12, 2014 by May 22, 2014.”*

137. By e-mail of May 2, 2014, DIBC submitted its objections to Canada's request to amend the Confidentiality Order and Procedural Order No. 3.
138. By e-mail of May 5, 2014, the Arbitral Tribunal acknowledged receipt of DIBC's e-mail of May 2, 2014 and informed the disputing parties that it would render its decision on this issue shortly.
139. On May 12, 2014, the Tribunal issued Procedural Order No. 8, where it decided that:

*“[...] Canada's request to amend paragraphs 14 and 16 of the Confidentiality Order and paragraph 31 of Procedural Order No. 3 lacks good cause under Article 19 of the Confidentiality Order and is dismissed.”*



140. By letter of May 12, 2014, Claimant submitted its objections to Mexico's and the United States' requests to have access to the transcripts, and proposed redactions to the transcripts in the event the Tribunal would nevertheless authorize the requested access.
141. By letter of May 22, 2014, Canada submitted its comments to Claimant's submission mentioned above.
142. On June 5, 2014, the Arbitral Tribunal issued Procedural Order No. 9, where it determined the following:

*“(a) the non-disputing NAFTA Parties shall have access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014, in accordance with Procedural Order No. 7. However, before allowing access to the transcripts to Mexico and the United States, the Tribunal shall first decide whether they shall have access to the transcripts in their entirety or only to parts thereof, so as to preserve the confidentiality required by the Confidentiality Order;*

*(b) in order to be able to decide which parts of the transcripts shall be redacted, if any, Claimant is to complete the enclosed table (Annex I to this Order), by no later than June 12, 2014, justifying its proposed redactions in accordance with the definition of “confidential information” in the Confidentiality Order;*

*(c) Canada shall submit its comments to Claimant's proposed redactions by June 19, 2014;”*

143. By letter of June 12, 2014, Claimant submitted that *“in light of the Tribunal's clarification in Procedural Order No. 9 about the proper scope of ‘confidential information’ as that term is defined in the Confidentiality Order of March 27, 2013, Claimant withdraws its previously proposed redactions and proposes no new redactions.”*
144. By e-mail of June 13, 2014, the Tribunal acknowledged receipt of Claimant's letter mentioned above and determined the following:

*“[...] the Tribunal grants the United States' and Mexico's requests to have access to the Transcripts of the Hearing on Jurisdiction of March 20-21, 2014 in their entirety in order to be able to make submissions on issues of interpretation of the NAFTA.[...].*

*The non-disputing Parties are invited to make their respective submissions under NAFTA Art. 1128, if any, by no later than June 27, 2014. The disputing parties shall submit their comments thereon, if any, by July 18, 2014. Please note that such time*

*limits are the same as those agreed by the disputing parties under Procedural Order No. 5 with respect to NAFTA Art. 1128 submissions.”*

145. On June 27, 2014, the United States and Mexico informed the Tribunal that they did not intend to make any submission under NAFTA Article 1128 at that stage.

## **VI. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT**

### **A. RESPONDENT'S POSITION**

#### **(1) Preliminary Statement**

146. According to Canada, at its core, this dispute can be described in a single sentence: DIBC, the owner of the Ambassador Bridge, wants to prevent a new toll bridge from being built in Windsor-Detroit, while the governments of Canada, Ontario, Michigan and the United States support its construction. Under the layers of interrelated events and baseless allegations levelled against Canada in this NAFTA arbitration and in domestic court proceedings lies DIBC's singular goal of stopping – or delaying for as long as possible – the cooperative efforts of Canadian and American public officials and business leaders to promote long-term economic prosperity and security for the citizens of both countries by building the DRIC Bridge, customs plazas and highway connections.<sup>65</sup>
147. As a means of achieving this goal, DIBC not only initiated this NAFTA arbitration against Canada but also initiated three different sets of domestic proceedings against Canada with respect to the same measures before the United States Court for the District of Columbia and the Ontario Superior Court of Justice, as well as involving the payment of damages. This is impermissible under NAFTA Article 1121 and renders Canada's consent to arbitration under Article 1122(1) without effect. While several of DIBC's NAFTA claims would fail anyway because they are untimely (NAFTA Articles 1116 and 1117) or otherwise fall outside of this Tribunal's jurisdiction, DIBC's failure to comply with NAFTA Article 1121 fully deprives this Tribunal of jurisdiction to determine any of DIBC's NAFTA claims, as summarized below.<sup>66</sup>

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<sup>65</sup> Canada's Memorial on Jurisdiction, ¶ 3.

<sup>66</sup> Canada's Memorial on Jurisdiction, ¶ 4.

## (2) International legal principles for establishing the Tribunal's jurisdiction

- (i) Claimant bears the burden of proof to show that it has met the jurisdictional requirements of the NAFTA

148. According to Canada, its consent to arbitrate under NAFTA Chapter Eleven is contingent on certain requirements being met, including that the Claimant and its enterprise waive their right to pursue and actually refrain from domestic proceedings for damages with respect to the measure(s) alleged to breach the NAFTA (Article 1121), and that the NAFTA claim must be timely (Article 1116(2) and 1117(2)). Failure to comply with these requirements means there is no agreement to arbitrate and, thus, no jurisdiction for the Tribunal.<sup>67</sup>

149. Contrary to DIBC's argument, Canada submits that an investor bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions necessary to commence arbitration and that the tribunal has jurisdiction over the dispute. This position has been constantly upheld by NAFTA tribunals, including in the *Apotex v. United States* case, *Methanex*, *Bayview*, and *Grand River*.<sup>68</sup>

- (ii) Jurisdiction is determined on the date that the Notice of Arbitration is filed

150. According to Canada, under NAFTA Chapter Eleven the jurisdiction of a tribunal is determined on the date the claim is submitted to arbitration; and in this case the relevant date is April 29, 2011. Thus, NAFTA Article 1121 stipulates that a claim may be submitted to arbitration “*only if*” an investor and its enterprise filed a valid waiver and comply with that waiver as of the date the notice of arbitration is submitted. This general rule has been confirmed by NAFTA and other international courts and tribunals.<sup>69</sup>

151. Canada concludes that DIBC cannot create jurisdiction after it has submitted its NAFTA claim to arbitration without the express consent of Canada, which Canada has not and will not give.<sup>70</sup> Therefore, the Tribunal cannot have jurisdiction over a claim that was not validly submitted to arbitration in the first place, even if the claim was subsequently amended. In any

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<sup>67</sup> Canada's Reply Memorial on Jurisdiction, ¶ 49.

<sup>68</sup> Canada's Reply Memorial on Jurisdiction, ¶ 51.

<sup>69</sup> Canada's Reply Memorial on Jurisdiction, ¶ 54-56; See also RLA-4; RLA-6; RLA-40 to RLA-42.

<sup>70</sup> Canada's Reply Memorial on Jurisdiction, ¶ 57.

event, an amended claim could only be valid to the extent that it is not “*amended or supplemented in such a manner that the amended or supplemented claim of defense falls outside the jurisdiction of the arbitral tribunal*”, pursuant to UNCITRAL Rule Article 22.<sup>71</sup>

**(3) The Tribunal has no jurisdiction because DIBC has failed to comply with NAFTA Article 1121**

- (i) Consent to arbitration by a NAFTA Party is conditioned on compliance with the waiver requirement in Article 1121

152. Canada submits that NAFTA Article 1121, entitled “*Conditions Precedent to Submission of a Claim to Arbitration*,” is a prerequisite to the formation of a valid agreement to arbitrate between the disputing investor and the NAFTA Party involved.<sup>72</sup> Article 1121(1) and (2) provides the following:

*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 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*

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<sup>71</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 58.

<sup>72</sup> Canada’s Memorial on Jurisdiction, ¶ 82.

*(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.*

153. NAFTA Article 1121(3) provides that the “*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.*” For cases submitted under the UNCITRAL Rules, NAFTA Article 1137(1)(c) stipulates that a claim is submitted to arbitration when the notice of arbitration is received by the disputing Party. The tribunal in *Waste Management I* noted that the waiver delivered with the notice of arbitration “*must be clear, explicit and categorical*” and legally effective.<sup>73</sup>
154. The responsibility to comply with a waiver lies with the Claimant, which has an affirmative obligation to discontinue its domestic proceedings with respect to the measures alleged to breach the NAFTA. As the tribunal in *Commerce Group* stated, “*logic tells us that it is up to the Claimants to make the waiver of their legal rights effective, not Respondent*”.<sup>74</sup> Unless DIBC has actually done what is required by Article 1121, including having terminated domestic proceedings with respect to measures alleged to breach NAFTA, it is the NAFTA arbitration that must be terminated for lack of jurisdiction.<sup>75</sup> Contrary to the submission of DIBC that the issue of compliance with Article 1121 is a matter for the Respondent to pursue in domestic courts, Canada submits that it is for the Arbitral Tribunal to determine whether there is compliance with Article 1121 and whether it has jurisdiction.<sup>76</sup>
155. Canada concludes that a claimant’s failure to file a proper waiver with its notice of arbitration, or its failure to otherwise act consistently with that waiver, means there is no consent to arbitrate and that the tribunal has no jurisdiction.<sup>77</sup>

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<sup>73</sup> Canada’s Memorial on Jurisdiction, ¶ 83; Exhibit RLA-4.

<sup>74</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 65.

<sup>75</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 67.

<sup>76</sup> Transcripts of the Hearing on Jurisdiction, Day 1, p. 62, Lines 9-13.

<sup>77</sup> Canada’s Memorial on Jurisdiction, ¶ 84.

- (ii) The ordinary meaning of NAFTA Article 1121, read in its context and in light of the object and purpose of the NAFTA

156. Article 31(2) of the Vienna Convention on the Law of Treaties (the “VCLT”) sets out the general rule of treaty interpretation in international law: “*A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*”<sup>78</sup>
157. As applied to this NAFTA arbitration, DIBC and CTC were required to file a valid waiver on April 29, 2011 and, as of that date, discontinue any existing domestic proceedings and refrain from initiating new proceedings against Canada in Canadian, U.S. or Mexican courts “*with respect to*” any of the “*measures*” alleged to be in violation of NAFTA Chapter Eleven. The only exception to this is to allow DIBC and CTC to seek injunctive, declaratory or other extraordinary relief in Canada – not in the U.S. or Mexico – and only if those proceedings are “*not involving the payment of damages*”.
158. Canada points out that the NAFTA tribunal in *Waste Management I* discussed the term “*with respect to the measure*” in the context of Article 1121, stating that:

“*[f]or the purposes of considering the waiver valid when that waiver is a condition precedent to arbitration, it is not imperative to know the merits of the question submitted to arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA*”<sup>79</sup>

159. Canada concludes that a domestic proceeding “*with respect to*” a measure that is alleged to breach the NAFTA is thus one that is “*in regards to or with reference to*” that measure in a way that might “*directly affect*” the NAFTA arbitration. This could mean, for example, a domestic proceeding that requires for its disposition the making of determinations of facts or

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<sup>78</sup> Canada’s Memorial on Jurisdiction, ¶ 86.

<sup>79</sup> Canada’s Memorial on Jurisdiction, ¶ 94; *Waste Management I*, §27, Exhibit RLA-4.

determinations of legal rights, or that might award compensation “*in regards to or with reference to*” a measure that is alleged to breach the NAFTA.<sup>80</sup>

160. The only exception to the rule that domestic proceedings be discontinued with respect to the measures alleged to breach NAFTA is the right of the claimant to initiate or continue a domestic proceedings within the respondent NAFTA Party’s territory as long as that proceeding is for “*injunctive, declaratory or other extraordinary relief*” but “*not involving the payment of damages*”.<sup>81</sup>
161. Canada rejects DIBC’s narrow interpretation of the words proceedings “with respect to”, which would require a waiver of claims only if the exact measure is specifically challenged and identified as the specific basis of its claim in the domestic proceedings. Canada counters that DIBC’s interpretation is incorrect because the ordinary meaning of the words “with respect to” is “as regards; with reference to”, not “identical” or “same as”. Article 1121 is focused on the underlying actions of the respondent Party at issue, not the cause of action, and not on the claims to which such measure may give rise.<sup>82</sup>
162. Moreover, Canada argues that the terms of Article 1121 must be interpreted in their context and in light of the object and purpose of the NAFTA. Canada points to the *Consolidated Lumber* case, where the tribunal stated that “the drafters of the NAFTA sought to avoid concurrent and parallel proceedings” and pointed specifically to Article 1121 as proof that overlapping proceedings “are to be avoided”.<sup>83</sup> Canada submits that other NAFTA tribunals have taken the same view.<sup>84</sup>
163. Canada also rejects DIBC’s argument that Article 1121 would allow it to seek damages in the domestic courts of the respondent NAFTA Party as long as the damages sought are “in the alternative” to other equitable relief or as long as the damages are not being sought for the

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<sup>80</sup> Canada’s Memorial on Jurisdiction, ¶ 95.

<sup>81</sup> Canada’s Memorial on Jurisdiction, ¶ 96.

<sup>82</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 74-75.

<sup>83</sup> Canada’s Memorial on Jurisdiction, ¶ 106; *Consolidated Lumber* Decision on Preliminary Question, June 6, 2006, ¶¶ 237, 242, RLA-12.

<sup>84</sup> Canada’s Memorial on Jurisdiction, ¶ 106; RLA-4 and RLA-5.

“same” measures alleged to breach NAFTA. According to Canada, DIBC’s interpretation does not find any support in the plain language of Article 1121.<sup>85</sup>

(iii) DIBC’s waivers contravene Article 1121

164. Canada submits that a waiver filed pursuant to NAFTA Article 1121 must be consistent with the requirements set out in that provision. Because jurisdiction is determined on the date DIBC submitted its claim to arbitration, it is DIBC’s First NAFTA Waiver that is decisive in this case. Canada argues that even if the Second NAFTA waiver were considered, it also is inconsistent with the requirements of Article 1121.
165. Canada argues that DIBC’s First NAFTA Waiver is inconsistent with Article 1121 for two reasons. First, while NAFTA Article 1121 requires a waiver in respect of “any proceedings”, DIBC expressly carved-out the Washington Litigation, making the waiver inapplicable to those domestic proceedings. Second, according to Canada, the measures that DIBC includes in its First NAFTA Waiver are narrower than the measures alleged to breach the NAFTA in its First NAFTA NOA; and accordingly the First waiver only waives DIBC’s right to pursue certain specified measures in domestic proceedings, and thereby purports to preserve the possibility of DIBC pursuing other claims that may nonetheless be claims “with respect to” measures at issue in the NAFTA arbitration.<sup>86</sup>
166. Canada submits that DIBC’s Second Waiver which accompanied its Amended NAFTA NOA aggravates the above defects, for the following three reasons: (i) DIBC carved out the Washington Litigation again, but in addition also carved-out the CTC Litigation; (ii) DIBC’s Second Waiver failed to include the following phrase from Article 1121(1)(b) and 2(b): “before an administrative tribunal or court under the law of the Disputing Party”, giving itself the right to pursue “injunctive, declaratory or other extraordinary relief” against Canada in the United States; and (iii) DIBC only made the waiver applicable to certain measures at issue in the NAFTA arbitration.<sup>87</sup>

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<sup>85</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 86.

<sup>86</sup> Canada’s Reply Memorial on Jurisdiction, ¶¶ 99-103.

<sup>87</sup> Canada’s Reply Memorial on Jurisdiction, ¶¶ 105-107.



167. Finally, Canada alleges that DIBC's Third Waiver, introduced at the Hearing on Jurisdiction as Exhibit C-171, is a clear acknowledgement that the previous waivers were defective, because the Third Waiver tried to correct the defective aspects of the First and Second waivers. In any case, Canada argues that such waiver is irrelevant because it was not submitted at the time of the NOA.<sup>88</sup>

(iv) DIBC's continuation of the Washington Litigation past April 29, 2011 contravenes NAFTA Article 1121 and deprives the Tribunal of jurisdiction

168. Canada argues that DIBC's continuation of the Washington Litigation against Canada after it commenced NAFTA arbitration contravenes Article 1121 because it was (and continues to be) both (i) a proceeding with respect to the measures it alleges breach the NAFTA (i.e. DRIC EA and the Nine Point Plan<sup>89</sup>), and (ii) is a proceeding for damages.<sup>90</sup>

169. Canada argues that the gravamen of the First NAFTA NOA and DIBC's Original and Amended Complaint in the Washington Litigation was the same: Canada's decision to locate the DRIC Bridge, corresponding Parkway, and customs plaza in proximity to the Ambassador Bridge. The measure which approved the location of the DRIC Bridge and the Parkway is the same: the DRIC EA.<sup>91</sup>

170. DIBC's First NAFTA NOA was focused primarily on the DRIC EA, alleging that: "*Canada's focus in developing the Central Corridor crossing infrastructure was to develop a publicly owned bridge to take traffic from the Ambassador Bridge, drive down the value of the Ambassador Bridge, and facilitate a future acquisition of the Ambassador Bridge by Canada.*" In DIBC's Original and First Amended Complaint in the Washington Litigation it also alleged that Canada "*created a new opportunity to attempt to force the transfer of the Ambassador Bridge to ownership and control by Canada, this time by proposing to build a new bridge (the "DRIC bridge") between Detroit and Windsor, designed to take nearly all the traffic revenue from the Ambassador Bridge.*"<sup>92</sup>

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<sup>88</sup> Transcripts of the Hearing on Jurisdiction, Day 1, p. 90, lines 9-12; p. 94, lines 17-22.

<sup>89</sup> Transcripts of the Hearing on Jurisdiction, Day 1, p. 109, lines 1-9.

<sup>90</sup> Canada's Reply Memorial on Jurisdiction, ¶ 110.

<sup>91</sup> DRIC EA Report, Exhibit R-47; CEEA Screening Report, Exhibit C-92.

<sup>92</sup> Canada's Reply Memorial on Jurisdiction, ¶ 113.

171. Canada argues that the timing of DIBC’s NAFTA arbitration and Washington Litigation is also telling. The DRIC EA was approved by Ontario and Canada in August and December 2009, respectively, after which CTC initiated a judicial review of the DRIC EA in the Federal Court of Canada on December 31, 2009. DIBC and CTC then launched the Washington Complaint against Canada on March 22, 2010, and filed a notice of intent under the NAFTA on March 23, 2010. According to Canada, the DRIC EA was the impetus for all three lawsuits.<sup>93</sup>
172. Canada rejects DIBC’s argument that overlapping allegations in the Washington proceedings should be construed as “context” and would only be there to corroborate Canada’s discriminatory intent in the Washington Litigation. According to Canada, the Original Complaint and First Amended Complaint show that the allegations made and the relief requested by DIBC for Canada’s decision on the location of the DRIC Bridge and Parkway overlap with the measures alleged to breach the NAFTA. As example, Canada cites the following:

First NAFTA NOA	Washington Complaint/1 <sup>st</sup> Amended Complaint
Allegations with respect to the DRIC EA	
<p>“The location selected for the DRIC Bridge, in the areas known as the Central Corridor, was intentionally chosen to divert traffic away from the Ambassador Bridge. The planned DRIC Bridge will have a direct connection to Highway 401 like the connection Canada promised but never built for the Ambassador Bridge. The new connection from Highway 401 to the DRIC Bridge, known as the Windsor-Essex Parkway, is designed to divert as much as 75% of the Ambassador Bridge’s commercial truck traffic, in order to ensure that the DRIC Bridge succeeds at the Ambassador Bridge’s expense.”<sup>94</sup></p>	<p>“[T]o ensure that the DRIC Bridge succeeds at the expense of the Ambassador Bridge, Canada and FHWA have manipulated regulatory and other processes to speed the construction of the DRIC Bridge, delay or prevent the construction of the Ambassador Bridge New Span, and impede the flow of traffic to the Ambassador Bridge. By the DRIC Proponent’s own estimate, the objective of the DRIC Bridge is to divert from up to 75% of the Ambassador Bridge’s truck traffic and up to 39% of its passenger traffic.”<sup>95</sup></p>

<sup>93</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 114.

<sup>94</sup> First NAFTA NOA, ¶ 38.

<sup>95</sup> Washington Complaint, ¶ 86, Exhibit R-17; See also Washington First Amended Complaint, ¶ 7, Exhibit R-18.

Relief Requested	
<p>“As a result of the measures taken by the Government of Canada described above, the Claimant respectfully requests an award...Directing Canada to pay damages in an amount to be proved at the hearing by which the Claimant presently estimates to be in excess of US\$3.5 billion.”<sup>96</sup></p>	<p>Based on these allegations<sup>97</sup>, DIBC “respectfully request[s] judgment against [Canada] for the following relief:</p> <p>(1)A declaratory judgment against...Canada under 28 USC 2201-2202 that the construction and operation of the planned DRIC Bridge across the Detroit River would violate the obligations of Canada and the United States to DIBC and CTC;...</p> <p>(8) An injunction against Canada...prohibiting...[it]from taking any steps to construct, prepare for construction of, or arrange for construction of the planned DRIC Bridge or any other bridge across the Detroit River between Canada and the United States;</p> <p>(9) Damages against Canada in an amount to be determined at trial.”<sup>98</sup></p>

173. Moreover, Canada argues that both the First NAFTA NOA and the Washington Litigation were initiated “with respect to” the Nine Point Plan. The moment DIBC alleged in the Washington Litigation that Canada unlawfully reneged on the alleged USD 300 million promise in the Nine Point Plan/LGWEM Strategy, those proceedings became proceedings “with respect to” the measures alleged by DIBC in its First NAFTA NOA to violate NAFTA. Canada rejects DIBC’s argument that its allegations against the Nine Point Plan in the Washington Litigation are merely “facts” that provide “background and context”. Allegations of discriminatory behavior are not facts or background.<sup>99</sup>

174. Canada rejects DIBC’s argument that the NAFTA arbitration is about Canada’s measures in Canada and the Washington Litigation about Canada’s measures in the United States. The

<sup>96</sup> First NAFTA NOA, ¶ 52.

<sup>97</sup> Washington Complaint, ¶¶ 147, 156, 160, 164, 167, 173, Exhibit R-17; Washington First Amended Complaint, ¶¶ 212, 220, 231, 235, 245, Exhibit R-18.

<sup>98</sup> Washington Complaint, ¶¶ 45-47, Exhibit R-17; Washington First Amended Complaint, ¶¶ 67-68, Exhibit R-18.

<sup>99</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 117.

Washington Litigation is clearly about Canada's measures in Canada, in particular, about Canada's involvement in the DRIC EA process and the Nine Point Plan.<sup>100</sup>

175. Canada also rejects DIBC's allegation that, while this NAFTA arbitration challenges Canada's regulatory and legislative actions, the Washington Litigation is addressed solely to commercial conduct by Canada as a prospective owner, constructor, and operator of the DRIC. Canada counters that the DRIC EA was a process under Canadian legislation, and is, therefore, a regulatory and legislative action. It is Canada's exclusive sovereign prerogative to decide where and under what conditions a bridge will be constructed on Canadian soil.<sup>101</sup>
176. Finally, Canada rejects DIBC's argument that the allegations made in the Washington Litigation are permissible under NAFTA Article 1121 because DIBC is not seeking monetary damages. Article 1121(1)(b) and (2)(b) contains a limited exception for injunctive and declaratory proceedings brought against Canada *in Canada*, as long as those proceedings are "not involving the payment of damages". The Washington Litigation is not a proceeding in Canada but is in front of the DDC in the United States. The limited exception in NAFTA Article 1121 does not apply, so the issue of whether the Washington Litigation is involving the payment of damages is immaterial. In any case, the suggestion that DIBC and CTC are not seeking the payment of damages in the Washington Litigation is false. The Washington Complaint and First Amended Complaint in the Washington Litigation explicitly sought damages against Canada.<sup>102</sup>
177. DIBC wrongly assumes that the NAFTA and international law allow it to create jurisdiction at any time after commencing arbitration and it ignores the consequences of in the failure to comply with Article 1121 at the outset of the arbitration. Canada considers that this Tribunal need not look further than the First NAFTA NOA and the Washington Original Complaint and First Amended Complaint.<sup>103</sup>
178. Canada argues that even if the Tribunal were to look into the Amended NAFTA NOA filed on January 15, 2013, it would find that the amended claim is itself outside the jurisdiction of the

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<sup>100</sup> Transcripts of the Hearing on Jurisdiction, Day 1, p. 109, lines 16-25.

<sup>101</sup> Transcripts of the Hearing on Jurisdiction, Day 1, p. 110, lines 10-17.

<sup>102</sup> Canada's Memorial on Jurisdiction, ¶¶ 147-149.

<sup>103</sup> Canada's Reply Memorial on Jurisdiction, ¶ 119.

Tribunal because DIBC was continuing the Washington Litigation against Canada as of that date.<sup>104</sup> The “operative complaint” in the Washington Litigation at the time DIBC amended the submission of its claim to arbitrate was the Washington Second Amended Complaint. Canada alleges that DIBC’s allegations in the Second Amended Complaint also renders the Washington Litigation a proceeding “with respect to” the measures alleged to breach the NAFTA.<sup>105</sup>

179. Finally, Canada points out that on May 29, 2013 DIBC amended its claims against Canada in the Washington Litigation for a third time. DIBC assumes that its Third Amended Complaint is the “operative complaint” for the purposes of determining whether the Washington Litigation is a proceeding “with respect to” measures alleged to breach the NAFTA under Article 1121. The Third Amended Complaint is not the “operative complaint” as DIBC was required to comply with Article 1121 as of April 29, 2011. Nevertheless, the Third Amended Complaint does not rectify DIBC’s previous non-compliance with Article 1121 but only demonstrates DIBC’s continued willingness to flout conditions precedent under that provision.<sup>106</sup>

(v) CTC’s Initiation and Continuation of the *CTC v. Canada* Litigation Contravenes NAFTA Article 1121

180. Canada argues that DIBC contravened Article 1121 when it initiated and continued the CTC Litigation for the following two reasons: (i) the CTC Litigation is a proceeding with respect to the measures alleged to breach the NAFTA, as it seeks to impugn the Nine Point Plan, the DRIC EA, the IBTA and the delay purportedly caused with respect to the New Span EA; and (ii) it is also a proceeding involving the payment of damages.<sup>107</sup>

181. Canada rejects DIBC’s argument that DIBC is allowed to initiate and continue the CTC Litigation under Article 1121 because its damages claim in that proceeding is not for the “same” measures at issue in the NAFTA arbitration. DIBC’s allegation that the actual

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<sup>104</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 120.

<sup>105</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 121.

<sup>106</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 129.

<sup>107</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 135.

construction of the DRIC Bridge is a “measure” separate and distinct from the measures at issue in the NAFTA arbitration in untenable. For instance, the approved location of the DRIC Bridge through the DRIC EA is not a measure that is separate and distinct from the actual construction of the DRIC Bridge for the purposes of Article 1121. Both of DIBC’s allegations have their roots in the same underlying complaint: that a new international crossing in proximity to the Ambassador Bridge violates DIBC’s exclusive franchise rights and the NAFTA. DIBC acknowledges in the CTC Litigation that Canada, through the DRIC EA, “*unlawfully commenced construction of a new, government-owned international crossing to be built less than two miles from the Ambassador Bridge.*”<sup>108</sup>

182. Moreover, Canada argues that DIBC seeks in excess of US\$ 3.5 billion in damages against Canada in this arbitration and it is difficult to imagine how this quantum would not overlap with DIBC’s claim for expropriation in the CTC Litigation.<sup>109</sup>

(vi) DIBC refuses to confirm what Windsor measures are alleged to breach the NAFTA

183. According to Canada, in its NAFTA claim DIBC alleges that the City of Windsor took measures to discriminate against DIBC, violating Claimant’s exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant’s franchise rights by precluding the construction of the New Span. In the Windsor Litigation, CTC alleges that the City of Windsor “*engaged in unlawful and deliberate conduct for the purpose of delaying, obstructing, hindering and preventing CTC from engaging in its commercial activities to effectively operate and improve the Ambassador Bridge crossing.*”<sup>110</sup>

184. More specifically, in the Windsor Litigation, the following City of Windsor actions were alleged to be unlawful and to have caused CTC damages: (i) the Schwartz Report and Greenlink proposal; (ii) Purchase of property in the DRIC Bridge area; (iii) City Council Resolutions and submissions in the public consultation process opposing the construction of the New Span; (iv) planning studies relating to the Olde Sandwich Towne; (v) installation of

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<sup>108</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 138. See CTC Litigation Statement of Claim, ¶99, Exhibit R-20; CTC Litigation Amended Statement of Claim, ¶ 105, Exhibit C-119.

<sup>109</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 139.

<sup>110</sup> Canada’s Reply Memorial on Jurisdiction, ¶¶ 142-143.

traffic lights and unlimited driveway connections along Huron Church Road; and (vi) By-laws and City Council resolutions to prevent the demolition of houses in Old Sandwich Towne.<sup>111</sup>

185. Canada argues that in its Counter-Memorial in this arbitration, DIBC simply refused to identify which City of Windsor measures “discriminates against DIBC” and “preclude the construction of the New Span”. However, if any of those measures include those at issue in the Windsor Litigation, then DIBC has failed to meet the conditions precedent to arbitration under Article 1121.<sup>112</sup>

**(4) DIBC’s Highway 401 Road Access Claims and IBTA Claim are Time Barred under NAFTA Articles 1116(2) and 1117(2)**

- (i) Articles 1116(2) and 1117(2) set a rigid three-year time limit for submission of a claim to arbitration

186. Canada submits that if the Tribunal decides that DIBC has complied with Article 1121, it nonetheless lacks jurisdiction *rationae temporis* over DIBC’s Highway 401 and IBTA claims because of the three-year time limitation set out in Articles 1116(2) and 1117(2).<sup>113</sup>

187. Canada alleges that NAFTA Chapter Eleven sets a rigid time limitation within which claims must be submitted to arbitration. NAFTA Articles 1116(2) and 1117(2) are clear: DIBC had three years “*from the date* on which [DIBC and CTC] *first* acquired, or should have *first* acquired” (emphasis added by Canada) knowledge of the alleged breach and knowledge that DIBC and/or CTC incurred loss or damage to submit its claim to NAFTA arbitration.<sup>114</sup>

188. Canada points to DIBC’s allegation that it suffered damage as a result of Canada’s actions undertaken prior to filing its NAFTA claim, including diminished toll revenues (including future losses) and damage to its exclusive franchise rights. In light of this allegation, Canada argues that the Tribunal has to determine the date on which DIBC/CTC first acquired actual or constructive knowledge of the alleged breach and damage. Since DIBC’s First NAFTA

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<sup>111</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 143.

<sup>112</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 148.

<sup>113</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 149.

<sup>114</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 181.

NOA was filed on April 29, 2011, if the “first acquired” date show to be before April 29, 2008, then the claims are time barred and outside the Tribunal’s jurisdiction.<sup>115</sup>

189. Moreover, Canada argues that the NAFTA Parties set a specific time limit of three years in which to file a claim under Chapter Eleven regardless of whether the impugned conduct is continuing or not. The countdown starts from the date the investor/enterprise “*first acquired, or should have acquired, knowledge of the alleged breach*” and that some cognizable loss has been incurred. It does not matter if the measure is continuing.<sup>116</sup>
190. NAFTA Tribunals have also consistently noted that concrete knowledge of the actual amount of loss or damage is not a pre-requisite to the running of the limitation period under 1116(2) and 1117(2). For instance, the tribunal in *Mondev v. United States* stated that “[a] *claimant may know that it suffered loss or damage even if the extent of quantification of the loss or damage is still unclear.*”<sup>117</sup> Canada also cites the *Grand River Enterprises Six Nations Ltd. v. United States* case, which endorsed the *Mondev* tribunal’s conclusion.<sup>118</sup>
191. Canada alleges that all three NAFTA Parties have endorsed the *Grand River* tribunal’s interpretation of NAFTA’s limitations provisions. Under Article 31(3)(a) of the Vienna Convention on the Law of Treaties, the consistent position of the United States, Mexico and Canada on this issue constitutes a “*subsequent agreement between the parties regarding the interpretation of the treaty*” which “*shall be taken into account*” when interpreting the NAFTA.<sup>119</sup>
192. Canada argues that the Tribunal should not rely on the *UPS v. Canada* case in support of DIBC’s ‘continuing breach’ theory. This is because the UPS tribunal’s interpretation gives the word “first” no meaning and run afoul of the principle of interpretation of *effet utile* and is a

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<sup>115</sup> Canada’s Memorial on Jurisdiction, ¶ 182.

<sup>116</sup> Canada’s Memorial on Jurisdiction, ¶ 185.

<sup>117</sup> Canada’s Memorial on Jurisdiction, ¶ 194; See *Mondev International Ltd. v. US* (ICSID Case No. ARB(AF)/99/2) Award, October 11, 2001, ¶ 87, Exhibit RLA-20.

<sup>118</sup> Canada’s Memorial on Jurisdiction, ¶¶ 96-198; See *Grand River Enterprises Six Nations Ltd. v. United States*, Jurisdiction Decision, ¶¶ 77-78, Exhibit RLA-15.

<sup>119</sup> Canada’s Memorial on Jurisdiction, ¶ 199.



departure from the approach of the *Mondev* and *Grand River* tribunals, as well as the concordant view of the three NAFTA Parties.<sup>120</sup>

193. Finally, Canada submits that the text of NAFTA Articles 1116(2) and 1117(2) makes no allowance for the limitations period to be tolled by ongoing litigation with respect to the impugned measure. As a consequence, none of the ongoing litigation referenced by DIBC could toll the limitation period.<sup>121</sup>

(ii) DIBC failed to submit timely claims regarding the Highway 401 Measures, as DIBC first acquired knowledge of the alleged breach and loss before May 1, 2008

194. As mentioned above, Canada argues that if DIBC first acquired knowledge of the alleged breaches and damages before April 29, 2008, then DIBC's claims would be time barred and outside this Tribunal's jurisdiction.<sup>122</sup>

195. DIBC's claims regarding road access to Highway 401 encompasses the following:

- a. DIBC alleges that Canada reneged on a "promise" in the 2003 Windsor Gateway Action Plan/Nine Point Plan to spend USD 300 million to construct a direct highway connection between Highway 401 and the Ambassador Bridge;
- b. DIBC alleges that Canada manipulated the Highway 401 connection component of the DRIC EA (the "Parkway") to go to the new DRIC Bridge but not to the Ambassador Bridge; and
- c. DIBC alleges that Windsor installed "seventeen unnecessary traffic lights" and granted "unlimited curb cuts and driveways connection" on Huron Church Road in order to steer traffic to the Windsor-Detroit Tunnel and the DRIC Bridge.

196. For the Highway 401 claims, Canada sustains that the relevant dates are March 11, 2004 and November 15, 2005, i.e. dates on which Canada "reneged" on its alleged "promise" to build a direct highway link between the Ambassador Bridge and Highway 401.<sup>123</sup>

- *The Windsor Gateway Action Plan/Nine Point Plan was Replaced on March 11, 2004*

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<sup>120</sup> Canada's Memorial on Jurisdiction, ¶ 211.

<sup>121</sup> Canada's Reply Memorial on Jurisdiction, ¶¶ 168-170.

<sup>122</sup> Canada's Memorial on Jurisdiction, ¶ 182.

<sup>123</sup> Canada's Memorial on Jurisdiction, ¶ 183.

197. First, Canada states that nothing in the Windsor Gateway Action Plan/Nine Point Plan can possibly be construed as a commitment by Canada to spend \$300 million to build a direct Highway 401-Ambassador Bridge connection.<sup>124</sup>
198. In any event, Canada argues that the Windsor Gateway Action Plan/Nine Point Plan was replaced on March 11, 2004. On this date, all three levels of government announced a new plan under which the \$300 million in infrastructure funding would be used. The *Let's Go Windsor Essex Moving* strategy ("LGWEM Strategy") was explicit: "*The Let's Go Windsor-Essex Moving strategy replaces the nine-point Windsor Gateway Action Plan.*"<sup>125</sup>
199. Canada submits that LGWEM projects funded from the allocated \$300 million were well-publicized, including on the Ontario Ministry of Transportation and Transport Canada websites, City of Windsor public notices, and in the media.<sup>126</sup> No project under the LGWEM Strategy ever involved building a direct Highway 401 – Ambassador Bridge connection.<sup>127</sup> DIBC and CTC knew or should have known this, and the evidence indicates they did. In addition to constructive knowledge of the abandonment of the Nine Point Plan in March 2004, evidence of DIBC and CTC's actual knowledge can be found, Canada says, in the following:
- On June 1, 2007: CTC Executive Director of External Affairs Mr. Thomas Skip McMahon told the Windsor Star newspaper that the \$300 million was committed "to connect the 401 to the [Ambassador] bridge plaza" but was instead spent on other traffic construction projects in Windsor";<sup>128</sup>
  - On August 24, 2007: CenTra/DIBC/CTC General Counsel Mr. Patrick Moran wrote to Canada alleging that it had reneged on its promise to use the \$300 million to build a Highway 401-Ambassador Bridge connection;<sup>129</sup>

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<sup>124</sup> Canada's Memorial on Jurisdiction, ¶ 219. See Exhibits C-29 - C-33.

<sup>125</sup> Canada's Memorial on Jurisdiction, ¶ 221. See "A New Solution for the Windsor Gateway Announced By All Three Levels of Government," News Release, March 11, 2004, at p. 3, Exhibit R-34.

<sup>126</sup> Canada's Memorial on Jurisdiction, ¶ 225. See Exhibits R-89 to R-106.

<sup>127</sup> Canada's Memorial on Jurisdiction, ¶ 225.

<sup>128</sup> Canada's Memorial on Jurisdiction, ¶ 226. See Exhibit R-109.

<sup>129</sup> Canada's Memorial on Jurisdiction, ¶ 226. See Exhibit R-111.

- On October 3, 2007: Canada wrote to CenTra/DIBC/CTC President Mr. Stamper to confirm what was already known: (a) the \$300 million in the Nine Point Plan was never intended to be spent on building a Highway 401 connection to the Ambassador Bridge; (b) the LGWEM Strategy superseded the Nine Point Plan and the \$300 million was being spent on short and medium term traffic infrastructure improvements, and (c) Canada remained committed to the Bi-National Partnership Process.<sup>130</sup>

200. Canada argues that the evidence above shows that DIBC and CTC knew, or should have known, more than three years before it filed its First NAFTA NOA on April 29, 2011, that the Windsor Gateway Action Plan/Nine Point plan was terminated.<sup>131</sup> For these reasons, DIBC's claim with respect to the Windsor Gateway Action Plan/Nine Point plan is time barred under NAFTA Articles 1116(2) and 1117(2) and thus outside the Tribunal's jurisdiction.<sup>132</sup>

- *Highway 401 Connection to the Ambassador Bridge Through the DRIC EA was eliminated on November 14, 2005*

201. Canada rejects DIBC's allegation that Canada would have manipulated the DRIC EA to eliminate the twinned Ambassador Bridge option X12 in order to ensure the Parkway would go to the DRIC Bridge but not to the Ambassador Bridge. DIBC's allegations are without merit, as has been established in the Federal Court of Canada.<sup>133</sup>

202. Canada argues that, in any event, the claim is time-barred under NAFTA Articles 1116(2) and 1117(2) because DIBC knew or should have known on November 14, 2005 that there would not be a direct highway connection between Highway 401 and the Ambassador Bridge, because option X12 had been dropped from the DRIC EA.<sup>134</sup> Accordingly, DIBC had until November 14, 2008 to commence arbitration under NAFTA Chapter Eleven with respect to its Highway 401 claims.<sup>135</sup> Other evidence of DIBC and CTC's actual knowledge that there

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<sup>130</sup> Canada's Memorial on Jurisdiction, ¶ 227. See Exhibit C-110.

<sup>131</sup> Canada's Memorial on Jurisdiction, ¶ 128.

<sup>132</sup> Canada's Memorial on Jurisdiction, ¶ 229.

<sup>133</sup> Canada's Memorial on Jurisdiction, ¶ 230. See Exhibit R-9.

<sup>134</sup> Canada's Memorial on Jurisdiction, ¶ 230.

<sup>135</sup> Canada's Memorial on Jurisdiction, ¶ 238.

would not be a direct highway connection between Highway 401 and the Ambassador Bridge includes the following:

- On November 105, 2005: The day after option X12 was dropped from the DRIC EA, DIBC/CTC President Mr. Stamper wrote to MTO and MDOT declaring that the DRIC process had “*effected delay and damage*” to the Ambassador Bridge.<sup>136</sup>
- On November 28, 2006: DIBC/CTC President Mr. Stamper testified before the Canadian Senate Committee on Transport and Communication that “*The plan for the government-proposed bridge is to finish Highway 401 to the new bridge, not to our bridge. That is a continued way to take traffic away from the Ambassador Bridge [...]. This is not just pie in the sky. These things have been going on for a long time.*”<sup>137</sup>

203. Canada points out that DIBC has itself put forward, in its NAFTA Statement of Claim, October 3, 2007 as the date on which it first acquired knowledge of Canada’s alleged breach and knowledge that it incurred loss from this alleged breach. While the evidence above shows that DIBC actually first acquired knowledge of the alleged breach and damage much earlier than that date, even if this later date is used to measure the commencement of the three-year limitation period, DIBC would have had until October 3, 2010 to submit its claim to NAFTA arbitration (which it failed to do).<sup>138</sup>

204. Canada also rejects DIBC’s allegations that DIBC could not have known before May 1, 2008, (the day on which the exact route of the Parkway was publicly announced) that Canada would not build a direct highway connection between Highway 401 and the Ambassador Bridge.<sup>139</sup>

205. Canada states that every one of the DIRC EA public information open houses in 2006 and 2007 discussed and showed maps of specific routes and options to connect Highway 401 to a new bridge in one of the three locations in southwest Windsor, and none of those options included a highway connection to the Ambassador Bridge.<sup>140</sup>

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<sup>136</sup> Canada’s Memorial on Jurisdiction, ¶ 234. See Exhibits R-35 and R-36.

<sup>137</sup> Canada’s Memorial on Jurisdiction, ¶ 234. See Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006, p. 6 of 12, Exhibit R-37.

<sup>138</sup> Canada’s Memorial on Jurisdiction, ¶ 237.

<sup>139</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 179.

<sup>140</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 181.

206. Moreover, Canada rejects DIBC's suggestion that the elimination of option X12 from the DRIC EA was merely a preparatory act and that Canada's alleged unlawful conduct only occurred much later when the exact route of the Parkway was announced on May 1, 2008. With respect to the application of its composite act theory, DIBC advances a similar argument and alleges that "the final act which consummated the composite act" could not have occurred before the Parkway announcement. Canada counters that, in light of the evidence described above, DIBC's "legal" characterizations of Canada's actions as "preparatory" or "composite" do not withstand scrutiny. May 1, 2008 is not the date on which DIBC first acquired knowledge of any alleged NAFTA breach and resulting damage.<sup>141</sup>

(iii) DIBC failed to submit timely claims regarding the *International Bridges and Tunnels Acts* (IBTA) as such act was enacted on February 1, 2007

207. Canada rejects DIBC's allegation that Canada enacted the IBTA to give Canada the purported authority to interfere with the Ambassador Bridge's expansion plans and to coerce DIBC and CTC to transfer their rights in the Ambassador Bridge to Canada. Canada counters that, even if these allegations regarding the intent and purpose of the IBTA were believed for the purposes of jurisdiction, DIBC failed to submit a timely claim within the three-year time limitation set out in NAFTA Articles 1116(2) and 1117(2) because the IBTA was enacted on February 1, 2007.<sup>142</sup>

208. DIBC and CTC cannot plead ignorance of the law, and the evidence shows that they knew or should have known that the IBTA applied to the Ambassador Bridge on the day it was enacted.<sup>143</sup>

209. Canada also rejects DIBC's allegations, raised in its Counter-Memorial, that it did not incur the loss or damage required by NAFTA Articles 1116(2) and 1117(2) when the IBTA came into force in February 1, 2007. DIBC appears to suggest that October 18, 2010 is the date it first acquired knowledge of loss because that was when Canada issued a Ministerial Order to refrain from further work on the New Span until approval under the IBTA was received.<sup>144</sup>

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<sup>141</sup> Canada's Reply Memorial on Jurisdiction, ¶ 190.

<sup>142</sup> Canada's Memorial on Jurisdiction, ¶ 246.

<sup>143</sup> Canada's Memorial on Jurisdiction, ¶ 252.

<sup>144</sup> Canada's Reply Memorial on Jurisdiction, ¶ 198.

However, on January 25, 2010, 10 months before the Ministerial Order was issued, DIBC filed a notice of intent to arbitrate under NAFTA alleging that the IBTA breached the NAFTA and caused it damages of “not less than US\$1.5 billion”. DIBC chose not to pursue this claim in its First NAFTA NOA but opted to do so in its Amended NAFTA NOA. Moreover, on March 22, 2010 DIBC and CTC sued Canada in the United States federal court in Washington DC for damages caused by the IBTA.<sup>145</sup>

210. Canada argues that the fact that DIBC held the view that the IBTA did not apply to the Ambassador Bridge does not change the irrefutable fact that the IBTA did apply to the Ambassador Bridge and that DIBC was clearly told so. DIBC cannot toll the NAFTA’s time limitations period by unilaterally declaring itself unbound by a lawfully enacted statute.<sup>146</sup>
211. Finally, Canada rejects DIBC’s argument that the IBTA, the October 2010 Ministerial Order, and the BSTA are all components of a composite act that was only consummated with the passage of the BSTA in 2012. Canada counters that DIBC’s own allegations and pleadings stress that the passage of the IBTA breached its rights and caused it damage, which started the NAFTA limitations period. By the time the BSTA was enacted, almost three years had elapsed since DIBC alleged in its First NAFTA NOI that it had suffered “in excess of US\$ 1.5 billion” in damages arising out of the IBTA.<sup>147</sup>

#### **(5) Canada’s Request for Relief**

212. In its Reply Memorial on Jurisdiction Canada requested the Tribunal to “*dismiss the Claimant’s claims in their entirety and with prejudice on the grounds of lack of jurisdiction and/or admissibility and, in accordance with Article 42 of the UNCITRAL Arbitration Rules, order the Claimant to pay all of costs arising from this arbitration, including Canada’s legal costs and disbursements.*”<sup>148</sup>

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<sup>145</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 201.

<sup>146</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 205.

<sup>147</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 208.

<sup>148</sup> Canada’s Reply Memorial on Jurisdiction, ¶ 214.

## B. CLAIMANT'S POSITION

### (1) Preliminary Statement

213. DIBC is an American-owned business that owns and operates the Ambassador Bridge, which is the single largest trade crossing between the United States and Canada. DIBC alleges that for many years it has been making plans and seeking approvals to build a twin span to the Ambassador Bridge (the “New Span”) in order to maintain its bridge crossing, to enhance and upgrade the infrastructure of the crossing, to increase its capacity to facilitate cross-border traffic, and to reduce costs and disruptions resulting from maintenance on the existing bridge.<sup>149</sup>
214. This arbitration, says DIBC, challenges specific acts taken by Canada that reflect its hostility to the American ownership of the Ambassador Bridge. Canada has recently taken a series of actions designed to harm the American-owned Ambassador Bridge, and to favor a proposed Canadian-owned bridge that would be located adjacent to the Ambassador Bridge – i.e. the NITC/DRIC.<sup>150</sup>
215. Canada has refused to make long-promised improvements to the Canadian approach to the American-owned Ambassador Bridge or to construct a highway connection from that bridge to the region’s main thoroughfare, Highway 401. Canada simultaneously has embarked upon construction of a new highway connection between the unbuilt, not fully approved Canadian-owned NITC/DRIC and Highway 401. This highway follows a path directly from Highway 401 towards the Ambassador Bridge, but then a mere two miles (i.e. 3.2 Km) from the Ambassador Bridge, veers towards the planned location for the NITC/DRIC instead.<sup>151</sup>
216. Canada’s decision not to complete the last two miles of this critical connection between the Ambassador Bridge and Highway 401, while simultaneously redirecting connection towards the NITC/DRIC, comprised the discrimination known as the “Roads Claim” in this arbitration.<sup>152</sup>

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<sup>149</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 2.

<sup>150</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 3.

<sup>151</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 4.

<sup>152</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 5.

217. According to DIBC, Canada has also created a discriminatory legal regime with respect to the construction of the American-owned New Span and the Canadian-owned NITC/DRIC. Specifically, Canada has delayed and obstructed approvals for the American-owned New Span, while providing automatic approvals via legislative fiat for the Canadian-owned NITC/DRIC. This regulatory and legislative discrimination is referred to herein as the “New Span Claim”.<sup>153</sup>
218. DIBC seeks redress in this arbitration for this and other discrimination by Canada. In response Canada seeks to avoid jurisdiction based primarily on the affirmative defenses of waiver and time limitations. As summarized below, Canada has failed to meet its burden of proof on these affirmative defenses.<sup>154</sup>

## **(2) International Legal Principles for Establishing the Tribunal’s Jurisdiction**

- (i) Canada bears the burden of proof for its own affirmative defences

219. On the grounds of Article 27(1) of the UNCITRAL Rules<sup>155</sup> DIBC argues that the limitations and waiver defences brought by Canada are affirmative defences, and therefore Canada bears the burden of proving those defences and any facts relevant to those defences.<sup>156</sup>
220. In support of its allegation DIBC cites, *inter alia*, the *Pope & Talbot* NAFTA tribunal, which stated that “*Canada’s contention that the Harmac claim is time barred is in the nature of an affirmative defense, and, as such, Canada has the burden of proof of showing factual predicate to that defense...it is for Canada to demonstrate that the three-year period had elapsed prior to that date.*”<sup>157</sup>

- (ii) The Tribunal may consider events subsequent to the notice of arbitration in its jurisdictional analysis

221. DIBC rejects Canada’s allegation that no events occurring after the NOA, submitted on April 29, 2011, are relevant for jurisdictional purposes. According to DIBC, although it is true that

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<sup>153</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 6.

<sup>154</sup> DIBC’s Rejoinder on Jurisdiction, ¶ 8.

<sup>155</sup> Article 27(1) of the UNCITRAL Rules provides that “*Each party shall have the burden of proving the facts relied on to support its claim or defense.*”

<sup>156</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 15.

<sup>157</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 18. See Also *Pope & Talbot Inc. v. Government of Canada*, Award in Relation to Preliminary Motion dated February 24, 2000, Exhibit CLA-14, ¶ 11.



the relevant date for determining jurisdiction is generally said to be the date of filing of a notice of arbitration, international tribunals have made clear that this rule means only that subsequent events cannot deprive a tribunal of jurisdiction.<sup>158</sup> DIBC, citing as example a decision from the *Philip Morris* case, alleges that, conversely, a tribunal may look at post-filing events to establish or inform jurisdiction.<sup>159</sup>

222. DIBC concludes that it complied with all NAFTA jurisdictional requirements as of April 29, 2011, the date it filed its NOA, and the Tribunal cannot be divested of that jurisdiction by reference to later events.<sup>160</sup>

### **(3) DIBC Has Complied with NAFTA Waiver Requirement under Article 1121**

#### **(i) Canada Misrepresents the Requirements of the NAFTA Waiver Provision**

223. DIBC rejects Canada's argument that in order to comply with NAFTA Article 1121, a claimant must engage in additional affirmative conduct beyond submission of a written consent and waiver. DIBC points to Canada's allegation that a claimant must both submit the written document required by Article 1121(3) and refrain from initiating or continuing any domestic litigation proceeding covered by the waiver. DIBC counters that the plain language of Article 1121 contains no requirement of affirmative conduct by a claimant beyond delivery of a written document that the respondent State being sued in arbitration (Canada) can use to enforce the waiver in domestic courts.<sup>161</sup>
224. DIBC argues that it is up to Canada to present the waiver to the courts in the domestic proceedings if and when Canada concludes that the Article 1121 waiver applies. The respective courts in the domestic proceeding then may determine whether the waiver affects the claims before them. The NAFTA does not burden its own tribunals with the obligation to police the actions of litigants in domestic proceedings within the NAFTA States.<sup>162</sup>

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<sup>158</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 23. See also Case Concerning the Arrest Warrant of April 11, 2000 (Democratic Republic of Congo v. Belgium), Judgment of February 14, 2002, ICJ Reports 2002, ¶ 26, Exhibit CLA-57.

<sup>159</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 24. See *Philip Morris v. Uruguay*, ICSIC Case No. ARB/10/7, Decision on Jurisdiction dated July 2, 2013, ¶¶ 144-45, Exhibit CLA-58.

<sup>160</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 25.

<sup>161</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶¶ 46-49.

<sup>162</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 53.

225. Moreover, DIBC rejects Canada’s allegation that the *Waste Management I* tribunal found it had no jurisdiction because the claimant failed to terminate domestic proceedings that fell within Article 1121’s waiver provision. According to DIBC the tribunal found only that the claimant had failed in the one affirmative requirement of Article 1121(3), i.e. to deliver a legally enforceable waiver of its right to initiate or continue conflicting proceedings. DIBC concludes that the *Waste Management I* tribunal did not dismiss the arbitration because the claimant failed to terminate a conflicting domestic proceeding, as stated by Canada. Rather, the tribunal dismissed the arbitration because the physical waiver delivered to the respondent did not in fact contain a legally enforceable repudiation of claimant’s rights in conflicting litigation.<sup>163</sup>
226. DIBC argues that, the fact that Article 1121 only requires delivery of a legally enforceable consent and waiver (i.e. without a certification of past dismissals or a statement that the Tribunal should police all future conduct that the respondent seeks to challenge) is consistent with the acknowledged purpose of the Article 1121(3) ‘written waiver’ requirement, which is to provide the respondent State with documentary evidence of the claimant’s waiver to use before other courts. It does not follow, however, that this Tribunal should determine whether domestic proceedings comply with the waiver. Rather, Article 1121 provides the respondent with a tool (i.e. a legally enforceable waiver document) that the respondent may use or not, at its own discretion.<sup>164</sup>
227. In addition, according to DIBC, the scope of the waiver in Articles 1121(1)(b) and 1121(2)(b) extends only to “proceedings with respect to the measure” that is alleged to constitute a breach pursuant to NAFTA Articles 1116 and 1117, respectively. There is no requirement that claimants waive claims relating to other measures that are not alleged to breach the NAFTA.<sup>165</sup>
228. DIBC rejects Canada’s allegation that the *Commerce Group* tribunal determined that claims addressing merely related measures, rather than the same measure, can violate waiver provisions like Article 1121. DIBC counters that the *Commerce Group* tribunal found that

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<sup>163</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 55-56.

<sup>164</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 60-61.

<sup>165</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 63.

the claims at issue in the domestic proceedings and the arbitration “could [not] be teased apart” and thus comprised “the same measure” in both proceedings.<sup>166</sup>

229. Moreover, DIBC submits that Article 1121 includes an exception to the scope of its waiver provision, permitting claimants to maintain parallel “proceedings with respect to the measure” alleged to breach the NAFTA where those excepted proceedings are for “injunctive, declaratory or other extraordinary relief, not involving the payment of damages”, and that the plain meaning of this exception is that claimants can bring claims with respect to the NAFTA measures in domestic court, as long as they do not seek the payment of damages with respect to those measures. DIBC rejects Canada’s allegation that this exception would only apply to proceedings where no damages are sought with respect to any claim (i.e. claims wholly unrelated to the measure at issue in arbitration). DIBC states that Canada offers no explanation of how the text of Article 1121 justifies this conclusion. Article 1121 is specific as to what claims are to be waived and does not generally preclude all causes of action for damages, regardless of the nature of the claims.<sup>167</sup>

230. DIBC argues that Article 1121 permits claims for declaratory or injunctive relief, 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.” DIBC rejects Canada’s argument that the phrase “under the law of the disputing Party” requires not only application of the disputing Party’s law, but also that the proceeding be physically located within the jurisdiction of the respondent State. Under Canada’s reasoning, an injunction issued by a US (or Mexican) court based on a violation of Canadian law, and enjoining Canada from violating Canadian statute, would not result from a proceeding conducted “under the law of the disputing Party”. According to DIBC this position has no basis in the text of Article 1121, which contains no reference to choice of forum; nor does Article 1121 demand that the court or tribunal “owe its existence to or operate” under the law of the disputing Party.<sup>168</sup> DIBC argues that this interpretation is also in accordance with the preliminary drafts of the NAFTA.<sup>169</sup>

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<sup>166</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 71.

<sup>167</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 75-76.

<sup>168</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 79-81.

<sup>169</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 84-85.

(ii) DIBC's Waivers are Consistent with Article 1121

231. DIBC alleges that all the waivers it provided in this arbitration meet the requirements of Article 1121. Each waiver was properly and timely delivered, and none facially failed to waive rights covered by Article 1121. Canada's letters objecting to DIBC's waivers do not change this fact.<sup>170</sup>

*a. The First NAFTA Waiver is consistent with Article 1121*

232. DIBC rejects Canada's argument that DIBC First NAFTA Waiver is not consistent with Article 1121 because DIBC included a statement in the waiver that (correctly) informed Canada that the Washington Litigation fell outside the scope of Article 1121. DIBC counters that it does not seek damages from Canada in the Washington Litigation nor does that litigation challenge the same Canadian measures challenged in this arbitration, and therefore the Washington Litigation is excepted from the waiver requirement of Article 1121.<sup>171</sup>

233. DIBC also rejects Canada's argument that the First NAFTA Waiver is impermissibly "narrower" than the First NOA because the waiver does not parrot the description contained in the notice of the measures at issue in the arbitration. DIBC counters that there is no requirement that the language included in the waiver and notice of arbitration be identical, so long as the substance of the waiver is of the scope required by Article 1121.<sup>172</sup>

234. DIBC argues that the measure identified both in the NOA and in the First NAFTA Waiver is the decision to locate the Parkway so that it both bypasses the Ambassador Bridge and steers traffic to the NITC/DRIC directly to and from the Canadian highway system. This measure is wrongful under the NAFTA because it fails to provide "comparable" treatment to the Ambassador Bridge. DIBC thus did not fail to include in its waiver any measure identified in the NOA.<sup>173</sup>

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<sup>170</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 86.

<sup>171</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶¶ 87-88.

<sup>172</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 90.

<sup>173</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 92.

*b. The Second and Third NAFTA Waivers are consistent with Article 1121*

235. According to DIBC, Canada incorrectly argues that events occurring after DIBC's submission of its NOA are irrelevant to this Tribunal's jurisdiction. DIBC's First NAFTA Waiver is decisive only with respect to measures addressed in the NOA as it existed at that time. As DIBC amended and expanded its claims in its amended NOA (to which Canada did not object), the Second NAFTA Waiver is the operative document with respect to new measures or claims addressed in the Amended NOA.<sup>174</sup>
236. DIBC rejects Canada's argument that DIBC's omission of the phrase "before an administrative tribunal or court under the law of the disputing Party" in the Second Waiver is incompatible with the requirements of Article 1121 because the omission purportedly gives DIBC the right to bring claims for injunctive or declaratory relief in the United States. DIBC argues that the exception to the waiver provision in Article 1121 does not include a choice of forum clause, and accordingly Canada has not been deprived of any substantive rights.<sup>175</sup>
237. On March 20, 2014, during the Hearing on Jurisdiction, Claimant submitted the Third NAFTA Waiver in order to address Canada's allegations that the Second Waiver was defective because it did not include the term "not involving the payment of damages", which was present in the First NAFTA Waiver. Claimant states that it had no intention for such omission to be substantive as it interprets the Second Waiver as including such language. The Third Waiver included this language in order to assure Canada of Claimant's good faith.<sup>176</sup>

(iii) *The Washington Litigation Does Not Fall Within the Scope of the Proceedings Prohibited by Article 1121*

238. DIBC argues that it did not violate Article 1121 by failing to terminate the Washington Litigation. First, DIBC had no affirmative obligation to take action with respect to the waiver. Second, the Washington Litigation does not fall within the scope of Article 1121 because: (a)

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<sup>174</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 95.

<sup>175</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 98.

<sup>176</sup> Transcripts of the Hearing on Jurisdiction, p. 192, lines 8-16.

it involves measures different from those at issue in this arbitration; and (b) the Washington Litigation seeks only declaratory relief under Canadian Law.<sup>177</sup>

*a. The Measures at issue in DIBC's First NOA are not the same as those addressed in the Washington First Amended Complaint*

239. DIBC alleges that it is not Canada's decision to locate the DRIC Bridge in proximity to the Ambassador Bridge that constitutes the 'measure' at issue in this arbitration, but the disparate treatment of Canadian-owned and US-owned bridges. DIBC's Road Claim is premised on Canada's decision to connect only the NIT/DRIC Bridge to Highway 401 and not the Ambassador Bridge or New Span. DIBC's New Span Claim is premised on Canada's decisions to block construction of the U.S.-owned New Span while expediting construction of the Canadian NIT/DRIC.<sup>178</sup>
240. The operative complaints in the Washington Litigation challenge particular measures taken by Canada in the United States or directed towards the United States to construct, promote and operate the NIT/DRIC Bridge. By contrast, DIBC's First NOA challenges particular measures taken by Canada within its own borders to discriminate against the United States owned Ambassador Bridge and favour the NIT/DRIC within Canada.<sup>179</sup>
241. While this arbitration challenges many of Canada's regulatory and legislative actions, the Washington Litigation is addressed solely towards commercial conduct by Canada as a prospective owner, constructor and operator of the NITC/DRIC. DIBC was forced to seek relief in both proceedings as a consequence of the fact that Canada's actions with respect to the Parkway and the NITC/DRIC and Ambassador Bridge were (i) conducted in and directed towards two countries; and (ii) taken in both Canada's governmental and commercial capacities.<sup>180</sup>
242. According to DIBC, Canada's characterization of some of the purported overlap in allegations is factually incorrect. For instance, the allegations from the Washington Litigation that Canada characterizes as relating to the DRIC EA do not refer to the Canadian environmental

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<sup>177</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 105.

<sup>178</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 107.

<sup>179</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 108.

<sup>180</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 109.

assessment process with respect to the proposed NIT/DRIC and X12 alternative, but instead refer to Canada's improper actions with respect to the United States' environmental assessment process relating to the United States' side of the crossing.<sup>181</sup>

243. DIBC also argues that there is no conflict in the "relief requested" in the First NOA and the Washington First Amended Complaint.<sup>182</sup>

*b. The Amended NOA did not add measures to this proceeding that conflicted with the Washington Litigation*

244. DIBC rejects Canada's allegation that the Amended NOA would have added claims to this arbitration that conflicted with the Washington Litigation. DIBC states that when it amended the NOA, it added claims with respect to the New Span. The New Span Claim, which challenges disparate treatment by Canada of the New Span in Canada, has never been part of the Washington Litigation, which challenges only Canada's wrongful conduct in the United States (and directed solely towards the United States) with respect to the NITC/DRIC and New Span.<sup>183</sup>

245. Canada nonetheless complains that DIBC's Washington Second Amended Complaint includes allegations that Canada: (1) delayed processing DIBC's Canadian application for environmental approval of the New Span; (2) enacted the IBTA to interfere with DIBC's rights with respect to the New Span; and (3) further enacted the BSTA to interfere with DIBC's rights with respect to the New Span by exempting the NITC/DRIC from the requirements of the IBTA. DIBC counters that these allegations of wrongdoing by Canada within its own borders are not the basis for any relief requested against Canada in the Washington Litigation; rather, they are background facts to inform the court in Washington Litigation of the full extent of Canada's campaign against DIBC, and they may form a basis for DIBC's claim under the Equal Protection Clause of the United States Constitution against the United States government defendants. They do not form the basis upon which the court is asked to rule against Canada. DIBC concludes that double recovery and conflicting outcomes cannot result from domestic proceedings challenging conduct taken by Canada in different

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<sup>181</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 110.

<sup>182</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 111.

<sup>183</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 113.

countries, even if the wrongdoing in one country is informed by Canada's conduct in the other.<sup>184</sup>

*c. The Washington Third Amended Complaint also is consistent with the Washington Litigation*

246. DIBC argues that most of the issues raised by Canada with respect to the Washington Third Amended Complaint are identical to those addressed with respect to the Washington First and Second Amended Complaints, and are invalid for the reasons discussed above.<sup>185</sup>

247. Canada also mistakenly claims, says DIBC, that DIBC challenges measures in the Washington Litigation other than those specifically identified in paragraph 43 of the Washington Third Amended Complaint. In support of this assertion, Canada points to a list of occurrences set forth in paragraph 44 of the Washington Third Amended Complaint. The allegations in that paragraph, however, are not the measures at issue in the litigation, but a list of the "direct effects" of Canada's acts in the United States. A recitation of harms caused by a measure is not the same as the measure itself. In any event, those harms occurred in the United States and are not the same as the measures challenged in this arbitration.<sup>186</sup>

*d. The Washington Litigation challenges violations of Canadian law and does not seek damages*

248. The Washington Litigation also does not conflict with Article 1121 because it is a proceeding for declaratory relief, not involving damages, brought under Canadian Law. DIBC rejects Canada's argument that the litigation falls outside Article 1121 because it is before a United States, rather than a Canadian, court.

249. Second, Canada argues that the Article 1121 exception does not apply because the declaratory relief sought by DIBC in its Washington Second Amended Complaint (but notably not the Washington Third Amended Complaint) includes a declaration that Canada's actions constitute a taking. DIBC rejects this argument as DIBC has not asked the court in the Washington Litigation to award any damages against Canada for the taking or for any other

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<sup>184</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 114.

<sup>185</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 115; Canada Reply Memorial on Jurisdiction ¶ 130 (regarding the Nine Point Plan, the DRIC EA, the New Span EA, and the BSTA).

<sup>186</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 116.



misconduct.<sup>187</sup> A claim for declaratory relief is not the same as a claim for damages, and the takings claim plainly seeks only declaratory relief. DIBC also argues that the takings claim is not being brought against Canada. This declaratory judgment claim originally named Canada as well as the United States, but it no longer does so (as per Washington Third Amended Complaint, ¶ 332-339, Exhibit C-141).<sup>188</sup>

250. Lastly, DIBC rejects Canada’s argument that because DIBC brings a claim in the Washington Litigation under the United States Declaratory Judgment Act, the claim is not brought pursuant to Canadian law. According to DIBC, the U.S. Supreme Court has long held that “*the operation of the Declaratory Judgment Act is procedural only*”. Accordingly, DIBC’s invocation of the Declaratory Judgment Act in no way affects the fact that the substantive law to be applied in the Washington Litigation is Canadian law.<sup>189</sup>

(iv) *The CTC v. Canada Litigation Does Not Violate Article 1121*

251. DIBC argues that the *CTC v. Canada Litigation* also does not conflict with the written waiver. To the extent that CTC challenges the same ‘measures’ in that litigation as in this arbitration, CTC seeks only declaratory relief under Canadian law with respect to those measures. The only measure for which CTC seeks damages in that case is not a measure at issue in this arbitration, and thus cannot violate Article 1121.<sup>190</sup>

252. DIBC rejects Canada’s argument that the measure for “actual construction” of the NITC/DRIC cannot be separated from the other measures pleaded in the litigation. In this arbitration, DIBC challenges Canada’s use of its role as a regulator and legislator to treat the US-owned Ambassador Bridge and New Span differently from the proposed Canadian-owned NITC/DRIC. In the *CTC v. Canada Litigation*, the “actual construction” claim is an alternative claim asserting that if and when Canada ever builds the NITC/DRIC, such construction would constitute an expropriation under Canadian law. This is a logical distinction between measures for purposes of Article 1121. Canada’s argument to the contrary depends solely upon the success of its argument that all actions ever taken by Canada with respect to either the NITC/DRIC or the Ambassador Bridge constitute a single measure for

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<sup>187</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 118.

<sup>188</sup> DIBC’s Counter-Memorial, ¶ 205.

<sup>189</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 119.

<sup>190</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 120.

purposes of Article 1121 (i.e., the decision to locate the NITC/DRIC near the Ambassador Bridge).

253. DIBC notes that in the Washington Litigation, Canada has taken the position that the construction and operation of the bridge are separate matters from Canada's decision regarding the location of the NITC/DRIC. Canada argues in the Washington Litigation that: "*The location of the DRIC, not its construction or operation, is the gravamen of Plaintiffs' claims against the Canadian Defendants.*"<sup>191</sup>

254. Canada has previously expressed its views as to what claims CTC should remove from the *CTC v. Canada* Litigation, and CTC subsequently withdrew those claims.<sup>192</sup>

(v) The Windsor Litigation Does Not Violate Article 1121

255. According to DIBC, the Windsor Litigation does not violate the NAFTA waiver provision because it does not challenge the measures at issue in this arbitration. Moreover, CTC has not taken any steps to pursue the case since DIBC initiated this arbitration and the case is effectively over. The only affirmative action CTC has taken with respect to the Windsor Litigation since the First NOA was to abandon an appeal. DIBC is further willing to have CTC take affirmative steps to dismiss the action if required.<sup>193</sup>

256. In any event, the February 2010 Statement of Claim in the Windsor Litigation makes clear that CTC seeks damages only as to certain individual defendants and does not seek monetary damages from the City of Windsor.<sup>194</sup>

257. DIBC rejects Canada's argument that DIBC has refused to identify which Windsor measures it challenges in this arbitration. In its NAFTA Statement of Claim, DIBC made clear that "this arbitration arises from measures taken by...the City of Windsor...(5) to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and other crossings not owned by a U.S. inventor."<sup>195</sup> This

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<sup>191</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 123.

<sup>192</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 124; Letter from Mark Luz to Donald F. Donovan and Carl Micarelli dated March 15, 2012, Exhibit R-23; *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12446428, Amended Statement of Claim of February 19, 2013, Exhibit C-119.

<sup>193</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶¶ 125-126.

<sup>194</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 127.

<sup>195</sup> DIBC Statement of Claim, ¶ 215.

measure was not challenged in the Windsor Litigation, which challenged only the Windsor By-laws. The traffic measures taken by Windsor were referenced only once in that litigation as background and were never identified as the basis for any legal claim or challenge in that litigation.<sup>196</sup>

(vi) If the Tribunal Finds that a Claim Does Impermissibly Overlap, It Should Only Dismiss that Claim

258. DIBC concludes that, in light of the fact that none of the domestic proceedings challenged by Canada here fall within the scope of Article 1121, Canada's waiver defense should be dismissed.
259. In the alternative, if this Tribunal finds that DIBC has violated Article 1121 with respect to a particular measure, it should dismiss only those portions of DIBC's claims alleging wrongdoing with respect to that measure, but retain jurisdiction over the other claims. This outcome would promote the objective of the NAFTA to "create effective procedures for the implementation and application of this Agreement".<sup>197</sup>

**(4) DIBC's Roads Claim and New Span Claim are both Timely**

(i) Canada's Interpretation of NAFTA Articles 1116 and 1117 is Incorrect

260. According to DIBC, three different types of acts can affect the operation of the limitation period. The simplest is the one-time act, where the respondent engages in a discrete act at a particular time and place. Next is the continuing act, where the wrongful conduct takes place over time and continues to harm the claimant while the conduct continues. The third is a composite act, where a series of acts taken together comprises the wrongful conduct.<sup>198</sup>
261. DIBC rejects Canada's assertion that the NAFTA does not recognize either the continuing acts or composite acts doctrines and treats all claims as one-time acts for purposes of the limitations provisions. Canada thus insists that the limitations periods in this proceeding began to run on: (1) March 11, 2004 for the Roads Claim (the date on which Canada incorrectly asserts DIBC first should have known Canada would not connect the Ambassador

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<sup>196</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 129.

<sup>197</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 130.

<sup>198</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 141.

Bridge to Highway 401) and (2) February 1, 2007 for the IBTA portion of the New Span Claim (the date on which the IBTA was enacted). According to Canada, claims filed more than three years after these dates are untimely “regardless of whether a measure is continuing or not”. These arguments are rejected by DIBC, for the reasons summarized below.<sup>199</sup>

*a. Canada fails to challenge the NAFTA’s recognition of the “composite acts” doctrine*

262. According to DIBC the doctrine of continuing acts is well established through the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), the decisions of other arbitral tribunals, and the decisions of the only NAFTA tribunal ever to consider the question directly – *UPS v. Government of Canada*. DIBC rejects Canada’s argument that the NAFTA chose to depart from customary international law by including the word “first” in Articles 1116(2) and 1117(2), each of which provides that a claimant may not make a claim if more than three years have elapsed from the date on which the investor or enterprise “*first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage*”.<sup>200</sup>
263. DIBC alleges that Canada’s argument is inconsistent with the fact that numerous other international treaties contain virtually identical limitations provisions. DIBC cites as example, among others, the CAFTA (the treaty at issue in the *Pac Rim Cayman* decision recognizing the continuing acts doctrine), the Canada-Chile Free Trade Agreement and the Canada-Panama Free Trade Agreement. DIBC concludes that the phrasing of Articles 1116(2) and 1117(2) is not unique to the NAFTA, but a routine phrasing of time limitations provisions in international law.
264. According to DIBC, under the continuing acts doctrine, 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.<sup>201</sup> Thus, one can “first acquire” knowledge of a “breach” arising from a continuing act multiple times.<sup>202</sup>

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<sup>199</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 142.

<sup>200</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 146.

<sup>201</sup> UPS Award, ¶ 24, Exhibit C-13; DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 149.

<sup>202</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 149.

265. Canada also fails to provide any authority that supports its interpretation of Articles 1116 and 1117. It tries to invoke the recent decision of *Apotex Inc. v. United States*, claiming that *Apotex* “concluded that a continuing course of conduct does not toll the NAFTA’s three-year time limitation period.” DIBC argues that Canada misinterprets *Apotex*, as the *Apotex* Tribunal determined that there was no continuing act at issue in that case, and thus did not opine on whether NAFTA’s time limitation provisions would apply to such acts had they existed.<sup>203</sup>
266. Canada also relies upon the decision of the tribunal in *Grand River Enterprises Six Nations Ltd. v. The United States of America* for the proposition that “a continuing course of conduct does not toll the NAFTA’s three-year limitation period.” This argument is inapposite because it does not relate to the doctrine of continuing acts. In addition, the *Grand River* Tribunal specifically declined to address the question of whether “there is not one limitations period, but many” arising from the conduct at issue because the claimant failed to plead or brief the argument, raising it for the first time at hearing. DIBC concludes that *Grand River* says nothing one way or the other regarding the doctrine of continuing acts.<sup>204</sup>
267. According to Articles 1116 and 1117, the limitations periods accrue when an investor first acquires (1) “knowledge of the alleged breach” and (2) “knowledge that the investor has incurred loss or damage”. Canada wrongly argues that DIBC reads these provisions to require a claimant to have knowledge of the full “extent” or “amount” of the loss or damage before the limitations periods begin to run. According to DIBC, the investor must have actually been harmed and have specific knowledge of that harm for the limitations periods to run. DIBC asserts that the harm must be concrete, not merely anticipated or potential. DIBC does not argue that such concrete harm must be fully quantifiable before a claim may accrue under the NAFTA.<sup>205</sup>
268. Canada’s interpretation of Articles 1116 and 1117 is contrary to the object and purpose of the NAFTA itself. A primary object and purpose of NAFTA Chapter 11 is to protect foreign investors. But Canada’s interpretation would permit NAFTA States to engage in years of continuing discrimination towards a foreign investor merely because the investor did not

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<sup>203</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 152.

<sup>204</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 156.

<sup>205</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 172-173.

challenge the discrimination when it first began (and even if it first began in a manner that made it unclear whether it was discrimination and whether nationals were going to be treated more favorably).<sup>206</sup>

(ii) The Roads Claim is Timely

*a. The Roads claim could not accrue until Canada had both disfavoured the American-Owned Ambassador Bridge (and the New Span) and favored the Canadian-Owned Bridges (including the NITC/DRIC) with respect to highway access*

269. The Parkway as currently designed travels directly towards the Ambassador Bridge. The last two miles, however, veer off to the site of the proposed NITC/DRIC and away from the Ambassador Bridge. This means that a traveler going from Canada to the United States would travel along a direct highway connection from Highway 401 towards both bridges, but would then only use the Ambassador Bridge to cross the border if he/she chose to exit this highway and instead travel along a road with numerous traffic lights and cross-streets. DIBC challenges this disparate impact on travelers crossing the U.S.-Canada border (the Roads Claim) in this arbitration.<sup>207</sup>

270. Canada initially argues that DIBC first acquired knowledge of the breach underlying its Roads Claim when DIBC knew or should have known that Canada would not improve the roads to the Ambassador Bridge or New Span. Canada alternatively sets this date at March 11, 2004<sup>208</sup>, November 15, 2005<sup>209</sup>, and various dates in 2007<sup>210, 211</sup>.

271. As of those proffered dates, however, there is no serious dispute that Canada had not yet announced that it would build a highway connection to the Canadian-owned NITC/DRIC, a critical part of the breach alleged by DIBC. DIBC's knowledge of breach with respect to the Roads Claim could not have begun to run until May 1, 2008 at the very earliest, when Canada

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<sup>206</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 174.

<sup>207</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 177.

<sup>208</sup> Canada's Reply, ¶ 178 (the date the Nine Point Plan was replaced by the LGWEN Strategy).

<sup>209</sup> Canada's Reply, ¶ 180 (the date option X12 (i.e., the New Span) was eliminated from consideration by the DRIC Partnership).

<sup>210</sup> Canada's Reply, ¶ 183 (May 24, 2007, when the Ontario Ministry of Transportation said it had no plans to provide a direct connection to the Ambassador Bridge); ¶ 186 (July 4, 2007, when Helena Borges met with DIBC officials and purportedly said that the community and environmental impacts of building a direct Highway 401-Ambassador Bridge connection were too serious to consider further).

<sup>211</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 178.

established the measure at issue by first officially announcing the preferred alternative for the Parkway, which included a connection to the NITC/DRIC, but not to the Ambassador Bridge.<sup>212</sup>

272. DIBC argues that Canada's disregard of this second portion of DIBC's claims – *i.e.*, that Canada treated the Canadian-owned NITC/DRIC more favorably than the American-owned Ambassador Bridge and New Span with respect to access to Highway 401 – reflects a misunderstanding of what constitutes a “breach” under the NAFTA and the measures complained of in DIBC's Statement of Claim. Canada's breach of the NAFTA was not complete (and the limitations period thus could not begin to run) until Canada “completed the measure of impermissibly favoring the NITC/DRIC over the Ambassador Bridge with respect to highway access”.<sup>213</sup>

273. Canada's reliance on DIBC letters from November 2005 complaining of “delay and damage” arising from the elimination of the New Span (the X12 option) from the DRIC EA process prove nothing. The fact that DIBC already was being harmed by Canada's actions does not mean that Canada's actions at the time constituted the measure being challenged as a breach of the NAFTA.<sup>214</sup>

*b. It was not established that Canada would build a connection between Highway 401 and the Canadian-owned NITC/DRIC until May 1, 2008 at the earliest*

274. In summary, DIBC argues that none of the evidence proffered by Canada demonstrates that Canada had taken a ‘measure’ or completed its breach of NAFTA prior to May 1, 2008. Rather it reinforces the interim status of the Parkway decisions as of that date.<sup>215</sup>

275. Canada's argument that DIBC must have known that Canada would build a highway to the Canadian-owned NITC/DRIC prior to May 1, 2008 also cannot be squared with the position that Canada takes in its Reply Memorial with respect to the issue of waiver: *i.e.*, that “the measure which approved the location of the DRIC bridge and the Parkway is one in the same: the DRIC EA”. The DRIC EA was not even released as a draft for public comment until

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<sup>212</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 179; News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road” (May 1, 2008), Exhibit C-125.

<sup>213</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 180.

<sup>214</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 181.

<sup>215</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 189.

November 12, 2008, well within the limitations period for this proceedings. It was not finally approved by Ontario and Canada until “August and December 2009” respectively. If “the measure which approved the location of the DRIC Bridge and the Parkway” did not occur until December 2009, then there could not have been a breach arising from that measure prior to that date.<sup>216</sup>

*c. Alternatively, the Roads Claim is a continuing Act*

276. DIBC states that Canada does not directly address DIBC’s characterization of the Roads Claim as a continuing act. DIBC argues that numerous events in connection with the Parkway have occurred since May 2008 that demonstrates continuing discrimination against DIBC and in favor of the NITC/DRIC. These events include environmental approvals in 2008, 2009 and 2010, and the beginning of construction in 2011. Parkway construction has begun from near Highway 401 towards the border, and its plans could still be revised to allow its final completion to include the creation of a highway connection to the Ambassador Bridge. This continuum of events constitutes a continuing breach of Canada’s obligations under the NAFTA. The Roads Claim thus is based on a continuing act and would be timely even if filed today.<sup>217</sup>

*d. Alternatively, the Roads Claim is a composite Act*

277. DIBC argues that the Roads Claim is also a composite act. Because the nature of the breach is ‘comparative’, the claim necessarily is based on multiple acts (i.e., favoring the NITC/DRIC and disfavoring the Ambassador Bridge and New Span with respect to highway access), each of which may or may not have been permissible standing alone.<sup>218</sup>

278. Since May 2008, Canada has announced the Parkway, engaged in multiple environmental studies and approvals, commenced construction, and maintained construction. Until the Parkway is completed, Canada will continue to engage in acts that, in the composite, create a breach of Canada’s obligations under the NAFTA. Thus, the last event in the composite act

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<sup>216</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 190.

<sup>217</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 192.

<sup>218</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶ 193.



that forms DIBC's Roads Claim "necessarily occurred after May 2008, and may not yet have occurred even today".<sup>219</sup>

(iii) The IBTA Portion of the New Span Claim is Timely

a. *Claimant did not suffer loss or damage pursuant to the IBTA prior to 2009, at the earliest – Canada fails to show that DIBC had knowledge of breach "and knowledge of loss or damage" prior to April 20, 2008 with respect to the IBTA part of the New Span Claim*

279. According to DIBC, Canada does not question the timeliness of the entirety of DIBC's New Span Claim, but challenges only that portion of the claim that alleges disparate and wrongful application of the IBTA to DIBC. Accordingly, all other aspects of the New Span Claim are timely, including those portions of the claim related to the BSTA.<sup>220</sup>

280. DIBC rejects Canada's argument that the IBTA portion of the New Span accrued when the IBTA was enacted, because DIBC knew at the time that the IBTA would apply to the Ambassador Bridge and New Span. Even if true, such knowledge relates only to a "breach" of the NAFTA, not knowledge of loss or damage, which are also required under Articles 1116 and 1117.<sup>221</sup>

281. DIBC also rejects Canada's argument that because DIBC publicly opposed to the IBTA *prior to its passage*, DIBC must have had "knowledge of general loss" at the time the statute was actually enacted. According to DIBC, knowledge of a high likelihood of future loss is not the same as knowledge of actual damage.<sup>222</sup>

b. *The IBTA portion of the New Span Claim is based on a continuing act*

282. DIBC alleges that the paradigm continuing act is "the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting state."<sup>223</sup> The IBTA has been continuously in effect since its passage, and to the extent DIBC remains subject to its provisions while the NITC/DRIC is excluded, Canada is maintaining a legislative provision

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<sup>219</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 194.

<sup>220</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 197.

<sup>221</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 199.

<sup>222</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 200.

<sup>223</sup> DIBC Counter-Memorial ¶ 297; Exhibit CLA-32.

incompatible with the NAFTA. The IBTA portion of DIBC's New Span Claim thus is timely as a continuing act.<sup>224</sup>

*c. Alternatively, the IBTA portion of the New Span Claim is one component of a composite act*

283. Alternatively, DIBC argues that the IBTA portion of the New Span Claim is timely as a part of a composite act, along with the October 2010 Ministerial Order and the BSTA. DIBC rejects Canada's allegation that this argument is "illogical" because DIBC purportedly has previously asserted that the mere passage of the IBTA breached DIBC's rights and caused it damages. DIBC states that it has always asserted that its NAFTA claims arose only after affirmative application of the law to DIBC through enforcement against CTC and DIBC.<sup>225</sup>
284. Even if the enactment of the IBTA were independently actionable, that would not prevent the IBTA from being considered part of a composite claim that includes later acts. A composite act is comprised of a series of events. In this case the composite act is the IBTA, the 2010 Ministerial Order, and the BSTA. These three events combine to form their own, composite measure: Canada's creation of a legally discriminatory approval regime that discriminates against the American-owned Ambassador Bridge and its New Span, and in favor of the Canadian-owned NITC/DRIC.<sup>226</sup>
285. The various actions by Canada that comprise this composite act are inherently interrelated: the IBTA creates new barriers that, as applied under the 2010 Ministerial Order, impose unlawful restrictions on the New Span; the BSTA then exempts the NITC/DRIC from those same barriers (as well as numerous other regulatory requirements), thus creating a discriminatory legal regime. These actions together form a composite act of discrimination and inequitable treatment. Because the last action within the composite set of acts (the passage of the BSTA in 2012) occurred well within the limitations period, the portion of the claim challenging the IBTA is timely because the IBTA forms a part of this composite act.<sup>227</sup>

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<sup>224</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 202.

<sup>225</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 204.

<sup>226</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 206.

<sup>227</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 207.

*d. The correct date for measuring the timeliness of the IBTA portion of the New Span Claim is the date of DIBC's Notice of Arbitration*

286. DIBC alleges that the correct time bar date for the IBTA portion of the New Span Claim is the date of DIBC's NOA, *i.e.*, April 29, 2011. DIBC rejects Canada's argument that the timeliness should be measured from the date of DIBC's Amended NOA on January 15, 2013 because the IBTA portion of the New Span Claim was not included in the original notice.<sup>228</sup> DIBC argues that even if Canada were correct, measuring three years from January 15, 2013 permits claims that accrued any time after January 15, 2010. Because the IBTA was not enforced against DIBC until October 2010 at the earliest, the IBTA portion of the New Span Claim remains timely.<sup>229</sup>
287. Canada attempts to distract the Tribunal through reference to letters by which Canada purportedly informed DIBC prior to 2010 that the IBTA would apply to the Ambassador Bridge. However, none of these letters sought to actually enforce the IBTA vis-à-vis CTC or DIBC, or to require DIBC to seek regulatory approval under the IBTA.<sup>230</sup>
288. In any event, the January 15, 2010 date is critical only to the extent that the IBTA portion of the New Span Claim is considered to be a one-time act claim. To the extent it is a continuing act or composite act claim, the January 15, 2010 bar date allegedly caused by DIBC's amendment of its claims is irrelevant. Treating the IBTA more properly as a paradigm of a continuing act, the limitations period remains open today. Finally, were one to examine the claim as a composite act, the earliest the claim could have accrued would be at the time of the 2012 enactment of the BSTA.<sup>231</sup>

**(5) DIBC's Request for Relief**

289. In its Rejoinder on Jurisdiction, Claimant requested the Tribunal to "*dismiss Canada's defences with respect to jurisdiction and admissibility and award costs to Claimant and grant such other relief as is appropriate.*"<sup>232</sup>

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<sup>228</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 208.

<sup>229</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 209.

<sup>230</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶ 211.

<sup>231</sup> DIBC's Rejoinder Memorial on Jurisdiction, ¶¶ 212-213.

<sup>232</sup> Claimant's Rejoinder on Jurisdiction, ¶ 215.

## VII. THE TRIBUNAL'S DECISION

290. In summary, Canada argues that the Arbitral Tribunal does not have jurisdiction to hear DIBC's claim in this case because DIBC has failed to comply with the waiver requirements set forth in NAFTA Article 1121 and that, in any event, DIBC's claims are not admissible because they are untimely. Accordingly, in order to decide whether it has jurisdiction over Canada, the Arbitral Tribunal will analyze (A) the conditions set forth in NAFTA Article 1121; and (B) whether DIBC has complied with those conditions. The issue of whether DIBC's claims are timely will only be addressed if the Tribunal decides that DIBC has complied with Article 1121.

### A. PRELIMINARY CONSIDERATIONS

291. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration" stipulates the conditions that a claimant must meet in order to submit a claim under NAFTA Chapter Eleven. A claimant's failure to meet these conditions renders the NAFTA Party's consent to arbitrate without effect.

292. By way of reminder NAFTA Article 1121 provides the following:

*"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 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. (Emphasis added)*

293. Pursuant to NAFTA Article 1121, the Arbitral Tribunal will only have jurisdiction in this case if Claimant has duly waived its right to initiate and/or continue proceedings before any administrative tribunal or court under the law of any Party (i.e. Canada, Mexico or USA) with respect to Canada’s measures allegedly constituting a breach referred to in NAFTA Articles 1116 or 1117. The only exceptions allowed are those set out in Article 1121, i.e., proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.
294. As stated above, it is Canada’s case that the waivers presented by DIBC in this arbitration do not meet the requirements set forth in NAFTA Article 1121. That submission is contested by DIBC.

**B. DOES CLAIMANT COMPLY WITH NAFTA ARTICLE 1121?**

**(1) Timing and Relevant Waiver**

295. Pursuant to NAFTA Article 1121, in order to determine whether it has jurisdiction in this case the Tribunal will analyze the validity of the waiver submitted by Claimant on the date Claimant submitted its claims to arbitration, i.e. the date of the notice of arbitration. The Tribunal notes that Claimant submitted its First NAFTA NOA together with its First Waiver on April 29, 2011 and its Second NAFTA NOA accompanied by the Second Waiver on January 15, 2013. The Tribunal further notes that the Third Waiver was submitted at the Hearing on Jurisdiction on March 20, 2014.
296. In view of Article 1121 and the fact that Canada has objected to the jurisdiction of this Tribunal as of the submission of the First NAFTA NOA,<sup>233</sup> the Tribunal will first analyze whether it has jurisdiction in this case based on the First NAFTA NOA and the First Waiver. If the answer is in the negative, the Tribunal will consider whether the Second NAFTA NOA

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<sup>233</sup> Canada’s Reply Memorial, ¶¶ 99-119. See also paragraph 74 above.

together with the Second and/or Third Waiver would have been able to cure its initial lack of jurisdiction.

**(2) The Jurisdiction of the Arbitral Tribunal based on the First NAFTA NOA and the First Waiver**

297. By way of reminder, the First Waiver reads as follows:

*“[...] [DIBC and CTC] 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 in the foregoing Notice of Arbitration to be a breach referred to in Article 1116 or Article 1117, namely the decisions by Canada, the Province of Ontario, and the City of Windsor to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Detroit River International Crossing (“DRIC”) Bridge, and to take traffic measures with respect to the Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge, 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. For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of the claims included in the Complaint filed on or about March 22, 2010, in the action titled Detroit International Bridge Company et al. v. The Government of Canada et al., in the United States District Court for the District of Columbia.” (Emphasis added)*

298. On April 29, 2011, when the First NOA and the First Waiver were submitted, Claimant had a court proceeding ongoing against Canada (i.e., the Washington Litigation), which according to Canada involved the same measures as those at stake in this arbitration and included a request for damages. However, the Washington Litigation was expressly carved out from the First Waiver,<sup>234</sup> which according to Canada prevents the Tribunal from acquiring jurisdiction in this arbitration.

299. On April 29, 2011, Claimant’s claims against Canada in the Washington Litigation were set forth in the Washington Complaint dated March 22, 2010.

300. In view of the foregoing, the Tribunal will now analyze whether the ‘measures’ at stake in the Washington Complaint are the same as those at stake in Claimant’s claims presented in the

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<sup>234</sup> The Tribunal notes that DIBC also carved-out the Washington Litigation from the Second and Third Waivers.

First NAFTA NOA. If the Tribunal concludes that the measures are the same, it will then proceed to analyze whether they relate only to injunctive, declaratory or extraordinary relief, not involving the payment of damages, before a court under the law of Canada, pursuant to the second part of Article 1121.

(i) Are the measures at stake in the Washington Litigation the same as those at stake in Claimant's claims in this arbitration?

301. In order to analyze whether Canada's measures at stake in the Washington Litigation are the same as those at stake in this arbitration, it is necessary to first define the term "measure".
302. Under NAFTA Chapter Two, titled "General Definitions", Article 201 defines "measure" as "*any law, regulation, procedure, requirement or practice*".
303. The Tribunal notes that, "[...] *in contrast to the formulations in 'fork in the road' clauses, or in Article 26 of ICSID, the formulation in Article 1121 focuses on the State measure – the governmental act – which has given rise to the dispute, and not on the claims to which such a measure may give rise.*"<sup>235</sup> For instance, if a discriminatory licensing denial gives rise to distinct legal claims under NAFTA and under a domestic law, both claims relate to the same measure, regardless of the legal cause of action under the respective laws.
304. At the same time, a measure is a discrete act. The fact that multiple discriminatory acts may be part of a common plan does not make them one measure. If a State discriminates against a foreign investor by successively denying a license, imposing a special tax, and subsidizing a domestic competitor, these constitute separate measures, and need not all be pursued in one forum.
305. The measures at issue in this arbitration at the time the First NAFTA NOA was submitted are those identified at paragraph 48 of the First NOA; and the claims arising from them are summarized in paragraph 49. Paragraphs 48 and 49 read as follows:

*"48. This arbitration arises from the decisions by Canada, the Province of Ontario and the City of Windsor:*

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<sup>235</sup> Campbell McLachlan, Q.C., Laurence Shore & Matthew Weiniger, *Investment Treaty Arbitration: Substantive Principles*, (Oxford: Oxford University Press, 2007) at 109-110 (RLA-45) commenting on the Waste Management I decision.

(a) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge,

(b) to fail to provide comparable improvements in road access to the Ambassador Bridge, because of its ownership by a United States investor; and

(c) to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge.

49. The points raised by this arbitration are (a) whether those measures are inconsistent with Canada's obligations under Chapter 11 of NAFTA, including national treatment under Article 1102, most-favored-nation treatment under Article 1102, most-favored-nation treatment under Article 1103 and the minimum standard of treatment under Article 1105; and (b) if so, what is the appropriate amount of damages."<sup>236</sup> (Emphasis added)

306. The Tribunal notes that the "measures" indicated above are expressed in a range of laws, policy statements and decisions. No individual law or policy statement is identified as a distinct "measure" or as a specific breach of NAFTA.

307. The Tribunal notes, however, that the measure alleged to be a breach of NAFTA is the practice of the discriminatory and inequitable diminution of DIBC's toll revenues that the Claimant expected to be caused by Canada's decision to locate the DRIC Bridge so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge, and by Canada's failure to improve highway connections to the Ambassador Bridge, in order to drive down the value of DIBC's investment.<sup>237</sup>

308. In the Washington Complaint,<sup>238</sup> DIBC alleged, *inter alia*, that:

"153. The acts of Canada and FHWA to construct the DRIC Bridge across the Detroit River within two miles of the Ambassador Bridge, without legitimate need, for the purpose of destroying the economic value of DIBC's and CTC's rights, is a violation of DIBC's and CTC's rights under the U.S. and Canadian legislation constituting the Special Agreement and the Boundary Waters Treaty.  
[...]

157. The acts of Canada, the FHWA Defendants and the Coast Guard Defendants in

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<sup>236</sup> Exhibit C-140, p. 18, ¶¶ 48-49.

<sup>237</sup> First NAFTA NOA, ¶¶ 42 and 47.

<sup>238</sup> Exhibit R-17.



*manipulating the U.S. and Canadian regulatory processes to attempt to ensure, without lawful justification, that the DRIC Bridge receives rapid approval, and that any improvements to the Ambassador Bridge are delayed or prevented is a violation of DIBC's and CTC's rights under the U.S. and Canadian legislation constituting the Special Agreement and the Boundary Waters Treaty.”(Emphasis added)*

309. In the Washington Complaint, DIBC's request for relief reads as follows:

*“WHEREOF, plaintiffs respectfully request judgment against defendants for the following relief:*

*(1) A declaratory judgment against the FHWA Defendants and Canada under 28 U.S.C §§2201-2202 that the construction and operation of the planned DRIC Bridge across the Detroit River would violate the obligations of Canada and the United States to DIBC and CTC;*

*(2) A declaratory judgment against the FHWA Defendants, the Coast Guard Defendants and Canada under 28 U.S.C. §§2201-2202 that DIBC and CTC have a right to continue to own and operate the Ambassador Bridge, and a right to build a second span of the Ambassador Bridge across the Detroit River without interference by Canada or the United States, subject only to the conditions set forth in the Special Agreement;*

*[...]*

*(4) A declaratory judgment against Canada under 28 U.S.C. §§2201-2202 that (a) DIBC and CTC have a right to determine the level of tolls to be charged on the Ambassador bridge, subject only to the conditions set forth in the Special Agreement, and (b) DIBC and CTC have a right to transfer their corporate ownership or ownership of any of their property rights;*

*[...]*

*(8) An injunction against the FHWA Defendants and Canada prohibiting each such defendant from taking any steps to construct, prepare for construction of, or arrange for construction of the planned DRIC bridge or any other bridge across the Detroit River between Canada and the United States;*

*(9) Damages against Canada in an amount to be determined in trial;*

*[...]*

*(12) Any other appropriate relief.”<sup>239</sup> (Emphasis added)*

310. The Tribunal finds that DIBC's claims in the Washington Complaint covers the same grounds that the “measures” put in issue in the First NAFTA NOA.

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<sup>239</sup> Exhibit R-17, p. 45-47.

311. The Tribunal also notes that paragraphs 5, 8 and 157 of the Washington Complaint indicate that the Washington Litigation is also based upon, *inter alia*, alleged traffic diversion and non-improvement of roads.

312. In view of the foregoing, the Washington Complaint shows that the Washington Litigation was a proceeding with respect to the measures that are alleged to breach NAFTA in this arbitration.

(ii) Considering that the measures are the same, do they only relate to injunctive, declaratory or extraordinary relief, not involving the payment of damages?

313. Considering that the Washington Litigation and this arbitration both deal with the same measures, the Tribunal will now analyze whether the Washington Litigation is a proceeding “*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,*” pursuant to the second part of Article 1121.

314. The Tribunal notes that at item (9) of DIBC’s prayer for relief in the Washington Complaint DIBC requests a judgment for “*damages against Canada in an amount to be determined at trial.*”<sup>240</sup> As a consequence, considering that the Washington Complaint did involve a request for damages and, in view of DIBC’s failure to waive the Washington Litigation at the time the First NOA was submitted, the Tribunal finds that it is deprived of jurisdiction to arbitrate DIBC’s claims in this case.

(iii) Was the Washington Litigation before a court under the law of Canada?

315. In any event, even if the Washington Litigation had not involved a request for damages against Canada, the Tribunal would still be deprived of jurisdiction in this case because the Washington Litigation is not a proceeding “*before an administrative tribunal or court under the law of the disputing Party*”. The “disputing Party”, plainly, is Canada; but the claim was brought before the US courts.

316. By way of reminder, according to DIBC, NAFTA Article 1121 authorizes claims for declaratory or injunctive relief, even if they challenge the same measure as in the NAFTA

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<sup>240</sup> Washington Complaint, p. 47.

arbitration, so long as they are brought “*under the law of the disputing Party.*” However, DIBC rejects Canada’s argument that the phrase “*under the law of the disputing Party*” not only requires the application of the disputing Party’s law, but also that the proceeding be physically located within the jurisdiction of the respondent State. DIBC argues that Article 1121 contains no reference to a choice of forum. Nor does it demand that the court or tribunal “owe[s] its existence to or operate[s]” under the law of the disputing Party.<sup>241</sup>

317. Contrary to DIBC’s allegations, the Tribunal finds that the last part of Article 1121 (i.e. “*before an administrative tribunal or court under the law of the disputing Party*”) is intended to designate the adjudicative bodies operating under the domestic law of the disputing Party. Although the preliminary works of the NAFTA do not shed any light on this issue, most of the provisional/extraordinary measures one could seek in a court or administrative tribunal in the context of Article 1121 would be based on the *lex fori*. The idea of using the applicable law to determine the competent court is implausible. It appears highly improbable that NAFTA Parties would accept the initiation of multiple proceedings around the world discussing the same measures, with the only condition being the application by the court or administrative tribunal of the law of the disputing Party.

318. The logic behind Article 1121 is evident. It is to allow the investor quickly to start an action in the court of the host State to resolve its dispute, without prejudice to the possibility of subsequent resort to an investment arbitration tribunal should the investor still consider that the treaty standards have not been met and decide to abandon the action in the host State’s courts. The only exceptions allowed are actions for injunctive, declaratory, or other extraordinary relief: these need not be abandoned. Once treaty arbitration has been invoked, the tribunal will be able to view the host State’s conduct in the round, including the treatment accorded to the investor in the State’s courts or administrative tribunals. This can be an important element of an investor’s claim for fair and equitable treatment.<sup>242</sup>

319. The Tribunal also finds that the Washington Litigation is a dispute under US law, and not a dispute under Canadian law as alleged by Claimant. This is because any injunctive or declaratory relief available in the United States courts would necessarily be given under the

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<sup>241</sup> DIBC’s Rejoinder Memorial on Jurisdiction, ¶¶ 79-81.

<sup>242</sup> Exhibit RLA-45, p. 107.

laws of the United States, not the laws of Canada, as is illustrated by the very wording of the relief sought in the Washington Complaint which refers expressly to provisions of the U.S.C.<sup>243</sup> Accordingly, any relief granted by a US court, even if based on an alleged violation of Canadian law, is not relief “under the law of” Canada as permitted by NAFTA Article 1121(1)(b) and (2)(b).

(iv) Tribunal’s conclusion

320. In light of the above, considering that (i) the Washington Litigation involves the same measures as those at stake in this arbitration; (ii) the Washington Complaint contains a request for damages against Canada; and (iii) the Washington Litigation is a court procedure initiated before U.S. Courts (and not before Canadian Courts), the First Waiver does not comply with Article 1121. Accordingly, the absence of a valid waiver prevents the Tribunal from having jurisdiction in this case.

**(3) Were the Second NAFTA NOA together with the Second and/or Third Waiver able to cure the initial lack of jurisdiction of the Arbitral Tribunal?**

321. The Tribunal further notes that DIBC subsequently withdrew its request for damages against Canada in the Washington Second Amended Complaint of November 9, 2012,<sup>244</sup> and that DIBC submitted its Second NAFTA NOA on January 15, 2013, in order to include its “New Span” claim. However, considering that Canada was already objecting to the Tribunal’s jurisdiction in this arbitration at the time DIBC submitted the Washington Second and Third Amended Complaints, and that Canada has maintained that objection, the Tribunal does not consider that the submission of such documents could retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction but had some kind of potential existence that might have been realized if it had acquired jurisdiction at some subsequent date. The lack of a valid waiver precluded the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprived the Tribunal of the very basis of its existence.

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<sup>243</sup> Washington Complaint, pp. 45-47.

<sup>244</sup> DIBC’s request for damages also does not appear in the Washington Third Amended Complaint of May 29, 2013.

322. As demonstrated below, even if the Tribunal were to focus its analysis on the Second NAFTA NOA submitted on January 15, 2013, the Tribunal would still reach the conclusion that the measures at stake in this case are the same as those at stake in the Washington Litigation.
323. DIBC's claims in this arbitration, as amended by the Second NAFTA NOA, arise from the measures identified at paragraph 135 of the Second NOA; and the claims arising from them are summarized in paragraph 136. Paragraphs 135 and 136 read as follows:<sup>245</sup>

*“135. This arbitration arises from measures taken by the Government of Canada, the Province of Ontario and the City of Windsor:*

*(1) to discriminate against DIBC, violating Claimant's exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant's franchise rights by precluding the construction of the New Span;*

*(2) to prevent or delay DIBC's ability to obtain Canadian approval to build the New Span;*

*(3) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian-owned NITC/DRIC Bridge, in breach of prior commitments and agreements to improve the connections to the Ambassador Bridge through the Ambassador Bridge Gateway Project;*

*(4) to fail to provide comparable improvements in road access to the Ambassador Bridge as was previously provided to the Blue Water Bridge and is currently being provided to the non-existent NITC/DRIC Bridge, because the Ambassador Bridge is owned by a United States investor; and*

*(5) to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and other crossings not owned by a U.S. investor.*

*136. The points raised by this arbitration are (a) whether those measures are inconsistent with Canada's obligations under Chapter 11 of NAFTA, including national treatment under Article 1102, most-favored-nation treatment under Article 1103, and the minimum standard of treatment under Article 1105; and (b) if so, what is the appropriate amount of damages.”<sup>246</sup> (Emphasis added)*

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<sup>245</sup> The same measures are described at paragraphs 215-216 of DIBC's Statement of Claim of January 31, 2013.

<sup>246</sup> Exhibit C-116, ¶¶ 135-136.

324. The Tribunal notes once again that the “measures” indicated above are expressed in a range of laws, policy statements and decisions. No individual law, policy statement or decision is identified as a specific breach of NAFTA: all are instances and evidence of “*the discriminatory and inequitable actions that Canada has undertaken prior to this Demand (and any during these proceedings) that have diminished Claimant’s past and future toll revenues due to the failure to improve the highway connections to the Ambassador Bridge and due to the delay and obstruction of Claimant’s ability’s to construct the New Span to the Ambassador Bridge*”<sup>247</sup>.
325. The Tribunal further notes that the measure alleged to be a breach of NAFTA according to the Second NOA is the practice of the discriminatory and inequitable diminution of DIBC’s toll revenues caused by Canada’s failure to improve highway connections to the Ambassador Bridge, and the obstruction of DIBC’s ability to construct the New Span.
326. The Tribunal notes that, on January 15, 2013, when the Second NAFTA NOA was submitted, Claimant’s claims against Canada in the Washington Litigation were set forth in the Washington Second Amended Complaint dated November 9, 2012.<sup>248</sup> DIBC filed its Washington Third Amended Complaint on May 29, 2013.<sup>249</sup>
327. In both the Washington Second and Third Amended Complaints, DIBC alleged, *inter alia*, that:

*“11. Defendants [which includes Canada] have also violated plaintiffs’ franchise rights by thwarting plaintiffs’ ability to exercise their right to build the New Span, and by attempting to accelerate the approvals of the NITC/DRIC to prevent plaintiffs from exercising their right to build the New Span.*

*13. ....defendants [which includes Canada] have taken a series of steps to discriminate in favor of the NITC/DRIC and against the New Span.*

*240.<sup>250</sup> Another glaring example of Canada’s discrimination against the New Span and in favor of the NITC/DRIC can be found in Canada’s development of a highway connection between the location of the proposed NITC/DRIC (which does not exist and has not even been approved yet), and its refusal to build similar highway*

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<sup>247</sup> Second NAFTA NOA, ¶ 15; DIBC’s NAFTA Statement of Claim, ¶ 15.

<sup>248</sup> Exhibit R-19.

<sup>249</sup> Exhibit C-141.

<sup>250</sup> In the Washington Third Amended Complaint this statement can be found at ¶ 243.

connection to the Ambassador Bridge.”

328. In the Washington Second Amended Complaint, DIBC’s request for relief against Canada reads as follows:

*“WHEREOF, plaintiffs respectfully request judgment against defendants as follows:*

[...]

*(c) A declaratory judgment against all defendants declaring that plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor, or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent a special agreement under the Boundary Waters Treaty authorizing such an additional bridge, and declaring that no such special agreement currently exists;*

[...]

*(e) A declaratory judgment against all defendants declaring that plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by any defendant that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or to delay the regulatory approvals of the New Span;*

[...]

*(j) A declaratory judgment that defendants’ actions in supporting the construction of the NITC/DRIC, and in preventing plaintiffs from exercising their right to build the New Span, constitute a taking of plaintiffs’ private property rights without payment of just compensation, in violation of the Taking Clause of the Fifth Amendment and of international law;*

*(k) Any and all other injunctive relief necessary to prevent defendants from taking any action that infringes upon plaintiffs’ exclusive statutory and contractual franchise rights under their Special Agreement; and*

*(l) Any such other and further relief as may be just and proper;”<sup>251</sup> (Emphasis added)*

329. The Tribunal finds that DIBC’s prayer for relief in the Washington Second Amended Complaint was made in respect of the same “measures” as the “measures” put in issue in the Second NAFTA NOA. Even if the Tribunal excludes sub-paragraph (k), the Washington Second Amended Complaint plainly covers the “New Span” issues in the Second NOA.

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<sup>251</sup> Second Amended Washington Complaint, p. 90.

330. The Tribunal also notes that paragraphs 239 to 249 of the Washington Second Amended Complaint indicate that the Washington Litigation is also based upon, *inter alia*, alleged traffic diversion and non-improvement of roads.

331. As for the Washington Third Amended Complaint, DIBC's request for relief with respect to Canada reads as follows:

*“WHEREOF, plaintiffs respectfully request judgment against defendants as follows:*

[...]

*(i) A declaratory judgment against Canada that, under Canadian law, plaintiffs own an exclusive franchise to own and operate an international bridge between Detroit and Windsor; or, in the alternative, declaring that no additional bridge may be authorized between Detroit and Windsor absent a special agreement under the Boundary Waters Treaty authorizing such an additional bridge, and declaring that no such special agreement currently exists;*

[...]

*(l) A declaratory judgment against Canada declaring that, under Canadian law, plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by Canada that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or to delay the regulatory approvals of the New Span, or otherwise to discriminate in favor of the NITC/DRIC and against the New Span;*

[...]

*(s) Any and all other injunctive relief necessary to prevent defendants from taking any action that infringes upon plaintiff's exclusive statutory and contractual franchise rights under their Special Agreement; and*

*(t) Any such other and further relief as may be just and proper.”<sup>252</sup> (Emphasis added)*

332. In view of the above, the Tribunal finds that DIBC's prayer for relief in the Washington Third Amended Complaint also relates to the same “measures” as the “measures” put in issue in the Second NAFTA NOA.

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<sup>252</sup> Washington Third Amended Complaint, pp. 112-116.



333. As a consequence, even if the Tribunal were to consider the Second NAFTA NOA as the document containing Claimant's operative claims in this arbitration, the Washington Second and Third Amended Complaints also show that the Washington Litigation is a proceeding with respect to the same measures as those at issue in this arbitration.
334. The Tribunal notes that since the submission of the Washington Second and Third Amended Complaints DIBC no longer requests for damages against Canada in the Washington Litigation. However, even if the Tribunal could take into account DIBC's subsequent withdrawal of its request for damages against Canada in the Washington Litigation, the Tribunal would still be deprived of jurisdiction in this case because the Washington Litigation, which was carved out from all the three waivers submitted in this arbitration, is not a proceeding "*before an administrative tribunal or court under the law of the disputing Party [Canada]*". The fact that the relief sought in the Washington Second and Third Amended Complaints does not refer to the U.S.C. (as had been the case in the original Washington Complaint) is not enough to change that conclusion.
335. Therefore, even if the Second NAFTA NOA together with the Second and/or Third Waivers were able to cure the lack of jurisdiction of the Tribunal from a procedural point of view, they did not do so for substantial reasons, because the conditions set in Article 1121 were not met.

#### **(4) Tribunal's conclusion**

336. In light of the above, and considering that (i) the Washington Litigation involves the same measures than those at stake in this arbitration; (ii) the Washington Complaint contains a request for damages against Canada; and (iii) the Washington Litigation is a court procedure initiated before U.S. Courts (instead of Canadian Courts), the First Waiver does not comply with Article 1121. In any event, none of the waivers presented by DIBC complies with Article 1121, because the Washington Litigation, which was carved out from all three waivers submitted, is a court proceeding initiated before U.S. courts, not before the Canadian courts. As a consequence, DIBC's failure to waive its rights to continue the Washington Litigation deprives the Tribunal of jurisdiction to arbitrate DIBC's claims in this case.

337. Accordingly, the Tribunal does not have jurisdiction in this case, because of DIBC's failure to comply with NAFTA Article 1121.

338. In view of the Tribunal's decision above, there is no need to address the remaining issues raised by Canada in this jurisdictional and/or admissibility phase. Although Canada has requested the Tribunal to dismiss Claimant's claims in their entirety and with prejudice on the grounds of lack of jurisdiction and/or admissibility, in view of the Tribunal's decision that it does not have jurisdiction in this case, the Tribunal does not have the authority to dismiss Claimant's claims in this arbitration and can only declare that it has no jurisdiction to hear them.

339. The allocation of costs arising from this arbitration will be decided in a future award, after the Tribunal hears the disputing parties on the issue, pursuant to a timetable to be established in consultation with the disputing parties.

#### VIII. HOLDING

340. In view of the foregoing, the Tribunal decides:

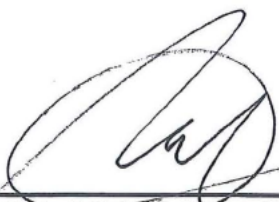
- (a) That it does not have jurisdiction to hear Claimant's claims in this case, and
- (b) To defer the decision regarding the allocation of the costs of this arbitration to a future award.


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Date: April 2<sup>nd</sup>, 2015

Place of the arbitration: Washington DC, USA.

#### ARBITRAL TRIBUNAL

  
\_\_\_\_\_  
The Hon. Michael Chertoff  
Co-arbitrator  
(See Annex I - Separate Jurisdictional  
Opinion)

  
\_\_\_\_\_  
Mr. Vaughan Lowe, Q.C.  
Co-arbitrator



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Mr. Yves Derains  
Chairman