

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL  
ARBITRATION RULES**

**BETWEEN:**

**DETROIT INTERNATIONAL BRIDGE COMPANY**

**Claimant/Investor**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent/Party**

**PCA Case No. 2012-25**

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**GOVERNMENT OF CANADA  
BRIEF STATEMENT ON JURISDICTION AND ADMISSIBILITY**

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**February 22, 2013**

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<b>I.</b>	<b>PRELIMINARY STATEMENT .....</b>	<b>1</b>
<b>II.</b>	<b>BRIEF FACTUAL OVERVIEW .....</b>	<b>6</b>
	A. Historical Background of the Ambassador Bridge and Surrounding Area.....	6
	B. Traffic Issues in the Windsor Gateway.....	7
	1. Short/Medium Term Transportation Improvements.....	8
	a) Windsor Gateway Action Plan/Nine Point Plan .....	9
	b) Let’s Get Windsor Essex Moving Strategy .....	10
	2. Long Term Transportation Improvements: Detroit River International Crossing Process .....	11
	C. Ambassador Bridge New Span .....	17
	D. The International Bridges and Tunnels Act .....	18
	E. The Bridge to Strengthen Trade Act.....	19
<b>III.</b>	<b>JURISDICTION AND ADMISSIBILITY POINTS AT ISSUE.....</b>	<b>19</b>
	A. The Tribunal has no Jurisdiction with respect to Claims Based on the <i>Boundary Waters Treaty</i> .....	19
	B. DIBC has Failed to Comply with NAFTA Article 1121 .....	21
	1. DIBC and CTC’s Initiation and Continuation of Claims in the Washington Litigation Violates NAFTA Article 1121 .....	23
	2. CTC’s Initiation and Continuation of Claims in the <i>CTC v. Canada</i> (ONSC) Litigation Violates NAFTA Article 1121 .....	27
	3. CTC’s Initiation and Continuation of Claims in the Windsor Litigation Violates NAFTA Article 1121 .....	28
	4. Conclusion .....	30
	C. Regardless of DIBC’s Non-Compliance with Article 1121, DIBC’s Highway 401 Connection Claims and <i>International Bridges and Tunnels Act</i> Claims Are Time Barred under NAFTA Articles 1116(2) and 1117(2) .....	31
	1. Three Year Time Limit for Submission of a Claim to Arbitration.....	31
	2. DIBC Failed to Submit Timely Claims Regarding its Highway 401 Road Access Claims .....	31
	a) The Windsor Gateway Action Plan/Nine Point Plan Was Replaced on March 11, 2004 .....	32

b)	The Potential for a Highway 401 Connection to the Ambassador Bridge Through the Bi-National Partnership Process Was Eliminated on November 14, 2005.....	33
c)	DIBC Failed to Submit Timely Claims Regarding Huron Church Road .....	35
d)	DIBC's own NAFTA Statement of Claim Proves That its Highway 401 Road Access Claims Are Time Barred .....	36
3.	DIBC Failed to Submit Timely Claims Regarding the <i>International Bridges and Tunnels Act</i> .....	38
<b>IV.</b>	<b>DOCUMENT DISCOVERY DURING JURISDICTIONAL PHASE .....</b>	<b>38</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>40</b>

## I. PRELIMINARY STATEMENT

1. This submission provides a brief statement of Canada's jurisdictional and admissibility arguments prior to the upcoming procedural meeting for further organization of the proceedings. Pursuant to the Tribunal's Procedural Order No. 1, legal argument and evidence in support of these objections will be presented at a later stage in Canada's Memorial on Jurisdiction and Admissibility.

2. As Canada sets out below, the claimant Detroit International Bridge Company ("DIBC" or "Claimant") and its enterprise, the Canadian Transit Company ("CTC"), have failed to meet certain requirements set out in NAFTA Chapter Eleven which are preconditions to Canada's consent to arbitration. As a result, this Tribunal does not have jurisdiction to hear any of DIBC's claims.

3. DIBC has filed two Notices of Arbitration against Canada in this dispute under NAFTA Chapter Eleven. In its first Notice of Arbitration filed on April 29, 2011 ("First NAFTA NOA"), DIBC alleged that Canada reneged on a commitment to build a direct highway link between Ontario Highway 401 ("Highway 401") and the Ambassador Bridge, which is owned by DIBC. DIBC also alleged that Canada designed a new highway – the Right Honourable Herb Gray Parkway (formerly known as the Windsor-Essex Parkway) (the "Parkway") – to bypass the Ambassador Bridge and instead connect to a new bridge, the Detroit River International Crossing ("DRIC Bridge").<sup>1</sup> Finally, the Claimant alleged that Canada implemented certain traffic measures on Huron Church Road, the existing road connection between Highway 401 and the Ambassador Bridge, to divert traffic away from the Ambassador Bridge and towards the Windsor-Detroit Tunnel and the DRIC Bridge.

4. In its amended Notice of Arbitration filed January 15, 2013 ("Amended NAFTA NOA"), the Claimant argues that, in addition to the above Highway 401 road access claims, Canada has violated DIBC's "exclusive franchise rights" that purportedly exist under a "special agreement" pursuant to the *Boundary Waters Treaty* by adopting the

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<sup>1</sup> Also known as the New International Trade Crossing (NITC) Bridge.

*International Bridges and Tunnels Act* (“IBTA”). DIBC also alleges that Canada has intentionally delayed approval of DIBC’s application to build its own new bridge adjacent to the existing Ambassador Bridge (“AB New Span”) while accelerating approval of the DRIC Bridge. DIBC alleges that these measures breach Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment) and 1105 (Minimum Standard of Treatment) of the NAFTA.<sup>2</sup>

5. The above allegations were maintained and expanded upon in DIBC’s Statement of Claim filed January 31, 2013 (“NAFTA Statement of Claim”).

6. In support of these allegations, DIBC points to the following measures by Canada, which underlie its claims:

- a) Canada reneged on its 2003 promise in the Windsor Gateway Action Plan/Nine Point Plan to spend C\$300 million to construct a direct highway connection between Highway 401 and the Ambassador Bridge;<sup>3</sup>
- b) Canada manipulated the DRIC environmental assessment (“DRIC EA” or “Bi-National Partnership Process”) to ensure that the direct Highway 401 connection component of the DRIC EA (the “Parkway”) would go to the DRIC Bridge but not the Ambassador Bridge;<sup>4</sup>
- c) Canada installed “seventeen unnecessary traffic lights” and granted “unlimited curb cuts and driveway connections” on Huron Church Road in order to steer traffic to the Windsor-Detroit Tunnel and the DRIC Bridge.<sup>5</sup> (The three above measures, sub (a) to (c), can be collectively referred to as the “Highway 401 Road Access Claims”);

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<sup>2</sup> Together, the First NAFTA NOA and the Amended NAFTA NOA are referred to as the “NAFTA NOAs.”

<sup>3</sup> First NAFTA NOA ¶¶ 26-34; Amended NAFTA NOA ¶¶ 12, 113-114, NAFTA Statement of Claim ¶¶ 95-96, 158, 190.

<sup>4</sup> First NAFTA NOA ¶¶ 38-42 ; Amended NAFTA NOA ¶¶ 82-84; NAFTA Statement of Claim ¶¶ 119, 120, 133.

<sup>5</sup> First NAFTA NOA ¶¶ 43-47; Amended NAFTA NOA ¶¶ 125-129; NAFTA Statement of Claim ¶¶ 206, 208, 209.

- d) Canada's enactment of the *International Bridges and Tunnels Act* violated DIBC's franchise rights under a "special agreement" under the *Boundary Waters Treaty* (the "IBTA Claim");<sup>6</sup>
- e) Canada has intentionally delayed approval of DIBC/CTC's application to construct the AB New Span while accelerating approval of the DRIC Bridge by enacting the *Bridge to Strengthen Trade Act* (the "AB New Span Claim").<sup>7</sup>

7. DIBC's claims are devoid of merit, intended only to sow further legal confusion in order to delay the cooperative efforts of the Governments of Canada, Ontario, Michigan and the United States to secure long-term economic prosperity and security by building a new bridge, customs plazas and highway connections in the Windsor-Detroit corridor.

8. At this juncture, however, Canada need not address the misrepresentations upon which the Claimant's NAFTA NOAs and NAFTA Statement of Claim are based because the disputing parties have agreed to a separate phase on jurisdiction.<sup>8</sup> In this regard, Canada submits that this Tribunal is without jurisdiction over *any* of DIBC's claims.

9. The scope of a NAFTA Party's consent to arbitrate is limited by the terms of the NAFTA. The Claimant must comply with the requirements the NAFTA Parties have imposed as preconditions to access Chapter Eleven arbitration. These preconditions include that the investor waive its right to pursue domestic litigation with respect to the same measure(s) (Articles 1121(1)(b) and 2(b)) and that the claims be brought within the time limits set out in Articles 1116(2) and 1117(2). Failure to comply with these and other preconditions set out in NAFTA Chapter Eleven means there is no consent to arbitrate by a NAFTA Party.

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<sup>6</sup> Amended NAFTA NOA ¶¶102-109; NAFTA Statement of Claim ¶¶ 174-180.

<sup>7</sup> Amended NAFTA NOA ¶¶ 97-99, 110, 111; NAFTA Statement of Claim ¶¶ 169-171, 182-184.

<sup>8</sup> See Joint Letter of the Parties to the Tribunal dated December 10, 2012, p. 2 ("The disputing parties have agreed that this arbitration shall be divided into three phases: issues of jurisdiction, merits and damages shall be heard separately.").

10. DIBC and its enterprise CTC have not only failed to comply with the terms on which Canada's offer to arbitrate is based, they have intentionally flouted those conditions. Undaunted by domestic court judgments in Canada and in the United States, which have already rejected many of the same meritless arguments DIBC and CTC propagate in their NAFTA claim, the Claimant has re-packaged the same allegations, facts, documents and measures to launch another multi-front litigation attack against Canada under NAFTA Chapter Eleven, in the United States District Court for the District of Columbia, and in the Ontario Superior Court of Justice.

11. DIBC has abandoned any pretense that this NAFTA arbitration is not founded on the same measures at issue in these domestic litigations. Indeed, large passages of the text from DIBC's NAFTA submissions paraphrase or even copy word-for-word its past and present domestic litigation submissions. Canada, Ontario and Windsor have already produced thousands of documents, incurred millions of dollars in legal expenses and have had its public servants spend hundreds of hours preparing for and being examined under DIBC/CTC-initiated domestic litigations covering the same measures at issue in this NAFTA arbitration.

12. DIBC seeks to re-litigate yet again the same issues before this NAFTA Tribunal in an effort to delay attempts by Canada, the United States, Ontario and Michigan to build a new crossing, but it cannot do so as it has failed to comply with the terms the NAFTA Parties agreed were fundamental to accessing arbitration under Chapter Eleven.

13. Canada submits that the Tribunal is without jurisdiction over *any* of DIBC's claims for at least the following reasons:

***Lack of Jurisdiction Relating to the Boundary Waters Treaty***

- This NAFTA Tribunal has no jurisdiction to determine whether a "special agreement" pursuant to Articles XIII of the *Boundary Waters Treaty* exists or whether Canada has breached any such "special agreement."

***Failure to Comply with the Waiver Requirements in Article 1121***

- DIBC/CTC has failed to comply with the waiver requirements under NAFTA Article 1121. The waivers DIBC attached to its First NAFTA NOA and

Amended NAFTA NOA are invalid both because of the limitations they contain and because DIBC/CTC initiated and continued litigations against Canada in both U.S. and Canadian courts with respect to the same measures as in this NAFTA arbitration.

***DIBC's Highway 401 Road Access Claims and International Bridges and Tunnels Act Claim Are Time Barred Under NAFTA Articles 1116(2) and 1117(2)***

- Regardless of DIBC's non-compliance with Article 1121, DIBC had knowledge more than three years prior to filing its First NAFTA NOA of Canada's alleged breach with respect to the construction of a direct highway connection from Highway 401 to the Ambassador Bridge. Thus, all of DIBC's Highway 401 Road Access Claims are time barred under NAFTA Articles 1116(2) and 1117(2).
- DIBC also had knowledge more than three years prior to filing its First NAFTA NOA of Canada's alleged breach with respect to the IBTA and thus its claim relating thereto is time barred under NAFTA Articles 1116(2) and 1117(2).<sup>9</sup>

14. In light of the serious and fatal jurisdictional issues raised in this brief, a procedural schedule, including a phase for limited document requests, should be established in order to provide the parties with a fair and reasonable opportunity to fully brief the Tribunal.

15. This Brief Statement on Jurisdiction and Admissibility is organized as follows. Part II provides a summary overview of the main facts and issues relevant for the jurisdictional phase. Part III summarily sets out Canada's jurisdiction and admissibility defenses with respect to NAFTA Articles 1116, 1117 and 1121. Part IV explains why limited document discovery is required during the jurisdictional phase.

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<sup>9</sup> Canada reserves the right to expand upon and supplement these objections in its Memorial on Jurisdiction and Admissibility, including, with respect to DIBC's failure to comply with temporal notice requirements under NAFTA Articles 1119 and 1120 with respect to its AB New Span and *Bridge to Strengthen Trade Act* claims.



## II. BRIEF FACTUAL OVERVIEW

### A. Historical Background of the Ambassador Bridge and Surrounding Area

16. The Ambassador Bridge was built in 1929 and spans the Detroit River between the cities of Windsor, Ontario and Detroit, Michigan. To authorize its construction, Canada passed legislation to incorporate the Canadian Transit Company (“CTC”) in 1921 (“CTC Act”).<sup>10</sup> The CTC Act sets out CTC’s corporate rights and obligations, subject to the provisions of the *Railway Act 1919* and the *Navigable Waters Protection Act*, and permits CTC to “construct, maintain and operate a railway and general traffic bridge across the Detroit River.”<sup>11</sup> The CTC Act stipulates that the construction and location of the bridge was subject to government approval and that construction could not start until the United States enacted legislation approving construction of the bridge on its side of the Detroit River.<sup>12</sup>

17. The United States Congress passed legislation in 1921 which gave the American Transit Company (“ATC”), DIBC’s predecessor, the right to “construct, maintain and operate a bridge across the Detroit River,” provided that all proper and requisite authority was obtained from Canada prior to construction (“ATC Act”).<sup>13</sup>

18. The Ambassador Bridge was constructed to suit the transportation needs of the time, long before modern highway and road infrastructure. In the 1950s, 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. As a result, there is now no direct highway connection between the Ambassador Bridge and Highway 401. Instead, traffic must exit Highway 401 and traverse local Windsor roads in order to access the Ambassador Bridge. One of those local roads, Huron Church

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<sup>10</sup> *Canadian Transit Company Act*, 11-12 George V., Chap. 57, May 3, 1921 (“CTC Act”), **Exhibit C-6**.

<sup>11</sup> CTC Act, s.8, **Exhibit C-6**.

<sup>12</sup> CTC Act, s. 9, 11, 13, **Exhibit C-6**.

<sup>13</sup> *American Transit Company Act*, 66<sup>th</sup> Congress. Sess III Chs. 166-168, March 4, 1921 (“ATC”), **Exhibit C-5**.

Road, connects directly to the Ambassador Bridge after passing through Windsor just west of the downtown core.<sup>14</sup>

19. Huron Church Road was not intended to be an international thoroughfare and features a mixture of historic residential, institutional, commercial and retail establishments. It is flanked on both sides by homes, apartment buildings, restaurants, schools, community centers and hotels. Immediately to the east and southeast of the Ambassador Bridge and Huron Church Road are the University of Windsor and its predecessor, Assumption College, founded in 1857. Adjacent to the base of the Ambassador Bridge is Our Lady of the Assumption Parish Church. This church and adjacent Assumption Cemetery were established in the mid-1800s, with parts of the structure dating as far back as 1795. Immediately to the west of the Ambassador Bridge and Huron Church Road is the historic Olde Sandwich Town neighborhood, established in 1797 and one of Canada's oldest settlements. Sandwich played host to some of Canada's most historic events, including the beginning of the War of 1812, and is home to several of Canada's oldest and historically important buildings and structures.

### **B. Traffic Issues in the Windsor Gateway**

20. The transportation corridor connecting Ontario and Michigan at Windsor-Detroit (the "Windsor Gateway") is Canada's single most important trade crossing with the United States and one of the most important international trade corridors in the world.<sup>15</sup> Following the implementation of the NAFTA in 1994, cross-border trade between the two countries exploded and more goods and services cross the Canada-U.S. border at Windsor-Detroit than anywhere in North America, most of it across the 84 year old Ambassador Bridge. In 2000, the Windsor Gateway accounted for almost 30% of

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<sup>14</sup> See map of Windsor, **Exhibit R-1**.

<sup>15</sup> *Latin Americans for Social and Economic Development et al v Administrator of the Federal Highway Administration*, F. Supp. 2d, 2012 WL 1138473 (E.D. Mich.), Decision and Order Granting Defendants' Motion to Affirm (Doc. 68), (5 April 2012) ("EA JR (US)") p. 6, **Exhibit R-2**; News Release: C\$300 Million Canada-Ontario Investment at the Windsor Gateway (25 September 2002), **Exhibit R-3**.

Canada's annual C\$171 billion exports by road and almost 40% of Canada's annual C\$170 billion imports by road.<sup>16</sup>

21. Traffic issues in the corridor leading to the Ambassador Bridge have been a longstanding issue of concern for Windsor and its citizens. Persistent traffic congestion, trucks on local streets, exhaust fumes from trucks traversing through densely populated neighborhoods, noise, pedestrian-vehicle accidents and long wait times at the border are all common. In 2000, the governments of Canada, the United States, Ontario and Michigan recognized that the existing Windsor-Detroit border crossings<sup>17</sup> were experiencing acute congestion and transportation capacity problems. Given the importance of this trade corridor to the local, regional and national economies of both Canada and the United States it was recognized that government had to take responsible steps to reduce the likelihood of disruption to transportation service in the Windsor Gateway. To this end, the transportation agencies from each jurisdiction began looking at both short/medium term solutions to existing border crossings as well as a coordinated Canada-United States-Michigan-Ontario approach to identify and evaluate trans-border infrastructure improvements in the region, with a focus on the long term studies needed to support this work. The work of each of these initiatives is described in more detail below.

### **1. Short/Medium Term Transportation Improvements**

22. Starting in 2002, Canada, Ontario and Windsor made efforts to develop short and medium term projects to improve immediate traffic conditions and transportation infrastructure leading to the existing crossings at the Windsor-Detroit border. These short and medium term projects were to be carried out concurrently with the early

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<sup>16</sup> News Release: C\$300 Million Canada-Ontario Investment at the Windsor Gateway (25 September 2002), **Exhibit R-3**.

<sup>17</sup> In addition to the Ambassador Bridge, the Detroit River is traversed at Windsor-Detroit by the Michigan Central Railway Tunnel (built in 1910), the Windsor-Detroit Tunnel (built in 1930) and the Detroit-Windsor Truck Ferry (in operation since 1990).

stages of the Bi-National Partnership,<sup>18</sup> which was examining the long-term transportation needs of the region.

**a) Windsor Gateway Action Plan/Nine Point Plan**

23. On September 25, 2002, Canada and Ontario signed a Memorandum of Understanding (“2002 MOU”) to commit C\$300 million to upgrade transportation infrastructure at the Ontario approaches to the existing border crossings in the Windsor-Detroit corridor.<sup>19</sup> The 2002 MOU was intended to create a process to identify potential transportation projects in Windsor, to consult with stakeholders and the public and to develop an action plan for investment in transportation/traffic infrastructure without prejudicing the long-term planning of the Bi-National Partnership.

24. A working group of federal and provincial officials (“Joint Management Committee” or “JMC”) was set up in September 2002 to consult with the public and stakeholders and identify potential infrastructure projects to improve the existing border crossings and their approaches.<sup>20</sup> CTC participated in the process, along with many others, and CTC proposed that a dedicated highway be constructed to connect Highway 401 to the Ambassador Bridge.<sup>21</sup>

25. On November 26, 2002, the JMC submitted a report to the Governments of Canada and Ontario entitled the *Windsor Gateway: An Action Plan for the 21st Century Gateway* (“Windsor Gateway Action Plan”) which observed, among other things, that the CTC proposal would have “significant community impacts and requires significant

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<sup>18</sup> As discussed below, in 2001, the Ministry of Transportation for Ontario (“MTO”), Transport Canada (“TC”), the Michigan Department of Transportation (“MDOT”) and the United States Federal Highway Administration (“FHWA”) established the Canada-United States-Ontario-Michigan Border Transportation Partnership (the “Bi-National Partnership”) to examine the long-term transportation network needs of southeast Michigan and southwest Ontario.

<sup>19</sup> Government of Canada and Government of Ontario, Memorandum of Understanding, “Windsor Gateway Short and Medium Term Improvements”, (25 September 2002) (“2002 MOU”), **Exhibit R-4**.

<sup>20</sup> Government of Canada and Government of Ontario, Memorandum of Understanding, “Windsor Gateway Short and Medium Term Improvements”, (25 September 2002), Part II, **Exhibit R-4**.

<sup>21</sup> *Windsor Gateway: An Action Plan for the 21st Century Gateway*, November 25, 2002, pp. 13-17, **Exhibit R-5**.

property acquisition” and that it would have to be scrutinized under all regulatory approvals.<sup>22</sup> While the JMC believed there was a need for a direct highway connection between Highway 401 and the border, they noted that there was “no consensus on how to achieve it and where it should be located.”<sup>23</sup> The Windsor Gateway Action Plan was released to the public in December 2002.<sup>24</sup>

26. The Canadian and Ontario governments took the Windsor Gateway Action Plan under advisement and on May 27, 2003, agreed on nine points of action that could lead to short and medium term projects to ease traffic congestion in Windsor (“the Nine Point Plan”).<sup>25</sup> None of the nine points of action involved a commitment to build a direct highway connection between Highway 401 and the Ambassador Bridge.

#### **b) Let's Get Windsor Essex Moving Strategy**

27. In any event, the Nine Point Plan was short-lived because of concerns raised by the City of Windsor. The plan was thus replaced on March 11, 2004 by a new plan jointly endorsed by Canada, Ontario and Windsor – the *Let's Get Windsor-Essex Moving Strategy* (“LGWEM Strategy”) – and a new Memorandum of Understanding (“2004 MOU”) signed by each level of government.<sup>26</sup> The press release accompanying the 2004 MOU and LGWEM Strategy stated explicitly that it “replace[d] the nine-point Windsor Gateway Action Plan.” The LGWEM Strategy announced new measures to use the C\$300 million originally allocated to the Nine Point Plan,<sup>27</sup> none of which

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<sup>22</sup> *Windsor-Gateway: An Action Plan for the 21st Century Gateway*, November 25, 2002, p. 14, **Exhibit R-5**.

<sup>23</sup> *Windsor Gateway: An Action Plan for the 21st Century Gateway*, November 25, 2002, **Exhibit R-5**; News Release, *Joint Committee Delivers Windsor Gateway Action Plan*, November 26, 2002, **Exhibit R-6**.

<sup>24</sup> *Canada and Ontario Welcome Windsor Gateway Action Plan Recommendations*, December 20, 2002, **Exhibit R-7**. Canada notes that DIBC included only a summary document of the Windsor Gateway Action Plan at **Exhibit C-30**. Canada has included the full report as **Exhibit R-5**.

<sup>25</sup> News Release, *Canada and Ontario Announce Next Steps at Windsor Gateway*, May 27, 2003, **Exhibit C-32**.

<sup>26</sup> News Release: *A new Solution for the Windsor Gateway Endorsed by all Three Levels of Government*, March 11, 2004 (“2004 MOU”) **Exhibit R-8**.

<sup>27</sup> See letter from Lawrence Cannon (Minister of Transport) to DIBC/CTC President Dan Stamper dated

involved a direct highway connection between Highway 401 and the Ambassador Bridge.

## 2. Long Term Transportation Improvements: Detroit River International Crossing Process

28. In 2001, the Ministry of Transportation for Ontario (“MTO”), Transport Canada (“TC”), the Michigan Department of Transportation (“MDOT”) and the United States Federal Highway Administration (“FHWA”) established the Canada-United States-Ontario-Michigan Border Transportation Partnership (the “Bi-National Partnership”) to examine the long-term transportation network needs of southeast Michigan and southwest Ontario, including improved highway connections between Highway 401 in Ontario and the interstate highway system in Michigan (referred to as an “end-to-end” solution).<sup>28</sup> The objective of the Bi-National Partnership was to provide for the safe, secure and efficient movement of people and goods between southwest Ontario and southeast Michigan, while minimizing environmental and community impacts.<sup>29</sup>

29. To this end, the Bi-National Partnership commenced a Planning, Need and Feasibility Study (“P/NF Study”) in May 2001.<sup>30</sup> The P/NF Study, completed in January

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October 3, 2007, **Exhibit C-110**.

<sup>28</sup> Ontario Michigan Border Transportation Partnership Charter, **Exhibit C-35**; Canada-United States-Ontario-Michigan Border Transportation Partnership Charter, **Exhibit C-36**; Memorandum of Cooperation Between the Department of Transportation of the United States of America and the Department of Transport of Canada on the Development of Additional Border Capacity at the Detroit-Windsor Gateway, **Exhibit C-37**; *Canadian Transit Co. v Canada (Minister of Transport)*, (2011) 59 C.E.L.R. (3d) 127, 2011 FC 515, Reasons for Order and Order (4 May 2011) (“EA JR (Can)”) ¶ 25, **Exhibit R-9**; EA JR (US), pp. 3, 5-6, **Exhibit R-2**; See also Canadian Environmental Assessment Act Screening report, CEAA No: 06-01-18170 Detroit River International Crossing Study, (“CEAA Screening Report”) Page 1, **Exhibit C-92**. For a summary review of the Bi-National Partnership Process, see the Executive Summary of the Detroit International River Crossing Environmental Assessment Report (“EA Executive Summary”) attached as **Exhibit R-10**. Canada notes that DIBC has provided excerpts from the EA Report, including Chapter 10. Canada only includes the EA Executive Summary and Chapter 6 as an exhibit to this Brief Statement on Jurisdiction and Admissibility but will submit the full Environmental Assessment as an exhibit to its Memorial on Jurisdiction and Admissibility.

<sup>29</sup> CEAA Screening report, p.1, **Exhibit C-92**; EA JR (Can) ¶ 26, **Exhibit R-9**; EA JR (US), pp. 5-6 **Exhibit R-2**.

<sup>30</sup> EA JR (Can) ¶ 27 (May 4, 2011), **Exhibit R-9**; EA JR (US), p. 3, **Exhibit R-2**; Planning, Needs and Feasibility Study Report, January 2004 (“P/NF Study”), **Exhibit R-11**. Canada notes that DIBC only included a portion of the P/NF study at **Exhibit C-77**. Canada has included the full report as **Exhibit R-11**.

2004, included a broad range of recommendations to meet long-term needs, including the need to build a new or expanded international crossing(s) and direct highway connections on both sides of the border.<sup>31</sup> The findings of the P/NF Study provided the basis for the Bi-National Partnership to initiate formal environmental assessments in each country.<sup>32</sup>

30. In May 2004, the Bi-National Partnership formally launched simultaneous environmental assessments in Canada and the United States to examine all options for a new or expanded crossing at Windsor-Detroit together with road connections and customs plazas. The Bi-National Partnership agreed to coordinate their environmental assessments to ensure consistency of approach to ensure the best possible “end-to-end” solution that would create a direct connection between Ontario and Michigan’s freeway systems.<sup>33</sup>

31. A set of evaluation factors were arrived at by the Bi-National Partnership through public consultation and were to be used throughout the Bi-National Partnership Process to assess the respective benefits and impacts of the alternative “end-to-end” crossing, plaza and access road options.<sup>34</sup> These evaluation factors were established to achieve the objectives of the Bi-National Partnership and were consistent with the legislated environmental approval processes in both Canada and the U.S.<sup>35</sup> They included evaluating impacts on the local communities, the environment, regional mobility, and constructability.<sup>36</sup>

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<sup>31</sup> EA Executive Summary at (i), **Exhibit R-10**; EA JR (Can) ¶ 27 (May 4, 2011), **Exhibit R-9**.

<sup>32</sup> Although conducted in a manner consistent with the environmental study process in both Canada and the United States, the P/NF Study was not completed within the formal environmental study framework. The findings of the P/NF Study identified transportation problems and opportunities that provided the basis for the Bi-National Partnership to initiate the formal environmental assessment in each country. See EA Executive Summary at (v), **Exhibit R-10**.

<sup>33</sup> CEAA screening report, p. 1, **Exhibit C-92**.

<sup>34</sup> EA Executive Summary at (ii).

<sup>35</sup> EA Executive Summary at (vi).

<sup>36</sup> EA Executive Summary at (ii).

32. In Canada, the federal and Ontario governments used the existing administrative framework to formally coordinate their respective environmental assessments under the *Canadian Environmental Assessment Act* (“CEAA”) and the *Ontario Environmental Assessment Act* (“OEAA”).<sup>37</sup> The evaluation factors were incorporated into a detailed terms of reference prepared to meet the assessment requirements of Ontario environmental legislation and to ensure full coordination with the federal environmental assessment regime (“EA TOR”).<sup>38</sup> In the United States, the environmental assessment was carried out pursuant to the *National Environmental Policy Act*.<sup>39</sup>

33. A “preliminary analysis area” was developed in January 2005 that would fulfill the “end-to-end” goal of the Bi-National Partnership Process.<sup>40</sup> In June 2005, 15 alternative river crossings, 13 alternative Canadian inspection plazas and a wide range of possible road connections to Highway 401 were identified as options (“Illustrative Alternatives”).<sup>41</sup> By November 2005, each of the Illustrative Alternatives had been examined against the evaluation factors outlined in the EA TOR.<sup>42</sup> The results of the U.S. and Canadian analyses were compiled for a comprehensive end-to-end assessment of the various illustrative crossing, plaza and access road alternatives to connect Highway 401 in Ontario to the interstate freeways in Michigan.<sup>43</sup>

34. Among the Illustrative Alternatives was the twinning of the Ambassador Bridge, referred to in the Bi-National Partnership Process as option “X12.”<sup>44</sup> As was done with

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<sup>37</sup> EA JR (Can) ¶¶ 29, 30, 34, **Exhibit R-9**.

<sup>38</sup> EA JR (Can) ¶¶ 35-37, 102, **Exhibit R-9**.

<sup>39</sup> EA JR (Can) ¶¶ 29-32 (May 4, 2011), **Exhibit R-9**; EA JR (US) pp. 3-13, **Exhibit R-2**.

<sup>40</sup> EA Executive summary p. (i), **Exhibit R-10**; Detroit International River Crossing Environmental Assessment Report, Chapter 6, p. 6-1, **Exhibit R-12**.

<sup>41</sup> EA Executive summary p. (vii), **Exhibit R-10**; EA Chapter 6, p. 6-1 **Exhibit R-12**; EA JR (US), pp. 8-9, **Exhibit R-2**.

<sup>42</sup> EA Executive summary pp. (vii) – (viii), **Exhibit R-10**; EA Chapter 6, pp. 6-1 to 6-2, **Exhibit R-12**.

<sup>43</sup> EA executive summary pp. (vii) - (viii), **Exhibit R-10**; EA Chapter 6, **Exhibit R-12**.

<sup>44</sup> EA Chapter 6, pp. 6-34 and 6-35, **Exhibit R-12**. Option X12's consideration of a twinned Ambassador



all the other crossing options, routes for a direct connection from Highway 401 to the option X12 were integral to the analysis and assessed in light of the evaluation factors outlined in the EA TOR. The same assessment was done for the U.S. side of the border.<sup>45</sup>

35. While option X12 scored well on the U.S. side of the border, the situation was different on the Canadian side.<sup>46</sup> In addition to community impact concerns regarding the customs plaza, potential road access routes between Highway 401 and the Ambassador Bridge would have had a high negative impact on Windsor, particularly on the neighborhoods surrounding the Ambassador Bridge north of E.C. Row Expressway.<sup>47</sup> Canada recommended that option X12 not be carried forward in the Bi-National Partnership Process because it had high negative impacts to community cohesion, character and function.<sup>48</sup>

36. After reviewing the X12 evaluation results, the Bi-National Partnership mutually agreed that the disadvantages of this option on the Canadian side outweighed the advantages on the U.S. side.<sup>49</sup>

37. On November 14, 2005, the Bi-National Partnership publically announced its decision and released an "Area of Continued Analysis" map which identified the remaining area which would be further assessed to determine the best location for a new

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bridge was separate from DIBC's own proposal to build the AB New Span, discussed below.

<sup>45</sup> EA JR (Can) ¶ 40, **Exhibit R-9**; EA Chapter 6, pp. 6-34 and 6-35, **Exhibit R-12**.

<sup>46</sup> EA JR (Can) ¶¶ 40-41, **Exhibit R-9**.

<sup>47</sup> EA Chapter 6, pp. 6-34 to 6-35, **Exhibit R-12**; EA JR (Can) ¶¶ 46-47, **Exhibit R-9**.

<sup>48</sup> EA Chapter 6, pp. 6-34, **Exhibit R-12**; EA JR (Can) ¶¶ 46-48, **Exhibit R-9**.

<sup>49</sup> See EA JR (Can) ¶ 48 (May 4, 2011), **Exhibit R-9** ("In consideration of the high community impacts to the residential area impacted by the expansion of the Canadian bridge plaza and the expansion of Huron Church Road to a freeway facility on the Canadian side, and the potential for disruption to border traffic during construction of the plaza and freeway, on an end-to-end basis, the disadvantages of this alternative outweighed the advantages."); EA Chapter 6, p. 6-1, **Exhibit R-12**.

crossing, customs plaza and Highway 401-Michigan interstate highway connection.<sup>50</sup> The Area of Continuing Analysis map identified an area leading from Highway 401 to a crossing point in southwest Windsor that would be the circumscribed geographic location carried forward for future study for the bridge location and Highway 401 connection.<sup>51</sup> Option X12 was eliminated from further study and therefore lay outside the Area of Continued Analysis.<sup>52</sup>

38. In early 2006, the Bi-National Partnership continued its consultations with the public and stakeholders and released a shortlist of practical alternatives for plazas, crossings and access roads within the Area of Continued Analysis (“Practical Alternatives”).<sup>53</sup> In August 2007, based on numerous rounds of public consultation and further technical studies, the specific parkway alternative for the access road connecting Highway 401 to the new international bridge crossing was developed and released for further public comment.<sup>54</sup>

39. On May 1, 2008, the preferred alternative for the access road leading to the DRIC bridge, the Windsor-Essex Parkway (now called the Right Honourable Herb Gray Parkway) was announced (the “Parkway”).<sup>55</sup> The preferred location for the international bridge crossing and the Canadian plaza were announced in June 2008.<sup>56</sup>

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<sup>50</sup> EA JR (Can) ¶ 48 (May 4, 2011), **Exhibit R-9**; News Release: *Border Transportation Partnership Identifies Central Area of Analysis for a New Detroit-Windsor Border Crossing*, November 14, 2005, **Exhibit R-13**; EA Chapter 6 p. 6-1, Exhibit 6-17, **Exhibit R-12**.

<sup>51</sup> EA JR (Can) ¶ 48 (May 4, 2011), **Exhibit R-9**; News Release, November 14, 2005, **Exhibit R-13**; EA JR (US), pp. 9-10, **Exhibit R-2**.

<sup>52</sup> EA JR (Can) ¶¶ 47-48 (May 4, 2011), **Exhibit R-9**; News Release, November 14, 2005, **Exhibit R-13**.

<sup>53</sup> EA JR (Can) ¶¶ 50-52 (May 4, 2011), **Exhibit R-9**. This triggered the applicability of the federal EA under CEAA, **Exhibit R-9**.

<sup>54</sup> EA executive summary at (ix), **Exhibit R-10**.

<sup>55</sup> EA JR ¶ 53 (May 4, 2011), **Exhibit R-9**.

<sup>56</sup> EA executive summary pp. 1-3, **Exhibit R-10**.

40. The full Ontario environmental assessment report was published for public comment in November 2008 and subsequently approved by the Ontario Ministry of the Environment pursuant to the *OEEA* on August 21, 2009.<sup>57</sup> The federal environmental assessment under *CEAA*, which had been coordinated with the Ontario environmental assessment, was made available for public comment on July 9, 2009 and approved on December 3, 2009.<sup>58</sup>

41. On December 31, 2009, CTC filed an application at the Federal Court of Canada for judicial review of the DRIC EA.<sup>59</sup> In its application, CTC made the same allegations as it does in its NAFTA NOAs and NAFTA Statement of Claim (and based on most of the same documents cited therein), including that Canada's decision to drop the X12 option in November 2005 was a result of bias rather than legitimate environmental and community reasons, that there was no need for the new DRIC Bridge, and that the DRIC Bridge and highway connection had negative environmental impacts.<sup>60</sup>

42. On May 4, 2011, the Court ruled that CTC's claims were "without any merit" and had "caused delay in this [DRIC] project."<sup>61</sup> Among other findings, the Court found that the reasons for dropping the X12 option from the DRIC EA were reasonable and based on rational criteria, including the negative impacts of extending Highway 401 to the Ambassador Bridge. Justice Kelen stated:

[A]n informed person viewing the matter realistically would not have a reasonable apprehension of bias regarding the Partnership's decision to eliminate

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<sup>57</sup> EA JR (Can) ¶ 58 (May 4, 2011), **Exhibit R-9**; EA executive summary at (iii), **Exhibit R-10**; "Environmental Assessment Act Section 9 Notice of Approval to Proceed with the Undertaking", **Exhibit C-91**.

<sup>58</sup> EA JR (Can) ¶¶ 62, 68, **Exhibit R-9**; News Release: Detroit River International Cross Project Receives Environmental Approval, **Exhibit C-93**.

<sup>59</sup> *The Canadian Transit Company v. Minister of Transport et al*, Federal Court File No. T2189-09, Notice of Application, December 31, 2009 ("EA JR CTC Notice of Application"), **Exhibit R-14**.

<sup>60</sup> EA JR CTC Notice of Application ¶¶ 1-58, **Exhibit R-14**. See Amended NOA ¶¶ 79, 81-84.

<sup>61</sup> EA JR (Can) ¶ 3, **Exhibit R-9**.

the X-12 Option.<sup>62</sup>

43. CTC appealed that decision to the Federal Court of Appeal, which was also dismissed.<sup>63</sup>

44. On May 14, 2009, DIBC also challenged the DRIC environmental assessment 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>64</sup> Judge Cohn found that:

[T]he [Record of Decision] shows that the FHWA considered all of the alternative and the competing interests before determining that the Preferred Alternative was the best option in light of all the considerations. The [Ambassador Bridge] Second Span option [X12] was rejected in light of objections from Canada, whose shores would also host the proposed twinning of the Ambassador Bridge. The Second Span also did not meet the need for system connectivity, redundancy, capacity, or economic security needs. The rejection of all other proposed alternatives, including in particular the Second Span, had a reasoned basis. That is what NEPA requires and that is what was done.<sup>65</sup>

### C. Ambassador Bridge New Span

45. After option X12 was eliminated from the Bi-National Partnership Process in November 2005, DIBC announced that it would pursue its own plan to construct a new six lane bridge next to the existing Ambassador Bridge and connected to the existing customs plaza and Huron Church Road.<sup>66</sup>

46. In 2006, CTC submitted a project description to regulatory authorities in Canada and the United States to add a second span to its existing Ambassador Bridge. On

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<sup>62</sup> EA JR (Can) ¶¶ 107-108, **Exhibit R-9**.

<sup>63</sup> *The Canadian Transit Company v. Minister of Transport et al*, 2012 FCA 70, Reasons for Judgment, March 1, 2012 ("EA JR (Can) Appeal"), **Exhibit R-15**

<sup>64</sup> EA JR (U.S.) **Exhibit R-2**. DIBC is appealing this ruling to the United States Court of Appeals for the Sixth Circuit.

<sup>65</sup> EA JR (U.S.), p. 24, **Exhibit R-2**.

<sup>66</sup> The elimination of X12 as an option from the Bi-National Partnership process due to road access and plaza impacts did not preclude DIBC from seeking its own environmental approval to build a twined Ambassador Bridge.

December 5, 2007, they submitted an environmental impact statement (EIS). Transport Canada and the Windsor Port Authority, the responsible authorities for this project under the *Canadian Environmental Assessment Act*, undertook a preliminary review of the EIS and determined that it did not include any analysis concerning the potential environmental effects associated with the modification and/or expansion that may be required for the Canadian customs facilities. Transport Canada and the Windsor Port Authority advised CTC that the analysis in its EIS would need to be completed before any meaningful and effective review of the report could be conducted.

47. Between 2008 and 2011, CTC's application sat mostly inactive because of CTC's failure to complete its EIS as required. CTC finally filed its complete EIS on April 11, 2011. The environmental assessment is ongoing.

#### **D. The International Bridges and Tunnels Act**

48. The *International Bridges and Tunnels Act* ("IBTA") was enacted on February 1, 2007.<sup>67</sup> The purpose of the legislation is to establish an approval mechanism for the construction, alteration and acquisition of all international bridges and tunnels in Canada and provide for the regulation of their operation, maintenance and security.<sup>68</sup> Prior to its enactment, no legislation existed to regulate in a coordinated fashion the 24 international bridges and tunnels along the Canada-US border.

49. The IBTA specifies that it prevails over preexisting legislation governing international bridges and tunnels in Canada to the extent of any inconsistency or conflict. Like all the pre-existing legislation regarding international bridges and tunnels, the CTC Act was included in the schedule, subjecting that legislation to the IBTA.<sup>69</sup>

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<sup>67</sup> *International Bridges and Tunnels Act*, S.C. 2007, c.1. (in force April 25, 2007), **Exhibit C-94**.

<sup>68</sup> An "international bridge or tunnel" is defined in the IBTA to include not only the bridge or tunnel, but also any part of the bridge or tunnel that connects any place in Canada to any place outside Canada, including the approaches and facilities related to the bridge or tunnel. *International Bridges and Tunnels Act*, S.C. 2007, c.1, section 2, **Exhibit C-94**.

<sup>69</sup> *International Bridges and Tunnels Act*, S.C. 2007, c.1, **Exhibit C-94**.

### **E. The Bridge to Strengthen Trade Act**

50. Canada and Michigan signed an agreement on June 15, 2012 (“Crossing Agreement”) to construct the DRIC Bridge by a private-public-partnership (“P3”) whereby a private sector concessionaire will build, finance and operate the DRIC Bridge and associated facilities under the oversight of a joint Canada-Michigan public authority akin to other crossing authorities which own and operate international bridges and tunnels along the Canada-U.S. border.<sup>70</sup> In December 2012, Canada passed the *Bridge to Strengthen Trade Act* (“BSTA”) to facilitate the P3 process and provide greater certainty to the market once tendering for the construction of the DRIC Bridge commences. The BSTA streamlines a limited number of permit requirements, which may be required under existing legislation.

### **III. JURISDICTION AND ADMISSIBILITY POINTS AT ISSUE**

51. Canada raises the following jurisdictional and admissibility objections. First, the Tribunal has no jurisdiction with respect to claims based on the *Boundary Waters Treaty*. Second, DIBC did not comply with NAFTA Article 1121 because it failed to deliver a valid waiver with its NAFTA NOAs and failed to refrain from initiating and continuing domestic litigations with respect to the same measures alleged to violate NAFTA Chapter Eleven. Third, DIBC's Highway 401 Road Access Claims and IBTA claim are time barred under NAFTA Articles 1116(2) and 1117(2).<sup>71</sup>

#### **A. The Tribunal has no Jurisdiction with respect to Claims Based on the *Boundary Waters Treaty***

52. On January 11, 1904, the United Kingdom and the United States signed a treaty *Concerning the Boundary Waters and Questions Arising Along the Boundary Between Canada and the USA* (the “*Boundary Waters Treaty*”).<sup>72</sup> The *Boundary Waters Treaty*

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<sup>70</sup> Crossing Agreement, June 15, 2012, **Exhibit C-64**.

<sup>71</sup> Canada reserves the right to expand upon and supplement these jurisdictional objections in its Memorial on Jurisdiction and Admissibility, including, with respect to DIBC's failure to comply with temporal notice requirements under NAFTA Articles 1119 and 1120 with respect to its AB New Span and BSTA claims.

<sup>72</sup> *Treaty Between the United Kingdom and the United States of America Concerning Boundary Waters and Questions Arising Along the Boundary Between Canada and the USA*, U.S. Treaty Series, No. 548,

sets out the principles and mechanisms to resolve and prevent disputes concerning the uses of water along the boundary between Canada and the United States.<sup>73</sup>

53. The Claimant alleges that the CTC Act and ATC Act together constitute a “special agreement” under Article XIII of the *Boundary Waters Treaty*, which grants them the exclusive right to build, operate, maintain and collect tolls on a bridge across the Detroit River.<sup>74</sup> DIBC alleges that by enacting the IBTA on February 1, 2007, and by “preventing” the AB New Span, Canada violated DIBC’s “franchise rights”, which it has by virtue of the *Boundary Waters Treaty* “special agreement.”<sup>75</sup>

54. DIBC’s assertion is premised on a fundamental misunderstanding of international treaty law and the *Boundary Waters Treaty* itself.<sup>76</sup> However, even taking the Claimant’s position at face value, their claim is outside the scope of the NAFTA.

55. This Tribunal only has jurisdiction to determine whether there has been a breach of NAFTA Chapter Eleven. It does not have jurisdiction to determine whether a “special agreement” under Article XIII of the *Boundary Waters Treaty* exists. The *Boundary Waters Treaty* has its own unique dispute resolution provisions for disagreements between the United States and Canada with regard to its applicability that

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ratification exchanged May 5, 1910, proclaimed May 13, 1910. (“*Boundary Waters Treaty*”), **Exhibit R-16**.

<sup>73</sup> *Boundary Waters Treaty*, **Exhibit R-16**.

<sup>74</sup> Amended NOA ¶ 33-36; NAFTA Statement of Claim ¶¶ 33-39. See also *DIBC et al v. Canada et al*, USDC, Docket 1:10-CV-00476-RMC, Complaint (March 22, 2010) (“Washington Complaint”) ¶¶ 26-33, **Exhibit R-17**; *DIBC et al v. Canada et al*, USDC, Docket 1:10-CV-00476-RMC, First Amended Complaint (June 6, 2011) (“Washington First Amended Complaint”) ¶¶ 44-51, **Exhibit R-18**; *DIBC et al v. Canada et al*, USDC, Docket 1:10-CV-00476-RMC, Second Amended Complaint (November 9, 2012) (“Washington Second Amended Complaint”) ¶¶ 53-60, **Exhibit R-19**; *The Canadian Transit Company v. Attorney General of Canada* (Ontario Superior Court of Justice Court File No. CV-12-446428), Statement of Claim (15 February 2012) (“*CTC v. Canada* (ONSC)”) ¶¶ 15-29, **Exhibit R-20**.

<sup>75</sup> Amended NAFTA NOA ¶ 107; NAFTA Statement of Claim ¶¶ 174-180; Washington First Amended Complaint ¶¶ 113-114; Washington Second Amended Complaint ¶ 126.

<sup>76</sup> Moreover, Canada and the United States had different positions in 1927 on whether a “special agreement” existed with respect to the Ambassador Bridge. DIBC has misinterpreted both the *Boundary Waters Treaty* and the language and context of Canada’s Letter to the American Transit company dated August 17, 1927, **Exhibit C-13** (NAFTA Statement of Claim ¶ 38).

are to be settled by the International Joint Commission (IJC) in accordance with Articles VIII and IX. DIBC has no standing *rationae personae* to even assert a claim based on the *Boundary Waters Treaty*. Any such claim can only be espoused by the United States on behalf of DIBC in accordance with Articles VIII and IX of the *Boundary Waters Treaty*. For these reasons, this Tribunal has no jurisdiction with respect to claims based on the *Boundary Waters Treaty*.

**B. DIBC has Failed to Comply with NAFTA Article 1121**

56. NAFTA Article 1121 is entitled “Conditions Precedent to Submission of a Claim to Arbitration” and stipulates that a claimant may submit a claim to arbitration “only if” they:

[W]aive 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.<sup>77</sup>

57. NAFTA Article 1121(3) further provides that the “consent and waiver required by this Article [1121] shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”<sup>78</sup>

58. Thus, in order to fulfill the condition precedent to arbitration in Article 1121, a claimant and its enterprise must file a valid waiver with its notice of arbitration and must then not initiate or continue any domestic court proceedings with respect to the same measures alleged to be in breach of the NAFTA.

59. The only exception to the Article 1121 waiver requirements is that a claimant is permitted to seek injunctive, declaratory or other extraordinary relief, “not involving the

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<sup>77</sup> NAFTA Article 1122(2)(b). This same principle is reflected in Article 1121(1)(b). NAFTA Article 1116 permits an investor to bring a claim on its own behalf, while Article 1117 allows an investor to bring a claim on behalf of an enterprise. This distinction is reflected in Article 1121 where Article 1121(1)(b) covers waiver in relation to claims brought under Article 1116 and Article 1121(2)(b) covers waiver in relation to claims brought under Article 1117.

<sup>78</sup> NAFTA Article 1121(3).



payment of damages,” with respect to the same measures in its NAFTA claim “before an administrative tribunal or court under the law of the disputing Party.” The term “disputing Party” is defined in NAFTA Article 1139 as “a Party against which a claim is made under Section B [of Chapter Eleven].” Thus, it is permissible under Article 1121 for a claimant to seek injunctive, declaratory or other extraordinary relief against the respondent State before an administrative tribunal or court of that respondent State (i.e., in this case, Canada), as long as it does not involve the payment of damages.

60. A claimant's failure to file a proper waiver or to act consistently with the waiver requirements under Article 1121 renders the NAFTA Party's consent to arbitrate without effect.

61. DIBC and its enterprise, CTC, have filed two waivers in this NAFTA arbitration. In their first waiver, filed with its First NAFTA NOA (“First NAFTA Waiver”), DIBC and CTC purport to waive their right to initiate or continue domestic proceedings, but then explicitly carve out litigation in the United States from that waiver. The First NAFTA Waiver states:

[T]his 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.

62. This action, referred to as the “Washington Litigation,” is discussed below and involves the same measures as this NAFTA arbitration. DIBC/CTC's explicit carve out of this lawsuit from its First NAFTA Waiver contravenes Article 1121. Canada communicated this position to the Claimant on October 3, 2011.<sup>79</sup> DIBC did not respond.

63. In its second waiver filed with its Amended NAFTA NOA (“Amended NAFTA Waiver”), DIBC and CTC again exclude the Washington Litigation despite purporting to waive their right to initiate or continue domestic claims mere sentences before. They

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<sup>79</sup> See Letter from Canada to DIBC dated October 3, 2011, **Exhibit R-21**. Canada had explicitly reserved its right to object to DIBC's First NAFTA Waiver in its letter to DIBC dated June 6, 2011, **Exhibit R-22**.

also exclude from the waiver another lawsuit, *CTC v. Attorney General of Canada*,<sup>80</sup> an action they filed in the Ontario Superior Court on February 15, 2012 against Canada involving the payment of damages and after its First NAFTA Waiver (“*CTC v. Canada* (ONSC) Litigation”). The Amended NAFTA Waiver states:

[T]his 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).

64. The *CTC v. Canada* (ONSC) Litigation is discussed below and involves the same measures as the NAFTA arbitration. DIBC/CTC's explicit carve out of this lawsuit and the Washington litigation from its Amended NAFTA Waiver contravenes NAFTA Article 1121.

65. In sum, not only have DIBC and CTC failed to file a proper waiver pursuant to Article 1121, they have also failed to comply with that provision by initiating and continuing domestic lawsuits against Canada in both the courts of the United States and Canada. These lawsuits include the Washington Litigation, the *CTC v. Canada* (ONSC) Litigation, and claims filed against the City of Windsor on February 22, 2010, and June 24, 2010 (the “Windsor Litigation”). Each lawsuit will now be discussed in turn.

### **1. DIBC and CTC's Initiation and Continuation of Claims in the Washington Litigation Violates NAFTA Article 1121**

66. On March 22, 2010, DIBC commenced the Washington Litigation in the United States District Court for the District of Columbia (“D.D.C.”) by filing a complaint (“Washington Complaint”) claiming damages against Canada, the United States, and

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<sup>80</sup> On March 15, 2012, Canada wrote to DIBC to inform it that filing of the lawsuit was in violation of the waiver provisions under NAFTA Article 1121. See Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

various U.S. government agencies.<sup>81</sup> On April 29, 2011, DIBC filed its First NAFTA NOA, which included its First NAFTA Waiver explicitly carving out the Washington Litigation. On June 6, 2011, DIBC and CTC amended their Washington Complaint to expand on their existing allegations (“Washington First Amended Complaint”).<sup>82</sup>

67. Canada filed submissions in the Washington Litigation in opposition to DIBC and CTC's claims throughout 2010 and 2011. On November 29, 2011, the day before Canada's motion to dismiss DIBC/CTC's lawsuit was to be heard by the Court, DIBC/CTC abruptly withdrew its complaint against Canada.<sup>83</sup> However, DIBC and CTC made their withdrawal on a without prejudice basis and threatened to re-file their claim should Canada continue its efforts with Ontario, Michigan and the United States to build the DRIC Bridge.<sup>84</sup>

68. Only one week after Canada wrote to this Tribunal informing it of Canada's long-standing objections to the First NAFTA Waiver,<sup>85</sup> DIBC and CTC carried out that threat. On November 9, 2012, DIBC and CTC filed a new motion in the D.D.C. seeking to re-join Canada to the Washington Litigation.<sup>86</sup> The new complaint (“Washington Second Amended Complaint”) maintains and expands upon all of DIBC's previous

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<sup>81</sup> **Exhibit R-17.** See p. 47 § 47 (“Damages against Canada in an amount to be determined at trial.”). DIBC/CTC filed its Notice of Intent to Submit a Claim under the NAFTA against Canada the following day on March 23, 2010.

<sup>82</sup> **Exhibit R-18.** See p. 68 § 3 (“Against Canada, damages in an amount to be determined at trial.”).

<sup>83</sup> *Detroit International Bridge Company v. Government of Canada et al.*, (D.D.C. File No. 10-cv-476-RMC), Notice of Voluntary Dismissal Without Prejudice as to Defendants Canada, Federal Highway Administration, Mendez and LaHood (November 29, 2011), **Exhibit R-24**. DIBC and CTC have been continuing the litigation against the U.S. Coast Guard since that time. On December 28, 2011, Canada wrote to DIBC to inform it that, despite withdrawing the lawsuit, it was still in violation of the waiver provisions under NAFTA Article 1121, **Exhibit R-25**.

<sup>84</sup> *Detroit International Bridge Company v. Government of Canada et al.*, (D.D.C. File No. 10-cv-476-RMC), Notice of Voluntary Dismissal Without Prejudice as to Defendants Canada, Federal Highway Administration, Mendez and LaHood (November 29, 2011), **Exhibit R-24**.

<sup>85</sup> See Canada's letter and attachments to the Tribunal dated November 2, 2012.

<sup>86</sup> *DIBC et al v. Canada et al*, USDC, Docket 1:10-CV-00476-RMC, Motion for Leave to File Second Amended Complaint (November 9, 2012) **Exhibit R-26**. The complaint also names the Canada-U.S.-Ontario-Michigan Border Transportation Partnership and the Windsor-Detroit Bridge Authority as parties.

claims, but instead of seeking damages, it now purports to seek only injunctive and declaratory relief.<sup>87</sup> DIBC and CTC formally filed its Second Amended Complaint in the D.D.C. on February 15, 2013.

69. The measures at issue in the Washington Litigation are the same as those at issue in this NAFTA arbitration. Even a superficial reading of the pleadings in each case reveals large swaths of duplicative text.

- **Highway 401 Road Access:** DIBC/CTC is pursuing claims in both the Washington Litigation and the NAFTA arbitration alleging that Canada reneged on an alleged promise to spend C\$300 million through the Windsor Gateway Action Plan/Nine Point Plan to connect the Ambassador Bridge with Ontario Highway 401,<sup>88</sup> and manipulated the Bi-National Partnership Process to ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge.<sup>89</sup>
- **Violation of DIBC's Franchise Rights:** DIBC/CTC is pursuing claims in both the Washington Litigation and the NAFTA arbitration alleging that it has rights arising out of a "special agreement" made between Canada and the United States under the *Boundary Waters Treaty*. DIBC/CTC alleges that this "special agreement" gives them the exclusive right to build, operate, maintain, and collect tolls from a bridge at or near Windsor to the opposite side of the river in the State of Michigan.<sup>90</sup> DIBC/CTC alleges that Canada's enactment of the *International Bridges and Tunnels Act* is a violation of this exclusive right.<sup>91</sup>

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<sup>87</sup> Washington Second Amended Complaint, pp. 90-91, **Exhibit R-19**.

<sup>88</sup> Washington Complaint, ¶¶ 79-81, **Exhibit R-17**; Washington First Amended Complaint ¶ 193, **Exhibit R-18**; Washington Second Amended Complaint ¶¶ 229, 240-243, **Exhibit R-19**; NAFTA NOA ¶¶ 33-35; Amended NAFTA NOA ¶¶ 113-114; NAFTA Statement of Claim ¶¶ 95, 158, 190.

<sup>89</sup> Washington Complaint, ¶ 101, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 169-170, 194-195, **Exhibit R-18**; Washington Second Amended Complaint ¶¶ 200-203, 242, **Exhibit R-19**; Amended NAFTA NOA ¶¶ 70, 83-84; NAFTA Statement of Claim ¶¶ 119-120, 133, 197-204.

<sup>90</sup> Washington Complaint, March 22, 2010, ¶ 42, **Exhibit R-17**; Washington First Amended Complaint, June 6 2011, ¶¶ 46, 52, 58, **Exhibit R-18**; Washington Second Amended Complaint, June 6 2011, ¶¶ 63-71, **Exhibit R-19**; NAFTA NOA ¶ 21; Amended NAFTA NOA ¶¶ 4, 36; NAFTA Statement of Claim ¶¶ 34, 42, 53.

<sup>91</sup> Washington Complaint ¶ 133, **Exhibit R-17**; Washington First Amended Complaint ¶¶ 110-112; 237, **Exhibit R-18**; Washington Second Amended Complaint ¶ 126, **Exhibit R-15**; Amended NAFTA NOA ¶¶ 101-108; NAFTA Statement of Claim ¶¶ 174, 180.

- ***Ambassador Bridge New Span***: DIBC/CTC is pursuing claims in both the Washington Litigation and the NAFTA arbitration alleging that Canada is delaying approval of the AB New Span<sup>92</sup> and seeking to accelerate approval of the DRIC Bridge by enacting the *Bridge to Strengthen Trade Act*.<sup>93</sup>

70. If the Tribunal requires any further confirmation that the measures at issue in the Washington Litigation are the same as those in this NAFTA arbitration, it need only look to DIBC/CTC's document requests filed against Canada in the Washington Litigation. These document requests encompass all documents in Canada's possession relating the same measures at issue in this NAFTA arbitration.<sup>94</sup>

71. DIBC and CTC's claims against Canada in the Washington Litigation are thus with respect to the same measures against which they claim under the NAFTA. The Washington Complaint and First Amended Complaint claimed damages against Canada. The fact that the DIBC's Washington Second Amended Complaint purports to seek only injunctive and declaratory relief does nothing to correct DIBC's failure to comply with NAFTA Article 1121, which only permits injunctive and declaratory relief

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<sup>92</sup> Washington Complaint, ¶ 112, **Exhibit R-17**; Washington First Amended Complaint ¶¶ 213, 232-237, **Exhibit R-18**; Washington Second Amended Complaint ¶¶ 11-12, **Exhibit R-19**; Amended NAFTA NOA ¶¶ 6-9, 97-99; NAFTA Statement of Claim ¶¶ 168-171.

<sup>93</sup> Washington Second Amended Complaint ¶¶ 12, 246-248, **Exhibit R-19**; Amended NAFTA NOA ¶¶ 11, 109-112; NAFTA Statement of Claim ¶¶ 182, 184.

<sup>94</sup> Plaintiffs' (DIBC and CTC) First Request for Production of Documents Directed to the Defendant the Government of Canada, July 2, 2010 (Washington Litigation), **Exhibit R-27**. DIBC's document requests encompassed all documents in Canada's possession relating to: The evaluation, planning and financing of the DRIC Bridge and the Parkway (Requests #1-4, 8, 16); Highway 401 road connections to the Ambassador Bridge and the Parkway (defined therein as the "DRIC Parkway") (Request #14-15, 18); Ambassador Bridge New Span and Canada's environmental assessment thereof (Request #10-12); the CTC Act and "special agreement" under the *Boundary Waters Treaty* (Request #17); improvement of road connections to the Blue Water Bridge (Request #19); the *International Bridges and Tunnels Act* (Request #20); the enforcement of Windsor's heritage by-laws (Request #21); and Canada's policy from the 1970s regarding international bridges and the Settlement Agreements (Request #22-23). DIBC's final document request #24 was the sweeping "To the extent not otherwise encompassed, all communications with or concerning the Plaintiffs that relate to the Ambassador Bridge, the New Span, or the DRIC Project." The Claimant made almost identical document requests as against the United States, including Canadian documents. See Plaintiffs' (DIBC and CTC) First Request for Production of Documents Directed to the Defendants The United States Federal Highway Administration, Victor Mendez, and Ray Lahood, July 2, 2010 (Washington Litigation), **Exhibit R-28**.

in Canada, not the United States, regardless of whether the proceedings involve the payment of damages.<sup>95</sup>

72. DIBC and CTC's actions in the Washington Litigation contravene Article 1121 and renders Canada's consent to arbitration without effect.

## **2. CTC's Initiation and Continuation of Claims in the *CTC v. Canada* (ONSC) Litigation Violates NAFTA Article 1121**

73. On February 15, 2012, CTC commenced proceedings in the Ontario Superior Court of Justice seeking damages against Canada ("*CTC v. Canada* (ONSC) Litigation").<sup>96</sup> Canada wrote to DIBC on March 15, 2012 informing it that the *CTC v. Canada* (ONSC) Litigation conflicted with its First NAFTA Waiver and Article 1121.<sup>97</sup> Canada received no reply.

74. The measures at issue in the *CTC v. Canada* (ONSC) Litigation are the same as those at issue in this NAFTA arbitration:

- **Highway 401 Road Access:** CTC is pursuing claims in both the *CTC v. Canada* (ONSC) Litigation and the NAFTA arbitration alleging that Canada reneged on an alleged promise to spend C\$300 million through the Windsor Gateway Action Plan/Nine Point Plan to connect the Ambassador Bridge with Ontario Highway 401,<sup>98</sup> and that Canada manipulated the DRIC EA process to

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<sup>95</sup> Washington Second Amended Complaint, pp. 90-92. While moot in light of the fact that Article 1121 does not permit injunctive or declaratory relief against Canada in United States courts regardless of whether the proceedings involves the payment of damages, it is questionable whether the Washington Litigation Second Amended Complaint is truly "not involving the payment of damages" given that DIBC and CTC are seeking a declaration that "under international law and the Foreign Sovereign Immunities Act, the conduct of Canada that seeks to construct the NITC/DRIC, and/or that seeks to defeat the ability of [DIBC/CTC] to build the New Span by accelerating the approval of the NITC/DRIC, constitutes a taking of [DIBC/CTC's] franchise rights without payment of just compensation and hence in violation of international law..." (Washington Second Amended Complaint ¶ 317). Canada reserves its rights in this regard and will address this issue in its Memorial on Jurisdiction and Admissibility.

<sup>96</sup> *The Canadian Transit Company v. Attorney General of Canada* (Ontario Superior Court of Justice Court File No. CV-12-446428), Statement of Claim (15 February 2012) ("*CTC v. Canada* (ONSC) Statement of Claim"), **Exhibit R-20**.

<sup>97</sup> See Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

<sup>98</sup> *CTC v. Canada* Statement of Claim, ¶¶ 87-95, **Exhibit R-20**; NAFTA NOA: ¶¶ 34, 35; Amended NAFTA NOA: ¶¶ 12, 92, 113, 114; NAFTA Statement of Claim ¶¶ 95-103, 158, 190.

ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge.<sup>99</sup>

- **Violation of DIBC's Franchise Rights:** CTC is pursuing claims against Canada in both the *CTC v. Canada* (ONSC) Litigation and the NAFTA arbitration alleging that it has a perpetual and exclusive right under the *Boundary Waters Treaty* and CTC Act to build, operate, maintain, and collect tolls from a bridge at or near Windsor to the opposite side of the river in the State of Michigan.<sup>100</sup>
- **Ambassador Bridge New Span:** CTC is pursuing claims in both the *CTC v. Canada* (ONSC) Litigation and the NAFTA arbitration alleging that Canada is improperly withholding approvals required for the construction of the AB New Span.<sup>101</sup>

75. DIBC and CTC's claims against Canada in the *CTC v. Canada* (ONSC) Litigation are thus with respect to the same measures against which they claim under the NAFTA and involve the payment of damages. The Claimant has therefore failed to comply with NAFTA Article 1121 and Canada does not consent to the arbitration.<sup>102</sup>

### 3. CTC's Initiation and Continuation of Claims in the Windsor Litigation Violates NAFTA Article 1121

76. On February 24, 2010 and June 22, 2010, CTC launched two lawsuits in the Ontario Superior Court of Justice against the City of Windsor and personally against Windsor Mayor Eddie Francis and various members of the Windsor City Council ("Windsor Litigation").<sup>103</sup> CTC alleged that Windsor had enacted certain heritage by-

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<sup>99</sup> *CTC v. Canada* Statement of Claim, ¶¶ 99-111, **Exhibit R-20**; NAFTA NOA: ¶¶ 35, 37, 47; Amended NAFTA NOA: ¶¶ 70, 83-84; NAFTA Statement of Claim ¶¶ 119-120, 133, 197-204.

<sup>100</sup> *CTC v. Canada* Statement of Claim, ¶ 25, **Exhibit R-20**; NAFTA NOA: ¶ 21; Amended NAFTA NOA ¶ 4; NAFTA Statement of Claim ¶¶ 34, 42, 53.

<sup>101</sup> *CTC v. Canada* Statement of Claim, ¶ 98, **Exhibit R-20**; Amended NAFTA NOA: ¶¶ 133-135; NAFTA Statement of Claim ¶¶ 182, 184.

<sup>102</sup> Canada notes that CTC filed an amended Statement of Claim in this litigation on February 20, 2013, yet again altering their claims against the Government of Canada for the payment of damages.

<sup>103</sup> See *Canadian Transit Company v. Corp. of the City of Windsor, Edgar Francis, Dave Brister, Drew Dilkens, Ron Jones, Caroline Postma, Alan Halberstadt, Fulvio Valentinis, Ken Lewenza, JR., Biago Marra, Jo-Anne Gignac and Percy Hatfield*, CV -10-395654 (Statement of Claim of 24 February 2010) (Ont. Sup. Ct.) ("*CTC v. Windsor* Statement of Claim, February 2010"), **Exhibit R-29**; *Canadian Transit Company v. Corp. of the City of Windsor*, CV -10-405347 (Statement of Claim of 22 June 2010) (Ont. Sup.

laws in bad faith and as part of a conspiracy to support the DRIC Project and to unfairly prevent CTC from building the AB New Span. CTC sought damages against Windsor and personally against the Mayor and City Council Members.<sup>104</sup>

77. CTC continued litigation against the Windsor defendants through 2010, 2011 and 2012. On September 6, 2011, the Ontario Superior Court ruled that the allegations against the Windsor defendants were “totally without merit” and costs were awarded to the City.<sup>105</sup> The Court found no evidence of conspiracy, bad faith or misfeasance by Windsor to use the heritage by-laws to favor the DRIC Project or prevent CTC from building the AB New Span. Justice Gates noted that “CTC’s ultimate economic aim is obviously to defeat the DRIC plan, construct a privately-owned second bridge on its own property and remain sole master of this crossing...”<sup>106</sup>

78. CTC appealed, but then abandoned its appeal on August 13, 2012.<sup>107</sup>

79. In its NAFTA claim DIBC also alleges that Windsor imposed seventeen “unnecessary” stoplights along Huron Church Road and granted “unlimited curb cuts and driveway entrances” which have caused the diversion of traffic to the Windsor-Detroit Tunnel and, eventually, to the DRIC Bridge.<sup>108</sup> DIBC provides no more specificity. More than a year ago, Canada asked DIBC for greater specificity as to the

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Ct.) (“*CTC v. Windsor* Statement of Claim, June 2010”), **Exhibit R-30**.

<sup>104</sup> *CTC v. Windsor* Statement of Claim, February 2010, ¶ 1, **Exhibit R-29**; *CTC Windsor* Statement of Claim, June 2010 ¶ 1, **Exhibit R-30**.

<sup>105</sup> *Payne et al v. Corp. of the City of Windsor et al* (2011), 2011 ONSC 5123 (Ont. Sup. Ct.), Reasons for Judgment (12 September 2011) (“*Payne v. City of Windsor*”), **Exhibit R-31**; *Payne et al v. Corp. of the City of Windsor et al* (2012), 2012 ONSC 4728 (Ont. Sup. Ct.), Endorsement on Costs (6 September 2012) (“*Payne v. City of Windsor*, Endorsement on Costs”), ¶13, **Exhibit R-32**.

<sup>106</sup> See also *Payne v. City of Windsor*, Reasons for Judgment ¶ 37 **Exhibit R-31**; See also *Payne v. City of Windsor*- Endorsement on Costs, ¶¶13-17 (“[T]here was virtually no evidence of any conspiracy, bad faith, lack of candour or municipal misfeasance”), **Exhibit R-32**.

<sup>107</sup> See *Payne et al. v. Corp. of the City of Windsor et al.*, Notice of Abandonment of Appeal (Court of Appeal for Ontario) (13 August 2012), **Exhibit R-33**.

<sup>108</sup> Amended NAFTA NOA ¶¶125-129; NAFTA Statement of Claim ¶¶ 205-209.



nature of this claim,<sup>109</sup> but DIBC has still failed to provide any information or supporting evidence in response to Canada's request.<sup>110</sup>

80. Nonetheless, the measures at issue in the Windsor Litigation are the same measures alleged by the Claimant to be a violation of NAFTA Chapter Eleven:

- **Highway 401 Road Access:** CTC pursued claims in both the Windsor Litigation and the NAFTA arbitration alleging that Windsor installed traffic lights and "unlimited driveway connections" along Huron Church Road to impede traffic to the Ambassador Bridge.<sup>111</sup>
- **Ambassador Bridge New Span:** CTC pursued claims in both the Windsor Litigation and the NAFTA arbitration alleging that Windsor implemented measures for the purpose of impeding and frustrating CTC's ability build the AB New Span and favour the DRIC Bridge.<sup>112</sup>

81. CTC's claims for damages against the City of Windsor in the Windsor Litigation are thus with respect to the same measures in the NAFTA arbitration. The Claimant continued the Windsor Litigation after filing their First NAFTA Waiver and has thus contravened Article 1121.

#### 4. Conclusion

82. Not only have DIBC and CTC failed to file a proper waiver pursuant to Article 1121, they have also failed to comply with those provisions by initiating and continuing domestic lawsuits against Canada in both the courts of the United States and Canada.

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<sup>109</sup> See Canada's Letter to DIBC dated October 3, 2011, p. 2, **Exhibit R-21**. See also Canada's Letter to the Tribunal dated November 2, 2012, p. 6.

<sup>110</sup> Neither the NAFTA NOA, Amended NAFTA NOA or NAFTA Statement of Claim cite to a single document. Article 20(4) of the UNCITRAL Arbitration Rules requires that the Statement of Claim should be accompanied by documents and other evidence relied upon by the Claimant.

<sup>111</sup> *CTC v. Windsor* Statement of Claim dated February 24, 2010, ¶¶ 8-9, 18-28, **Exhibit R-29**; NAFTA NOA: ¶¶ 44, 47; Amended NAFTA NOA: ¶¶ 125-129; NAFTA Statement of Claim: ¶ 208. See also *Payne v. City of Windsor*, Reasons for Judgment ¶¶ 42-61, **Exhibit R-31**.

<sup>112</sup> *CTC v. Windsor* Statement of Claim dated February 24, 2010, ¶¶ 20, 22, 35-39, **Exhibit R-29**; *CTC v. Windsor* Statement of Claim dated June 22, 2010, ¶¶ 26-27, 37, **Exhibit R-30**; NAFTA NOA ¶¶ 44-47; Amended NAFTA NOA ¶ 126; NAFTA Statement of Claim ¶ 209.

As a result, Canada does not consent to arbitrate their claims and this Tribunal has no jurisdiction over any of them.

**C. Regardless of DIBC's Non-Compliance with Article 1121, DIBC's Highway 401 Connection Claims and *International Bridges and Tunnels Act* Claims Are Time Barred under NAFTA Articles 1116(2) and 1117(2)**

**1. Three Year Time Limit for Submission of a Claim to Arbitration**

83. NAFTA Articles 1116(2) and 1117(2) place a strict three year time limit for the submission of a claim to arbitration:

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.<sup>113</sup>

84. The plain language of Articles 1116(2) and 1117(2) indicates that the three year limitation period starts when claimant and/or its enterprise *first* acquires knowledge of the alleged breach and damage. The NAFTA Parties intended to use the language of "first acquired, or should have first acquired" to convey that the three year time limit to make a claim under NAFTA Chapter Eleven starts as soon as the investor is or should have been aware of the alleged breach and damage.

**2. DIBC Failed to Submit Timely Claims Regarding its Highway 401 Road Access Claims**

85. The Claimant alleges that Canada has "reneged on its commitments to improve the highway connections to the Ambassador Bridge, in particular by refusing to extend Highway 401 to the Ambassador Bridge."<sup>114</sup> The Claimant's Highway 401 Road Access Claims are predicated on three measures by Canada. First, DIBC alleges that Canada reneged on a "commitment" in the 2003 Windsor Gateway Action Plan/Nine Point Plan

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<sup>113</sup> NAFTA Article 1116(2). NAFTA Article 1117(2) provides the same for claims on behalf of the investor's enterprise ("An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage").

<sup>114</sup> Amended NAFTA NOA ¶ 113; NAFTA Statement of Claim, ¶ 190.

to spend C\$300 million to build a Highway 401 connection to the Ambassador Bridge.<sup>115</sup> Second, DIBC alleges that Canada's removal of option X12 from the Bi-National Partnership Process in 2005 was intended to ensure that the Highway 401 connection to the DRIC Bridge (the Parkway) would not go to the Ambassador Bridge.<sup>116</sup> Third, DIBC alleges that Windsor has intentionally obstructed access to the Ambassador Bridge on Huron Church Road, in favour of the Windsor-Detroit Tunnel and the DRIC Bridge, by maintaining "unnecessary" stoplights and granting "unlimited curb cuts and driveway connections."<sup>117</sup>

86. Even if DIBC's Highway 401 Road Access Claims had any credibility (which they do not), each of these claims are, by contemporaneous evidence and the admissions of the Claimant itself, time barred under NAFTA Articles 1116(2) and 1117(2).

**a) The Windsor Gateway Action Plan/Nine Point Plan Was Replaced on March 11, 2004**

87. DIBC states that Canada "promised" in the Windsor Gateway Action Plan/Nine Point Plan, released on May 27, 2003, to spend C\$300 million to build a direct Highway 401 connection to the Ambassador Bridge, but reneged on that commitment.<sup>118</sup> While the allegation has no basis in reality,<sup>119</sup> even if assumed to be true for the purposes of jurisdiction, the alleged C\$300 million "promise" in the Windsor Gateway Action

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<sup>115</sup> Amended NAFTA NOA ¶¶ 12, 58, 92, 113, 114-122; NAFTA Statement of Claim ¶¶ 12, 95-103, 158. See also Washington Complaint ¶¶ 8, 79-81, **Exhibit R-17**; Washington First Amended Complaint ¶¶ 118-120, 193, **Exhibit R-18**; Washington Second Amended Complaint ¶¶ 131-133, 224, **Exhibit R-19**; *CTC v. Canada (ONSC)* Statement of Claim ¶¶ 87-95, **Exhibit R-20**.

<sup>116</sup> Amended NAFTA NOA ¶¶ 70, 75-84, 119-124; NAFTA Statement of Claim ¶¶ 12, 119-133, 197-204. See also Washington Complaint ¶101, **Exhibit R-17**; Washington First Amended Complaint ¶¶ 6, 157-172, 176, 193, **Exhibit R-18**; Washington Second Amended Complaint ¶¶ 188-203, 207, **Exhibit R-19**.

<sup>117</sup> NAFTA NOA ¶¶ 43-47; Amended NAFTA NOA ¶¶ 125-129; NAFTA Statement of Claim ¶¶ 205, 208, 209. See also Washington First Amended Complaint ¶ 120, **Exhibit R-18**; Washington Second Amended Complaint ¶ 133, **Exhibit R-19**; *CTC v. Canada (ONSC)* Statement of Claim ¶¶ 8-9, **Exhibit R-29**.

<sup>118</sup> Amended NAFTA NOA ¶113; NAFTA Statement of Claim ¶190.

<sup>119</sup> None of the documents relied on by DIBC can possibly be construed as a commitment by Canada to spend C\$300 million to build a direct Highway 401-Ambassador Bridge connection. See **Exhibits C-29-C-33**.

Plan/Nine Point Plan was abandoned on March 11, 2004, and replaced with the *Let's Get Windsor Essex Moving Strategy* ("LGWEM Strategy"):

The Let's Get Windsor-Essex Moving strategy *replaces the nine-point Windsor Gateway Action Plan*. New projects announced today include...<sup>120</sup>

88. The Claimant thus knew that the Nine Point Plan/Windsor Gateway Action Plan no longer existed after March 11, 2004 and that the C\$300 million would be spent on other projects, none of which included a direct highway connection between Highway 401 and the Ambassador Bridge. The LGWEM Strategy was well-publicized and well-known to the Claimant because many of its short/medium term projects were directed at improving traffic flow to the Ambassador Bridge.

89. Accordingly, the Claimants' allegations relating to the Nine Point Plan/Windsor Gateway Plan are time barred under NAFTA Articles 1116(2) and 1117(2).

**b) The Potential for a Highway 401 Connection to the Ambassador Bridge Through the Bi-National Partnership Process Was Eliminated on November 14, 2005**

90. The Claimant also alleges that Canada manipulated the DRIC EA to eliminate option X12 in order to ensure the Parkway would go to the DRIC Bridge but not the Ambassador Bridge.<sup>121</sup>

91. DIBC's allegations on this issue are baseless. Nonetheless, accepting DIBC's allegations as true for the purposes of jurisdiction, the claim is time barred under NAFTA Articles 1116(2) and 1117(2) because DIBC first acquired knowledge of the alleged breach and damage on November 14, 2005.

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<sup>120</sup> "A New Solution for the Windsor Gateway Announced By All Three Levels of Government," News Release, March 11, 2004, p. 3, **Exhibit R-34**.

<sup>121</sup> NAFTA NOA ¶¶ 26-34; Amended NAFTA NOA ¶¶ 12, 113-114; NAFTA Statement of Claim ¶¶ 95-96, 158, 190. As noted above, option X12 was considered as part of the Bi-National process and was not in any way a DIBC initiative. The possible twinning of the Ambassador Bridge as X12 is separate and distinct from any proposals put forward by DIBC to twin the Ambassador Bridge, such as the New Span discussed below.

92. The Bi-National Partnership Process was focused on achieving an integrated “end-to-end” solution to connect Highway 401 to the Michigan interstate highways via a new or expanded crossing with accompanying customs plazas. No crossing option could be selected through the Bi-National Partnership Process if there was not also a reasonable means of connecting it to Highway 401. Thus, how to connect the Ambassador Bridge to Highway 401 was integral to the analysis of the X12 option just as it was integral to the analysis of every other crossing option considered in the DRIC EA. All feasible road access options to the Ambassador Bridge were examined and all of them were found to have high negative impacts.<sup>122</sup> For these reasons, the decision to drop option X12 from the Bi-National Partnership Process was publically announced on November 14, 2005.<sup>123</sup>

93. The “Area of Continuing Analysis” map released on November 14, 2005 showed that improvements to Huron Church Road north of E.C. Row Expressway were no longer under consideration in the Bi-National Partnership Process.<sup>124</sup>

94. The day after the November 14, 2005 announcement, DIBC/CTC President Mr. Dan Stamper wrote to MTO and MDOT declaring that DIBC was withdrawing from participating in the Bi-National Partnership Process, which he stated had “effected delay and damage” to the Ambassador Bridge.<sup>125</sup> A year later he stated in testimony before the Canadian Senate Committee on Transport and Communication on November 28, 2006:

*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*

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<sup>122</sup> EA Chapter 6, pp. 6-34-36, 6-41, **Exhibit R-12**.

<sup>123</sup> November 14, 2005 press release p. 2 (emphasis added), **Exhibit R-13** (“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>124</sup> Detroit River International Crossing Study, Area of Continuing Analysis, **Exhibit R-13**.

<sup>125</sup> Letter from Dan Stamper (DIBC/CTC) to Roger Ward (MTO) dated November 15, 2005, **Exhibit R-35**; Letter from Dan Stamper (DIBC/CTC) to Mohammed Alghurabi (MDOT) dated November 15, 2005, **Exhibit R-36**.

*Ambassador Bridge* [...] This is not just pie in the sky. These things have been going on for a long time.<sup>126</sup>

95. On November 14, 2005 DIBC thus knew that there would not be a direct highway connection between Highway 401 and the Ambassador Bridge. DIBC's admission of knowledge and damage is further evidenced by written statements by Mr. Patrick Moran, General Counsel and Executive Vice-President of CenTra Inc. (DIBC's parent company) and DIBC and signatory to both NAFTA Waivers. Mr. Moran wrote to Canada on July 9, 2007:

*Transport Canada refuses to build a 2km connection from the proposed DRIC highway connection to the Ambassador Bridge. The United States is currently spending millions of dollars making direct connections from the three highways in Detroit to the Ambassador Bridge to improve the flow through. Our company is spending millions of our own money on that same project. All of this was done in reliance upon the announcements and promises Canada made to connect the 401 to the Ambassador Bridge...Transport Canada made promises to the Ambassador Bridge, its own citizens and the United States government, and then reneged.*<sup>127</sup>

96. Accordingly, DIBC "first acquired knowledge" of the alleged breach and damage on November 14, 2005, and it had until November 14, 2008 to commence arbitration under NAFTA Chapter Eleven. DIBC failed to do so and its claims are thus time barred under NAFTA Articles 1116(2) and 1117(2).

**c) DIBC Failed to Submit Timely Claims Regarding Huron Church Road**

97. The third part of DIBC's Highway 401 Road Access Claims is the allegation that Windsor has maintained seventeen "unnecessary" stoplights along Huron Church Road and granted "unlimited curb cuts and driveway entrances" which have caused the diversion of traffic to the Windsor-Detroit Tunnel and, eventually, to the DRIC

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<sup>126</sup> Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006, p. 6 of 12, **Exhibit R-37**. Mr. Stamper was accompanied by Mr. Matthew Moroun, Vice-Chairman of CenTra Inc. (DIBC's parent), and Thomas "Skip" McMahon, CTC Executive Director of External Affairs.

<sup>127</sup> Letter from Patrick Moran to Jacques Pigeon, Q.C. dated July 9, 2007, **Exhibit R-38**. Canada wrote back to DIBC on July 30, 2007 stating, among other things, that Canada remained "committed to the [DRIC] bi-national process it embarked upon some time ago in the public interest." Letter from Jacques Pigeon, Q.C. to Patrick Moran dated July 30, 2007, **Exhibit R-39**.

Bridge.<sup>128</sup> As discussed above, DIBC has failed to provide any information as to the measure alleged to be a breach of the NAFTA or provide any supporting evidence to which Canada can prepare a reply.<sup>129</sup>

98. Nonetheless, DIBC's Huron Church Road claims are inextricably linked to its allegations regarding the "promised" Highway 401 connection because the Claimant has sought to transform Huron Church Road into a dedicated highway connecting Highway 401 and the Ambassador Bridge. However, the impact on the Windsor community was one of the key reasons why extending Highway 401 in this way was rejected in November 2005 as part of the DRIC EA.<sup>130</sup> As noted above, the Claimant knew that Huron Church Road would not be transformed into a highway to the Ambassador Bridge and, accordingly, the claim is time-barred under NAFTA Articles 1116(2) and 1117(2).

99. Canada reserves the right to raise other defenses with respect to DIBC's Huron Church Road claims when DIBC provides the requisite specificity in regards to this claim in its reply to this submission.

**d) DIBC's own NAFTA Statement of Claim Proves That its Highway 401 Road Access Claims Are Time Barred**

100. The statements by Mr. Stamper and Mr. Moran above establish that DIBC's Highway 401 Road Access Claims are time barred under NAFTA Article 1116(2) and 1117(2). Canada will submit further documentary evidence on this point with its

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<sup>128</sup> Amended NAFTA NOA ¶¶125-129; NAFTA Statement of Claim ¶¶ 205-209.

<sup>129</sup> Neither the First NOA, Amended NOA or Statement of Claim cite to a single document. Article 20(4) of the UNCITRAL Arbitration Rules requires that the Statement of Claim should be accompanied by documents and other evidence relied upon by the Claimant. DIBC has failed to provide Canada with any details as to the nature of this claim, particularly with respect to how the Windsor-Detroit Tunnel has been allegedly favoured over the Ambassador Bridge by virtue of stoplights, curbcuts and driveway entrances.

<sup>130</sup> See EA Chapter 6 p. 6-48, **Exhibit R-12** "In consideration of the high community impacts to the residential area impacted by the expansion of the Canadian bridge plaza and the expansion of Huron Church Road to a freeway facility on the Canadian side, and the potential for disruption to border traffic during construction of the plaza and freeway, on an end-to-end basis, the disadvantages of this alternative outweighed the advantages."; EA JR (Can) ¶¶ 4, 45-48, **Exhibit R-9**.

Memorial on Jurisdiction. In addition, the Claimants' own NAFTA Statement of Claim also shows that its Highway 401 Road Access claim are time barred:

As part of its effort to discriminate in favor of the Canadian-owned NITC/DRIC Bridge and against the U.S.-owned Ambassador Bridge and its proposed New Span, Canada has reneged on its commitments to improve the highway connections to the Ambassador Bridge – in particular by refusing to extend Highway 401 to the Ambassador Bridge. Canada has admitted in writing that rather than being a temporary delay, this failure reflects a decision by Canada to renege on its commitments to improve the management of traffic to the Ambassador Bridge. *See letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC (Oct. 3, 2007) at 1-2 (attached as Exhibit C-110).*<sup>131</sup>

101. By pointing to the letter from the Canadian Minister of Transport to DIBC/CTC President Dan Stamper as the alleged “decision by Canada to renege on its commitments,” DIBC has itself put forward **October 3, 2007** as the date on which it first acquired knowledge of Canada's alleged breach and knowledge that it incurred damage from this breach.<sup>132</sup>

102. This concession by DIBC is fatal to its Highway 401 Road Access claims. While Canada submits that, in reality, DIBC first acquired knowledge of the alleged breach and damage much earlier than October 3, 2007, *even if* this later date proposed by DIBC is used to measure the commencement of the NAFTA Articles 1116(2) and 1117(2) three year limitations period, DIBC had until October 3, 2010 to submit its claim to NAFTA arbitration. As it did not file its First NAFTA NOA until April 29, 2011, DIBC's road access claims are plainly time barred.<sup>133</sup>

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<sup>131</sup> NAFTA Statement of Claim, ¶ 190 (emphasis added).

<sup>132</sup> The letter from Minister Cannon to Mr. Stamper simply explains what was already long known to the Claimant: (1) the C\$300 million in the Windsor Gateway Action Plan/Nine Point Plan was never intended to be spent on building a Highway 401 connection to the Ambassador Bridge, (2) that the LGWEM Strategy superseded the Nine Point Plan and the C\$300 million was being spent on short and medium term traffic infrastructure improvements, and (3) Canada remained committed to the end-to-end solution under the Bi-National Partnership Process, **Exhibit C-110**.

<sup>133</sup> On January 30, 2013, DIBC/CTC President Mr. Dan Stamper sent a letter, copying DIBC's legal counsel, to Canada's Minister of Transport Infrastructure and Communities, Denis Lebel, to request “an update by Transport Canada as to the current construction plans to connect the [Windsor-Essex/Herb Gray] Parkway to the Ambassador Bridge, which will ensure access to the highway in Windsor equal to the improvements made on the US side of the Ambassador Bridge.” This letter appears to be a misguided



### 3. DIBC Failed to Submit Timely Claims Regarding the *International Bridges and Tunnels Act*

103. The Claimant alleges Canada enacted the IBTA to interfere with its rights under a *Boundary Waters Treaty* “special agreement” and to interfere with the AB New Span.<sup>134</sup> Canada argues above that a NAFTA Tribunal has no jurisdiction with respect to claims based on the *Boundary Waters Treaty*. However, even if said jurisdiction existed, the Claimant’s allegations are time barred under NAFTA Articles 1116(2) and 1117(2).

104. The IBTA was enacted on February 1, 2007<sup>135</sup> and thus the Claimant had until February 1, 2010 to commence arbitration under the NAFTA. They failed to do so. This is conceded by the Claimant: “The *IBTA* provides that it supersedes the 1921 CTC Act, which is part of the Special Agreement, to the extent of any inconsistency.”<sup>136</sup>

105. Accordingly, given that DIBC first acquired knowledge of the alleged breach and damage on February 1, 2007, it had until February 1, 2010 to commence arbitration under NAFTA Chapter Eleven with respect to its IBTA claim. DIBC failed to do so and as a consequence its IBTA claims are time barred under NAFTA Articles 1116(2) and 1117(2).

## IV. DOCUMENT DISCOVERY DURING JURISDICTIONAL PHASE

106. As outlined in this brief, Canada has serious objections to the Tribunal’s jurisdiction to hear the claims brought by DIBC. In order to fully support its case for dismissal of the claims and in advance of its Memorial on Jurisdiction and

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attempt to “re-acquire” knowledge which DIBC first acquired on November 15, 2005 regarding the Bi-National Partnership Process. See Letter from Dan Stamper to Minister Lebel dated January 30, 2013, **Exhibit R-40**.

<sup>134</sup> Amended NAFTA NOA, ¶¶ 102-108; NAFTA Statement of Claim ¶¶ 180. See also Washington Complaint, ¶¶ 123-133, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 103-114, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 126, **Exhibit R-19**.

<sup>135</sup> **Exhibit C-94**.

<sup>136</sup> Washington Complaint, ¶ 124, **Exhibit R-17**; Washington First Amended Complaint, ¶ 104, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 117, **Exhibit R-19**. See also Amended NAFTA NOA, ¶ 102; NAFTA Statement of Claim ¶ 174.

Admissibility, Canada requests the opportunity to present to the Claimant targeted document requests focused on evidence relevant and material to Canada's jurisdictional objections described above.<sup>137</sup>

107. Given that the Parties agreed to, and discussed with the Tribunal on the first procedural call, a separate phase on jurisdictional issues, limiting document production to issues relevant to jurisdiction and admissibility is appropriate at this phase to ensure efficient and orderly proceedings. It also reflects Article 3(14) of the 2010 *IBA Rules on the Taking of Evidence in International Arbitration* ("2010 IBA Rules")<sup>138</sup>:

If the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce Separately for each issue or phase.<sup>139</sup>

108. Canada's objections based on NAFTA Articles 1116(2) and 1117(2) are premised on when DIBC and CTC "*first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [DIBC and CTC] has incurred loss or damage*" (emphasis added). With respect to the Highway 401 Road Access and IBTA claims, Canada argues that DIBC and CTC "*first acquired knowledge*" of the alleged breaches and damage more than three years prior to filing its First NAFTA NOA (i.e., prior to April 29, 2008). Any documentary evidence in possession or under the control of DIBC which demonstrates when it first acquired knowledge of the alleged breach and damage will be relevant and material for Canada to complete its jurisdictional objections based on Articles 1116(2) and 1117(2). Canada has exercised due diligence and obtained public documents and correspondence from DIBC and CTC which demonstrate that they first acquired, or should have first acquired, knowledge of the alleged breach and damage with respect to the Highway 401 Road Access claims and the IBTA more than three years prior to filing the First NAFTA NOA.

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<sup>137</sup> Canada raised this issue during the December 13, 2012 conference call with the Tribunal.

<sup>138</sup> International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) **RLA-1**.

<sup>139</sup> Exhibit **RLA-1**.

109. These documents will demonstrate DIBC's "objective" knowledge. However Canada believes there are additional documents internal to DIBC and CTC which demonstrate their own actual or subjective knowledge regarding the alleged breaches.

110. Canada requests written confirmation from the Claimant that it has and will continue to preserve evidence in its possession and control relating to this dispute, including evidence relating to Canada's jurisdictional objections.<sup>140</sup>

## V. CONCLUSION

111. DIBC has not only failed to comply with the terms of the NAFTA under which Canada's consent to arbitrate is based; it has deliberately flouted the requirement that a Claimant waive domestic remedies. It has done so by filing a defective waiver and by pursuing multiple claims against Canada for the same measures in domestic courts in Canada and in the United States. Canada has already produced thousands of documents and incurred millions in legal expenses defending these claims. At least two legal proceedings are on-going, and others have been dismissed since the filing of the Notice of Arbitration. While the scope of DIBC's NAFTA claims and its claims before domestic courts seem to be constantly changing, it is clear that DIBC seeks to litigate the same issues both under NAFTA and in domestic proceedings. This is exactly what the NAFTA Parties wanted to avoid by requiring waivers as a condition of their consent to arbitration under NAFTA Chapter 11.

112. DIBC also advances a number of claims over which they first acquired knowledge more than three years from the date they submitted their First NAFTA NOA. These claims are time barred under the plain language of NAFTA Articles 1116(2) and 1117(2) and the Tribunal has no jurisdiction to hear them.

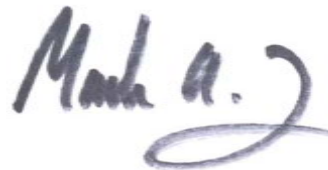
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<sup>140</sup> With such written confirmation, Canada does not expect it will be necessary to request an order from the Tribunal in this regard. See NAFTA Article 1134 (Interim Measures of Protection) which provides that "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party...including an order to preserve evidence in the possession or control of a disputing party..." Similarly, UNCITRAL Rule 26(2)(d) provides that the Tribunal may grant an interim measure to "preserve evidence that may be relevant and material to the resolution of the dispute."

113. As Canada will demonstrate in its Memorial on Jurisdiction and Admissibility, the Tribunal has therefore no jurisdiction to hear DIBC's claims. Legal argument and evidence in support of these objections will be presented in Canada's later submissions. In light of these serious and fatal jurisdictional objections, a procedural schedule, including a phase for limited documents requests, should be established in order to provide the parties with a fair and reasonable opportunity to fully brief the Tribunal.

114. During the preliminary call with the Tribunal on December 13, 2012, DIBC requested an expedited schedule for the jurisdictional phase. However, the Claimants filed their Notice of Arbitration nearly two years ago and chose not to advance their claim. They also only recently filed their Amended NAFTA NOA and Statement of Claim, which significantly expand on their original claims. In light of their delay in advancing the original claim and then suddenly expanding it, the Claimants' request for an expedited schedule is inequitable and unrealistic in light of Canada's jurisdictional objections. Canada should be provided with an opportunity to fully brief the Tribunal on its jurisdictional objections and looks forward to discussing an efficient procedural schedule with the Tribunal that will allow these objections to be addressed.

Respectfully submitted on behalf of  
the Government of Canada  
this 22<sup>nd</sup> day of February, 2013



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