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

GOVERNMENT OF CANADA
MEMORIAL ON JURISDICTION AND ADMISSIBILITY

June 15, 2013

Departments of Justice and of
Foreign Affairs and
International Trade
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TABLE OF ABBREVIATIONS

ATC	American Transit Company
BSTA	Bridge to Strengthen Trade Act
CBSA	Canadian Border Services Agency
CEAA	Canadian Environmental Assessment Act
CTC	Canadian Transit Company
DDC	United States District Court for the District of Columbia
DIBC	Detroit International Bridge Company
DRIC	Detroit River International Crossing
DRTP	Detroit River Tunnel Partnership
EIS	Environmental Impact Statement (U.S.A)
FEIS	Final Environmental Impact Statement (U.S.A.)
FHWA	Federal Highway Administration
IBTA	International Bridges and Tunnels Act
IJC	International Joint Commission
LGWEM	Let's Get Windsor-Essex Moving Strategy
MDOT	Michigan Department of Transportation
MTO	Ontario Ministry of Transportation
NAFTA	North American Free Trade Agreement
NEPA	National Environmental Policy Act
NWPA	Navigable Waters Protection Act
OEAA	Ontario Environmental Assessment Act
ONSC	Ontario Superior Court
P/NF Study	Planning, Need and Feasibility Study
TC	Transport Canada
VCLT	Vienna Convention on the Law of Treaties

I. PRELIMINARY STATEMENT

1. Pursuant to the Tribunal's Procedural Order No. 4, Canada respectfully submits this Memorial on Jurisdiction and Admissibility and, attached as Annex A, Canada's document requests.

2. The Claimant, Detroit International Bridge Company ("DIBC" or "Claimant"), on its own behalf and on behalf of its enterprise, the Canadian Transit Company ("CTC"), has filed two Notices of Arbitration[1] and a Statement of Claim[2] in this arbitration against Canada under NAFTA Chapter Eleven. DIBC alleges that Canada has violated its obligations under NAFTA Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment) and 1105 (Minimum Standard of Treatment).

3. At its core, this dispute can be described in a single sentence: DIBC, the owner of the Ambassador Bridge, wants to prevent a new toll bridge from being built in Windsor-Detroit, while the governments of Canada, Ontario, Michigan and the United States support its construction. Under the layers of interrelated events and baseless allegations levelled against Canada in this NAFTA arbitration and in domestic court proceedings lies DIBC's singular goal of stopping – or delaying for as long as possible – the cooperative efforts of Canadian and American public officials and business leaders to promote long-term economic prosperity and security for the citizens of both countries by building the Detroit River International Crossing ("DRIC Bridge"), customs plazas and highway connections.

4. As a means of achieving this goal, DIBC has initiated not only this NAFTA Chapter Eleven arbitration against Canada but has also initiated, and continues today, three different sets of domestic proceedings before the United States District Court for the District of Columbia and the Ontario Superior Court of Justice against Canada *with*

[1] DIBC Notice of Arbitration filed on April 29, 2011 ("First NAFTA NOA"); DIBC Amended Notice of Arbitration filed January 15, 2013 ("Amended NAFTA NOA"). The First NAFTA NOA and the Amended NAFTA NOA are together referred to as the "NAFTA NOAs." DIBC did not request nor did Canada give its consent to DIBC filing an Amended NAFTA NOA.

[2] DIBC's Statement of Claim filed January 31, 2013 ("NAFTA Statement of Claim").

respect to the same measures, as well as involving the payment of damages. This is impermissible under NAFTA Article 1121 and renders Canada's consent to arbitration under Article 1122(1) without effect. While several of DIBC's NAFTA claims would fail anyway because they are untimely (Articles 1116 and 1117) or otherwise fall outside of this Tribunal's jurisdiction, DIBC's failure to comply with NAFTA Article 1121 fully deprives this Tribunal of jurisdiction to determine the entirety of DIBC's NAFTA claims.

5. DIBC argues that its NAFTA claims arise from a series of allegedly discriminatory measures by Canada falling into three broad and overlapping categories.[3] First, DIBC alleges that Canada is violating its "exclusive franchise rights" under a *Boundary Waters Treaty* Article XIII "special agreement" through its efforts to build the DRIC Bridge and by enacting the *International Bridges and Tunnels Act* and the *Bridge to Strengthen Trade Act* (collectively the "Franchise Measures").[4] Second, DIBC alleges that Canada is delaying or preventing regulatory approval of its plan to build a new bridge next to the existing Ambassador Bridge in favour of the DRIC Bridge, including through the *IBTA* and *BSTA* (collectively the "New Span Measures").[5] Third, DIBC alleges that Canada reneged on a commitment to build a direct highway connection between Ontario Highway 401 and the Ambassador Bridge but instead manipulated the DRIC environmental assessment process and Huron Church Road stoplights to steer traffic elsewhere (collectively "Highway 401 Measures").[6] DIBC alleges that it has suffered loss or damage as a result of these measures.

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[3] See Statement of Claim, ¶ 215; Canada's Brief Statement on Jurisdiction and Admissibility filed on February 22, 2013, ¶¶ 6, 66-81. In this Memorial, "Canada" is generally used to collectively refer to measures taken by Canada, Ontario and Windsor except where otherwise specified. Canada uses the labels "Franchise Measures," "New Span Measures," and "Highway 401 Measures" in this Memorial for the sake of convenience as the challenged measures are intrinsically linked and substantially overlap with each other. Pinpoint references to DIBC's pleadings with respect to the various measures at issue are provided as examples and not meant to be inclusive of all instances where a fact, measure or allegation is discussed.

[4] Amended NAFTA NOA, ¶¶102-109; NAFTA Statement of Claim, ¶¶ 174-186. The *International Bridges and Tunnels Act* is hereinafter referred to as the "*IBTA*." The *Bridge to Strengthen Trade Act* is hereinafter referred to as the "*BSTA*."

[5] Amended NAFTA NOA, ¶¶ 97-99, 110, 111; NAFTA Statement of Claim, ¶¶ 169-171, 182-184.

[6] DIBC alleges that Canada (1) reneged on its 2003 "promise" to spend $300 million to construct a direct highway connection between Highway 401 and the Ambassador Bridge (First NAFTA NOA, ¶¶ 26-34; Amended NAFTA NOA, ¶¶ 12, 113-114, NAFTA Statement of Claim , ¶¶ 95-96, 158, 190), (2)

6. Canada argued in its Brief Statement on Jurisdiction and Admissibility on February 22, 2013 ("Brief Statement") that, while DIBC's claims have no merit on the facts and law, the Tribunal need not consider the merits as it has no jurisdiction to hear *any* of DIBC's claims. Canada raised the following objections and maintains the same in this Memorial:

Failure to Comply with the Waiver Requirements in Article 1121

- DIBC has failed to comply with the waiver requirements under NAFTA Article 1121, which deprives the Tribunal of jurisdiction over all of DIBC's NAFTA claims. 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 and CTC initiated and continued proceedings against Canada in both U.S. and Canadian courts with respect to the measures alleged to have breached NAFTA Chapter Eleven.

Failure to Submit Timely Claims Under NAFTA Articles 1116(2) and 1117(2)

- Regardless of DIBC's non-compliance with Article 1121, DIBC and CTC had knowledge more than three-years prior to DIBC's First NAFTA NOA (April 29, 2011) of Canada's alleged actions with respect to the construction of a direct highway connection from Highway 401 to the Ambassador Bridge. Thus, all of DIBC's Highway 401 claims are time barred under NAFTA Articles 1116(2) and 1117(2).

- Regardless of DIBC's non-compliance with Article 1121, DIBC and CTC also had knowledge more than three-years prior to filing its First NAFTA NOA of Canada's alleged breach with respect to its IBTA claim. Thus, DIBC's IBTA claim is time barred under NAFTA Articles 1116(2) and 1117(2).

Lack of Jurisdiction Relating to the Boundary Waters Treaty

- DIBC alleges that a source of its "exclusive franchise rights" stems from a *Boundary Waters Treaty* "special agreement" called the *Ambassador Bridge Treaty* which, as a "binding international agreement under international law," was incorporated into Canadian law.[7] While no such international treaty

manipulated the DRIC EA to ensure that the direct Highway 401 parkway component would go only to the DRIC Bridge but not the Ambassador Bridge (First NAFTA NOA, ¶¶ 38-42 ; Amended NAFTA NOA, ¶¶ 82-84; NAFTA Statement of Claim, ¶¶119, 120, 133), and (3) 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 (First NAFTA NOA, ¶¶ 43-47; Amended NAFTA NOA, ¶¶ 125-129; NAFTA Statement of Claim, ¶¶ 206, 208, 209).

[7] First NAFTA NOI, ¶ 16, 26-28, **Exhibit R-44**; Amended NAFTA NOA, ¶¶ 34-35; DIBC's Response, ¶ 29.

exists, to the extent DIBC is claiming a breach of the *Boundary Waters Treaty* and/or *Ambassador Bridge Treaty*, this Tribunal has no jurisdiction to make such a determination.

7. DIBC's March 15, 2013 Response to Canada's Brief Statement filed on ("DIBC's Response") does nothing to fill the void in the legal merit of its arguments. In fact, DIBC's Response serves to further illustrate its lack of candour with respect to issues relevant for determining this Tribunal's jurisdiction. For example:

- DIBC said in its Response that it submitted a valid waiver because NAFTA Article 1121permits injunctive relief before an administrative tribunal or court "under the law of the disputing NAFTA Party."[8] But DIBC *specifically deleted* those operative words from its January 15, 2013 waiver.[9]

- DIBC said in its Response that the IBTA is part of this NAFTA arbitration but not part of the Washington Litigation.[10] But DIBC's Corporate Counsel himself wrote in an affidavit to the Federal Court of Canada that "[T]he issue of the applicability of the IBTA to the operations of CTC and its affiliates *is also squarely at issue in the D.C. action*."[11]

- DIBC said in its Response that "Canada's position that the IBTA applies to the Ambassador Bridge was not made clear until 2009."[12] But DIBC/CTC itself wrote in pleadings to the Federal Court of Canada that Canada has "gone to great lengths to seek to apply the IBTA against CTC" *since October 30, 2007*.[13]

- DIBC said in its Response that the Ambassador Bridge legislation in Canada and the United States constitutes a "special agreement" within the meaning of *Boundary Waters Treaty* Article 13.[14] But Canada wrote in 1927 that

[8] DIBC's Response, ¶ 35.

[9] See Amended NAFTA NOA, Waiver and Consent, January 15, 2013: "[…] Consistent with NAFTA's waiver requirements, the only exception from this waiver is for proceedings for injunctive, declaratory, or other extraordinary relief, no involving the payment of damages." The explicit language of Article 1121(1)(b) and 2(b) "before an administrative tribunal or court under the law of the disputing NAFTA Party" has been deleted by DIBC. See Part III(D)(1)(b) below.

[10] DIBC's Response, ¶¶ 43-44.

[11] *Canadian Transit Company v. Minister of Transport*, Court File No. T-1939-10, December 17, 2010 (FCC) Motion for a Temporary Stay of CTC's Application for Judicial Review with affidavit of Patrick A. Moran, **Exhibit R-45** (emphasis added). See Part IV(E)(1) below.

[12] DIBC's Response, ¶ 26.

[13] *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), Court File No. T-1930-10, November 18, 2010, ¶¶ 10-11, **Exhibit R-46**. See Part IV(E)(1) below.

[14] DIBC's Response, ¶ 29.

> "Parliamentary and Congressional approval of projects *such as that of the Detroit-Windsor Bridge does not constitute a 'special agreement' between the High Contracting Parties as defined and intended in Article 13 of the Boundary Waters Treaty*."[15]

8. DIBC's arguments in this dispute cannot stand scrutiny. Canada respectfully requests that the Tribunal find that it has no jurisdiction over any of DIBC's claims.

9. This Memorial is organized as follows. Part II is a general overview of the dispute and facts relevant for the jurisdictional phase. Part III sets out Canada's objections with respect to NAFTA Article 1121. Part IV sets out Canada's objections based on DIBC's failure to submit timely claims under NAFTA Articles 1116 and 1117. Part V sets out Canada's jurisdictional objection with respect to the alleged *Boundary Waters Treaty* "special agreement." Part VI sets out the justification for Canada's document discovery requests relevant for issues of jurisdiction, which are found at Annex A. Part VII provides a summary conclusion of this Memorial and Parts VIII and XI sets forth Canada's request for costs and legal fees, as well as the order requested.

II. FACTS

10. In this Part II, Canada provides a general overview of the dispute and facts which are relevant for the Tribunal's determination of Canada's objections to jurisdiction. Canada does not seek to address or rebut all of the misrepresentations made by DIBC in its various NAFTA pleadings and this should not be construed as constituting agreement with DIBC's characterization of the facts in its submissions.

A. The Ambassador Bridge and Surrounding Area in Windsor and Detroit

11. The Ambassador Bridge was built in 1929 and spans the Detroit River between the cities of Windsor, Ontario and Detroit, Michigan. In addition to the Ambassador Bridge, the Detroit River is traversed at Windsor-Detroit by the Michigan Central

[15] Letter from W.W. Cory (Deputy Minister of the Interior) to O.D. Skelton, Esq. (Under-Secretary of State for External Affairs) dated August 13, 1927, **Exhibit R-133** (emphasis added). See Part V(B) below.

Railway Tunnel (built in 1910), the Windsor-Detroit Tunnel (built in 1930) and the Detroit-Windsor Truck Ferry (in operation since 1990).[16]

12. To authorize the construction of the Ambassador Bridge in Canada, legislation was enacted in 1921 to incorporate the Canadian Transit Company ("CTC Act").[17] 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 allowed CTC to "construct, maintain and operate a railway and general traffic bridge across the Detroit River."[18] The CTC Act stipulates that construction and location of the bridge was subject to government approval and that construction could not start until the United States enacted legislation approving the bridge's construction on its side of the Detroit River.[19]

13. 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").[20]

14. 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 Windsor city limits. As a result, there is now no direct highway connection between the Ambassador Bridge and Highway 401. Instead, traffic is transitioned through local roads starting at Highway 3/Talbot Road in order to access the Ambassador Bridge in Windsor, approximately fourteen kilometres from the end of Highway 401.[21]

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[16] See DRIC Environmental Assessment, § 4.7 at pp. 4-32 – 4-35, **Exhibit R-47**.

[17] *An Act to Incorporate the Canadian Transit Company Act*, 11-12 George V., Chap. 57, May 3, 1921, as am. ("CTC Act"), **Exhibits C-6, C-7, C-11**.

[18] CTC Act, s.8, **Exhibit C-6**.

[19] CTC Act, s.9, 11, 13, **Exhibit C-6**.

[20] *American Transit Company Act*, 66th Congress. Sess III Chs. 166-168, March 4, 1921, as am. ("ATC Act"), **Exhibits C-5, C-8, C-9, C-10**.

[21] See map of Windsor, **Exhibit R-1**; DRIC Environmental Assessment, § 4.7 at p. 4-33, **Exhibit R-47**.

15. One of those local roads is Huron Church Road, which starts outside city limits and, north of E.C. Row Expressway, passes through Windsor just west of the downtown core.[22] The segment of Huron Church Road between E.C. Row Expressway and the Ambassador Bridge is heavily populated and is flanked on both sides by residential homes, apartment buildings, restaurants, educational institutions, community centres and hotels with direct access to Huron Church Road. For decades, local Windsor residents commuting to and from work and school, shopping or accessing the multitude of services adjacent to or in close proximity to Huron Church Road have shared this mixed-use thoroughfare with thousands of commercial trucks accessing Ambassador Bridge. Today, more than 10,000 vehicles traverse the Ambassador Bridge daily.

16. 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 neighbourhood, 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, a terminus point for fugitive slaves who fled the United States to Canada via the "underground railroad" in the mid-1800s and is home to several of Canada's oldest and historically important buildings and structures.[23]

17. On the Detroit side of the river, Michigan Interstate Highway I-75 is located less than half a kilometre from the foot of the Ambassador Bridge, although for decades the lack of a direct highway connection to I-75 and the nearby Interstate Highway I-96 caused trucks and cars entering the United States to traverse through local Detroit streets to access the interstate highway system. To remedy this problem, the Michigan

[22] See map of Windsor, **Exhibit R-1**; DRIC Environmental Assessment, § 4.7 at p. 4-33, **Exhibit R-47**.

[23] See DRIC Environmental Assessment, § 4.5.1 at pp. 4-16-4-18, **Exhibit R-47**; Sandwich Community Planning Study, Background Information, **Exhibit R-48;** *Payne et al* v. *Corp. of the City of Windsor et al* (2011), 2011 ONSC 5123 (Ont. Sup. Ct.), Reasons for Judgment (September 12, 2011), ¶ 2, **Exhibit R-31.**

Department of Transportation ("MDOT") and DIBC entered into an agreement in 2004 to build the appropriate connection infrastructure from the foot of the Ambassador Bridge on to Interstate Highway I-75 ("Gateway Project").[24] Canada was not involved in the Gateway Project.[25] The Gateway Project has been a source of major litigation between MDOT and DIBC since 2009.[26]

B. Traffic Issues in the Windsor-Detroit Gateway

18. The transportation corridor connecting Ontario and Michigan at Windsor-Detroit is Canada's single most important trade crossing with the United States and one of the most important international trade corridors in the world. 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. One quarter of Canada-U.S. trade today depends on the bridge, tunnel, rail and ferry crossings at Windsor-Detroit.

19. 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 neighbourhoods, noise, pedestrian-vehicle accidents and long wait times at the border are all common.

20. As described below, the governments of Canada, the United States, Ontario and Michigan recognized that the existing Windsor-Detroit border crossings were experiencing acute congestion and transportation capacity problems. Given the importance of this trade corridor to the local, regional and national economies of both Countries, governments on both sides of the border recognized the imperative of taking

[24] First NAFTA NOA, ¶¶ 24, 33; Statement of Claim, ¶¶ 70-73, 92, **Exhibits C-19 - C-21**.

[25] See e.g., Letter from Kirk L. Steudle (MDOT) to Dan Stamper dated February 27, 2008, **Exhibit R-49**. ("At the time MDOT and the Detroit International Bridge Company (DIBC) were developing the Gateway Project, *no one from Transport Canada, the Ontario Ministry of Transportation, nor the City of Windsor was involved in the planning process.*") (emphasis added).

[26] See Part (II)(E)(2) below.

responsible steps to reduce the likelihood of disruption to transportation infrastructure at Windsor-Detroit.

21. To this end, the transportation agencies from each jurisdiction began looking at both short/medium term solutions to existing border crossings as well as engaging in 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 border crossings in Windsor. These projects were carried out concurrently with the early stages of the DRIC environmental assessment process ("DRIC EA" or "DRIC Process"), which was examining the long-term transportation needs of the region (discussed below).

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 $300 million to upgrade transportation infrastructure at the Ontario approaches to the existing border crossings in the Windsor-Detroit corridor.[27] The 2002 MOU was intended to create a process to identify potential transportation projects in Windsor that could be carried out in the short term, 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 DRIC Process.

24. A working group of Canadian federal and provincial officials ("Joint Management Committee" or "JMC") was set up in September 2002 to consult with the public and

[27] Government of Canada and Government of Ontario, Memorandum of Understanding, "Windsor Gateway Short and Medium Term Improvements", (September 25, 2002) ("2002 MOU"), **Exhibit R-4**.

stakeholders and identify potential infrastructure projects to improve the existing border crossings and their approaches.[28] CTC participated in the process and proposed that a dedicated highway be built to connect Highway 401 to the Ambassador Bridge.[29] Other private sector companies interested in building new crossings with direct road access to Highway 401, including the Detroit River Tunnel Partnership and the Mich-Can International Bridge Company, also made crossing and highway proposals to the JMC for consideration.[30]

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 CTC's proposal for a parkway from Highway 401 to the Ambassador Bridge would have "significant community impacts and requires significant property acquisition" and that it would have to be scrutinized under all regulatory approvals.[31] While the JMC believed there was a need for a direct highway connection between Highway 401 and the border, it noted that there was "no consensus on how to achieve it and where it should be located."[32] The Windsor Gateway Action Plan was released to the public on December 20, 2002.[33]

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 ("Nine Point

[28] Government of Canada and Government of Ontario, Memorandum of Understanding, "Windsor Gateway Short and Medium Term Improvements", (September 25, 2002), Part II, **Exhibit R-4**.

[29] Windsor Gateway: An Action Plan for the 21st Century Gateway, November 25, 2002, at pp. 13-17, **Exhibit R-5**. .

[30] Windsor Gateway: Action Plan, at pp. 14-16, 22-25, **Exhibit R-5**.

[31] Windsor-Gateway: Action Plan, at p. 14, **Exhibit R-5**. News Release, Joint Committee Delivers Windsor Gateway Action Plan, November 26, 2002, **Exhibit R-6.**The JMC made a similar observation with respect to the proposals put forth by DRTP and Mich-Can. See *Id*. at pp. 15-16.

[32] Windsor Gateway: An Action Plan for the 21st Century Gateway, November 25, 2002, at p. 5, **Exhibit R-5**.

[33] Canada and Ontario Welcome Windsor Gateway Action Plan Recommendations, December 20, 2002, **Exhibit R-7**.

Plan").[34] None of the nine points of action involved any promise to build a direct highway connection between Highway 401 and the Ambassador Bridge.

b) Let's Get Windsor Essex Moving Strategy

27. The Nine Point Plan was short-lived because Windsor wanted a greater role in determining how the infrastructure funds should be spent. 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.[35] The press release accompanying the 2004 MOU and LGWEM Strategy stated explicitly that it "replace[d] the nine-point Windsor Gateway Action Plan."[36] Since March 2004, the LGWEM Strategy has financed numerous traffic and infrastructure projects from the $300 million originally allocated to the Nine Point Plan.[37] Like the Nine Point Plan, none of the LGWEM Strategy projects involved building a direct highway connection between Highway 401 and the Ambassador Bridge.

2. Long Term Transportation Improvements: Detroit River International Crossing Environmental Assessments

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 the "end-to-end" solution).[38]

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[34] News Release, Canada and Ontario Announce Next Steps at Windsor Gateway, May 27, 2003, **Exhibit C-34**.

[35] News Release: A new Solution for the Windsor Gateway Endorsed by all Three Levels of Government, March 11, 2004 ("2004 MOU") **Exhibit R-8**. The 2004 MOU replaced the 2002 MOU.

[36] *Ibid*. at p. 3, **Exhibit R-8**.

[37] See Part IV(D)(1) below.

[38] Ontario Michigan Border Transportation Partnership Charter, **Exhibit C-35**; Canada-United States-Ontario-Michigan Border Transportation Partnership Charter, **Exhibit C-36**; Memorandum of Cooperation

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.[39]

29. To this end, a Planning, Need and Feasibility Study ("P/NF Study") was initiated in May 2001 to assess the transportation infrastructure needs of the region.[40] The P/NF Study, completed in January 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.[41]

30. The findings of the P/NF Study provided the basis for the initiation of formal environmental assessments in Canada and the United States.[42] The four transportation agencies in each jurisdiction – TC, MTO, MDOT and FHWA – agreed to coordinate their respective environmental assessments to ensure that the legislative requirements in Canada, Ontario and the United States were fulfilled and would result in the best possible

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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**. The Bi-National Partnership is not a legal partnership and the partnership charter explicitly noted that it was not a binding agreement but a memorialization of the consensus of TC, MTO, MDOT and FHWA. *Id*.

[39] 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-47**. Canada has included the full DRIC Environmental Assessment as **Exhibit R-47**. See also *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.)") ¶ 25-26, **Exhibit R-9**; *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 (U.S.)"), at pp. 3, 5-6, **Exhibit R-2;** Canadian Environmental Assessment Act Screening report, CEAR No: 06-01-18170 Detroit River International Crossing Study, ("CEAA Screening Report") at p. 1, **Exhibit C-92**.

[40] Planning, Needs and Feasibility Study Report, January 2004 ("P/NF Study"), **Exhibit R-11**; DRIC Environmental Assessment Appendix C, **Exhibit R-47;** EA JR (Can.) ¶ 27 (May 4, 2011), **Exhibit R-9**; EA JR (US), p. 3, **Exhibit R-2**; The PN/F Study is summarized in Chapter 5 of the DRIC EA.

[41] P/NF Study, **Exhibit R-11**; EA Executive Summary at (ii), **Exhibit R-47**; EA JR (Can.) ¶ 27 (May 4, 2011), **Exhibit R-9**.

[42] See EA Executive Summary at (v), **Exhibit R-47**.

"end-to-end" solution that would create a direct connection between Ontario and Michigan's freeway systems.[43]

31. 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"). In the United States, the environmental assessment was carried out pursuant to the *National Environmental Policy Act* ("NEPA").

32. In September 2004, a detailed Terms of Reference ("DRIC EA TOR") was approved by the Ontario Ministry of the Environment to meet the requirements of Ontario environmental legislation and to ensure full coordination with the federal environmental assessment regime and the *NEPA* process in the United States.[44] Based on a list of evaluation criteria set out in the DRIC EA TOR, a consolidated set of seven evaluation factors was used to assess the respective benefits and impacts of the various "end-to-end" crossing, plaza and access road options: (1) changes in air quality, (2) protection of community/neighbourhood characteristics, (3) maintain consistency with existing and planned land use, (4) protect cultural resources, (5) protect the natural environment, (6) improve regional mobility, and (7) constructability/minimize cost.[45]

33. A "preliminary analysis area" (i.e., the geographic area in which alternative crossing, plaza and road access options would be developed) was identified in January

[43] PN/F Study p. 2, **Exhibit R-11**; Ontario-Michigan Border Transportation Partnership Framework, February 7, 2001, **Exhibit C-35**; Canada-United States-Ontario-Michigan Border Transportation Partnership Charter, February 2, 2005, **Exhibit C-36**; EA Terms of Reference § 1.3.4 at p. 9, **Exhibit R-50**; CEAA Screening Report, at p. 1, **Exhibit C-92**.

[44] Detroit River International Crossing, Environmental Assessment Terms of Reference, May 2004, **Exhibit R-50**. Because of the volume of documentation supporting the DRIC EA TOR, Canada only includes the main document. All appendices to the DRIC EA TOR are available on the Bi-National Partnership website www.partnershipborderstudy.com. See also DRIC Environmental Assessment, at pp. 1-2, 1-5 – 1-12, 5-1-5-15, **Exhibit R-47**; EA JR (Can.), ¶¶ 35-37, 102, **Exhibit R-9**.

[45] DRIC EA, at pp. 6-16-6-20, **Exhibit R-47**; EA JR (Can.), at p. 17, **Exhibit R-9**; EA JR (U.S.), pp. 7-8, **Exhibit R-2**;

2005 and the coordinated Ontario-Canada DRIC EA was formally launched in February 2005.[46]

34. In June 2005, fifteen alternative river crossings, thirteen alternative Canadian inspection plazas and a wide range of possible road connections to Highway 401 were identified as options ("Illustrative Alternatives").[47]

35. By November 2005, each of the Illustrative Alternatives had been examined against the seven evaluation factors outlined in the DRIC EA TOR.[48] 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.[49]

36. Among the Illustrative Alternatives was the twinning of the Ambassador Bridge, referred to in the DRIC EA as option "X12."[50] As was done with the fourteen other crossing options, routes for a direct highway connection from Highway 401 to the Ambassador Bridge were integral to the analysis and assessed in light of the evaluation factors outlined in the DRIC EA TOR. The same assessment was done for the U.S. side of the border.[51]

37. While Option X12 scored well on the U.S. side of the border, the situation was different on the Canadian side.[52] Option X12 was found to have high negative impacts in three of the seven evaluation factors: (i) protection of community and neighbourhood

[46] DRIC EA Executive summary p. (i) and Detroit International River Crossing Environmental Assessment Report, Chapter 6, at p. 6-1, **Exhibit R-47;** "Windsor-Detroit International Crossing: Canadian Environmental Assessment Phase Begins," Transport Canada Press Release No. GC003/05, February 15, 2005, at pp. 3-4, **Exhibit R-51**.

[47] DRIC EA Executive summary p. (vii) and EA Chapter 6, at p. 6-1 **Exhibit R-47;** EA JR (U.S.), at pp. 8-9**, Exhibit R-2.** See also Generation and Assessment of Illustrative Alternatives Report (November 2005), **Exhibit R-52**.

[48] DRIC EA Executive summary, at pp. (vii) – (viii) and EA Chapter 6, at pp. 6-1 to 6-2, **Exhibit R-47**.

[49] DRIC EA executive summary, at pp. (vii) - (viii) and EA Chapter 6, **Exhibit R-47**.

[50] DRIC EA Chapter 6, at pp. 6-34 and 6-35, **Exhibit R-47**. Option X12's consideration of a twinned Ambassador bridge is distinct from DIBC's later proposal to build the New Span, discussed below.

[51] EA JR (Can.), ¶ 40, **Exhibit R-9**; EA Chapter 6, at pp. 6-34 and 6-35, **Exhibit R-47**.

[52] EA JR (Can.), ¶¶ 40-41, **Exhibit R-9**.

characteristics, (ii) protection of cultural resources, and (iii) maintaining consistency with existing and planned land use (with respect to the customs plaza). Option X12 also fared poorly in respect of the "minimize cost" evaluation factor as the construction of a new freeway along Huron Church Road to Canada's busiest border crossing would result in delays to international traffic and greater potential for increased costs due to traffic management and relocation.[53]

38. In sum, in addition to community impact concerns regarding the customs plaza, each potential road access route between Highway 401 and the Ambassador Bridge would have had a high negative impact on Windsor, particularly on the neighbourhoods surrounding the Ambassador Bridge north of E.C. Row Expressway.[54] Accordingly, Canada recommended that option X12 not be carried forward in the DRIC EA.[55]

39. After reviewing the option X12 evaluation results, all four transportation agencies – TC, MTO, MDOT and FHWA – mutually agreed that the disadvantages of this option on the Canadian side outweighed the advantages on the U.S. side:

> 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.[56]

40. On November 14, 2005, the decision to drop several options from the DRIC EA, including the twinned Ambassador Bridge option X12, was publically announced. An

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[53] Generation and Assessment of Illustrative Alternatives Report (November 2005), at pp. 102-106, **Exhibit R-52**; DRIC Environmental Assessment Chapter 6 at pp. 6-1-6-49, **Exhibit R-47**. See also EA JR (U.S.), at p. 33, **Exhibit R-2** ("redundancy was one component of the larger Purpose and need for the project."); DRIC EA TOR, at p. 22, **Exhibit R-50**.

[54] EA Chapter 6, at pp. 6-34 to 6-35, **Exhibit R-47**; EA JR (Can.), ¶¶ 46-47, **Exhibit R-9**.

[55] EA Chapter 6, at pp. 6-34, **Exhibit R-47**; EA JR (Can.), ¶¶ 46-48, **Exhibit R-9**.

[56] EA JR (Can.), ¶ 48 (May 4, 2011), **Exhibit R-9**. See also "Welcome to the Second Public Information Open House for the Detroit River International Crossing Environmental Assessment," November 29, 30 & December 1, 2005, at pp. 27-28, 36, **Exhibit R-53** and Second Public Information Open House DRIC Video Presentation (November/December 2005), **Exhibit R-53(a)**; Evaluation of Studied Alternatives and Determination of Practical Alternatives, James Steele (United States Federal Highway Administration), November 10, 2005, **Exhibit R-54**.

"Area of Continued Analysis" map identifying the remaining area which would be further assessed for a new crossing, customs plaza and Highway 401-Michigan interstate highway connection was also released to the public.[57] The Area of Continued 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.[58] Option X12 was eliminated from further study and lay outside the Area of Continued Analysis.[59]

41. The Bi-National Partnership also publically released a supporting document describing the basis for the generation and assessment of the Illustrative Alternatives, including the rationale for dropping Option X12 based on the negative impacts of building a direct Highway 401-Ambassador Bridge highway connection and the negative impacts of expanding the customs plaza.[60]

42. 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").[61]

43. 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 within the Area of Continued Analysis was developed and released for further public comment.[62]

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[57] 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 at p. 6-1, **Exhibit R-47**.

[58] EA JR (Can.), ¶ 48 (May 4, 2011), **Exhibit R-9**; News Release, November 14, 2005, **Exhibit R-13**; EA JR (US), at pp. 9-10, **Exhibit R-2**.

[59] EA JR (Can.), ¶¶ 47-48 (May 4, 2011), **Exhibit R-9**; News Release, November 14, 2005, **Exhibit R-13**.

[60] Generation and Assessment of Illustrative Alternatives Report (November 2005), at pp. 102-115, **Exhibit R-52**; DRIC Environmental Assessment Chapter 6 at pp. 6-34-6-42, 6-46-6-49, **Exhibit R-47**.

[61] DRIC EA, § 3.2 Table 3.3 at pp. 3-11 – 3-16, and Chapters 7-8, **Exhibit R-47**; EA JR (Can.), ¶¶ 50-52 (May 4, 2011), **Exhibit R-9**.

[62] DRIC EA executive summary at (ix) and Chapter 8, **Exhibit R-47**.

44. On May 1, 2008, the preferred alternative for the access road leading to the DRIC Bridge, the Windsor-Essex Parkway (now called the Rt. Hon. Herb Gray Parkway) was announced.[63] The specific location for the international bridge crossing and the Canadian plaza was announced in June 2008.[64]

45. The final Ontario environmental assessment report was published for public comment in November 2008 and approved by the Ontario Ministry of the Environment pursuant to *OEAA* on August 21, 2009.[65] 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.[66]

46. The DRIC EA was one of the most thorough and comprehensive transportation infrastructure studies ever undertaken in Ontario. The entire process lasted eight years starting with the PN/F Study in May 2001 and concluded with the formal approvals of the provincial and federal DRIC environmental assessments in 2009. The DRIC EA was based on hundreds of consultations and meetings with the public and stakeholders and supported by dozens of voluminous studies.[67]

47. The parallel environmental assessment under the *National Environmental Policy Act* in the United States, the Final Environmental Impact Statement (FEIS), was approved on January 14, 2009 with the Record of Decision issued by the U.S. Federal Highway Administration.[68]

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[63] DRIC EA executive summary at (v-vi) and Chapter 9, **Exhibit R-47**; EA JR (Can.), ¶ 53 (May 4, 2011), **Exhibit R-9**.

[64] DRIC EA executive summary at pp. 1-3, **Exhibit R-47**.

[65] EA JR (Can.), ¶ 58 (May 4, 2011), **Exhibit R-9**; EA executive summary at (iii), **Exhibit R-47**; "Environmental Assessment Act Section 9 Notice of Approval to Proceed with the Undertaking", **Exhibit C-91**.

[66] EA JR (Can.), ¶¶ 62, 68, **Exhibit R-9**; News Release: Detroit River International Cross Project Receives Environmental Approval, **Exhibit C-93**.

[67] DRIC Environmental Assessment Chapter 3, **Exhibit R-47**.

[68] Detroit River International Crossing Study Record of Decision, January 14, 2009, **Exhibit R-55**.

48. Documentation specific to the environmental assessments in both Canada and the United States was made publically available throughout the process on the Bi-National Partnership website www.partnershipborderstudy.com.

3. DIBC and CTC's Legal Challenges to the DRIC Environmental Assessments in Canada and the United States

a) CTC's DRIC EA Challenge in Canada

49. On December 31, 2009, CTC filed an application at the Federal Court of Canada for judicial review of the federal DRIC EA.[69] In its application, CTC made many of the same allegations as DIBC does in this NAFTA arbitration (and based on most of the same documents). CTC argued that Canada's decision to drop Option X12 in November 2005 was a result of bias against a privately owned crossing rather than legitimate environmental and community reasons. CTC also argued that there was no need for the new DRIC Bridge because of declining traffic. Finally, CTC argued that the DRIC Bridge and highway connections had negative environmental impacts.[70]

50. On May 4, 2011, the Court ruled that "after four days of hearings and considering thousands of pages of evidence," CTC's claims were "without any merit" and had "caused delay in this [DRIC] project."[71] Justice Kelen found that the reasons for dropping the twin Ambassador Bridge option X12 from the DRIC EA in November 2005 were reasonable and based on rational criteria, including the negative impacts of extending Highway 401 to the Ambassador Bridge. Justice Kelen wrote:

> 1. The transportation needs of the Windsor-Detroit corridor represent a vital part of the economy for both Canada and the United States. It is prudent that a second bridge be constructed to relieve any congestion or obstruction which might arise on the existing Ambassador Bridge. For example, if a terrorist or some other event or mishap affected the Ambassador Bridge, the current $146 billion worth of trade which annually crosses this border area would be jeopardized. (The Court finds that it was reasonable that a second bridge at a

[69] *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.**

[70] EA JR CTC Notice of Application, ¶¶ 18, 36-38, 42, **Exhibit R-14**. See Amended NOA, ¶¶ 79, 81-84.

[71] EA JR (Can), ¶ 3, **Exhibit R-9**. The claims of the Sierra Club of Canada, which focused on environmental issues, were also dismissed.

> different location than the Ambassador Bridge was necessary for this vital Windsor-Detroit transportation corridor);
>
> 2. Expansion of the existing Ambassador Bridge with a second span would require a much larger customs and inspection plaza. This would disrupt and displace the historic community of Sandwich, which is adjacent to Windsor. The Court finds it reasonable that a new bridge ought to be located so that it minimizes the impact on existing communities.
>
> 3. Building a second span for the existing Ambassador Bridge would also require the expansion of the existing Windsor local roads leading to the Ambassador Bridge. These roads would need be converted into a dedicated freeway. This would have a serious impact on the community of Windsor since the existing roads leading to the Ambassador Bridge are essential for local Windsor traffic; and
>
> 4. If a second span were added to the Ambassador Bridge, the existing Windsor roadways leading to the Bridge would be under construction for a period of time which would disrupt international truck and auto traffic using this vital border crossing during construction.[72]

51. Justice Kelen concluded:

> [A]n informed person viewing the matter realistically would not have a reasonable apprehension of bias regarding the Partnership's decision to eliminate the X-12 Option.[73]

52. CTC's appeal to the Federal Court of Appeal was dismissed on March 1, 2012.[74]

b) DIBC's DRIC EA Challenge in the United States

53. On May 14, 2009, DIBC challenged the DRIC FEIS Record of Decision in U.S. federal court, arguing that approval of the DRIC Bridge was arbitrary and capricious.[75] Among other things, DIBC alleged that the United States FHWA had dropped the twin Ambassador Bridge Option X12 from the environmental assessment because it was "duped" by Canada and that the FHWA had been "scheming" with Canada to build a new

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[72] EA JR (Can.), ¶ 4, **Exhibit R-9**.

[73] EA JR (Can.), ¶ 108, **Exhibit R-9**.

[74] *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**. CTC did not seek leave to appeal to the Supreme Court of Canada.

[75] *Latin Americans for Social and Economic Development et al. v. Federal Highway Administration*, Complaint for Declaratory and Injunctive Relief, May 14, 2009, **Exhibit R-56**.

bridge and divert traffic from the Ambassador Bridge.[76] DIBC alleged, among other things, that Canada had "hijacked" the environmental assessment process, exerted "undue influence" on the FHWA and failed to fulfill its 2003 commitment to spend $300 million to connect Highway 401 to the Ambassador Bridge and instead is building a new highway to the DRIC Bridge.[77]

54. DIBC's claims were dismissed by the United States District Court for the Eastern District of Michigan on April 5, 2012.[78] 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.[79]

55. Judge Cohn stated that if DIBC wished to challenge Canada's reasons for eliminating Option X12, it would have to do so in Canada.[80] Judge Cohn concluded that the approval of the DRIC Bridge was a "reasoned process and a reasoned decision"[81] and that DIBC's assertion "that the FHWA acted arbitrarily and capriciously has no merit."[82]

C. Canada and the United States Move Forward With the DRIC

56. With the completion and formal approval of the DRIC environmental assessments under *CEAA* and *OEAA* in Canada and under *NEPA* in the United States in 2009, Canada,

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[76] *Latin Americans for Social and Economic Development et al. v. Federal Highway Administration*, Complaint for Declaratory and Injunctive Relief, May 14, 2009, ¶¶ 63, 163, **Exhibit R-56**.

[77] *Latin Americans for Social and Economic Development et al. v. Federal Highway Administration*, Complaint for Declaratory and Injunctive Relief, May 14, 2009, ¶ 112, 113, 161, 163, **Exhibit R-56**.

[78] EA JR (U.S.), **Exhibit R-2**. DIBC is appealing this ruling to the United States Court of Appeals for the Sixth Circuit.

[79] EA JR (U.S.), at p. 24, **Exhibit R-2**.

[80] EA JR (U.S.), at p. 25, **Exhibit R-2**. As discussed above, CTC unsuccessfully challenged the DRIC EA in the Federal Court of Canada. See EA JR (Can.), **Exhibit R-9**.

[81] EA JR (U.S.), at p. 2, **Exhibit R-2**.

[82] EA JR (U.S.), at p. 45, **Exhibit R-2**.

Ontario, the United States and Michigan moved forward to implement plans for the DRIC Bridge, highway connections and customs plazas.

57. Canada and Michigan signed an agreement on June 15, 2012 ("Crossing Agreement") establishing the framework for a crossing authority ("Windsor-Detroit Bridge Authority") to design, construct, finance, operate and maintain the DRIC Bridge under a public-private-partnership ("P3") and 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.[83]

58. Once the Crossing Agreement was signed, Canada passed the *Bridge to Strengthen Trade Act* in December 2012 to facilitate the implementation of the project under a P3 model and provide greater certainty to the market once tendering for the construction of the DRIC Bridge commences.[84] In light of the lengthy DRIC environmental assessment process that had already been undertaken and approved under federal and provincial legislation in both Canada and in the United States, the *BSTA* streamlined a limited number of permit requirements which may be required under existing federal legislation. However, the *BSTA* requires that the DRIC project proponents must still meet the obligations under those laws from which the permits have been exempted.[85]

59. On April 12, 2013, the United States Department of State announced that it had issued a Presidential Permit to Michigan authorizing it to construct the DRIC Bridge and approved the Crossing Agreement between Michigan and Canada.[86] The Presidential

[83] Crossing Agreement, June 15, 2012, **Exhibit C-64**. Press Release "PM announces signing of an agreement for the construction of the new Detroit River International Crossing", June 15, 2012, **Exhibit R-57**; Press Release – Governor Rick Snyder "New International Trade Crossing agreement to bring jobs, economic security, easier travel" June 15, 2012, **Exhibit R-58**. The DRIC Bridge is also referred to as the "New International Trade Crossing" or "NITC" but for the sake of consistency and convenience, Canada uses the term "DRIC Bridge" throughout this Memorial.

[84] See for example *BSTA* s.7, s.9, s.11, **Exhibit C-1**.

[85] See for example *BSTA* s.7, s.9, s.11, **Exhibit C-1**

[86] Letter to Michael Gadola (Michigan) from Lee Martinez (U.S. State Dept.) dated April 12, 2013 *attaching* Presidential Permit Authorizing the State of Michigan to Construct, Connect, Operate and Maintain an International Bridge, its Approaches, and Facilities at the International Boundary between the United States and Canada, March 29, 2013, **Exhibit R-59**.

Permit confirms that construction of the DRIC Bridge "would serve the national interest" of the United States.[87] With the issuance of the Presidential Permit, the Windsor-Detroit Bridge Authority can move forward with project implementation, including the tendering and selection of a P3 concessionaire.

D. The International Bridges and Tunnels Act

60. There are currently 24 international bridges and tunnels along the Canada-U.S. border, most of them constructed decades ago under a variety of disparate legislation, governance structures and degree of oversight. Prior to the IBTA's enactment in 2007, there was no legislation in Canada akin to the 1906 *Bridge Act* or 1972 *International Bridge Act* in the United States to deal with the construction, operation and maintenance of international bridges and tunnels.[88] Legislation governing international bridges and tunnels with provisions similar to the IBTA had been tabled in Parliament in 2003 and 2005, but enactment was interrupted by federal elections.

61. The IBTA was introduced as Bill C-3 for approval by Parliament in April 2006 and was enacted on February 1, 2007.[89] The purpose of the IBTA is to establish a review and 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. Given the critical role of international bridges and tunnels in securing Canada's borders and facilitating trade in North America, the IBTA is intended to ensure that they are built and maintained safely and securely and operated in a manner that enables and does not impede international trade and flow of traffic.

62. To streamline the *ad hoc* legislation currently governing international bridges and tunnels in Canada , the IBTA specifies that it will prevail over pre-existing legislation to the extent of any inconsistency or conflict.[90] The CTC Act was included in the IBTA

[87] Presidential Permit Article 14, **Exhibit R-59**.

[88] *Bridge Act* of 1906, **Exhibit C-14**; *International Bridge Act* of 1972, 33 USC § 535, **Exhibit R-60**. The *International Bridge Act* of 1972 allows U.S. states to enter into agreements with Canada to construct, operate and maintain bridges and tunnels.

[89] *International Bridges and Tunnels Act,* S.C. 2007, c.1 (in force April 25, 2007), **Exhibit C-94**.

[90] *International Bridges and Tunnels Act,* S.C. 2007, c.1, s. 4, **Exhibit C-94**.

Schedule, as were all the other existing laws currently governing international bridges and tunnels in Canada.[91]

E. Ambassador Bridge New Span

63. After option X12 was eliminated from the DRIC EA 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.[92]

1. CTC seeks approval for New Span in Canada.

64. The *Canadian Environmental Assessment Act* requires the issuance of formal guidelines to establish roles and responsibilities, requirements and processes for the environmental assessment of a proposed project.[93] Accordingly, after consultations with CTC, draft guidelines were posted for public comment in March 2007 and revised guidelines issued in August 2007 ("New Span EA Guidelines").[94] On December 4, 2007, CTC submitted an environmental impact statement ("EIS") for its New Span proposal.[95]

65. Transport Canada and the Windsor Port Authority, the responsible authorities for the New Span under *CEAA*, undertook a preliminary review of CTC's EIS and determined that it did not, as was required under the New Span EA Guidelines, include an analysis of the potential environmental effects associated with the modification and/or expansion that may be required for the Canadian customs facilities at the Ambassador

[91] *International Bridges and Tunnels Act*, S.C. 2007, c.1, (Schedule), **Exhibit C-94**.

[92] 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 to build the New Span on its own.

[93] For example, draft federal guidelines under *CEAA* were issued for the DRIC Bridge in November 2006 and later updated after public consultation. See EA JR (Can.), ¶ 50, **Exhibit R-9**.

[94] Revised Federal Environmental Assessment Guidelines, Ambassador Bridge Enhancement Project (August 2007), **Exhibit R-61**. See Draft Environmental Assessment Screening Report: Ambassador Bridge Enhancement Project, Windsor Ontario (April 2013), at pp. 2-3, **Exhibit R-62**.

[95] Ambassador Bridge Enhancement Project Environmental Impact Statement, **Exhibit C-89**.

Bridge. CTC was promptly advised that this analysis would need to be completed before any meaningful and effective review of the EIS could be conducted.[96]

66. 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 EIS in April 2011.[97] After consultations between federal authorities and CTC, the *CEAA* Draft Environmental Assessment Screening Report for the AB New Span was issued by Canada and opened for public comment in April 2013.[98] Upon completion of the public comment period, the comments will be assessed against the legal requirements set out in *CEAA* and a decision issued accordingly.

2. DIBC seeks approval for the New Span in the United States.

67. DIBC has also been seeking regulatory approval from government authorities in the United States for its New Span. Approval of the New Span in the United States has been delayed because of various litigations provoked by DIBC involving the City of Detroit, MDOT and the U.S. federal government.

68. As mentioned in Part II(A) above, the 2004 Gateway Project between MDOT and DIBC was intended to cover a highway connection in the short distance from the Ambassador Bridge to Michigan Interstate Highway I-75.[99]

69. In 2009, after DIBC unilaterally altered the agreed construction plans and built, among other structures, approach ramp piers for its New Span without authorization from

[96] Email/Letter from Kaarina Stiff (Transport Canada) to Dan Stamper (DIBC/CTC) dated January 18, 2008, **Exhibit R-63**; Letter from Bryce Conrad (Transport Canada) to Dan Stamper (DIBC/CTC) dated February 8, 2008, **Exhibit R-64**.

[97] Ambassador Bridge Enhancement Project Environmental Impact Statement, **Exhibit C-89**.

[98] Draft Environmental Assessment Screening Report: Ambassador Bridge Enhancement Project, Windsor Ontario (April 2013), **Exhibit R-62**.

[99] **Exhibits C-19 - C-21**. As noted above, Canada was not involved in the Gateway Project. See e.g., Letter from Kirk L. Steudle (MDOT) to Dan Stamper dated February 27, 2008, **Exhibit R-49**. ("At the time MDOT and the Detroit International Bridge Company (DIBC) were developing the Gateway Project, *no one from Transport Canada, the Ontario Ministry of Transportation, nor the City of Windsor was involved in the planning process.*") (emphasis added). In the same letter, MDOT explains its views regarding DIBC's allegations regarding the Gateway Project, the DRIC EA and the New Span. *Id.*

either MDOT or the United States Coast Guard,[100] MDOT received court orders against DIBC to remove the offending construction and build the Gateway Project as agreed. But it was only after two civil contempt of court sanctions and fines against DIBC, imprisonment of both CenTra/DIBC owner Mr. Manuel Moroun and DIBC President Mr. Dan Stamper and, finally, transfer of control of the project from DIBC to MDOT (at DIBC's expense) that the Gateway Project was completed in 2012 and the offending New Span and other structures were demolished.[101]

70. DIBC's Gateway Project litigation tactics to avoid compliance with court orders were admonished by both state and federal court judges in Michigan:

> "Considering this Court's more than thirty-three years as a judicial officer, DIBC may be entitled to its recognition as the party who has devised the most creative schemes and maneuvres to delay compliance with a court order."[102]

71. The New Span application in the United States has also been delayed because DIBC does not have the right to build the New Span over top of a public park owned by the City of Detroit.[103] In light of the uncertainty surrounding DIBC's ability to procure from Detroit the land/air rights necessary to construct the New Span, the U.S. Coast

[100] See e.g., Letter from Hala Elgaaly (USCG) to Dan Stamper (DIBC) dated March 20, 2009, **Exhibit R-65** (noting that DIBC's failure to construct the Gateway Project as required "impacts the [New Span] in that traffic passing through the plaza (via the Gateway) will necessarily affect traffic at the bridge since these projects are physically adjacent to one another. As a result, the efficacy of the NEPA analysis contained in the [New Span] EA is in question."); Letter from Andrew Zeigler (MDOT) to Dan Stamper (DIBC) dated May 18, 2009, **Exhibit R-66** (noting that DIBC's construction of an approach ramp pier for the New Span violated the terms of the Gateway Project). As noted in Part IV(E)(1) below, CTC also built approach ramps for the New Span in Canada without authorization.

[101] *Michigan Department of Transportation v. Detroit International Bridge Company et al*, Case No. 09-015581-CK, Opinion and Order, January 10, 2011, **Exhibit R-67**; "MDOT Wins Round Against Bridge Company," Michigan Information & Research Service (MIRS) News, January 10, 2011, **Exhibit R-68**; *Michigan Department of Transportation v. Detroit International Bridge Company et al*, Case No. 09-015581-CK, Opinion and Order, November 3, 2011, **Exhibit R-69**; Statement of Matthew Moroun in response to Judge Edward's Opinion and Order, November 3, 2011, **Exhibit R-70**; *Michigan Department of Transportation v. Detroit International Bridge Company et al*, Case No. 09-015581-CK, Opinion and Order, January 12, 2012, **Exhibit R-71**.

[102] *Michigan Department of Transportation v. Detroit International Bridge Company et al*, Case No. 09-015581-CK, Opinion and Order, January 10, 2011, p. 8, **Exhibit R-67,** quoting Opinion & Order of Remand, *Michigan Department of Transportation v. Detroit International Bridge Company et al*, No. 2:10-CV-13767 (E.D. Mich. Nov. 5, 2010), p. 2, **Exhibit R-72**.

[103] See e.g., Letter from Hala Elgaaly (USCG) to Dan Stamper dated June 15, 2009, **Exhibit R-73**; Letter from Hala Elgaaly (USCG) to Dan Stamper dated March 2, 2010, **Exhibit R-74**.

Guard, which has authority to issue permits to construct new bridges in the United States, returned DIBC's New Span application as incomplete in March 2010.[104]

72. It was against this background that on March 22, 2010, in addition to suing Canada, DIBC commenced the Washington Litigation against the United States Coast Guard and other U.S. federal government authorities alleging, among other things, the Coast Guard wrongfully decided not to process DIBC's New Span application under *NEPA*.[105] The Washington Litigation continues today (discussed at Part III(D)(1) below).

F. DIBC's Opposition to the DRIC Project

73. After Option X12 was dropped from the DRIC environmental assessment in November 2005, DIBC and CTC have vigorously opposed the efforts of Canada, the United States, Ontario and Michigan to move forward with the DRIC project.

74. In addition to this NAFTA arbitration, the DRIC environmental assessment challenge in Canada,[106] the DRIC environmental assessment challenge in the United States,[107] the Washington Litigation,[108] the *CTC v. Canada* Litigation[109] and the Windsor Litigation,[110] DIBC and CTC have also initiated proceedings in Canada challenging the IBTA's applicability to the Ambassador Bridge and New Span,[111] and the constitutional authority of Windsor to apply municipal by-laws to the Ambassador Bridge.[112]

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[104] See e.g., Letter from Hala Elgaaly (USCG) to Dan Stamper dated June 15, 2009, **Exhibit R-73**; Letter from Hala Elgaaly (USCG) to Dan Stamper dated March 2, 2010, **Exhibit R-74**.

[105] See Washington Complaint, **Exhibit R-17**; Washington First Amended Complaint, **Exhibit R-18**; Washington Second Amended Complaint, **Exhibit R-19.**

[106] See Part II(B)(3)(a).

[107] See Part II(B)(3)(b).

[108] See Part III(D)(1).

[109] See Part III(D)(3).

[110] See Part III(D)(4).

[111] *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), Court File No. T-1930-10, November 18, 2010, ¶¶ 10-11, **Exhibit R-46**; *Canadian Transit Company v. Minister of Transport*, Court File No. T-1939-10, December 17, 2010 (FCC) Motion for a Temporary Stay of CTC's Application for Judicial Review with affidavit of Patrick A. Moran, **Exhibit R-45**.

[112] *Hilary Payne & Lawrence Leigh v. Windsor, CTC et al.*, Notice of Constitutional Question (ONSC), March 25, 2011, **Exhibit R-75**.

75. In the United States, DRIC and New Span litigation includes the DRIC environmental assessment challenge,[113] Washington Litigation[114] and the Gateway Project litigation,[115] as well as other recent and related litigations involving DIBC and the Ambassador Bridge (e.g., eviction of DIBC from the public park over which the New Span is proposed to be built; court order and permanent injunction against DIBC for misappropriation of federal status).[116]

76. After Canada and Michigan signed the Crossing Agreement in June 2012, DIBC initiated and financed a multi-million dollar referendum campaign to amend the Michigan constitution so as to require that future construction of the DRIC Bridge be approved by a state-wide referendum before proceeding. DIBC's proposition was rejected by Michigan voters on November 7, 2012.

III. THE TRIBUNAL HAS NO JURISDICTION BECAUSE DIBC HAS FAILED TO COMPLY WITH NAFTA ARTICLE 1121

A. Summary of Canada's Position

77. Undaunted by their unsuccessful challenges to the DRIC EAs in Canada and the United States, DIBC and CTC have re-packaged their allegations under new cover and challenged the same measures concurrently in this NAFTA arbitration, in the United States District Court for the District of Columbia and in the Ontario Superior Court of Justice. These proceedings are with respect to the same measures by Canada and involve overlapping facts, documents, witnesses, allegations and issues of law. Canada has already spent millions of dollars in time and resources defending itself against these vexatious lawsuits.

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[113] See Part II(B)(3).

[114] See Part III(D0(1).

[115] See Part II(E)(2).

[116] See *Ambassador Bridge Company v. City of Detroit*, Case No. 09-026059, Opinion and Order, February 3, 2012 (Mich. Cir. Ct.), **Exhibit R-76**; *Commodities Export Company v. Detroit, United States of America and Detroit International Bridge Company*, Case No. 09-CV-11060-DT, Opinion and Order, June 29, 2010 (E. D. Mich), **Exhibit R-77**; *Commodities Export Company v. Detroit, United States of America and Detroit International Bridge Company*, Case No. 11-1758, September 24, 2012 (6th Cir.), **Exhibit R-78**.

78. The gravamen of each proceeding is the same: DIBC alleges that it has an "exclusive franchise" on toll bridges across the Detroit River and alleges that Canada has violated this right through various measures, including the *International Bridges and Tunnels Act*, the alleged delay of approval for the New Span, the DRIC environmental assessment process to build the DRIC Bridge, and "reneging" on an alleged promise to build a direct Highway 401 link to the Ambassador Bridge.

79. DIBC and CTC's actions violate NAFTA Article 1121, which prohibits a claimant from simultaneously initiating or continuing domestic proceedings with respect to the same measures alleged to breach the NAFTA. This is a fundamental provision upon which Canada's consent to arbitrate under NAFTA Chapter Eleven is based. Despite Canada's multiple letters notifying DIBC that it has not complied with Article 1121 and that Canada does not consent to arbitration,[117] DIBC and CTC continue to flout this condition precedent. DIBC has set up a constantly moving target, amending its NAFTA and domestic pleadings regularly in order to obfuscate their failure to comply with the requirements of Article 1121.

80. As explained below, this Tribunal does not have jurisdiction to hear *any* of DIBC's NAFTA claims because of non-compliance with Article 1121. First, Canada will explain that compliance with Article 1121 is a pre-condition to a NAFTA Party's consent to arbitration. Second, Canada provides an ordinary meaning interpretation of Article 1121 based on the text in its context and in light of the object and purpose of the NAFTA. Third, Canada will explain how DIBC and CTC have violated Article 1121 by initiating and continuing domestic proceedings after the date of their First NAFTA NOA with respect to the measures DIBC alleges to breach the NAFTA.

[117]Letter from Canada to DIBC dated June 6, 2011, **Exhibit R-22**; Letter from Canada to DIBC dated October 3, 2011, **Exhibit R-21**; Letter from Canada to DIBC dated December 28, 2011, **Exhibit R-25**; Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

B. Consent to Arbitration by a NAFTA Party is Conditioned on Compliance with the Waiver Requirement in Article 1121

81. The jurisdiction of this Tribunal, and that of any arbitral tribunal, rests on the consent of the parties before it to arbitrate a particular dispute.[118] Without a party's consent, there "can be no valid arbitration."[119] Under NAFTA Chapter Eleven, the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions have been met. Specifically, Articles 1116 to 1121 of the NAFTA set out the procedures a claimant must follow when submitting a claim to arbitration.[120] These procedures are fundamental to perfecting the Article 1122(1) consent of a NAFTA Party to arbitrate. These requirements cannot be unilaterally ignored or set aside by a claimant.[121]

82. Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," is a prerequisite to the formation of a valid agreement between the disputing investor and the NAFTA Party involved.[122] Article 1121(1) and (2) states:

> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> > (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

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[118] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), at pp. 5-7 ("Redfern & Hunter"), **RLA-30**.

[119] *Ibid*, p. 7.

[120] *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002, (*Methanex*, Partial Award), ¶¶ 120-121, **RLA-3**, ("In order to establish its jurisdiction, a tribunal "must establish that the requirements of Articles 1116-1121 have been met by a claimant...").

[121] *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000, ¶¶ 16-17, **RLA-4** (hereinafter *Waste Management I*); (Article 1122 "serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends."). *International Thunderbird Gaming Corp*. v. *United Mexican States* (UNCITRAL) Final Award, 26 January 2006, ¶ 115, **RLA-5**. ("[o]ne cannot therefore treat lightly the failure by a party to comply with those conditions."). *Commerce Group Corp et al v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, ¶ 115, **RLA-6**. See also *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶ 56, **RLA-7** (referring to CAFTA's equivalent to NAFTA Article 1121 "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected.".

[122] *Waste Management I*, ¶¶ 16-17, **RLA-4**; *Thunderbird,* Final Award, ¶ 115, **RLA-5**.

> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

83. Article 1121(3) states that the "consent and waiver required by this Article shall be in writing, shall be delivered to the disputing party and shall be included in the submission of a claim to arbitration."[123] For cases submitted under the UNCITRAL Rules, NAFTA Article 1137(1)(c) stipulates that a claim is submitted to arbitration when the notice of arbitration is received by the disputing Party. The tribunal in *Waste Management I* noted that the waiver delivered with the notice of arbitration "must be clear, explicit and categorical" and legally effective.[124]

84. Accordingly, a claimant's failure to file a proper waiver with its notice of arbitration or its failure to otherwise act consistently with that waiver means there is no

[123] *Waste Management I*, ¶ 19, **RLA-4**: ("[i]n light of [Article 1121], it is evident that submission of the waiver must take place in conjunction with that of the notice mandated by Article 2 of the Additional Facility Arbitration Rules, and that from this date it will come into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof … [I]t was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.")

[124] *Waste Management I*, ¶ 18, **RLA-4.**

consent to arbitrate and deprives the tribunal of jurisdiction.[125] All three NAFTA Parties have confirmed the same.[126]

85. Moreover, a claimant cannot *ex post facto* cure any Article 1121 jurisdictional defects absent the express consent of the responding NAFTA Party.[127] The consent of a NAFTA Party to arbitration under Article 1122(1) is conditioned on full compliance with the procedures set out in the NAFTA, including every requirement set out in Articles 1116-1121.[128] Canada did not and does not consent to have DIBC or CTC *ex post facto* cure its failure to comply with Article 1121.

C. The Ordinary Meaning of NAFTA Article 1121, Read in its Context and in Light of the Object and Purpose of the NAFTA

86. Article 31(1) of the *Vienna Convention on the Law of Treaties* (the "VCLT") sets out the general rule of treaty interpretation in international law: "A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[129]

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[125] *Waste Management I*, **RLA-4**; *Commerce Group*, **RLA-6**.

[126] See *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, February 4, 2005, ¶ 36, **RLA-8,** (hereinafter *Tembec)*, citing *Waste Management Inc v. United Mexican States*, ICSID Case No ARN(AF)/98/2), Canada's Article 1128 Submission, December 17, 1999, ¶ 8, **RLA-9** and *Waste Management Inc v. United Mexican States*, ICSID Case No ARN(AF)/98/2), Counter-Memorial Regarding the Competence of the Tribunal of the United Mexican States, November 5, 1999. Further support can also be found in jurisprudence under the United States-Central America-Dominican Republic Free Trade Agreement ("CAFTA"). In *Commerce Group v. El Salvador*, the Tribunal interpreted the waiver provision of CAFTA (which is modeled on and is substantively the same as NAFTA Article 1121) to confirm that compliance with the waiver provision requires compliance with the obligation to discontinue domestic proceedings in order to give effect to their waiver. The tribunal wrote: "[i]f the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the […] dispute." *Commerce Group*, ¶¶ 83-84, 102, 115, **RLA-6**.

[127] See *Waste Management I*, ¶ 19, **Exhibit RLA-4**.

[128] *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002, (*Methanex*, Partial Award), ¶¶ 120 and 121, **RLA-3** ("In order to establish its jurisdiction, a tribunal "must establish that the requirements of Articles 1116-1121 have been met by a claimant...").

[129] *Vienna Convention on the Law of Treaties*, 1969, C.T.S. 1980/37; 1155 U.N.T.S. 331; (1969) 63 A.J.I.L. 875, Article 31(1), **RLA-10**. See *Waste Management I*, ¶ 9, **RLA-4**. See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, March 22, 2010, ¶ 18, **RLA-11** ("Just as treaties facilitate cooperate behaviour by stabilizing expectations with respect to reciprocal rights and duties, the rules of interpretation of treaties are designed to ensure that those stabilized expectations are respected.").

1. The Ordinary Meaning of Article 1121(1)(b) and (2)(b)

87. Interpreting Article 1121 in accordance with its ordinary meaning can be described succinctly as follows: a claimant and its enterprise must file a valid waiver with its NAFTA Notice of Arbitration and must not, as of that date, initiate or continue any domestic proceedings in Canada, the United States or Mexico, or other dispute settlement procedures, "with respect to" the measures alleged to be in breach of NAFTA Chapter Eleven. The only exception to this rule is that a claimant may seek injunctive, declaratory or other extraordinary relief but only if those proceedings are in the domestic courts of the respondent State in the NAFTA arbitration and only if the proceedings are "not involving the payment of damages."

88. As applied to this NAFTA arbitration, DIBC and CTC were required to file a valid waiver on April 29, 2011 and, as of that date, discontinue any existing domestic proceedings and refrain from initiating new proceedings against Canada in Canadian, U.S. or Mexican courts "with respect to" any of the "measures" alleged to be in violation of NAFTA Chapter Eleven. The only exception to this is to allow DIBC and CTC to seek injunctive, declaratory or other extraordinary relief *in Canada* - not in the United States or Mexico - and only if those proceedings are "not involving the payment of damages."

89. This ordinary meaning interpretation is derived from the constituent elements of the text in Articles 1121(1)(b) and (2)(b) described below.

90. "***waive their right to initiate or continue***": Generally, where there is a legal basis to do so, a claimant typically has a right to initiate or continue domestic proceedings against a respondent State. The act of waiver is a unilateral abdication of this right[130] requiring a claimant to "refrain from insisting on or using" the right.[131] "Initiate or

[130] *Waste Management I*, ¶ 18, **RLA-4** ("The act of waiver *per se* is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.")

[131] Shorter Oxford English Dictionary, definition of "waive", at p. 3569, **Exhibit R-80**.

continue" means as of the date the waiver is submitted, a claimant must have discontinued any outstanding proceedings and may not initiate any new proceedings.

91. ***"before any administrative tribunal or court under the law of any Party"***: The word "Party" in Article 1121 refers to all three NAFTA Parties (Canada, the United States and Mexico). The terms "administrative tribunal or court" capture adjudicative bodies operating under the domestic law of the NAFTA Parties.[132] As such, interpreted in its ordinary meaning, the claimant (including its enterprise) is precluded from initiating or continuing any proceeding with respect to measure alleged to breach the NAFTA before an adjudicative body in Canada, the United States or Mexico.[133]

92. ***"any proceedings with respect to the measure that is alleged to be a breach referred to in Article 1116/1117"***: The term "proceedings" is not defined in the NAFTA, however the term is defined in Black's Law Dictionary to mean "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."[134]

93. "Measure" is defined in Article 201 (Definitions of General Application) of the NAFTA to include "any law, regulation, procedure, requirement or practice." The relevant measures for the purposes of Article 1121 are the measures "alleged to be a breach referred to in Article [1116/1117]."

94. The plain meaning of the term "with respect to" is "as regards; with reference to,"[135] and is thus broad.[136] The NAFTA tribunal in *Waste Management I* discussed the term "with respect to the measure" in the context of Article 1121, stating that:

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[132] Articles 1121(1)(b) and (2)(b) also refer to "other dispute settlement procedures", for example, other international proceedings.

[133] *Waste Management*, ¶ 28, **RLA-4** (emphasis added). As the Tribunal in *Waste Management* indicated, the wording of Article 1121 "clearly sets forth the spirit of intent of said waiver, which expressly proscribes the initiation or continuation of proceedings under the law of either party with respect to a measure allegedly breaching the provisions referred to in Article 1116 of the NAFTA."

[134] Black's Law Dictionary, at p. 1241, **Exhibit R-81**.

[135] Oxford Dictionary- Online, **Exhibit R-82**.

[136] *Canfor Corporation v. United States of America and Terminal Forest Products Ltd v. United States of*

> [f]or the purposes of considering a waiver valid when that waiver is a condition precedent to arbitration, it is not imperative to know the merits of the question submitted for arbitration, *but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA.*[137]

95. A domestic proceeding "with respect to" a measure that is alleged to breach the NAFTA is thus one that is "in regards to or with reference to" that measure in a way that might "directly affect" the NAFTA arbitration. This could mean, for example, a domestic proceeding that requires for its disposition making determinations of facts or determinations of legal rights, or that might award compensation, "in regards to or with reference to" a measure that is alleged to breach the NAFTA.

96. ***"except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages"****:* The only exception to the rule that domestic proceedings be discontinued with respect to the measures alleged to breach NAFTA is the right of the claimant to initiate or continue a domestic proceeding within the respondent NAFTA Party's territory as long as that proceeding is for "injunctive, declaratory or other extraordinary relief" but is "not involving the payment of damages."

97. A "proceeding for injunctive" relief refers to proceedings (as defined above) seeking a court order commanding or preventing an action.[138] Injunctions are sought to prevent irreparable injury and are granted in situations where the irreparable harm would not be compensable in damages if the injunction was denied. A "proceeding for declaratory" relief is a proceeding in which a litigant requests a court's assistance to establish the rights of parties without providing for or ordering enforcement.[139] Finally, a "proceeding for "other extraordinary" relief is a proceeding which seeks a remedy not

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America (UNCITRAL) Decision on Preliminary Question, June 6, 2006, ¶ 201, **RLA-12**.

[137] *Waste Management,* § 27, **RLA-4**.

[138] Black's law dictionary – definition of "injunction", at p. 800, **Exhibit R-83**.

[139] Black's law dictionary – definition of "declaratory judgment", at p. 859, **Exhibit R-84**.

available to a party "unless necessary to preserve a right that cannot be protected by a standard legal or equitable remedy."[140] Examples include *mandamus* and *habeas corpus*.

98. An example of a proceeding for "injunctive, declaratory or other extraordinary relief" could thus be a judicial review of a government decision, such as the environmental assessment judicial review launched by CTC with regards to the DRIC EA in the Federal Court of Canada.[141]

99. Such proceedings must not, however, be "involving the payment of damages." The term "damages" refers to "money claimed by, or ordered to be paid to, a person as compensation for loss or injury."[142] Proceedings that "involve" the payment of damages are those that include a request for monetary compensation, whether directly or indirectly. As a consequence, the claimant must not seek in any proceeding "for injunctive, declaratory or other extraordinary relief" payment for compensation either explicitly or in an alternative scenario, for example, in an eventuality or predicate scenario.

100. ***"before an administrative tribunal or court under the law of the disputing Party"***: The exception to the rule that permits a claimant to initiate or continue proceedings for "injunctive, declaratory, or other extraordinary relief" applies only to proceedings initiated or continued "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]." The term "disputing Party" was deliberately chosen by the NAFTA Parties, as was the deliberate choice to use the term "any Party" earlier in Articles 1121(1)(b) and (2)(b). The NAFTA Parties thus intended to limit the injunctive and declaratory relief exception to the jurisdiction of the respondent State. It follows that a claimant cannot initiate or continue *any* proceeding with "respect to the measure" outside of the jurisdiction of the respondent State, even if that proceeding is only for injunctive, declaratory or other extraordinary relief.

[140] Black's law dictionary – definition of "extraordinary remedy", at p. 1320, **Exhibit R-85**.

[141] EA JR (Can.), **Exhibit R-9**.

[142] Black's law dictionary – definition of "damages", at p. 416, **Exhibit R-86**.

101. The ordinary meaning of Article 1121(1)(b) and (2)(b) was confirmed by Mexico in its NAFTA Article 1128 non-disputing Party submission in the *Loewen* arbitration:

> [T]he concluding words of [Article 1121(1)(b) and 2(b)] permit a particular set of proceedings to continue as an exception to the non-initiation or discontinuance of proceedings […]. A would-be NAFTA claimant could initiate or continue before an administrative tribunal or court *of the disputing Party only*, proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages."[143]

102. Injunctive, declaratory or other extraordinary relief may thus only be sought before courts of the respondent State and only if that proceeding "is not involving the payment of damages."

2. The Terms of Article 1121 Must be Interpreted in Their Context and in Light of the Object and Purpose of the NAFTA

103. Article 31 of the *Vienna Convention on the Law of Treaties* requires that the terms of a treaty be interpreted "in their context and in light of its object and purpose."[144]

104. One of the objectives of NAFTA is to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes."[145] The dispute settlement procedures under Section B of NAFTA Chapter Eleven reflect the goal of effectiveness in the resolution of disputes.

105. Article 1121 meets this objective because it requires a claimant to commit to arbitration once it has submitted a claim to arbitration. Without this waiver provision, a claimant could initiate a proceeding before an international tribunal alleging a breach of

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[143] *Loewen Group Inc. et al v. United States of America*, ICSID Case No. ARB(AF)/98/3), Article 1128 submission of Mexico, October 16, 2000, ¶ 7, **RLA-13** (emphasis in original). In its submission, Mexico noted that Loewen, the Canadian claimant in that case, while bringing a claim against the United States under the NAFTA, "could *not* initiate or continue proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages in an administrative tribunal or court *other* than the administrative tribunals and domestic courts of the United States." Further, "it could not initiate or continue proceedings for damages in the domestic courts of the United States." *Id*., ¶ 10.

[144] VCLT, **Exhibit RLA-10**.

[145] NAFTA Article 102(1) ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, […], are to: (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes."

the NAFTA *and* initiate parallel proceedings before one or more domestic courts with respect to the same measures. In this situation, the possibility of duplicative proceedings would be a reality, presenting the real risk of inconsistent decisions or overcompensation. This is not only a waste of resources but undermines the rule of law and integrity of the arbitration process. The tribunal in *International Thunderbird*, NAFTA Article 1121 confirmed:

> The consent and waiver requirement set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.[146]

106. In response to Canada's Brief Statement, DIBC suggests that the sole object and purpose of Article 1121 is to prevent double recovery of damages and thus argue that duplicative proceedings may proceed simultaneously so long as there is no risk of double recovery.[147] DIBC is mistaken. While the prevention of double recovery is one aspect of creating effective procedures, allowing duplicative proceedings that involve the same measures and that could result in conflicting outcomes, is not. As the tribunal in *Consolidated Lumber* pointed out, "the drafters of the NAFTA sought to avoid concurrent and parallel proceedings" and pointed specifically to Article 1121 as proof that overlapping proceedings "are to be avoided."[148] Other NAFTA tribunals have said the same.[149]

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[146] See *Thunderbird*, ¶ 118, **RLA-5**. The Tribunal in *Methanex* also explained the purpose behind Article 1121 is to prevent concurrent or parallel proceedings on the same measures which could give rise to conflicting outcomes or double redress for the same measure, *Methanex*, ¶ 75, **RLA-3**. See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, March 22, 2010, ¶ 28, **RLA-11** (waiver provisions "prevent claimants from exploiting legal process to harass another party by seeking to litigate the same measures or actions through multiple instances.").

[147] DIBC's Response, ¶ 36 ("eliminates any possibility that a claimant will obtain double recovery."); DIBC's Response, ¶ 48. ("[i]n light of the purpose behind Article 1121, it is noteworthy that the Washington Litigation does not create any risk of double recovery, as DIBC is *only* seeking injunctive and declaratory relief in that case".).

[148] *Consolidated Lumber* Decision on the Preliminary Question, June 6, 2006, ¶¶ 237, 242, **RLA-12**.

[149] See *Waste Management I*, **RLA-4** (double compensation "would not have been the only cost, for even if the respondent state had evaded that consequence, it would still have had to bear the considerable costs involved in defending itself twice for the same matter."); *International Thunderbird*, ¶ 118 **RLA-5** (Article

107. Accordingly, as Canada has written previously in its NAFTA Article 1128 non-disputing Party submission in *Waste Management I*: "The same measures therefore cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor has a clear choice and can choose one or the other – but not both."[150]

D. DIBC and CTC have Failed to Comply with NAFTA Article 1121 Because They Initiated and Continued Domestic Proceedings in Canada and the United States With Respect to Measures Alleged to Breach the NAFTA

108. DIBC filed its First NAFTA NOA, accompanied by a waiver signed by DIBC and CTC, on April 29, 2011. As of that date they were both required to have discontinued any existing proceedings in Canada, the United States or Mexico and refrain from initiating any new proceedings with respect to any measure by Canada alleged to breach the NAFTA.[151] DIBC and CTC did neither. To the contrary, they not only continued existing domestic lawsuits against Canada (Washington Litigation and Windsor Litigation) but also initiated new proceedings (*CTC v. Canada* Litigation). Despite numerous letters from Canada to DIBC notifying it of its failure to comply with NAFTA Article 1121,[152] all three proceedings continue to this day.[153]

1121 intended to prevent "conflicting outcomes (and thus legal uncertainty).")

[150] *Waste Management I*, Submission of the Government of Canada Article 1128, December 17, 1999, ¶ 4, **RLA-9**. See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, March 22, 2010, ¶ 28, **RLA-11** (waiver provisions "prevent claimants from exploiting legal process to harass another party by seeking to litigate the same measures or actions through multiple instances."); *Loewen Group Inc. et al v. United States of America*, ICSID Case No. ARB(AF)/98/3), Article 1128 submission of Mexico, October 16, 2000, ¶ 6, **RLA-13**.

[151] See *Waste Management I*, ¶ 19, **Exhibit RLA-4** ("Waste Management submitted notice of request for arbitration to the Secretary-General of ICSID on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.").

[152] Letter from Canada to DIBC dated June 6, 2011, **Exhibit R-22**; Letter from Canada to DIBC dated October 3, 2011, **Exhibit R-21**; Letter from Canada to DIBC dated December 28, 2011, **Exhibit R-25**; Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

[153] For example, two weeks ago, DIBC amended its complaint against Canada and the United States defendants in the Washington Litigation for the *third time*.

109. The challenged measures in both the NAFTA arbitration and domestic proceedings fall within three intertwined and overlapping categories which, for the sake of convenience, can be categorized as the Highway 401 Measures, Franchise Measures and New Span Measures.[154]

1. DIBC'S Continuation of the Washington Litigation Contravenes NAFTA Article 1121

a) DIBC Continued the Washington Litigation Beyond the Submission of its Claim to Arbitration

110. On March 22, 2010, both DIBC and CTC 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 various U.S. government agencies.[155]

111. On April 29, 2011, DIBC filed its First NAFTA NOA. But rather than having discontinued the Washington Litigation as of that date as required under Article 1121 in order to perfect Canada's consent to arbitration in Article 1122(1), DIBC submitted a defective waiver on behalf of itself and CTC specifically carving out Washington Litigation. Just over one month later, it amended the Washington Complaint on June 6, 2011 to expand on the existing allegations against Canada ("Washington First Amended Complaint").[156] Canada wrote to DIBC advising it of its failure to comply with Article 1121,[157] but received no reply.

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[154] As noted above, Canada the challenged measures are intrinsically linked and substantially overlap with each other. For example, DIBC alleges that the *IBTA* and *BSTA* are measures violating both its exclusive franchise and its right to build the New Span (see NAFTA Statement of Claim ¶¶ 180, 184; Second Amended Complaint ¶¶ 126, 248). DIBC also alleges that Canada's actions to build the Windsor-Essex Parkway between Highway 401 and the DRIC Bridge but not to the Ambassador Bridge is also a measure intended to prevent the construction of the New Span (see NAFTA Statement of Claim ¶ 201; Second Amended Complaint ¶ 244).

[155] **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.

[156] **Exhibit R-18**. See p. 68 § 3 ("Against Canada, damages in an amount to be determined at trial.").

[157] Letter from Canada to DIBC dated October 3, 2011, **Exhibit R-21**.

112. Canada filed extensive 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.[158] 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.[159] As discussed in Part (II)(E) above, DIBC continued the Washington Litigation against the U.S. Coast Guard with respect to the New Span.

113. On November 9, 2012, only one week after Canada wrote to this Tribunal informing it of Canada's long-standing objections to DIBC's First NAFTA NOA and First NAFTA Waiver,[160] DIBC filed a new motion in the D.D.C. seeking to re-join Canada to the Washington Litigation.[161] The new complaint ("Washington Second Amended Complaint") maintains and expands upon all of DIBC's previous claims with respect to the measures in the NAFTA arbitration, but purports to seek only injunctive and declaratory relief against Canada.[162] On February 15, 2013, DIBC formally filed with the D.D.C. its Second Amended Complaint against Canada in the Washington Litigation.

114. On January 15, 2013, DIBC filed its Amended NAFTA NOA expanding on the allegations made in its First NAFTA NOA and included a Second NAFTA Waiver, which also expressly carved-out the Washington Litigation (discussed below). DIBC

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[158] *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**.

[159] *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**.

[160] See Canada's letter and attachments to the Tribunal dated November 2, 2012.

[161] *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.

[162] Washington Second Amended Complaint, at pp. 90-91, **Exhibit R-19**.

maintained and further expanded on these allegations in its NAFTA Statement of Claim filed on January 31, 2013.

b) DIBC and CTC Refused to "Waive their Right to Initiate or Continue" the Washington Litigation

115. Pursuant to Article 1121, on the date DIBC filed its Notice of Arbitration, DIBC and CTC were required to consent to arbitration "in accordance with the procedures set out in" the NAFTA and to "waive their right to initiate or continue…any proceeding with respect to the measure of the disputing Party that is alleged to be a breach referred to in [Article 1116/1117]."

116. DIBC filed its First NAFTA NOA on April 29, 2011. While the First NAFTA Waiver was attached to that submission, DIBC and CTC expressly carved-out from Article 1121 the Washington Litigation so as to protect their ability to continue proceedings against Canada in front of the D.D.C.:

> [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 entitled *DIBC v. Canada* in the United States District Court.

117. On January 15, 2013, DIBC and CTC filed their Second NAFTA Waiver with the Amended NAFTA NOA, and again expressly carved-out the Washington Litigation:

> [T]his waiver does not and shall not be construed to extend to or include any of (1) the claims included in the action titled DIBC v. Coast Guard et al. in the United States District Court for the District of Columbia (including all claims contained in the Second Amended Complain plaintiffs are currently seeking to file in that action)…[163]

118. DIBC and CTC have thus refused to waive their right to continue the Washington Litigation pursuant to Article 1121. DIBC argues that they were not required to waive this right because the Washington Litigation relates to "different measures" than in the NAFTA arbitration.[164] As will be seen below, this is not the case.

[163] Amended NOA Waiver.

[164] DIBC's Response, ¶ 45.

119. Moreover, in addition to these deficiencies, DIBC also refused in their Second NAFTA Waiver to waive their right to initiate any *new* proceedings against Canada for injunctive, declaratory or other extraordinary relief in the United States or Mexico:

> "Consistent with NAFTA's waiver requirements, the only exception from this waiver is for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages."

120. But DIBC's waiver language is not "consistent with NAFTA's waiver requirements" because it intentionally deletes critical text from Articles 1121(1)(b) and 2(b): "before an administrative tribunal or court under the law of the disputing Party." Even DIBC's First NAFTA Waiver did not remove this essential text:

> "…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*."

121. DIBC's omission of these words in the Second NAFTA Waiver is a blatant attempt to subvert the waiver requirements. Not only do DIBC and CTC refuse to carve-out the Washington Litigation, they also now refuse to waive their right to initiate *any* new proceedings outside of Canada for injunctive, declaratory or other extraordinary relief. DIBC's Second NAFTA Waiver is defective on its face and in contravention of NAFTA Article 1121.

c) The Washington Litigation is a "Proceeding with Respect to the Measure" that is Alleged to Breach the NAFTA

122. The Washington Litigation is a proceeding with respect to Canada's measures that DIBC alleges breach the NAFTA. All of the facts, witnesses, documents and other evidence relevant to substantiate the allegations in DIBC's NAFTA Statement of Claim are relevant for substantiating DIBC's allegations in the Washington Litigation. The fact that the pleadings in both proceedings contain largely word-for-word duplication and also rely on most of the same key documents cannot be explained away.

123. DIBC attempts to re-characterize the Washington Litigation as a proceeding that challenges "different measures." Without providing any specificity, DIBC vaguely states that "DIBC's claim in this [NAFTA] arbitration arises out of Canada's measures in

Canada, and DIBC's claims in the Washington Litigation arise out of Canada's measures in the United States."[165]

124. Yet, DIBC's pleadings in the Washington Litigation state the exact opposite, seeking remedy for "acts *outside the territory of the United States* in connection with a commercial activity of Canada *within the territory of Canada*."[166] For example, DIBC sought damages and a declaration in the Washington Litigation "in respect of the Government of Canada's actions in enacting the IBTA and seeking to apply it to CTC."[167] Canada's enactment of the IBTA (a Canadian statute) and its application to CTC (a Canadian company) is undoubtedly a measure "within Canada." DIBC's re-invention of the Washington Litigation as involving only measures "in the United States" is contradicted by their own pleadings.

125. As set out below, the Washington Litigation is a proceeding with respect to the same measures that DIBC alleges breach NAFTA Chapter Eleven.

(1) Highway 401 Measures

126. As explained in Canada's Brief Statement,[168] DIBC alleges in both the NAFTA arbitration and the Washington Litigation that Canada reneged on a promise to spend $300 million to connect the Ambassador Bridge with Ontario Highway 401[169] and manipulated the DRIC EA to ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge.[170]

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[165] DIBC's Response, ¶ 47.

[166] Washington Second Amended Complaint, ¶ 37, **Exhibit R-19**; Washington Complaint, ¶ 21, **Exhibit R-17**; Washington First Amended Complaint, ¶ 28, **Exhibit R-18**.

[167] Washington Complaint, ¶¶ 160-163, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 235-237, **Exhibit R-18**; Washington Second Amended Complaint, ¶¶ 126, 282-304, **Exhibit R-19**.

[168] Canada's Brief Statement, ¶¶ 66-72.

[169] 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.

[170] 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, ¶¶ 83-84; NAFTA Statement of Claim, ¶¶ 119-120, 133, 197-204; First NAFTA NOA, ¶ 35.

127. Large swaths of duplicative text in the two proceedings relate to these allegations. For example, in the NAFTA arbitration DIBC alleges that Canada promised to spend $300 million to improve highway connections to the Ambassador Bridge,[171] that in reliance on that promise DIBC invested hundreds of millions of dollars into improvements to the Ambassador Bridge,[172] and that Canada reneged on its commitment.[173]

128. The same allegations exist in the Washington Litigation:

> "Canada also promised to spend C$300 million on improving access of the Ambassador Bridge to Ontario Highway 401, creating an end-to-end solution giving the Ambassador Bridge direct highway access on both sides of the border. In reliance on these promises, plaintiff have invested over US$250 million into improvements to the Ambassador Bridge designed to take advantage of the promised improvements. But Canada then refused to spend the money that it had promised for improving the highway an access route to the Ambassador Bridge.[174]

129. Furthermore, in the NAFTA arbitration DIBC argues that "Canada has discriminated and continues to discriminate against DIBC, a U.S. investor, in favour of Canada's own investment in the planned NITC/DRIC Bridge."[175] In support of this allegation, DIBC argues:

> Canada has taken deliberate steps to divert traffic from the Ambassador Bridge to the Canadian NITC/DRIC, all without any legitimate or non-discriminatory justification. … [Canada] has designed and commenced construction on a new highway (the "Windsor-Essex Parkway") that will replace the old road to within approximately 3.4 kilometers (2.1 miles) of the foot of the Ambassador Bridge. But after being built to within just 2 miles short of the American-owned Ambassador Bridge, the new highway was diverted west to connect only to the proposed site of the new (but non-existent) Canadian NITC/DRIC.[176]

[171] NAFTA Statement of Claim, ¶ 95.

[172] NAFTA Statement of Claim, ¶ 102.

[173] NAFTA Statement of Claim, ¶ 190.

[174] Washington Complaint, ¶¶ 8-10, 79-81, **Exhibit R-17**; Washington First Amended Complaint, ¶ 118-120, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 131-133, **Exhibit R-19**.

[175] NAFTA Statement of Claim, ¶¶ 210-212.

[176] NAFTA Statement of Claim, ¶ 12.

130. DIBC makes the same allegation in the Washington Litigation, arguing that Canada's discrimination against DIBC "can be found in Canada's development of a highway connection between the location of the proposed NITC/DRIC…and its refusal to build similar highway connections to the Ambassador Bridge."[177] DIBC pleads:

> Canada deliberately stopped improving the connections just two kilometers short of the Ambassador Bridge, choosing instead to develop and improve its roads in a way that veered off the route to the Ambassador Bridge, towards the proposed site of the NITC/DRIC. Thus, the end result is that the Windsor-Essex Parkway is approximately 11 kilometers long in total; over this total length, approximately 9 kilometers cover the route between Highway 401 and the Ambassador Bridge. The final two kilometers to the Ambassador Bridge were then deliberately left undeveloped, even while the remainder of the Parkway was built in a different direction, away from the existing Ambassador Bridge, toward the site of the unauthorized NITC/DRIC. Again, the only reason for Canada's refusal to develop the Windsor-Essex Parkway in a manner that covered the *entire* connection between Highway 401 and the Ambassador Bridge was its desire to undermine the American-owned Ambassador Bridge. There is no other rational explanation.[178]

131. Putting aside the falsity of these allegations, the overlap in the NAFTA arbitration and Washington Litigation is obvious.

132. DIBC argues that the overlap is permissible under NAFTA Article 1121 because in the Washington Litigation the overlap is merely "context."[179] Yet, in the Washington Litigation DIBC and CTC seek a declaration that Canada "not discriminate in favour of the NITC/DRIC over the New Span" and incorporates by reference into that request the above allegations.[180] They also request a declaration that Canada's construction of the DRIC Bridge, of which the corresponding Highway 401 Parkway is a component, "constitute[s] a taking of plaintiffs' private property rights without payment of just compensation, in violation of…international law."[181]

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[177] Washington Second Amended Complaint, ¶ 240, **Exhibit R-19**.

[178] Washington Second Amended Complaint, ¶ 243, **Exhibit R-19** (emphasis in original).

[179] DIBC's Response, ¶ 47.

[180] Washington Second Amended Complaint , ¶ 303, **Exhibit R-19**.

[181] Washington Second Amended Complaint , ¶ 317, **Exhibit R-19**.

133. Moreover, an allegation that Canada has "discriminated" against DIBC cannot be construed as "context." Indeed, should the Washington Litigation proceed, Canada would have to defend itself against these allegations, just as it would in the NAFTA arbitration. Furthermore, in order to determine that Canada must not discriminate against the Ambassador Bridge, the D.D.C. would have to determine that Canada's Highway 401 measures are in fact discriminatory. That both proceedings overlap in this regard raises the spectre of conflicting outcomes and legal uncertainty.

(2) Franchise Measures

134. As explained in Canada's Brief Statement,[182] DIBC alleges in both the NAFTA arbitration and the Washington Litigation that it has rights arising out of domestic legislation and of a "special agreement" made between Canada and the United States under the *Boundary Waters Treaty*. For example, the following identical assertion of legal rights appear in both proceedings:

> "The franchise granted to DIBC and CTC to construct, maintain, and operate the Ambassador Bridge between Detroit and Windsor was created by concurrent and reciprocal legislation enacted by the United States Congress and the Canadian Parliament in 1921, expressly identifying DIBC's predecessor company and CTC as the sole entities receiving the franchise. That legislation constituted a "special agreement" between the United States and Canada under the 1909 Boundary Waters Treaty."[183]

135. In both proceedings DIBC thus alleges that Canada has granted DIBC/CTC the exclusive legal right to own, operate and construct a new bridge in the Detroit-Windsor corridor and argue in both proceedings that Canada has violated this exclusive franchise right. For example, DIBC argues that Canada enacted the IBTA in order to "give Canada the purported authority to interfere with Ambassador Bridge's expansion plans including the Ambassador Bridge New Span, to interfere with Claimant's rights to operate the bridge under the Special Agreement, and to promote Canada's long-term goal of limiting

[182] Canada's Brief Statement, ¶¶ 66-72.

[183] Washington Second Amended Complaint, ¶ 4. See also NAFTA Statement of Claim, ¶ 64.

the value of Claimant's rights in order to coerce DIBC and CTC to transfer their rights in the Ambassador Bridge only to Canada on Canada's terms."[184]

136. DIBC argued in its Response that the IBTA is not at issue in the Washington Litigation because that proceeding is "limited to claims arising out of Canada's acts in the United States."[185] This is not only self-serving, but conflicts directly with what DIBC's General Counsel (and signatory to both NAFTA waivers) Mr. Patrick Moran swore in an affidavit submitted to the Federal Court of Canada in an action challenging a 2010 order issued by Canada to CTC under the IBTA to cease and desist from unauthorized construction of the New Span.[186] In that affidavit, Mr. Moran describes the IBTA claim in the Washington Litigation as follows:

> *[T]he issue of the applicability of the IBTA to the operations of CTC and its affiliates is also squarely at issue in the D.C. action* [Washington Litigation]. In particular, CTC and DIBC seek the following relief with specific regard to the applicability of the IBTA:
>
> > (a) damages and declaratory and injunctive relief against the Government of Canada and others for violation of statutory and treaty rights under the Special Agreement to operate and maintain, and set and collect tolls on, the Ambassador Bridge in perpetuity, including the right to construct the new span [First claim];
> >
> > (b) damages and declaratory and injunctive relief against the Government of Canada and others for violation of statutory and treaty rights under the Special Agreement and the Boundary Waters Act by seeking to apply the IBTA so as to limit the rights that CTC and DIBC enjoy by the terms of the Special Agreement, including (i) the right to set and collect tolls on the Ambassador Bridge, (ii) the right to transfer their property or change their corporate ownership, (iii) the right to perform necessary and appropriate maintenance on the Ambassador Bridge [Third Claim]; and
> >
> > (c) damages and declaratory and injunctive relief against the Government of Canada in respect of the Government of Canada's actions in enacting

[184] Washington Second Amended Complaint, ¶ 126, **Exhibit R-19**; Washington Complaint, ¶ 133, **Exhibit R-17**; Washington First Amended Complaint, ¶ 113, **Exhibit R-18**; NAFTA Statement of Claim, ¶ 180.

[185] DIBC's Response, ¶¶ 43-44.

[186] *Canadian Transit Company v. Minister of Transport*, Court File No. T-1939-10, December 17, 2010 (FCC) Motion for a Temporary Stay of CTC's Application for Judicial Review with affidavit of Patrick A. Moran, **Exhibit R-45**.

> the IBTA and seeking to apply it to CTC and DIBC in violation of the 1990 Settlement Agreement [Sixth Claim].[187]

137. In addition to the IBTA, DIBC also alleges in the NAFTA arbitration and the Washington Litigation that Canada's decision to build the DRIC Bridge through the DRIC EA process also violates their exclusive franchise rights. For example, in the NAFTA litigation they argue that Canada's "commitment to construct a heavily-subsidized, competing bridge" is "discriminatory conduct [that] directly infringes on DIBC's exclusive franchise rights."[188] Similarly, in the Washington Litigation, DIBC requested "damages against Canada" because the acts of Canada:

> "to construct the DRIC Bridge across the Detroit River within two miles of the Ambassador Bridge, without legitimate need, for the purpose of destroying the economic value of DIBC's and CTC's rights, is a violation of DIBC's and CTC's rights under the U.S. and Canadian legislation constituting the Special Agreement and the Boundary Waters Treaty."[189]

138. If the NAFTA proceeding and Washington Litigation were permitted to continue in tandem, both this Tribunal and the D.D.C. would have to consider whether DIBC has an exclusive franchise right under the *Boundary Waters Treaty* and/or domestic legislation, as well as whether that right has been violated by Canada's allegedly discriminatory conduct by, among other things, enacting the IBTA, building the DRIC Bridge and its Highway 401 connection. The duplicative examination of facts, documents and witness is not only a waste of resources, but the distinct possibility of conflicting outcomes on these critical issues illustrates precisely why the requirements embedded in NAFTA Article 1121 are so important.

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[187] *Canadian Transit Company v. Minister of Transport*, Court File No. T-1939-10, December 17, 2010 (FCC) Motion for a Temporary Stay of CTC's Application for Judicial Review with affidavit of Patrick A. Moran, ¶ 30, **Exhibit R-45**.

[188] NAFTA Statement of Claim, ¶¶ 6-8.

[189] Washington Complaint, ¶¶ 153, 155, **Exhibit R-17**.

(3) New Span Measures

139. As explained in Canada's Brief Statement, DIBC argues in both the NAFTA arbitration and the Washington Litigation that Canada is delaying approval of the New Span and accelerating approval of the DRIC Bridge through the *BSTA*.[190]

140. In the NAFTA arbitration, DIBC argues that Canada is preventing it from building the New Span, with the alleged goal of forcing DIBC to sell the Ambassador Bridge for less than its fair market value.[191] Furthermore, DIBC argues that the *BSTA* is also a measure intended to prevent DIBC from exercising their right to build the New Span, and to ensure that the DRIC Bridge is built first.[192]

141. These measures are identical to the measures alleged to be discriminatory in the Washington Litigation, where they allege that:

> "[Canada] has also violated plaintiffs' franchise rights by thwarting plaintiffs' ability to exercise their right to build the New Span, and by attempting to accelerate the approvals of the NITC/DRIC to prevent plaintiffs from exercising their right to build the New Span.[193]

142. As an example of Canada's efforts to delay the New Span and accelerate the DRIC Bridge, DIBC cites the *BSTA*,[194] exactly as they do in the NAFTA arbitration.[195] For this reason, DIBC seeks a declaration in the Washington Litigation that Canada may not "accelerate the regulatory approvals of the NITC/DRIC and/or delay the regulatory approvals of the New Span."[196]

143. DIBC's allegations relating to the New Span shows the fallacy of its contention that the Washington Litigation is only about Canada's acts in the United States: Canada is

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[190] Canada's Brief Statement, ¶¶ 66-72. DIBC also alleges that the *BSTA* also violates DIBC's exclusive franchise rights. See Statement of Claim ,¶184; Second Amended Complaint ¶ 248.

[191] NAFTA Statement of Claim ¶ 8.

[192] NAFTA Statement of Claim ¶¶ 182-184.

[193] Washington Second Amended Complaint, ¶¶ 11-12, **Exhibit R-19** (emphasis added).

[194] Washington Second Amended Complaint, ¶¶ 12, 246-248, **Exhibit R-19**.

[195] NAFTA Statement of Claim ¶¶ 182-184.

[196] Washington Second Amended Complaint, ¶¶ 12, 246-248, **Exhibit R-19**.

incapable of allegedly accelerating approvals for the DRIC Bridge and/or delaying approval for the New Span anywhere else other than in Canada.

d) DIBC's Document Requests in the Washington Litigation

144. If the Tribunal requires any further confirmation that the measures at issue in the Washington Litigation are the same as those in this NAFT A arbitration, it need only look to DIBC and CTC's document requests filed against Canada in the Washington Litigation.[197] These document requests encompass all documents in Canada's possession relating the same measures at issue in this NAFTA arbitration. For example, DIBC has sought from Canada all documents in its possession, custody or control relating to:

- The evaluation, planning and financing of the DRIC Bridge and the Parkway (Requests #1-4, 8, 16);
- Ambassador Bridge New Span and Canada's environmental assessment thereof (Request #10-12);
- Highway 401 road connections to the Ambassador Bridge and the Parkway (defined therein as the "DRIC Parkway") (Request #14-15, 18);
- the CTC Act and "special agreement" under the *Boundary Waters Treaty* (Request #17);
- improvement of road connections to the Blue Water Bridge (Request #19); and
- the *International Bridges and Tunnels Act* (Request #20).

145. The final document request #24 in the Washington Litigation was the sweeping "[t]o 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." DIBC and CTC made almost identical document requests as against the United States, including Canadian documents.[198]

[197] 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**.

[198] 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**.

146. DIBC's contention that this NAFTA arbitration and the Washington Litigation are not with respect to the same measures is undermined by its own document requests.

2. It Is Irrelevant Whether or Not DIBC is seeking the "Payment of Damages" in the Washington Litigation

147. In DIBC's Response, DIBC argued that the allegations made in the Washington Litigation are permissible under NAFTA Article 1121 because they "are *not* seeking monetary damages in the Washington Litigation."[199] However, whether or not DIBC is seeking monetary damages in the Washington Litigation is immaterial to their violation of NAFTA Article 1121.

148. As discussed in Part III(C)(1) above, Article 1121(1)(b) and (2)(b) contains a limited exception for injunctive and declaratory proceedings brought against Canada *in Canada*, as long as those proceedings are "not involving the payment of damages." The Washington Litigation is not a proceeding in Canada but is in front of the D.D.C. in the United States. The limited exception therefore does not apply, so the issue of whether the Washington Litigation is involving the payment of damages is immaterial given their clear violation of the requirements of Article 1121.

149. In any event, the suggestion that DIBC and CTC are not seeking the payment of damages in the Washington Litigation is false. The Washington Complaint and First Amended Complaint in the Washington Litigation explicitly sought damages against Canada.[200] This alone establishes a violation of NAFTA Article 1121. Even DIBC's belated attempt to fix this defect by purporting to seek only declaratory and injunctive relief against Canada and saying now that they are not seeking damages is sophistry.[201] DIBC still seeks in its Second Amended Complaint:

> "A declaratory judgment that [Canada's] actions in supporting the construction of the NITC/DRIC, and in preventing plaintiffs from exercising their right to build the New Span, constitute a taking of plaintiffs' private property rights without

[199] DIBC's Response, ¶ 42 (emphasis in original).

[200] Washington Complaint, ¶¶ 155, 159, 163, 166, 172, 179, **Exhibit R-17**; Washington First Amended Complaint, p. 68, **Exhibit R-18**.

[201] DIBC's Response, ¶ 42.

payment of just compensation, in violation of…international law."[202]

150. Asking for a declaration that Canada's actions is a taking (i.e., expropriation) without compensation under international law not only begs the question of how Canada can "take" anything in the United States (it cannot, which further proves the fallacy of DIBC's "acts in the U.S." versus "acts in Canada" split between the Washington and NAFTA proceedings), but also involves the payment of damages.

3. CTC's Initiation and Continuation of the *CTC* v. *Canada* Litigation Contravenes NAFTA Article 1121

a) DIBC Initiated and Continued the CTC Litigation Beyond the Submission of its Claim to Arbitration

151. As of the date of its First NAFTA NOA (April 29, 2011) DIBC and CTC were precluded from initiating or continuing in Canada *any* proceeding with respect to the measures that it alleges breach the NAFTA and that also involves the payment of damages. However, on February 15, 2012, CTC commenced proceedings in the Ontario Superior Court of Justice with respect to the same measures they also allege breach the NAFTA and involving the payment of damages ("*CTC v. Canada* Litigation").[203]

152. On March 15, 2012 Canada wrote DIBC informing it that the *CTC v. Canada* Litigation conflicted with its First NAFTA Waiver and as such, DIBC and CTC had failed to comply with the requirements of Article 1121. Canada stated that it would object to the jurisdiction of the Tribunal.[204] Canada received no reply.

153. DIBC filed its Amended NAFTA NOA on January 15, 2013 with its Second NAFTA Waiver expanding on the claims made in its First NAFTA NOA. It also filed another waiver, but, as it did with the Washington Litigation, explicitly carved-out the *CTC v. Canada* Litigation:

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[202] Washington Second Amended Complaint, ¶ 317, **Exhibit R-19**.

[203] *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**.

[204] See Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

> "For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of…(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)."

154. On February 19, 2013, DIBC amended its Statement of Claim in the *CTC v. Ontario* Litigation.[205]

155. DIBC and CTC have failed to waive their right to initiate or continue the *CTC v. Canada* Litigation. Both proceedings are with respect to the same measures and both are "involving the payment of damages." Thus, the limited exception in Articles 1121(1)(b) and (2)(b) for injunctive and declaratory relief in Canada does not apply.

b) The *CTC v. Canada* Litigation is a "Proceeding with Respect to the Measure" that is Alleged to be a Breach of the NAFTA

156. Both the *CTC v. Canada* Litigation and this NAFTA arbitration are with respect to Canada's allegedly discriminatory Highway 401 Measures,[206] Franchise Measures[207] and New Span Measures.[208]

157. In its Response, DIBC has already conceded what is obvious from a comparison of the pleadings in both this NAFTA arbitration and the *CTC v. Canada* Litigation:

> The only instances where more than one proceeding bears on the same measures are where DIBC is seeking damages in this arbitration and declaratory relief in a court under the law of Canada – an overlap expressly permitted by Article 1121.[209]

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[205] **Exhibit C-119**.

[206] For the overlap relating to DIBC's allegations with respect to the Nine Point Plan/Windsor Gateway Action Plan, see *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. For the overlap with respect to Canada's alleged manipulation of the Highway 401 connection component in the DRIC EA process: *CTC* v. *Canada* Statement of Claim, ¶¶ 99, 103-111, **Exhibit R-20**; NAFTA NOA, ¶¶ 35, 37, 47; Amended NAFTA NOA, ¶¶ 70, 83-84; NAFTA Statement of Claim, ¶¶ 119-120, 133,197-204.

[207] *CTC* v. *Canada* Statement of Claim, ¶ 25, **Exhibit R-20**; NAFTA NOA, ¶ 21; Amended NAFTA NOA, ¶ 32-36; NAFTA Statement of Claim, ¶¶ 34, 42, 53.

[208] *CTC* v. *Canada* Statement of Claim, ¶ 98, **Exhibit R-20**; Amended NAFTA NOA, ¶¶ 133, 134, 97-100, 101; NAFTA Statement of Claim,¶¶ 173, 169.

[209] DIBC's Response, ¶ 37.

158. So while DIBC and Canada are in agreement that the *CTC v. Canada* Litigation is with respect to the same measures as alleged to breach NAFTA Chapter Eleven, a summary of that overlap is necessary to illustrate DIBC/CTC's constantly shifting characterization of the proceedings.

(1) Highway 401 Measures

159. In both proceedings, CTC alleges that Canada reneged on a promise to spend $300 million to connect the Ambassador Bridge with Ontario Highway 401[210] with references to the 2002 MOU,[211] the JMC Action Plan and the Nine Point Plan.[212] In both proceedings CTC alleges that Canada manipulated the DRIC EA process to ensure the direct Highway 401 connection would go to the DRIC Bridge but not the Ambassador Bridge.[213] Both proceedings allege that CTC invested millions of dollars to improve the Ambassador Bridge and its facilities in reliance on the promise[214] and that DIBC suffered damages when Canada "breached its commitments to the Windsor Gateway Action Plan by refusing to build the proposed connection between Highway 401 and the Ambassador Bridge."[215] Finally, both proceedings allege that Canada's actions were rooted solely in its desire to prevent CTC from building a twin span and to favour the DRIC Bridge.[216]

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[210] *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.

[211] *CTC* v. *Canada* Statement of Claim, ¶ 87, **Exhibit R-20**; NAFTA NOA, ¶ 26. See also NAFTA Amended NOA, ¶ 12 ("In 2002, Canada signed a Memorandum of Understanding with the Government of Ontario in which they jointly committed to a five-year, C$300 million investment in the highway connections to the Ambassador Bridge (as well as other border crossings)."); NAFTA Statement of Claim, ¶ 95 ("the Canadian Government and the Government of Ontario signed a Memorandum of Understanding (the "2002 MoU") in which they 'jointly commit[ted]" to a five-year, C$300 million "investment in the Windsor Gateway'").

[212] *CTC* v. *Canada* Statement of Claim, ¶ 88, **Exhibit R-20**; NAFTA NOA, ¶¶ 26-27.

[213] *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.

[214] *CTC* v. *Canada* Statement of Claim, ¶¶ 92-93, **Exhibit R-20**; NAFTA NOA, ¶ 33.

[215] *CTC* v. *Canada* Statement of Claim, ¶ 95, **Exhibit R-20**; NAFTA NOA, ¶ 34. See also NAFTA Amended NOA, ¶ 12 ("Canada has reneged on that commitment. Instead, it has designed and commenced construction on a new highway (the "Windsor-Essex Parkway") that will replace the old road to within approximately 3.4 kilometers (2.1 miles) of the foot of the Ambassador Bridge"), ¶ 92 ("the reason there is no highway connection to the Ambassador Bridge is *because Canadian officials diverted the C$300 million that had been allocated to building such a connection to other uses*."), ¶ 113 ("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

(2) Franchise Rights Measures

160. In both proceedings, CTC alleges it has a perpetual and exclusive right under an alleged "special agreement" (which DIBC alleges is an international treaty) pursuant to the *Boundary Waters Treaty* and CTC Act to a toll bridge across the Detroit River.[217] CTC alleges in both proceedings that that Canada violated this right when it enacted the IBTA[218] and also when Canada carried out the DRIC EA resulting in the decision to build a new crossing.[219]

(3) New Span Measures

161. In both proceedings, CTC alleges that Canada is improperly withholding approvals required for the construction of the AB New Span.[220] In the *CTC v. Canada* Litigation, CTC argues that "the Canadian Government has improperly withheld necessary approvals that the Canadian Government claims are required for the construction of the Second Span."[221] Similarly, in the NAFTA arbitration, DIBC argues that "Canada has discriminated against DIBC and CTC by delaying their ability to obtain

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connections to the Ambassador Bridge—in particular by refusing to extend Highway 401 to the Ambassador Bridge.")

[216] *CTC* v. *Canada* Statement of Claim, ¶ 94, 112-113, **Exhibit R-20**; NAFTA NOA ¶ 35. See also NAFTA Amended NOA, ¶ 114 ("The primary reason Canada has reneged on its commitments to improve the connection of Highway 401 to the Ambassador Bridge is the desire of the Canadian federal government and the Province of Ontario to build and favor the Canadian NITC/DRIC, rather than a bridge owned by a U.S. investor.") See also NAFTA Statement of Claim, ¶ 102 ("In reliance on Canada's promise of improved road connections to support the continued use and expansion of the Ambassador Bridge, Claimant has invested hundreds of millions of dollars into improvements to the Ambassador Bridge designed to take advantage of the Ambassador Bridge Gateway Project, including improvements to water, sewer, power generation, and lighting systems; expanded customs inspection facilities; and road connections on the Ambassador Bridge property.")

[217] *CTC* v. *Canada* Statement of Claim, ¶ 25, **Exhibit R-20**; NAFTA NOA, ¶ 21; Amended NAFTA NOA, ¶ 32-37, 84; NAFTA Statement of Claim, ¶¶ 34, 42, 53. DIBC/CTC also argue that this alleged exclusive franchise right exists as a matter of Canadian domestic law. DIBC Response, ¶ 28.

[218] Amended NAFTA NOA, ¶ 107; NAFTA Statement of Claim, ¶ 180; *CTC v. Canada* Statement of Claim at p. 4, **Exhibit R-20**.

[219] *CTC v. Canada* Statement of Claim, ¶¶ 110-111, **Exhibit R-20**; NAFTA Statement of Claim, ¶¶ 6-8.

[220] *CTC* v. *Canada* Statement of Claim, ¶ 98, **Exhibit R-20**; Amended NAFTA NOA, ¶¶ 133-135; NAFTA Statement of Claim, ¶¶ 182, 184.

[221] *CTC* v. *Canada* Statement of Claim, ¶ 98, **Exhibit R-20**.

regulatory approvals for the New Span in both the United States and Canada, even while accelerating the approvals granted to the Canadian NITC/DRIC."[222]

c) Amended Statement of Claim

162. Three days before Canada filed its Brief Statement, CTC amended its Statement of Claim in the *CTC v. Canada* Litigation on February 19, 2013.[223] However, as of the date DIBC submitted the NAFTA claim to arbitration (April 29, 2011), it and CTC were precluded from initiating or continuing any proceedings with respect to the same measure alleged to breach the NAFTA which also involves the payment of damages. CTC did the opposite when it initiated the *CTC v. Canada* Litigation and cannot now rectify its defective waiver by deleting paragraphs in an amended statement of claim without Canada's consent (which has not been given).

163. Further, all CTC did was draw strikeout lines through the paragraphs which were most egregiously duplicative as between the *CTC v. Canada* Litigation and the NAFTA proceedings while maintaining everything else relating to the Franchise Measures (including the IBTA) as well as maintaining the same prayer for relief and, as discussed below, the proceeding is still involving the payment of damages.[224] As DIBC conceded in its Response,[225] the *CTC v. Canada* Litigation still remains "with respect to the measures" alleged to breach the NAFTA.[226]

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[222] Amended NAFTA NOA, ¶ 11. See also Amended NAFTA NOA, ¶ 97 ("Canada has delayed and obstructed the construction of the New Span by, for example, delaying approval under the Canadian Environmental Assessment Act for the New Span.").

[223] *CTC v. Canada* Amended Statement of Claim, **Exhibit C-119**.

[224] See *CTC v. Canada* Amended Statement of Claim, **Exhibit C-119**. CTC struck out paragraphs dealing specifically with Highway 401 and New Span measures.

[225] DIBC's Response, ¶ 37.

[226] DIBC has suggested that it makes a difference that it is not bringing also an expropriation claim under NAFTA. See DIBC Response ¶ 55. DIBC is again confused as to the ordinary meaning and object and purpose of Article 1121 because it is the *measures* that matter.

d) The CTC Litigation is "Involving the Payment of Damages"

164. As discussed above, and regardless of the belated amendment to its pleadings, there is no dispute between DIBC and Canada that both proceedings are with respect to the same measures. But DIBC says that the *CTC v. Canada* Litigation seeks only declaratory relief and is not involving the payment of damages.[227] DIBC argues that CTC's claim for damages in the *CTC v. Canada* Litigation is merely an alternative damages claim limited to "damages that would result from the eventual *completion* of the NITC/DRIC."[228] DIBC argues that there is no risk of double recovery since DIBC's "damages claim in this arbitration and CTC's damages claim in the *CTC v. Canada* Litigation would remedy entirely different injuries arising from different breaches."[229]

165. Canada need not belabour the point: Article 1121(1)(b) and (2)(b) allow for injunctive and declaratory relief in Canadian courts with respect to the same measures as alleged to breach NAFTA as long as those proceedings are "not involving the payment of damages." It is simply not credible to say the *CTC v. Canada* Litigation does not expressly violate those terms. CTC demanded and still demands that it "must be compensated for economic loss caused by the violation of its rights and loss of its goodwill" as a result of the expropriation of the Ambassador Bridge caused by Canada building the DRIC Bridge.[230] It simply does not matter if the demand for damages is in the alternative (for example, if the ONSC does not find that DIBC/CTC has an exclusive franchise). Article 1121 provides no caveats in this regard. These proceedings were and remain "involving the payment of damages."

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[227] DIBC's Response, ¶ 37 ("The only instance where more than one proceeding bears on the same measures are where DIBC is seeking damages in this arbitration and declaratory relief in a court under the law of Canada – an overlap expressly permitted by Article 1121.") ¶ 54.

[228] DIBC Response, ¶ 55.

[229] DIBC Response, ¶ 56.

[230] *CTC v. Canada* Statement of Claim, ¶ 112, **Exhibit R-20**; *CTC v. Canada* Amended Statement of Claim, ¶112, **Exhibit C-119**.

166. The fact that CTC supposedly conditions the request for damages on the "eventual completion of the NITC/DRIC"[231] is similarly irrelevant. The eventual completion of the DRIC Bridge arises from the same measures at issue in the NAFTA proceedings.

167. For these reasons, both CTC's original and amended Statement of Claim in the *CTC v. Canada* Litigation violate Article 1121 and deprive this Tribunal of jurisdiction to hear any of DIBC's NAFTA claims.

4. DIBC Has Clarified That Measures by the City of Windsor With Respect to the New Span and Favouring the DRIC Bridge Are Not At Issue in this NAFTA Arbitration

168. 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").[232] CTC alleged that Windsor had taken various measures as part of a conspiracy to support the DRIC Project and to unfairly prevent CTC from building the New Span. CTC sought damages against Windsor and personally against the Mayor and City Council Members.[233]

169. On September 21, 2010, the Court joined CTC to a separate application by other plaintiffs dealing with the question of the validity of Windsor's by-laws intended to protect the heritage of Olde Sandwich Town (the neighbourhood directly to the west of the Ambassador Bridge), which overlapped in part with CTC's February and June 2010 statements of claim.[234] CTC's separate lawsuits against Windsor were stayed without

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[231] DIBC's Response, ¶ 55.

[232] 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 February 24, 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 June 22, 2010 (Ont. Sup. Ct.) ("*CTC v. Windsor* Statement of Claim, June 2010"), **Exhibit R-30**.

[233] *CTC* v. *Windsor* Statement of Claim, February 2010, ¶ 1, **Exhibit R-29**; *CTC v. Windsor* Statement of Claim, June 2010, ¶ 1, **Exhibit R-30.**

[234] *Hilary Payne and Lawrence Leigh and Canadian Transit Company v. the Corporation of the City of Windsor*, Ontario Sup. Court of Justice, Order dated September 21, 2010 (Court File No. CV-10-14295), **Exhibit R-87**.

prejudice until the Court ruled on the separate application dealing specifically with the by-laws.[235]

170. CTC continued litigation against the City of Windsor, the Mayor and various city councillors through 2010, 2011 and 2012. On September 6, 2011, the Court ruled that CTC's allegations were "totally without merit" and ordered CTC to pay the defendants their full costs.[236] The Court found no evidence of conspiracy, bad faith or misfeasance by Windsor. Justice Gates made the following observation:

> "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…"[237]

171. CTC appealed, but then abandoned its appeal on August 13, 2012.[238]

172. The Court's judgment on the issue on the validity of the Windsor by-laws is binding on CTC with respect to its original two statements of claim from February and June 2010.[239] However, despite the ruling on the heritage by-law issue, and contrary to what DIBC said in its response,[240] the Windsor Litigation is not a "dead issue" because CTC's two original lawsuits against the City of Windsor are both still pending before the Ontario Superior Court and have not been withdrawn by CTC.

173. In other words, the Windsor Litigation was ongoing at the time DIBC filed its First NAFTA NOA and is still continuing today. Thus, to the extent that the Windsor

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[235] *Ibid*.

[236] *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**.

[237] 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**.

[238] 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**.

[239] *Hilary Payne and Lawrence Leigh and Canadian Transit Company v. the Corporation of the City of Windsor,* Ontario Sup. Court of Justice, Order dated September 21, 2010 (Court File No. CV-10-14295), **Exhibit R-87**.

[240] DIBC's Response, ¶ 68.

Litigation is "with respect to" the same measures as those at issue in this NAFTA arbitration, DIBC and CTC were and continue to be in violation of the conditions precedent to NAFTA arbitration set out in Article 1121.[241]

174. Canada had asked for clarification from DIBC on two occasions in 2011 and 2012 as to the nature of its NAFTA claims in relation to the Windsor Litigation but DIBC refused to provide any explanation.[242] But in light of CTC's allegations in the Windsor Litigation it was apparent that it was a proceeding involving the payment of damages with respect to measures also at issue in this NAFTA arbitration alleged to be against the New Span and favouring the DRIC Bridge as well as measures alleged to impede traffic access to the Ambassador Bridge.[243]

175. In its Response to Canada's Brief Statement, DIBC made various arguments with respect to the Windsor Litigation and the consequences with respect to NAFTA Article 1121.[244] While Canada disagrees with DIBC's characterizations and legal conclusions with respect to Article 1121 and the Windsor Litigation, it is unnecessary to address each of them at this point because of DIBC's confirmation that none of the actions taken by Windsor in relation to the New Span are at issue in this NAFTA arbitration:

> In the Windsor Litigation, CTC argued that Windsor had undertaken certain discrete actions to delay or block the construction of the New Span. None of those specific actions by Windsor are mentioned in the Statement of Claim for this arbitration, and none of them are at issue in this arbitration.[245]

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[241] See Canada's Brief Statement, ¶¶ 76-81.

[242] See Canada's Letter to DIBC dated October 3, 2011, p. 2, **Exhibit R-21**; Canada's Letter to the Tribunal dated November 2, 2012, p. 6.

[243] CTC alleges in both the Windsor Litigation and the NAFTA arbitration that Windsor has taken measures to impede and frustrate the New Span and favour the DRIC Bridge. See *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**. CTC also alleges in both the Windsor Litigation and the NAFTA arbitration that Windsor installed traffic lights and "unlimited driveway connections" on Huron Church Road to impede traffic to the Ambassador Bridge. *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.

[244] DIBC's Response, ¶¶ 60-70.

[245] DIBC's Response, ¶ 66.

176. In light of this statement by DIBC, Canada understands that DIBC is confirming to the Tribunal that the following actions by Windsor relating to the New Span and alleged favouritism to the DRIC Bridge, all of which are still outstanding in the Windsor Litigation, are not at issue in this NAFTA arbitration: the Schwartz Report and Greenlink proposal,[246] Windsor's purchase of property in the area where the DRIC Bridge will be constructed,[247] Windsor City Council Resolutions and submissions in the public comment and consultations processes opposing the construction of the New Span,[248]Windsor's various planning studies relating to Olde Sandwich Towne,[249] and Windsor's by-laws and City Council resolutions relating to the demolition of houses in Olde Sandwich Town.[250]

177. All of the above actions are alleged by CTC in its still-pending February 2010 Statement of Claim to have been "designed to delay, obstruct, circumvent, hinder and

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[246] CTC alleges that Windsor's enforcement of the January 2005 Schwartz Report and October 2007 Greenlink proposal were intended to reduce traffic to the Ambassador Bridge, obstruct the New Span and favour the DRIC Bridge See *CTC* v. *Windsor* Statement of Claim, February 24, 2010, ¶¶ 23-28 , **Exhibit R-29** (¶ 24: "a key area and purpose of the Schwartz Report was to reduce the number of commercial vehicles using the Ambassador Bridge"; ¶ 25 "The Schwartz Report falsely concluded that the AB Replacement Span would impact Sandwich Town, University of Windsor and downtown Windsor communities…[it] was unanimously endorsed by City Council and publicly promoted as the desired location for a new international crossing"; ¶ 28: "The City promoted the Central Corridor crossing and GreenLink proposal knowing that it would detrimentally impact the existing Ambassador Bridge crossing and hinder, obstruct and/or delay the AB Replacement Span and would compete for traffic with the Ambassador Bridge"). The Schwartz Report and GreenLink Proposal are described in the DRIC Environmental Assessment at pp. 3-21 to 3-23, **Exhibit R-47**.

[247] CTC alleges that Windsor's purchase of property in the area where the DRIC Bridge will be constructed is a "pretextual" effort to "establish a predetermined location for the DRIC as identified by the Schwartz Report" and served Windsor's "vested interest in supporting the DRIC as an alternative to the [New Span] on account of speculative future land sales." *CTC* v. *Windsor* Statement of Claim, February 24, 2010, ¶¶ 30, 34, **Exhibit R-29**.

[248] CTC alleges that the Windsor City Council Resolutions of October 2006 opposing the construction of the New Span and submissions by Windsor in the public comment and consultations process in Canada and the United States because of the negative impact on Windsor's historic Old Sandwich Town, "deliberately interfered with CTC's proposal for the [New Span]." See *CTC* v. *Windsor* Statement of Claim, February 24, 2010, ¶¶ 35-39, **Exhibit R-29**.

[249] CTC alleges that Windsor's various planning studies relating to Olde Sandwich Towne, including the Community Planning Study, Community Improvement Plan, Sandwich Heritage Conservation District Study and Sandwich Heritage Conservation District Plan, were intended to delay and obstruct the New Span. See *CTC* v. *Windsor* Statement of Claim, February 24, 2010, ¶¶ 43-60, **Exhibit R-29**.

[250] CTC alleges that Windsor by-laws and City Council resolutions relating to the demolition of houses in Olde Sandwich Town, were designed to obstruct the construction of the New Span. See *CTC* v. *Windsor* Statement of Claim, February 24, 2010, ¶¶ 65-85, **Exhibit R-29**; *CTC* v. *Windsor* Statement of Claim, June 22, 2010, **Exhibit R-30**.

prevent the construction of the [New Span]"[251] and intended to "prevent the [New Span] from ever coming to fruition."[252] Based on these measures, CTC has alleged conspiracy, misfeasance in public office and unlawful interference in economic interests and has demanded damages.[253]

178. DIBC's written confirmation that Windsor's measures relating to the DRIC Bridge and New Span are not part of the NAFTA arbitration leaves only Windsor's alleged measures regarding Huron Church Road as the only Windsor measure at issue in this NAFTA arbitration. This issue is discussed in Part (D)(3) below.

E. Conclusion

179. For the reasons set out above, the Tribunal has no jurisdiction to hear *any* of DIBC's claims because of the failure of DIBC and CTC to comply with the NAFTA waiver requirements set out in Article 1121. Canada does not consent to this NAFTA arbitration.

IV. DIBC'S HIGHWAY 401 ROAD ACCESS CLAIMS AND IBTA CLAIM ARE TIME BARRED UNDER NAFTA ARTICLES 1116(2) AND 1117(2)

A. Summary of Canada's Position

180. None of DIBC's NAFTA claims can survive in light of DIBC and CTC's non-compliance with Article 1121. But DIBC's Highway 401 and IBTA claims would not survive anyway because they are untimely.

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

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[251] NAFTA Statement of Claim, February 24, 2010, ¶ 22, **Exhibit R-29.**

[252] NAFTA Statement of Claim, February 24, 2010, ¶ 87(a), **Exhibit R-29.**

[253] NAFTA Statement of Claim, February 24, 2010, ¶ 93, **Exhibit R-29** (damages "the particulars of which will be provided prior to trial.").

182. DIBC alleges it suffered damage as a result of Canada's actions undertaken prior to filing its NAFTA claim, including diminished toll revenues (including future losses) and damage to its exclusive franchise rights.[254] In light of this allegation, the Tribunal has to determine the date on which DIBC/CTC *first* acquired actual or constructive knowledge of the alleged breach and damage. Since DIBC's First NAFTA NOA was filed on April 29, 2011, if the "first acquired" date is show to be before April 29, 2008, then the claims are time barred and outside the Tribunal's jurisdiction.

183. With respect to its Highway 401 and IBTA claims, the evidence will show that the "first acquired" dates are undoubtedly prior April 29, 2008. As described below, for the Highway 401 claims, the relevant dates are March 11, 2004 and November 15, 2005, *i.e.*, the dates on which Canada's alleged "promise" to build a direct highway link between the Ambassador Bridge and Highway 401 was "reneged." For the IBTA claim, the relevant date is February 1, 2007, the day the IBTA was enacted. DIBC did not file its NAFTA claims within three-years as required by in Articles 1116(2) and 1117(2), so the claims all fail as the Tribunal lacks jurisdiction *rationae temporis*.

184. DIBC says that its Highway 401 and IBTA claims can still be salvaged because Canada's measures are a "continuing breach" which renews the three-year time limitations period on a daily basis as long for as the measure remains in place.[255]

185. DIBC has misinterpreted the ordinary meaning of the text, as well as the object and purpose, of Articles 1116(2) and 1117(2). The NAFTA Parties set a specific time limit of three-years in which to file a claim under Chapter Eleven regardless of whether the impugned conduct is continuing or not. The countdown starts "from the date" the investor/enterprise "first acquired, or should have first acquired, knowledge of the alleged breach" and that some cognizable loss has been incurred. It does not matter if the measure is continuing – it might still be in place, it may have been discontinued. The

[254] NAFTA Statement of Claim, ¶¶ 8, 15, 203, 211-212. In Canada's submissions, when referring to the date on which DIBC/CTC knew or should have known that they incurred loss or damage for the purpose of Articles 1116(2) and 1117(2), Canada does not concede that DIBC or CTC either incurred any compensable loss or damage under NAFTA Chapter Eleven.

[255] DIBC's Response, ¶¶ 21-24.

requirement that the claim must be submitted to NAFTA arbitration within three-years remains unchanged. If the investor fails to comply with this requirement, the claim is untimely and the consent to arbitration by the disputing NAFTA Party in Article 1122(1) is without effect.

B. Articles 1116(2) and 1117(2) Set a Rigid Three-Year Time Limit for Submission of a Claim to Arbitration

1. Consent to Arbitration by a NAFTA Party is Conditioned on Filing Timely Claims

186. As noted above, a NAFTA Party only consents to arbitration "in accordance with the procedures set out in this Agreement."[256] As explained by the *Methanex* tribunal:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claims has been brought by a claimant investor in accordance with Articles 1116 and 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[257]

187. Conformity with the time bar set out in Articles 1116(2) and 1117(2) is thus one of the pre-conditions to Canada's consent to arbitration and must be complied with in order to establish this Tribunal's jurisdiction. In other words, Canada does not consent to arbitrate untimely claims.

2. Ordinary Meaning of Articles 1116(2) and 1117(2)

188. Article 1116(2) of the NAFTA establishes a three-year limitation period for an investor to bring a claim under Chapter Eleven:

> 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.

[256] NAFTA Article 1122(1).

[257] *Methanex*, Preliminary Award, ¶120, **RLA-3**.

189. Article 1117(2) of the NAFTA establishes the same three-year limitations period with respect to 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.

190. As the *Feldman* tribunal stated:

> [T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is *not subject to any suspension […], prolongation or other qualification*. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years…[258]

191. The ordinary meaning of NAFTA Chapter Eleven's time limitation for filing a claim has been succinctly described by Professor Reisman:

> It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.[259]

192. The use of the word "first" is critical to the meaning of Articles 1116(2) and 1117(2). The word "first" means "earliest in occurrence, existence."[260] The inclusion of "first" to modify the phrase "acquired knowledge" was a deliberate drafting choice of the NAFTA Parties intended to mark the beginning of the time when knowledge of breach and loss existed and not the middle or end of a continuous event or period. All three NAFTA Parties have consistently taken this position. For example, in its NAFTA Article 1128 non-disputing Party submission to the tribunal in *Merrill & Ring v. Canada*, the United States wrote:

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[258] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)99/1, Award (December 16, 2002), ¶ 63, **RLA-14** (emphasis added and citation omitted); see also *Grand River Enterprises Six Nations Ltd. v. United States* (UNCITRAL) Decision on Objections to Jurisdiction, July 20, 2006 [*Grand River*, Jurisdiction Decision], ¶ 29, **RLA-15**.

[259] W. Michael Reisman, Opinion with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, April 22, 2008, ¶ 28, (emphasis in the original), **RLA-16**.

[260] *Shorter Oxford English Dictionary*, 5th ed. (Oxford University Press, 2002), at p. 965, **Exhibit R-88**.

> An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under 1116(2), that knowledge is acquired on a particular "date". Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.[261]

193. Mexico concurred "in its entirety" with the U.S. 1128 submission in *Merrill & Ring*.[262] The United States reiterated exactly the same position in its recent Article 1128 non-disputing Party submission to the tribunal in *Bilcon v. Canada*.[263] The NAFTA Parties – United States, Mexico and Canada – are all in agreement on this issue.

194. NAFTA tribunals have also consistently noted that concrete knowledge of the actual amount of loss or damage is not a pre-requisite to the running of the limitation period under 1116(2) or 1117(2). The *Grand River* tribunal stated:

> A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[264]

195. This confirms what the tribunal in *Mondev v. United States* had written: "[a] claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear."[265]

196. The most detailed consideration of the NAFTA Chapter Eleven limitations period is set out in *Grand River Enterprises Six Nations Ltd. v. United States*.[266] In that case, the

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[261] *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 5, **RLA-17**; (emphasis in original). As Professor Reisman has explained, "an investor does not and logically cannot 'first acquire' knowledge of the allegedly incompatible measure that constitutes the challenged 'breach' *repeatedly*." *Reisman Expert Opinion*, ¶ 29, **RLA-16** (emphasis in original).

[262] See Mexico 1128 Submission in *Merrill & Ring v. Canada*, April 2, 2009, **RLA-18**.

[263] *William Ralph Clayton,William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Government of Canada* (UNCITRAL), Submission of the United States of America (April 19, 2013), ¶ 12, **RLA-19**. In the footnote following this paragraph, the United States noted: "The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case Merrill & Ring Forestry, L.P. v. Canada."

[264] *Grand River*, Jurisdiction Decision, ¶ 77, **RLA-15**.

[265] *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, October 11, 2002, ¶ 87, **RLA-20**.

[266] *Grand River*, Jurisdiction Decision, **RLA-15**.

Claimant commenced a NAFTA Chapter Eleven arbitration on March 12, 2004, alleging NAFTA violations arising from a 1998 tobacco litigation Master Settlement Agreement ("MSA") and subsequent state actions taken pursuant to the MSA.[267] The United States challenged the Tribunal's jurisdiction over the claim on the ground that it was time barred by Article 1116(2).

197. The *Grand River* tribunal agreed with the United States, finding that claims based on the MSA and subsequent measures taken pursuant to the MSA were untimely.[268] In its award, the tribunal confirmed the ordinary meaning of the text: "Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification" and explained that an investor cannot bring a NAFTA Chapter Eleven 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 that it incurred loss or damage.[269]

198. The *Grand River* tribunal characterized "actual knowledge" of the breach and of loss or damage as "foremost a question of fact,"[270] whereas constructive knowledge could be imputed to an investor if it can be shown that the investor would have known that fact had it exercised reasonable care or diligence.[271] It also endorsed the *Mondev* tribunal's conclusion that knowledge of loss or damage exists for the purposes of Article 1116(2) even if the amount or extent of that loss or damage may not become fully known until

[267] *Grand River*, Jurisdiction Decision, ¶ 24, **RLA-15**.

[268] *Grand River*, Jurisdiction Decision, ¶ 103-104, **RLA-15**. The only claim it reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual states after March 12, 2001 (i.e., within the applicable three-year limitation period).

[269] *Grand River*, Jurisdiction Decision, ¶ 29, **RLA-15**; see also *Feldman* Award, ¶ 63, **RLA-14** ("… NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension … prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three-years, and does so in full knowledge of the fact that a State, i.e., one of the three Member Countries, will be the Respondent, interested in presenting a limitation defence.")

[270] *Grand River*, Jurisdiction Decision, ¶ 54, **RLA-15**.

[271] *Grand River*, Jurisdiction Decision, ¶¶ 58-59, **RLA-15**.

some future time and need not be precisely quantified at the time of first knowledge of the loss.[272]

199. All three NAFTA Parties have endorsed the *Grand River* tribunal's interpretation of NAFTA's limitations provisions.[273] Under Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*, the consistent position of the United States, Mexico and Canada on this issue constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty" which "shall be taken into account" when interpreting the NAFTA.[274]

3. The Context, Object and Purpose of Articles 1116(2) and 1117(2)

200. Article 31 of the VCLT requires that the terms of a treaty be interpreted "in their context and in light of its object and purpose."[275]

201. Articles 1116 and 1117 provide the extraordinary right for an investor to claim against a State for breach of a treaty obligation that is alleged to have caused loss to that investor, or in respect of Article 1117, to the enterprise on whose behalf the investor has filed a claim.

202. Articles 1116(1) and 1117(1) thus carefully define the circumstances under which such an extraordinary right to arbitrate a breach of a NAFTA obligation accrues to a claimant investor. It is no accident that Articles 1116(2) and 1117(2) follow directly from the conferral of the right to initiate investor-State arbitration. Read together with paragraph 1, Article 1116(2) defines the scope and right to an investor's claim by

[272] *Grand River*, Jurisdiction Decision, ¶¶ 77-78, **RLA-15**; *Mondev*, Award, ¶ 87, **RLA-20**.

[273] *Merrill & Ring*, 1128 Submission of the United States, ¶ 5, **RLA-17** ("An investor first acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date". Such knowledge cannot be first acquired on multiple dates, nor can such knowledge first be acquired on a recurring basis"). Both Mexico and Canada agreed with the United States interpretation in *Merrill & Ring*. See Mexico 1128 Submission in *Merrill & Ring v. Canada*, (UNCITRAL) April 2, 2009, **RLA-18.**

[274] VCLT Article 31(3)(a), **RLA-10** ("There shall be taken into account…(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.").

[275] See also Article 102(2): "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

prescribing when it may be exercised. The words in Article 1116(2) read in this context, are a clear indication that the Parties intended to limit the scope of the right conferred in Article 1116(1) by imposing time limits within which such right must be exercised. The same reasoning applies to Articles 1117(1) and (2).

203. A comparison of Articles 1116(2) and 1117(2) with other timing provisions in the NAFTA further supports the Parties' intention to apply a specific meaning. Chapter Eleven's other timing provisions include establishing times within which investor-state dispute settlement must be commenced and when a particular step in dispute settlement must be taken. Generally, the NAFTA Parties inserted temporal conditions by using phrases such as "within", "at least" or "no later than".[276] No other article in NAFTA adopts the formula found in 1116(2) and 1117(2) of counting time from a date on which the investor "first" acquired knowledge. Nor does any dispute settlement provision in other chapters of the NAFTA impose a time limit in the same manner as Articles 1116(2) and 1117(2). Articles 1116(2) and 1117(2) thus clearly were intended to pinpoint the moment at which knowledge of an alleged breach or loss was first acquired and to bar claims made more than three-years after that point.

204. The object and purpose of Articles 1116(2) and 1117(2) are also consistent with one of NAFTA's objectives: to create effective procedures for the resolution of disputes.[277] The limitations provisions enhance the effective resolution of disputes by ensuring that claims are brought forward as soon as the investor has the requisite knowledge. These provisions ensure that relevant evidence, such as witness testimony and the production of documents, will be available which otherwise might be lost with the passage of time and also ensure that an allegation of a breach of a NAFTA obligation

[276] See *e.g.* Article 1119(1) requiring delivery of a notice of intent "at least 90 days" before submitting a claim to arbitration; see also Article 1120 allowing submission of a claim "provided six months have elapsed"; Article 1124 which allows the ICSID Secretary-General to appoint tribunal members if a tribunal has not be constituted "within 90 days" of the submission of a claim to arbitration' Article 1126(5) and (11) requiring steps to be taken "within" 15 or 60 days of a prior step in consolidation; see also Articles 1127(1), 1132, 1136(a)(i) and 1137.

[277] NAFTA Article 102 is entitled "Objectives" and provides, in relevant part, "The objectives of this Agreement, as elaborated more specifically through its principles and rules…are to:…(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes…".

will be addressed rather than allowed to linger. This, in turn, creates certainty and stability for both NAFTA Parties and their investors.

205. In sum, the ordinary meaning of Articles 1116(2) and 1117(2) in their context and in light of their object and purpose does not support an interpretation under which the three-year period running from the first acquisition of knowledge of breach and loss can be extended or prolonged.

C. DIBC's "Continuing Breach" Theory is Without Foundation in NAFTA Chapter Eleven

206. DIBC seeks to escape the three-year limitation period by advancing an argument that its Highway 401 and IBTA claims are not untimely because Canada is "engaged in a continuing course of conduct" that "violates a legal obligation which constitutes a continuing breach of that obligation."[278] DIBC's position fails as a matter of law.

207. DIBC's theory ignores the ordinary meaning of the terms of Articles 1116(2) and 1117(2) which provide that the three-year period runs from the point at which the Claimants *first* acquired…knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. Whether the circumstances of a breach are continuing or not is irrelevant since the Parties deliberate inclusion of the word "first" refers to the beginning of a period, rather than its middle or end.

208. The NAFTA Parties contemplated that measures which might be construed as "continuing" could be challenged under Chapter Eleven. This is made clear by Article 1101 which provides that Chapter Eleven applies to "measures adopted or maintained" by a Party.[279] Mindful that continuing conduct could be challenged by investors under Chapter Eleven, the NAFTA Parties chose to identify the precise moment at which the

[278] DIBC's Response, ¶ 21-22.

[279] Similarly, various substantive obligations envisage claims concerning continuing measures. For example, Article 1105(2) provides for non-discriminatory treatment by measures a Party "adopts or maintains" relating to losses owing to armed conflict or civil strife. Article 1108(2), (2) and (3) addresses non-conforming measures "maintained" by a Party. Article 1113 allows a Party to deny benefits as a result of measures it "adopts or maintains," while Article 1114 states that nothing in Chapter Eleven prevents a Party from "adopting, maintaining or enforcing" a measure to ensure investment activity is sensitive to environmental concerns.

time limitation applicable to such claims would apply. The running of the three-year countdown is to be calculated from the "first" acquisition of relevant knowledge, not subsequent, repeated or ultimate acquisition of such knowledge. Such knowledge cannot first be acquired on multiple dates, nor can such knowledge first be acquired on a recurring basis.[280] Under DIBC's reading of Articles 1116(2) and 1117(2) for any continuing course of conduct the term "first acquired" would in effect mean "last acquired" given that the limitations period would only renew after an investor acquired knowledge of the final alleged transgression in a series of similar and related actions.

209. Indeed, as the *Grand River* Tribunal noted:

> [T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.[281]

210. DIBC relies solely on *UPS v. Canada* to support its "continuing breach" theory.[282] In that case, the claimant unsuccessfully challenged various aspects of Canada's customs laws and access to the Canadian postal infrastructure.[283] The measures at issue were first implemented by Canada three years before the NAFTA claim was made, but UPS argued that Canada's conduct was ongoing and constituted a new violation of NAFTA each day.[284] The *UPS* tribunal summarily concurred.[285]

211. With respect to the *UPS* tribunal, it was incorrect on this issue and its unsupported statements are inconsistent with a proper interpretation of the NAFTA as has been subsequently confirmed by all three NAFTA Parties and other international case law. The *UPS* tribunal did not address the fact that, whatever principles on continuing breaches

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[280] *Merrill & Ring*, 1128 Submission of the United States, ¶ 5, **RLA-17**.

[281] *Grand River*, Decision on Jurisdiction, ¶ 81, **RLA-15.** See also *Merrill & Ring*, 1128 Submission of the United States, ¶ 7, **RLA-17**.

[282] DIBC's Response, ¶ 21.

[283] *United Parcel Service v. Canada* (UNCITRAL) Award on Merits and Dissenting Opinion, May 24, 2007 ("*UPS*, Award"), ¶¶ 11-13, **RLA-21**.

[284] *UPS*, Award, ¶¶ 22-24, **RLA-21**.

[285] *UPS*, Award, ¶ 28, **RLA-21**.

may or may not exist "generally in the law," they cannot supersede the *lex specialis* specifically imposed by the NAFTA Parties in the treaty.[286] The *UPS* tribunal's interpretation gives the word "first" no meaning and runs afoul of the principle of interpretation of *effet utile*[287] and is an aberration from the *Mondev* and *Grand River* tribunals,[288] as well as the concordant views of the three NAFTA Parties.

212. All three NAFTA Parties have agreed in subsequent NAFTA proceedings that the *UPS* tribunal's interpretation of Article 1116(2) was incorrect. In *Merrill & Ring v. Canada*, the United States and Mexico made submissions in the arbitration pursuant to NAFTA Article 1128. They agreed that:

> Under the *UPS* tribunal's reading of Article 1116(2), for any continuing course of conduct the term "first acquired" would in effect mean "last acquired," given that the limitations period would fail to renew only after an investor acquired knowledge of the state's *final* transgression in a series of similar and related actions. Accordingly, the specific use of the term "first acquired" under Article 1116(2) is contrary to the *UPS* tribunal's finding that a continuing course of conduct renews the NAFTA Chapter Eleven limitations period.[289]

213. The United States and Mexico concluded that a measure, even if it is continuing, does not renew the limitation period under Article 1116(2):

> [O]nce an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).[290]

214. These views fully accord with Canada's long-standing interpretation of Articles 1116(2) and 1117(2). In sum, all three NAFTA Parties have confirmed what is already clear from the ordinary meaning, context and object and purpose of Articles 1116(2) and

[286] The *UPS* Tribunal characterized its finding that limitations periods are renewed by continuing courses of conduct as "true generally in the law". Whether or not this is accurate, such a general principle cannot override the specific requirements of Articles 1116(2) and 1117(2) which specifically govern the operation of the limitations periods for claims brought under NAFTA Chapter Eleven.

[287] In respect of "effet utile" also knows as the doctrine of effectiveness see *e.g.* Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) (reprinted 2003), at pp. 383-392, **RLA-31**.

[288] See *Mondev*, Award, ¶87, **RLA-20**; *Grand River*, Decision on Jurisdiction, ¶ 78, **RLA-15**.

[289] *Merrill & Ring*, 1128 Submission of the United States, ¶ 10, **RLA-17** (emphasis in original). This submission was supported by Mexico; see *Merrill & Ring*, 1128 Submission of Mexico, **RLA-18**.

[290] *Merrill & Ring*, 1128 Submission of the United States, ¶ 17, **RLA-17**. This submission was supported by Mexico; see *Merrill & Ring*, 1128 Submission of Mexico, **RLA-18**.

1117(2): a "continuing measure" does not renew the three-year limitations period under NAFTA Chapter Eleven.

215. Canada now turns to the evidence demonstrating that DIBC and CTC had knowledge of the measure, alleged loss and breach, well in advance of the relevant dates.

D. DIBC Failed to Submit Timely Claims Regarding the Highway 401 Measures

216. DIBC's claims regarding road access to Highway 401 encompass the following. First, DIBC alleges that Canada reneged on a "promise" in the 2003 Windsor Gateway Action Plan/Nine Point Plan to spend $300 million to construct a direct highway connection between Highway 401 and the Ambassador Bridge. Second, DIBC alleges that Canada manipulated the Highway 401 connection component of the DRIC EA (the "Parkway") would go to the new DRIC Bridge but not the Ambassador Bridge.[291] Third, DIBC alleges that Windsor 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.

217. DIBC's allegations are false. But the Tribunal need not even consider the merits because, as the evidence below shows, these claims are all untimely. As discussed in Part VI below, Canada seeks discovery from DIBC's internal records to complete the jurisdictional evidentiary record.

1. The Windsor Gateway Action Plan/Nine Point Plan Was Replaced on March 11, 2004

218. DIBC alleges that Canada "promised" to spend $300 million allocated under the 2002 MOU to build a direct Highway 401 connection to the Ambassador Bridge, allegedly relied on by DIBC to spend millions on the Gateway Project in Detroit, but Canada reneged on that commitment because of Canada's discrimination against

[291] The Windsor-Essex Parkway is now known as the Rt. Hon. Herb Gray Parkway.

DIBC.[292] DIBC points to the May 27, 2003 Nine Point Plan as the source of this alleged commitment.[293]

219. DIBC's allegation has no basis in reality because nothing in the Windsor Gateway Action Plan and/or Nine Point Plan can possibly be construed as a commitment by Canada to spend $300 million to build a direct Highway 401-Ambassador Bridge connection.[294] Regardless, even if DIBC's allegation were true, the claim is time barred under NAFTA Articles 1116(2) and 1117(2).[295]

220. The City of Windsor rejected the Nine Point Plan shortly after it was announced because it wanted a greater role in determining how the infrastructure funding should be spent. Accordingly, the Nine Point Plan was abandoned and replaced with a new memorandum of understanding jointly endorsed and publically announced by Canada, Ontario and Windsor less than ten months later.

221. On March 11, 2004 all three levels of government announced a new plan under which the $300 million in infrastructure funding would be used. The *Let's Get Windsor Essex Moving* strategy was explicit:

> The Let's Get Windsor-Essex Moving strategy replaces the nine-point Windsor Gateway Action Plan.[296]

222. As stated by Windsor Mayor Eddie Francis at the announcement of the LGWEM Strategy: "The old nine-point plan is done."[297]

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[292] First NAFTA NOA, ¶¶ 26-35; Amended NAFTA NOA, ¶113; NAFTA Statement of Claim, ¶ 102, 190. See also Washington Complaint, ¶ 8, 79-81, **Exhibit R-17**; Washington First Amended Complaint, ¶ 193, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 229, 240-243, **Exhibit R-19**.

[293] Statement of Claim, ¶¶ 98-99, **Exhibit C-32**.

[294] See **Exhibits C-29-C-33**.

[295] Canada's Brief Statement, ¶¶ 87-89.

[296] "A New Solution for the Windsor Gateway Announced By All Three Levels of Government," News Release, March 11, 2004, at p. 3, **Exhibit R-34**.

[297] "Border Fix Launch Gets Green light: $82M for five projects of $300M program," Windsor Star, March 12, 2004, **Exhibit R-89**.

223. The LGWEM Strategy set out five initial project investments: (1) improvements to the Windsor-Detroit Tunnel customs plaza, (2) construction of a pedestrian overpass on Huron Church Road near the Ambassador Bridge, (3) Walker Road rail grade separation, (4) improvements to the Huron Church Road/Industrial Drive intersection to support the development of a truck pre-processing facility, and (5) electronic "intelligent transportation systems" to improve the flow of traffic to the border at Windsor-Detroit.[298]

224. Phase 2 of the LGWEM Strategy was announced on April 21, 2005 and allocated $129 million for traffic improvement projects to Highway 3/Talbot Road, Lauzon Parkway, Manning Road, Howard Avenue and elsewhere.[299] An update on the original five LGWEM Strategy projects was also provided.[300]

225. LGWEM projects funded from the allocated $300 million were well-publicized, including on the Ontario Ministry of Transportation and Transport Canada websites, City of Windsor public notices and in the media.[301] No project under the LGWEM Strategy ever involved building a direct Highway 401-Ambassador Bridge connection.

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[298] "A New Solution for the Windsor Gateway Announced By All Three Levels of Government," News Release, March 11, 2004, at p. 3, **Exhibit R-34**; "Border Fix Launch Gets Green light: $82M for five projects of $300M program," Windsor Star, March 12, 2004, **Exhibit R-89**.

[299] "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," TC News Release No. GC004/05, April 21, 2005, **Exhibit R-90**; "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," Ontario News Release, April 21, 2005, **Exhibit R-91**.

[300] "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," News Release, April 21, 2005, at p. 6 of 7, **Exhibit R-91**.

[301] See *Let's Get Windsor-Essex Moving Strategy* website, Ontario Ministry of Transportation, Project Index, http://www.mto.gov.on.ca/english/engineering/border/windsor/westrategy.shtml, **Exhibit R-92**; "Border Fix Launch Gets Green light: $82M for five projects of $300M program," Windsor Star, March 12, 2004, **Exhibit R-89**; "Walker Road/CP Rail Construction Project: Public Information Meeting," Windsor News Release, September 28, 2004, **Exhibit R-93**; "Walker Road/CP Rail Construction Project: Public Information Meeting, September 29, 2004" Windsor Community Calendar Public Notice, September 28, 2004, **Exhibit R-94**; "Video Technology to Improve Traffic Flow at Canada's Busiest Border Crossing," News Release, November 23, 2004, **Exhibit R-95**; "Tenders Approved to Improve Road Congestion," Windsor Star, November 23, 2004, **Exhibit R-96**; "Government of Canada and Ontario Work to Make Border Crossing More Efficient," News Release, September 21, 2004, **Exhibit R-97**; Notice of Filing of the Environmental Study Report: Huron Church Road/Girardot Street Intersection, February 12, 2005, **Exhibit R-98**; "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," News Release No. GC004/05, April 21, 2005. **Exhibit R-90**; "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," Ontario News Release, April 21, 2005, **Exhibit R-91**; "Canada and Ontario Improving Safety at Windsor Border," News Release, May 27, 2005, **Exhibit R-99**; "Canada and Ontario Improving Roads in Windsor-Detroit Gateway," News Release, June 23, 2006, **Exhibit R-100**;

226. Based on DIBC's NAFTA allegations, the three-year time limitations period for submitting a claim to arbitration under NAFTA Articles 1116(2) and 1117(2) commenced March 11, 2004 when the alleged "promise" in the Nine Point Plan was "reneged" and replaced by the LGWEM Strategy. DIBC and CTC knew or should have known this and the evidence indicates they did. In addition to constructive knowledge of the abandonment of the Nine Point Plan in March 2004, examples of DIBC and CTC's actual knowledge can be found in the following:

- **May 11 and 30, 2006** – DIBC/CTC President Mr. Dan Stamper alleged before both the Michigan House & Senate Transportation Committee and Canadian House of Commons Transport Committee:

  > "The main impediment at the border is the lack of a dedicated thoroughfare from the Ambassador Bridge to Highway 401 to the Canadian side of the border…despite all of the public and private dollars invested on the U.S. side of the Bridge…*despite the $300 million Canada's federal government announced in 2002 allocated to improve access to current border facilities, Canada has failed to solve their well-known problem: a road from 401 to the border*."[302]

- **June 1, 2007** – CTC Executive Director of External Affairs Mr. Thomas "Skip" McMahon told the Windsor Star newspaper that the $300 million was committed "to connect the 401 to the [Ambassador] bridge plaza" but was instead spent on other traffic construction projects in Windsor.[303]

- **August 22, 2007** – DIBC/CTC took out an advertisement in the Windsor Star alleging that "$300 million of Canadian funds was designated in 2002 to complete Highway 401 to the current Windsor border. Despite five years of

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"Manning Road Widening Extended to County Road 22," Tecumseh Shoreline, September 6, 2006, **Exhibit R-101**; "Manning Widening Set," Windsor Star, September 9, 2006, **Exhibit R-102**; "Ontario and Michigan Improve Windsor-Detroit Border Safety," News Release, December 1, 2006, **Exhibit R-103**; "Ontario and Michigan Improve Windsor-Detroit Border Safety," A&A News, December 1, 2006, **Exhibit R-104**; "Canada's New Government and the Province of Ontario – Improving Highway 401 in Essex County," News Release, March 9, 2007, **Exhibit R-105**; "Improvements to Highway 401 Between Highway 77 and Essex Road 27 Now Complete," News Release No. h299/07, December 3, 2007, **Exhibit R-106**.

[302] Ambassador Bridge Testimony by D. Stamper, May 11, 2006, **Exhibit R-107**; House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1st Sess., 39th Parliament, Tuesday, May 30, 2006, at p. 3, **Exhibit R-108**.

[303] "Ambassador Bridge Owners Forging Ahead With Second Crossing," Truck News, June 1, 2007, **Exhibit R-109**.

talk, nothing has been done. Where has the money gone? Your government has failed to act."[304]

- **August 24, 2007** – CenTra/DIBC/CTC General Counsel Mr. Patrick Moran wrote to Canada alleging that it had reneged on its promise to use the $300 million to build a Highway 401-Ambassador Bridge connection.[305]

227. Any doubt that could have possibly existed in the mind of DIBC on this issue was, as it admits, dispelled on October 3, 2007. On that date, Canada wrote to DIBC/CTC President Mr. Stamper to confirm what was (or should have been) known long ago: (1) the $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 $300 million was being spent on short and medium term traffic infrastructure improvements, and (3) Canada remained committed to the Bi-National Partnership Process.[306] This is the letter which DIBC alleges in its Statement of Claim was the "decision by Canada to renege on its commitments to improve the management of traffic to the Ambassador Bridge."[307]

228. The evidence above shows that DIBC and CTC knew, or should have known, more than three-years before it filed its First NAFTA NOA on April 29, 2011 that the Windsor Gateway Action Plan/Nine Point plan was terminated. The alleged breach and alleged damage all occurred on March 11, 2004 when DIBC/CTC allegedly lost the benefit of $300 million for the "promised" Highway 401-Ambassador Bridge highway. DIBC has also alleged loss of toll revenue and that it suffered damage because it invested "hundreds of millions" in the Detroit Gateway Project in reliance of Canada's alleged promise to spend $300 million to make the same improvements to the Ambassador Bridge on the Canadian side.[308]

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[304] "We're Building a Better Bridge," Ambassador Bridge advertisement, Windsor Star, August 22, 2007, **Exhibit R-110**.

[305] Letter from Patrick Moran to Jacques Pigeon, Q.C. dated August 24, 2007, **Exhibit R-111**.

[306] Letter from Minister Lawrence Cannon to Dan Stamper, October 3, 2007, **Exhibit C-110**.

[307] NAFTA Statement of Claim, ¶ 190.

[308] Washington Complaint, ¶¶ 8, 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, ¶¶ 70, 83-84; NAFTA Statement of Claim ¶¶ 95, 158, 190.

229. For the reasons above, DIBC's claim with respect to the Windsor Gateway Action Plan/Nine Point Plan is time barred under NAFTA Articles 1116(2) and 1117(2) and thus outside the jurisdiction of the Tribunal.

2. Highway 401 Connection to the Ambassador Bridge Through the DRIC Process Was Eliminated on November 14, 2005

230. DIBC alleges that Canada manipulated the DRIC EA to eliminate the twinned Ambassador Bridge option X12 in order to ensure the Parkway would go to the DRIC Bridge but not the Ambassador Bridge.[309] DIBC's allegations are without merit, as has already been established in the Federal Court of Canada.[310] But even if taken as true for the purposes of determining jurisdiction, the claim is time barred under NAFTA Articles 1116(2) and 1117(2) because DIBC knew or should have known on November 14, 2005 that there would not be a direct highway connection between Highway 401 and the Ambassador Bridge.[311]

231. As described in Part II(B)(2) above, the DRIC EA 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 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 a direct Highway 401 connection 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 environmental impacts.[312]

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[309] NAFTA NOA, ¶¶ 26-34; Amended NAFTA NOA, ¶¶ 12, 113-114; NAFTA Statement of Claim, ¶¶ 95-96, 158, 190.

[310] EA JR (Can.), **Exhibit R-9**.

[311] To the extent DIBC alleges any other breach of NAFTA arising out of the elimination of the twin Ambassador Bridge Option X12, the claim would similarly be time-barred and be outside the jurisdiction of the Tribunal.

[312] DRIC Environmental Assessment Chapter 6 at pp. 6-34-6-42, 6-46-6-49, **Exhibit R-47**; Generation and Assessment of Illustrative Alternatives Report (November 2005), at pp. 102-115 **Exhibit R-52**. Second Public Information Open House DRIC Video Presentation (November/December 2005); **Exhibit R-53(a)**

232. The decision to drop option X12 from the Bi-National Partnership Process was publically announced on November 14, 2005.[313] The "Area of Continued analysis" map released on that date showed that improvements to Huron Church Road north of E.C. Row Expressway were no longer under consideration in the DRIC environmental assessment.[314] In other words, going forward from that date, no direct Highway 401-Ambassador Bridge road connections were under consideration by Canada.

233. Thereafter, DRIC EA public information sessions continued and substantial documentation setting out Canada's Highway 401 plans was published on the website www.partnershipborderstudy.com. None of those plans included building a direct Highway 401-Ambassador Bridge highway connection.[315]

234. Based on DIBC's NAFTA allegations regarding the alleged manipulation of the DRIC EA to ensure the Parkway component would go from Highway 401 to the DRIC Bridge but not the Ambassador Bridge, the three-year time limitations period for submitting a claim to NAFTA arbitration under Articles 1116(2) and 1117(2) started November 14, 2005 when option X12 was dropped from the DRIC EA. DIBC and CTC knew or should have known this and the evidence indicates they did. For example, in 2005 and 2006:

- **November 15, 2005** – The day after option X12 was dropped from the DRIC EA, DIBC/CTC President Mr. Dan Stamper wrote to MTO and MDOT declaring that the DRIC process had "*effected delay and damage*" to the Ambassador Bridge.[316]

- **November 29, 30 and December 1, 2005** – Canadian officials held public information sessions in Windsor and Detroit explaining the reasons for the

[313] November 14, 2005 press release at 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.").

[314] Detroit River International Crossing Study, Area of Continued Analysis, **Exhibit R-13**.

[315] In light of the volume of materials on this subject that was posted on an ongoing basis on www.partnershipborderstudy.com , Canada includes only a sample of relevant material relating to the Highway 401-DRIC Bridge road access as exhibits to this Memorial.

[316] 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** (emphasis added).

elimination of the X12 option because of negative impacts arising from the construction of a new Highway 401 link to the Ambassador Bridge.[317]

- **January 27, 2006** – In response to an email inquiry from CTC Executive Director of External Affairs Mr. Thomas "Skip" McMahon regarding the elimination of X12 option, Ontario explained that five different route alternatives to connect the Ambassador Bridge to Highway 401 were evaluated but:

> "[I]n consideration of the high community impacts of an expanded Canadian bridge plaza and the expansion of Huron Church Road north of E.C. Row Expressway, and the potential for disruption to border traffic during construction of the plaza and freeway, the Partnership considered that, on an end-to-end basis, the disadvantages of this alternative outweighed the advantages."[318]

- **January 31, 2006** – In reply to letters from DIBC/CTC President Mr. Dan Stamper in which he pointed out that "a 'complete connection' from Highway 401 to new or existing border crossings is not yet completed on the Canadian side," MTO informed Mr. Stamper that:

> "As you are aware, the DRIC EA was established in order to address the entire border crossing system, including the connection to the provincial freeway system. *The Area of Continued analysis, which we announced in November 2005, is the area in which the Project Team intends to develop specific alternatives for river crossings, plazas and access road to Highway 401*."[319]

- **January 31, 2006** – In response to MTO's January 31, 2006 letter DIBC/CTC President Mr. Dan Stamper wrote to MTO and MDOT:

> "On what basis does DRIC ignore *the important matter of rights granted the Ambassador Bridge by both US and Canadian governments and on what basis are those rights now being abrogated by DRIC without any consultation with the Ambassador Bridge?* […] *Canada has failed to properly accommodate existing border traffic by failing to complete the connection from the 401 to the border*; […] DRIC, by accommodating subjective Canadian preferences, would inherently decimate local Detroit communities – all while the preferred route is within kilometers of the Ambassador Bridge; and the obvious inequity of

[317] See "Welcome to the Second Public Information Open House for the Detroit River International Crossing Environmental Assessment," November 29, 30 & December 1, 2005, at pp. 27-28, 36, **Exhibit R-53**; DRIC Video Presentation, Second Public Information Open House (November/December 2005) **Exhibit R-53(a)**; DRIC Environmental Assessment, § 3.2 Table 3.3 at p. 3-11, **Exhibit R-47**.

[318] Letter from Len Kozachuk to S. McMahon dated January 27, 2006, **Exhibit R-112**.

[319] Letter from Roger Ward (MTO) to Dan Stamper dated January 31, 2006, **Exhibit R-113** (emphasis added).

> committing the US to invest $1.5 billion to overcome *Canada's longstanding failure to finish the 401 to the border*." [320]

- **March 28, 2006** – Transport Canada press release explained the various road access options to connect Highway 401 to the new customs plaza and new bridge.[321]

- **March 28 and 30, 2006 –** Public information houses in Windsor presented Highway 401-DRIC Bridge parkway alternatives, none of which included a direct connection to the Ambassador Bridge[322] because this option would require "either the conversion of all of Huron Church Road to a six-lane freeway, or construction of a new route through historic Sandwich."[323] The decision to eliminate option X12 was explained in detail. [324]

- **November 28, 2006** – DIBC/CTC President Mr. Dan Stamper testified before the Canadian Senate Committee on Transport and Communication:

  > *"The plan for the government-proposed bridge is to finish Highway 401 to the new bridge, not to our bridge. That is a continued way to take traffic away from the Ambassador Bridge* […] This is not just pie in the sky. These things have been going on for a long time."[325]

- **December 6 and 7, 2006** – Public Information Open House #4 set out further information about the planned Highway 401 access road to the DRIC Bridge, no option included a Highway 401-Ambassador Bridge highway.[326]

235. DIBC's knowledge of the alleged breach and damage is further demonstrated from events and documents in 2007. For example:

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[320] Letter from D. Stamper to M. Alghurabi dated January 31, 2006, **Exhibit R-114**.

[321] Transport Canada Press Release No. H009/06, "Border Transportation Partnership Announces Specific Options for Further Study for New Border Crossing in Windsor-Detroit," March 28, 2006, **Exhibit R-115**.

[322] DRIC Environmental Assessment, § 8.2.2 p. 8-26, **Exhibit R-47**; Third Public Information Open House, Display Board March 28 and 30, 2006, **Exhibit R-116**.

[323] Third Public Information House, DRIC-Why not other alternatives, March 28, 2006, **Exhibit R-117**.

[324] Third Public Information Open House, Display Board March 28 and 30, 2006, **Exhibit R-116**.

[325] 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.

[326] DRIC Environmental Assessment, § 8.2.2 pp. 8-26-8-36, **Exhibit R-47**. Fourth Public Information Open House Display Boards Handouts, Dec 6, 2006, **Exhibit R-118**.

- **April 26, 2007** – CenTra/DIBC General Counsel and Executive Vice-President Mr. Patrick Moran (and signatory to both waivers in this NAFTA arbitration) wrote in a letter to Canada:

> "DRIC has reported that the [Canadian] government has promised to connect [Highway] 401 with a new DRIC bridge although still failing to connect 401 to the Ambassador Bridge and its new span. *It would be a clear violation of the North American Free Trade Agreement ("NAFTA") to discriminate against the Ambassador Bridge in this manner*. Canada cannot favour a Canadian-owned DRIC bridge to the detriment of an American owned Ambassador Bridge."[327]

- **July 9, 2007** – CenTra/DIBC General Counsel and Executive Vice-President Mr. Patrick Moran wrote again to Canada:

> *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*.[328]

- **August 24, 2007** – In reply to Canada's letter of July 30, 2007 disagreeing with DIBC's characterization of the facts and Canada's legal obligations,[329] Mr. Moran reiterated DIBC's allegation that Canada had reneged on its promise to build a Highway 401-Ambassador Bridge connection.[330]

236. The evidence above is enough to put the question beyond debate. But the Tribunal need look no further than DIBC's own NAFTA Statement of Claim for its concession of when knowledge of the alleged breach and loss was first acquired:

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[327] Letter from Patrick Moran to Jacques Pigeon, QC dated April 26, 2007, **Exhibit R-119** (emphasis added).

[328] Letter from Patrick Moran to Jacques Pigeon, Q.C. dated July 9, 2007, **Exhibit R-38** (emphasis added). Canada replied to DIBC on July 30, 2007 stating, among other things, that it disagreed with DIBC's accusations and 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**.

[329] Letter from Jacques Pigeon, Q.C. to Patrick Moran dated July 30, 2007, **Exhibit R-39**.

[330] Letter from Patrick Moran to Jacques Pigeon, Q.C. dated August 24, 2007, **Exhibit R-111**.

> 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).***[331]

237. In other words, 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 loss from this breach. While the evidence above shows that DIBC actually first acquired knowledge of the alleged breach and damage much earlier than that date, *even if* this later date is used to measure the commencement of the three-year limitations period, DIBC would have had until October 3, 2010 to submit its claim to NAFTA arbitration (which it failed to do).

238. The evidence is irrefutable. DIBC "first acquired knowledge" of the alleged breach and loss or damage on November 14, 2005.[332] Accordingly, DIBC had until November 14, 2008 to commence arbitration under NAFTA Chapter Eleven with respect to its Highway 401 claims. Since DIBC failed to filed its First NAFTA NOA until April 29, 2011, the claims are time barred under NAFTA Articles 1116(2) and 1117(2) and this Tribunal does not have jurisdiction to hear them.

3. DIBC Failed to Submit Timely Claims Regarding Huron Church Road

239. As noted in Part III(D)(4) above, DIBC has confirmed that the only measure by the City of Windsor at issue in this NAFTA arbitration is the allegation that the Windsor-

[331] NAFTA Statement of Claim, ¶ 190 (emphasis added), citing to **Exhibit C-110**.

[332] DIBC/CTC President Mr. Dan Stamper accused Canada (and MDOT) of having "effected delay and damage" to the Ambassador Bridge the very next day. 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** (emphasis added). DIBC argues that Canada's alleged breach of past commitments regarding the Highway 401-Ambassador Bridge connection has caused it damage because a portion of existing traffic goes to competing bridges and tunnels instead of the Ambassador Bridge. DIBC's Response, ¶ 23.

Detroit Tunnel and the DRIC Bridge have been favoured by Windsor's maintenance of stoplights, driveway entrances and "curb cuts" on Huron Church Road.[333]

240. As Canada noted in its Brief Statement, DIBC has consistently failed to provide any information or supporting evidence with respect to this allegation and made no effort to correct this failure in its Response.[334] DIBC continues to avoid explaining how this allegation relates to its NAFTA claim and, in particular, how anything Windsor has done has the intention of favouring the Windsor-Detroit Tunnel. The stoplights that DIBC alleges have been wrongfully maintained on Huron Church Road have been in place for decades, the last set being installed in 1991 at the corner of Pulford Street between Cabana Road West and the E.C. Row Expressway.

241. While the Tribunal should consider this claim to be withdrawn, in any event, DIBC's Huron Church Road claim is apparently no different than its other allegations relating to the "promised" Highway 401-Ambassador Bridge connection. As described above, any possibility that the entirety of Huron Church Road would be transformed into a dedicated highway between the Ambassador Bridge and Highway 401 was rejected in November 2005.[335] The claim is accordingly time-barred under NAFTA Articles 1116(2) and 1117(2).[336]

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[333] First NAFTA NOA, ¶¶ 43-47; Amended NAFTA NOA, ¶¶125-129; NAFTA Statement of Claim, ¶¶ 205-209; DIBC's Response, ¶¶ 97-99.

[334] Neither the First NAFTA NOA, Amended NAFTA NOA, NAFTA Statement of Claim or DIBC's Response 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.

[335] EA Chapter 6 at p. 6-48, **Exhibit R-47** ("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."); *Generation and Assessment of Illustrative Alternatives Report* (November 2005), at pp. 102-115, **Exhibit R-50**; EA JR (Can.), ¶¶ 4, 45-48, **Exhibit R-9**. See Detroit River International Crossing Study, Area of Continued analysis, **Exhibit R-13**.

[336] DIBC has similarly failed to provide any indication as to the nature of its claim relating to highway improvements to the Blue Water Bridge in Sarnia, Ontario. Statement of Claim, ¶ 215. Canada therefore cannot respond to this allegation and reserves its right to supplement this jurisdictional objection with respect thereto.

4. DIBC's Continuing Breach Theory is Spurious With Respect to its Highway 401 Claims

242. As described at Part IV(C) above, the Claimant's theory of "continuing breach" is unfounded in law. Recent actions by DIBC serve to demonstrate the illogical consequences that would arise if such a theory were accepted by the Tribunal.

243. On January 30, 2013, the day before filing its NAFTA Statement of Claim, DIBC/CTC President Mr. Dan Stamper sent a letter to Canada's Minister of Transport Infrastructure and Communities Denis Lebel, copying DIBC's legal counsel and Messers. Manuel and Matthew Moroun (CenTra Inc. and owners of the Ambassador Bridge), 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."[337]

244. Mr. Stamper's letter appears to be a misguided attempt to re-start the time limitation period under NAFTA Article 1116(2) and 1117(2) and/or "re-acquire" knowledge which DIBC and CTC first acquired on November 14, 2005. This is simply not permitted under the NAFTA.[338]

245. If DIBC's continuing breach logic is accepted, DIBC would be able to re-start the limitations period in perpetuity as long as Canada does not build a direct Highway 401-Ambassador Bridge connection. Mr. Stamper's January 30, 2013 letter would serve as an instant "cure" to DIBC's otherwise untimely Highway 401 Claims. This position cannot stand in the face of the text of Article 1116(2) and 1117(2) and their purpose of ensuring NAFTA claims are brought in a timely fashion. DIBC's theory should be rejected by the Tribunal.

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[337] Letter from Dan Stamper to Minister Lebel dated January 30, 2013, **Exhibit R-40**; Canada's Brief Statement, ¶ 102 fn. 133.

[338] See *Merrill & Ring*, 1128 Submission of the United States, **RLA-17**; *Merrill & Ring* , 1128 Submission of Mexico, **RLA-18**.

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

246. DIBC alleges that "Canada has enacted the IBTA to give Canada the purported authority to interfere with the Ambassador Bridge's expansion plans including the Ambassador Bridge New Span, to interfere with [DIBC's] rights to operate the bridge under the Special Agreement, and to…coerce DIBC and CTC to transfer their rights in the Ambassador Bridge only to Canada on Canada's terms."[339]

247. DIBC's allegations regarding the intent and purpose of the IBTA are untrue.[340] But even if believed for the purposes of jurisdiction, DIBC failed to submit a timely claim within the three-year time limitation set out in NAFTA Articles 1116(2) and 1117(2) because the IBTA was enacted on February 1, 2007.[341] DIBC tries to avoid this fate by arguing that "Canada's ongoing assertion that the IBTA applies to the Ambassador Bridge is a continuing NAFTA violation…each day Canada continues in this course of conduct, DIBC suffers new injury."[342] But DIBC says that even if its continuing breach theory is rejected, it did not know that the IBTA applied to the Ambassador Bridge until the IBTA Regulations were adopted in 2009, which would make its claim timely under its First NAFTA NOA on April 29, 2011.[343]

248. Both of DIBC's arguments are meritless. As described above and elaborated further below with respect to the IBTA claim, DIBC's "continuing breach" theory is inconsistent with the plain meaning of the three-year time limitation in NAFTA Articles 1116(2) and 1117(2).

249. Furthermore, DIBC's suggestion that it did not first acquire knowledge of the alleged breach and damage until February 2009 is flatly contradicted by the evidence,

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[339] Amended NAFTA NOA, ¶ 107; 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**.

[340] See Part II(D) above.

[341] Canada's Brief Statement, ¶¶ 103-105.

[342] DIBC's Response, ¶ 24.

[343] DIBC's Response, ¶ 26. See International Bridges and Tunnels Act Regulations, SOR/2009-17 January 29, 2009, **Exhibit C-112.**

including explicit statements made by DIBC/CTC executives and CTC's own pleadings in other litigations. The evidence presented below shows that DIBC and CTC first acquired knowledge of the alleged breach and damage on February 1, 2007, rendering its IBTA claim untimely.[344]

1. The IBTA Applied to the Ambassador Bridge, including the New Span, as of February 1, 2007

250. DIBC alleges that "Canada's position that the IBTA applies to the Ambassador Bridge was not made clear until [February] 2009" when IBTA Regulations were adopted, which means its IBTA claim is timely.[345] This is an untenable assertion.

251. The IBTA was enacted on February 1, 2007.[346] It is self-evident that the IBTA applies to the Ambassador Bridge. The IBTA defines an "international bridge or tunnel" to include not only the bridge or tunnel, but also any part of the bridge of tunnel that connects any place in Canada to any place outside Canada.[347] The Ambassador Bridge is an international bridge because it traverses the border between Canada and the United States. The CTC Act is specifically listed as being subject to the IBTA in its schedule.[348] DIBC has *already conceded* that the IBTA "supersedes the 1921 CTC Act, which is part of the Special Agreement, to the extent of any inconsistency."[349]

252. DIBC and CTC cannot plead ignorance of the law and the evidence shows that they knew or should have known that the IBTA applied to the Ambassador Bridge on the day it was enacted. Indeed, when the IBTA was introduced as Bill-C3 for approval by Parliament in April 2006, DIBC and CTC immediately objected to its application to the

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[344] As discussed in Part VI below, Canada seeks discovery from DIBC's internal files to complete the evidentiary record.

[345] DIBC's Response, ¶ 26. Even if this assertion were true, it would still not make DIBC's IBTA claim timely under Articles 1116(2) and 1117(2).

[346] *International Bridges and Tunnels Act,* S.C. 2007, c.1., **Exhibit C-94**.

[347] *International Bridges and Tunnels Act,* S.C. 2007, c.1, section 2, **Exhibit C-94**.

[348] IBTA s. 4 and Schedule Bridges and Tunnels Acts, section 4 (34).

[349] 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.

Ambassador Bridge. During parliamentary hearings on May 30, 2006, CenTra Inc. Chairman Mr. Matthew Moroun and DIBC/CTC President Mr. Dan Stamper opposed the IBTA's applicability to the Ambassador Bridge and argued that it will damage the value of the Ambassador Bridge.[350]

253. In a letter dated November 3, 2006, DIBC/CTC President Mr. Stamper wrote to oppose the IBTA's applicability to the Ambassador Bridge, which Mr. Stamper alleged "creates a serious impediment for our project at the Windsor-Detroit crossing and could cause serious delays" to its New Span.[351]

254. In Parliamentary testimony on November 28, 2006, Mr. Stamper alleged that the IBTA "in combination with the work of the [DRIC], is an effort by bureaucrats to ensure that a public-private border crossing is to be constructed and made profitable, at our expense" and alleged that the IBTA is "designed to give the bureaucrats the opportunity to take business away from our border crossing and send it to a government-sponsored new bridge."[352] Mr. Moroun alleged that "the entire intent of [the IBTA] is to pass a law specifically for the Ambassador Bridge" and that Canada "wants to eradicate" the CTC Act through the IBTA.[353] Mr. Stamper proposed that the IBTA be amended to delete the CTC Act from the schedule of legislation to which the IBTA applied.[354] DIBC's proposed amendment was not adopted.

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[350] House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1st Sess., 39th Parliament, Tuesday, May 30, 2006, at 6, **Exhibit R-108** ("[IBTA] would also require the transport minister's or the government's approval to sell the bridge to the highest bidder in an auction sale, thus hurting the value of the bridge and my family's investment in it since 1979. It has serious financial ramifications to the point of almost disenfranchisement."). Mr. Stamper also alleged that the IBTA was "undoing" the 1992 Settlement Agreement between Canada and DIBC, *Id.* at p. 7.

[351] Letter from Dan Stamper to Senator Lise Bacon, Re: Bill C-3 International Bridges and Tunnels Act dated November 3, 2006, **Exhibit R-120**. DIBC also speculated that the IBTA's provisions regarding use and tolls could be a violation of NAFTA. *Id*., p. 2 ("Changing the type of vehicle that could cross our bridge could be a taking of business and we believe that it is in direct violation of NAFTA.").

[352] Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006, at p. 1 of 12, **Exhibit R-37**.

[353] *Ibid*., at p. 3.

[354] *Ibid*., at p. 3.

255. On December 4, 2006, in another letter from DIBC/CTC President Mr. Dan Stamper, DIBC alleged that the IBTA was "an attack on the Ambassador Bridge" and that it was an effort by "the bureaucrats…to take away our corridor's business."[355] Mr. Stamper proposed that the IBTA be amended to delete the CTC Act from the schedule of legislation to which the IBTA applied.[356] DIBC's proposed amendment was not adopted.

256. As shown above, DIBC was making the same baseless allegations about the IBTA from April-December 2006 as it does now in its NAFTA Statement of Claim (filed seven years later). It is simply not credible for DIBC to argue that it was "not made clear" that the IBTA applied to the Ambassador Bridge until February 2009.[357]

257. Once the IBTA came into force, Canada again made it clear to DIBC that the IBTA applied to the Ambassador Bridge in written correspondence on July 30, 2007 from Canada to CenTra/DIBC's legal counsel Mr. Patrick Moran. Among other things, Canada stated that it "does not agree with Centra, Inc.'s…position on the scope and effect of the *International Bridges and Tunnels Act*" as it relates to the Ambassador Bridge and stated that "the *International Bridges and Tunnels Act* applies [to] CenTra, Inc. and the related companies [DIBC and CTC] in accordance with its terms."[358] Mr. Moran responded on August 24, 2007 and maintained that CenTra/DIBC disagreed with Canada on the IBTA and other issues addressed in Canada's July 30, 2007 letter.[359]

258. Canada again made it clear that the IBTA applied to the Ambassador Bridge and the construction of the New Span in written correspondence from Canada to DIBC/CTC President Mr. Dan Stamper on October 30, 2007 and November 23, 2007.[360]

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[355] Letter from Dan Stamper to Members of the Standing Senate Committee on Transport and Communications, dated December 4, 2006, at pp. 1, 2, **Exhibit R-121**.

[356] *Ibid*., p. 7.

[357] DIBC's Response, ¶ 26.

[358] See Letter from Jacques Pigeon, Q.C. to Patrick Moran, July 30, 2007, at pp. 1, 2, **Exhibit R-39.**

[359] Letter from Patrick Moran to Jacques Pigeon dated August 24, 2007, **Exhibit R-111**.

[360] Letter from Brian E. Hicks to Dan Stamper dated October 30, 2007, **Exhibit R-122**; Letter from Paul Fitzgerald to Dan Stamper, dated November 23, 2007, **Exhibit R-123**.

259. On August 24, 2007, CTC Executive Director of External Affairs Mr. Thomas "Skip" McMahon revealed in an interview with the Windsor Star newspaper that DIBC/CTC had started building pillars and roadbed for the New Span in Canada even though it had not applied for approval under the IBTA nor had even filed an environmental impact statement for the New Span.[361]

260. Transport Canada wrote to DIBC/CTC President Mr. Dan Stamper on October 30, 2007 to inquire as to the nature of the construction and whether, as Mr. McMahon had told the Windsor Star in August 2007, it was in fact part of the New Span.[362] Canada reminded Mr. Stamper that regulatory approval under the IBTA was required before any alteration to the Ambassador Bridge or building the New Span could commence:

> As you are aware, federal legislation requires approval for work, including construction or alteration, with respect to existing or new international bridges. *Specifically, the International Bridges and Tunnels Act (IBTA) provides that no person shall construct or alter an international bridge without the approval of the Governor in Council.* The restriction not only applies to the construction of a new international bridge, including its approaches and related facilities, but also to alterations made in relation to any existing international bridge, including its approaches and related facilities […] *As Transport Canada is unaware of any application made by CTC under the IBTA* or the NWPA in relation to the work identified above, Transport Canada would like to ensure that the work has not inadvertently been undertaken without the necessary regulatory approval…we ask that your explanation address how this work is related to your proposal to build a new span.[363]

261. Mr. Stamper responded to Transport Canada the same day but did not directly answer the question as to whether CTC was in the process of constructing the New Span without authorization under the IBTA.[364] Instead, Mr. Stamper said that the work was

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[361] Dave Battagello, "Bridge to Nowhere- Construction has begun on Ambassador's twin span, despite lack of gov't approvals", *Windsor Star* (August 24, 2007), **Exhibit R-124**. Mr. McMahon "confirmed that [CTC] is building pillars and roadbed near the intersection of Huron Church and Wyandotte Street as part of its twin span plans… 'the platforms and pillars will eventually support our enhancement project' McMahon said 'After we have gone through the environmental assessment, it will be the hookup to the plaza on the Canadian side for the new span across the river.'"). As noted in Part II(E)(2) above, DIBC filed its initial New Span environmental impact statement on December 4, 2007. See Ambassador Bridge Enhancement Project Environmental Impact Statement, **Exhibit C-89**.

[362] Letter from Brian E. Hicks to Dan Stamper dated October 30, 2007, **Exhibit R-122**.

[363] Letter from Brian E. Hicks to Dan Stamper dated October 30, 2007, **Exhibit R-122**.

[364] Email from Dan Stamper to Paul Fitzgerald, dated October 30, 2007 **Exhibit R-125**.

part of the existing Ambassador Bridge customs plaza (a statement that conflicted with what CTC executive Mr. McMahon had told the Windsor Star in August 2007).[365]

262. Canada wrote back to Mr. Stamper on November 23, 2007 and, again, made it clear that the IBTA was applicable to the New Span:

> I wish to confirm that Transport Canada is committed to and will continue to fulfill all of its legal responsibilities under the various legislation it is charged with administering in respect of your [New Span] project, including the *International Bridges and Tunnels Act*, the NWPA and CEAA, in a diligent, objective, reasonable and effective manner.[366]

263. It was not until March 22, 2010 that DIBC and CTC revealed in the Washington Litigation Complaint that "the approach ramps for the New Span have already been constructed on both the U.S. side and the Canadian side of the river," that "the ramps for the New Span connect directly to the Ambassador Bridge's existing toll and customs plazas on both the U.S. side and the Canadian side" and that "all that remains is to construct the actual bridge span connection the two approach ramps."[367]

264. DIBC and CTC's revelation in the Washington Litigation meant that, notwithstanding the text of the IBTA and its schedule, and notwithstanding Canada's written notice to DIBC/CTC on July 30, 2007, October 30, 2007 and November 23, 2007 that the IBTA applied to the Ambassador Bridge and that any work on the New Span was subject to IBTA approval, DIBC and CTC commenced work on the New Span anyway.[368] DIBC and CTC's revelation in the Washington Litigation caused a cease and

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[365] *Ibid*.

[366] Letter from Paul Fitzgerald to Dan Stamper, dated November 23, 2007 **Exhibit R-123**.

[367] See Washington Complaint, ¶¶ 72 and 96 ("DIBC and CTC have already constructed the ramps that would connect the New Span to the existing plazas on the U.S. and Canadian sides"), **Exhibit R-17.** DIBC has confirmed this admission in its Statement of Claim. See NAFTA Statement of Claim ¶ 157.

[368] As discussed in Part II(E)(2) above, DIBC did the same on the Detroit side of the river without authorization from MDOT and the United States Coast Guard. See for example Letter from Hala Elgaaly (USCG) to Dan Stamper (DIBC) dated March 20, 2009, **Exhibit R-65**; Letter from Andrew Zeigler (MDOT) to Dan Stamper (DIBC) dated May 18, 2009, **Exhibit R-66**.

desist order under the IBTA to be issued against CTC in October 2010, which CTC has challenged in the Federal Court of Canada.[369]

265. CTC has even argued in its own litigation pleadings that Canada has "gone to great lengths to seek to apply the IBTA against CTC" and points specifically to Canada's October 30, 2007 letter to DIBC/CTC President Mr. Dan Stamper as evidence thereof.[370]

266. In light of the evidence above, DIBC's assertion that "Canada's position that the IBTA applies to the Ambassador Bridge was not made clear until 2009" is fatuous.[371]

267. Under NAFTA Articles 1116(2) and 1117(2), DIBC had three-years as of the date it first acquired, or should have first acquired, knowledge of the alleged breach and loss or damage with respect to its IBTA claim. Thus, the countdown started on February 1, 2007 when the IBTA was enacted. CenTra/DIBC/CTC executives Messrs. Matthew Moroun and Dan Stamper had alleged even prior to that date that the IBTA reduced the value of the Ambassador Bridge and that it created a "serious impediment" to the construction of the New Span.[372] DIBC alleges that the IBTA was enacted to interfere with its rights under the "Special Agreement" and to "limit the value of [DIBC's] rights" and that the IBTA "infringes on the exclusive franchise right to DIBC and CTC and interferes with DIBC's rights to build the New Span…DIBC must incur further expenses to defend its franchise and assert its rights to build the New Span" which is "depriving

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[369] See Letter from Mary Komarynsky (Transport Canada) to Dan Stamper (DIBC/CTC) dated July 19, 2010, **Exhibit R-126**; Ministerial Order: Construction or Alteration: International Bridges and Tunnel dated October 18, 2010, **Exhibit R-127**; Letter from Brian Hicks (Transport Canada) to Dan Stamper (DIBC/CTC) dated October 25, 2010, **Exhibit R-128**; *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), November 18, 2010, ¶¶ 10-11, **Exhibit R-46**; *Canadian Transit Company v. Minister of Transport*, Court File No. T-1939-10, December 17, 2010 (FCC) Motion for a Temporary Stay of CTC's Application for Judicial Review with affidavit of Patrick A. Moran, **Exhibit R-45**

[370] *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), November 18, 2010, ¶¶ 10-11, **Exhibit R-46**.

[371] DIBC's Response, ¶ 26.

[372] House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1st Sess., 39th Parliament, Tuesday, May 30, 2006, at p. 6, **Exhibit R-108** (Matthew Moroun: "[IBTA] would also require the transport minister's or the government's approval to see the bridge to the highest bidder in an auction sale, thus hurting the value of the bridge and my family's investment in it since 1979. It has serious financial ramifications to the point of almost disenfranchisement."); Letter from Dan Stamper to Senator Lise Bacon dated November 3, 2006, **Exhibit R-120**.

DIBC of toll and concession revenues it would otherwise earn through the operation of the New Span."[373] DIBC has also alleged that the IBTA interferes with its commercial operations in the United States.[374]

268. The evidence is irrefutable. DIBC failed to submit its IBTA claim to NAFTA arbitration within three-years of February 1, 2007, which renders it time barred under NAFTA Articles 1116(2) and 1117(2) and outside the Tribunal's jurisdiction.

2. DIBC's Continuing Breach Theory is Spurious With Respect to its IBTA Claim

269. DIBC says that "Canada's present course of conduct – including…its position that the IBTA applies to the Ambassador Bridge – is an *ongoing* violation of NAFTA that is harming DIBC each day it continues."[375] As explained in Part IV(E) above, this theory has no basis in NAFTA Chapter Eleven. The consequence of DIBC's theory would be that, notwithstanding that DIBC and CTC has been making the same allegations with respect to the IBTA's application to the Ambassador Bridge *since 2006*, DIBC can wait in perpetuity before deciding to challenge the IBTA in NAFTA arbitration without running afoul of Article 1116(2) and 1117(2). This is contrary to the plain text of these provisions and defeats their object and purpose and must be rejected by the Tribunal. If accepted, it would render the NAFTA three-year time limitation period void of meaning.

F. Conclusion

270. For the reasons set out above, the Tribunal has no jurisdiction over DIBC's Highway 401 and IBTA claims because they are all time barred under NAFTA Articles 1116(2) and 1117(2).

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[373] DIBC Response, ¶ 24. See also NAFTA Statement of Claim, ¶¶ 180, 213; First NAFTA NOI, ¶ 38, **Exhibit R-44**. As noted in Part IV(B)(2) above, an investor need not know the exact quantification or amount of damage suffered for the purposes of triggering the three-year time limitation under Articles 1116(2) and 1117(2) because knowledge of general loss or damage is sufficient. See *Grand River*, Jurisdiction Decision, ¶ 77, **RLA-15**. *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, October 11, 2002, ¶ 87, **RLA-20**.

[374] Statement of Claim, ¶ 178 ("The IBTA, if applicable, would have extraterritorial effects in the United States by interfering with DIBC's commercial ownership and operation of the U.S. portion of the [Ambassador] bridge.").

[375] DIBC's Response, ¶¶ 17, 24.

V. THE TRIBUNAL HAS NO JURISDICTION WITH RESPECT TO CLAIMS BASED ON THE *BOUNDARY WATERS TREATY*

A. Summary of Canada's Position

271. DIBC alleges that Canada has used the IBTA and other measures to deprive it of its "exclusive franchise" rights to operate the Ambassador Bridge, including its alleged right to build the New Span.[376]

272. An alleged source of this "exclusive franchise" comes from DIBC's proposition that the CTC Act in Canada and the ATC Act in the United States together constitute a "special agreement" within the meaning of Article XIII of the 1909 *Boundary Waters Treaty*.[377] DIBC says this "special agreement" formed an international treaty, which it called in its First NAFTA NOI the *Ambassador Bridge Treaty*, which is binding in international law and was incorporated into Canadian and U.S. domestic law.[378] DIBC argues that this international treaty "necessarily includes the right to build a replacement or additional span as needed or appropriate"[379] and that the Ambassador Bridge "is exempted from new regulation by virtue of the *Ambassador Bridge Treaty*," including from the IBTA.[380]

273. To the extent that DIBC is asking that the Tribunal make a determination that the alleged *Boundary Waters Treaty* Article XIII "special agreement" or *Ambassador Bridge Treaty* exists as an international treaty and has been violated by Canada, it would be beyond its jurisdiction to do so.[381] Under the NAFTA and international law, this Tribunal

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[376] First NAFTA NOI, ¶¶ 33-37, **Exhibit R-44**; Amended NOA, ¶¶102, 103, 107; NAFTA Statement of Claim, ¶¶ 174-175, 180.

[377] First NAFTA NOI, ¶ 26, **Exhibit R-44**; Amended NAFTA NOA, ¶¶ 33, 36, 42; NAFTA Statement of Claim, ¶¶ 33-39, 42, 48-49, 57, 61,-62, 64; Washington Complaint, ¶ 27, 28, 33, **Exhibit R-17;** DIBC also says that its alleged exclusive franchise rights are bestowed by statute in Canadian domestic law by the CTC Act and are enforceable without reliance on the *Boundary Waters Treaty*. DIBC's Response ¶ 28.

[378] First NAFTA NOI, ¶ 26, **Exhibit R-44**; Amended NOA, ¶¶ 33, 35; NAFTA Statement of Claim, ¶ 39; Washington Complaint, ¶ 33, **Exhibit R-17.**

[379] NAFTA Statement of Claim, ¶ 64.

[380] First NAFTA NOI, ¶¶ 33-37, **Exhibit R-44;** Amended NAFTA NOA, ¶¶102, 103, 107; NAFTA Statement of Claim, ¶¶ 174-175, 180.

[381] DIBC's allegation that it has an exclusive franchise in domestic law that would prevent the construction of any other bridge across the Detroit River is baseless in any event. Nothing in either Canadian or U.S.

has no jurisdiction to consider whether a *Boundary Waters Treaty* Article XII special agreement exists (it does not), whether it constitutes a treaty in international law (it does not) and what are Canada's international legal obligations thereunder (none).

274. DIBC's pleading on this issue is unclear. In its Response, DIBC appears to concede in one paragraph that its alleged exclusive franchise rights exist only in Canadian domestic law,[382] but in the next paragraph, it alleges the Canada is violating "a binding international agreement in international law."[383] DIBC also said in its Response that it is not "asserting any claim that Canada has breached the Boundary Waters Treaty,"[384] but this contradicts what it has argued elsewhere. For example:

- DIBC argues that the IBTA is "an attempt to use Canadian domestic legislation to deprive [DIBC] of rights created by the *Boundary Waters Treaty* and the *Ambassador Bridge Treaty*";[385]
- DIBC argues that the IBTA is "an abrogation of the rights of DIBC and CTC under the *Boundary Waters Treaty* [and] the *Ambassador Bridge Treaty*";[386]
- DIBC argues that the Ambassador Bridge is "exempted from new regulation by virtue of the *Ambassador Bridge Treaty*";[387]
- DIBC argues that "Canadian domestic legislation cannot unilaterally abrogate the rights created under an international treaty…in particular, if the IBTA is

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law, statutory or otherwise, can be construed as guaranteeing DIBC an exclusive right to construct a new bridge nor do the CTC and ATC Acts contain a provision prohibiting Canada or the United States from authorizing other bridges in the same area. The CTC Act only authorizes CTC to "maintain and operate a railway and general traffic bridge across the Detroit River" and "charge tolls." See **Exhibits C-5 – C-11**.

[382] DIBC's Response, ¶ 28 ("DIBC's franchise rights are specifically bestowed by those statutes [i.e., the CTC Act and ATC Act], which are independently enforceable and which do not depend on the Boundary Waters Treaty.")

[383] DIBC's Response, ¶ 29 ("The 1921 CTC Act, the 1921 DIBC Act, and subsequent Canadian and U.S. legislation…constitute a "special agreement" within the meaning of the Boundary Waters Treaty [and] as a result, the reciprocal agreement between Canada and the United States to grant franchise rights to DIBC and CTC constitutes a binding international agreement under international law, which has been incorporated into domestic Canadian law and U.S. law through legislation in each country. It is this agreement and these statutory rights that Canada is breaching.")

[384] DIBC's Response, ¶ 29.

[385] First NAFTA NOI, ¶ 33, **Exhibit R-44**.

[386] First NAFTA NOI, ¶ 36, **Exhibit R-44**.

[387] First NAFTA NOI, ¶ 34, **Exhibit R-44**.

interpreted and applied as Canada contends, Canada has [acted] in derogation of DIBC's and CTC's rights under the *Ambassador Bridge Treaty*."[388]

- DIBC argues that the "United States Congress has not consented to abrogation of any part of the Special Agreement…the IBTA is not part of any special agreement that can authorize the construction of a new bridge in a manner that is consistent with the *Boundary Waters Treaty*."[389]

275. As discussed below, a NAFTA tribunal does not have jurisdiction to make determinations on alleged violations of other international treaties. But a short description of the historical record is relevant to confirm the limits of the Tribunal's jurisdiction on this issue. In light of DIBC's inconsistent, and ultimately irrelevant, pleading on the issue, the Tribunal should disregard DIBC's *Boundary Waters Treaty* "special agreement" international treaty theory as a red herring and beyond its jurisdiction to address.

B. DIBC Misconstrues the Historical Record and Wrongly Asserts the Existence of a *Boundary Waters Treaty* Article XIII Special Agreement

276. The 1909 *Boundary Waters Treaty* lays out the principles and mechanisms to help resolve disputes, and to prevent future disputes, concerning water quantity and quality along the boundary waters (lakes, rivers and connecting waterways) between Canada and the United States. Disputes between Canada and the United States regarding use, obstruction or diversion of boundary waters may be referred to the International Joint Commission ("IJC") to resolve.

277. DIBC has misread the historical record when it says Canada and the United States agreed that the CTC Act and the ATC Act together constituted a special agreement within the meaning of Article XIII of the *Boundary Waters Treaty*.[390] Diplomatic correspondence from 1927 regarding the Ambassador Bridge shows this is not the case.

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[388] First NAFTA NOI, ¶ 37, **Exhibit R-44**.

[389] NAFTA Statement of Claim, ¶ 175; Washington Second Amended Complaint, ¶ 118, **Exhibit R-19**.

[390] DIBC's Response, ¶ 28; Amended NOA, ¶ 33; Statement of Claim, ¶¶ 34, 37-39. DIBC also misunderstands the object and purpose of the *Boundary Waters Treaty* and the role of special agreements thereunder, as well as the role of the IJC and fundamental issues of treaty law (see DIBC Response, ¶¶ 30-33), but it is unnecessary for Canada to elaborate on these issues in this Memorial.

278. On April 1, 1927, the lawyers for the American Transit Company ("ATC") sent a letter to the U.S. State Department asking the United States whether the approval of the IJC was necessary for the construction of the Ambassador Bridge.[391] On April 6, 1927, the U.S. replied that, in its view, the legislation of the United States and Canada regarding the Ambassador Bridge was a special agreement under the *Boundary Waters Treaty* and reference to the IJC was therefore unnecessary.[392]

279. However, Canada was unaware that the United States held that position until it was indirectly brought to the attention of Canada's Under Secretary of State for External Affairs on July 19, 1927 by the lawyers for CTC when they asked Canada for confirmation that it would also not seek IJC approval for the Ambassador Bridge.[393]

280. Canada's view was that since proposed Ambassador Bridge would have no measurable effect on the level or flow of boundary waters, the *Boundary Waters Treaty* did not even apply, so IJC approval was unnecessary.[394]

281. But in addition to the *Boundary Waters Treaty* having no application to the Ambassador Bridge, Canada observed that the U.S. view regarding the existence of an Article XIII "special agreement," which had not been directly communicated to Canada by the United States, was contrary to Canada's long-standing position on the subject:

> "It has always been the contention of the Government of Canada that Parliamentary and Congressional approval of projects such as that of the Detroit-Windsor Bridge *does not constitute a 'special agreement' between the High Contracting Parties as defined and intended in Article 13 of the Boundary*

[391] As referenced in Letter from Joseph C. Grew, Under Secretary of State, United States Department of State to Cook, Nathan and Lehman dated April 6, 1927, **Exhibit R-129**. ATC was DIBC's predecessor.

[392] Letter from Joseph C. Grew, Under Secretary of State, United States Department of State to Cook, Nathan and Lehman dated April 6, 1927, **Exhibit R-129**.

[393] Letter from McGiverin, Haydon & Ebbs to O.D. Skelton, Esq (Under-Secretary of State for External Affairs) dated July 19, 1927, **Exhibit R-130.** The ATC lawyers attached a copy of the April 6, 1927 letter from the U.S. State Department in its letter to Canada.

[394] Letter from R.C. Desrochers, Esq. (Acting Deputy Minister, Department of Public Words) to O.D. Skelton, Esq. (Under-Secretary of State for External Affairs) dated July 26, 1927, **Exhibit R-131**; Letter from O.D. Skelton, Esq. (Under-Secretary of State for External Affairs) to R.C. Desrochers, Esq. (Acting Deputy Minister, Department of Public Words) dated August 2, 1927, **Exhibit R-132**.

> *Waters Treaty*."[395]

282. In light of Canada having learned indirectly of the U.S. State Department's view regarding the existence of a *Boundary Waters Treaty* "special agreement," Canada resolved not only write to write CTC regarding its question about the IJC, but also write to the United States regarding the Ambassador Bridge "in order that our [i]nternational position in respect to this matter may be properly safeguarded."[396]

283. Accordingly, Canada wrote to CTC on August 17, 1927 informing it of Canada's position that since the Ambassador Bridge would have a negligible effect on boundary waters, "it is not considered that the occasion arises under which by Article 3 of the Boundary Waters Treaty of 1909 approval of the International Joint Commission must be sought."[397] Thus, contrary to what DIBC suggests, it was not because Canada believed there was a special agreement that IJC approval was deemed unnecessary.[398] Rather, IJC approval was moot because Canada did not consider the *Boundary Waters Treaty* to be applicable.

284. On August 24, 1927, Canada wrote to the U.S. State Department and referred to CTC's inquiry as to whether Canada considered it necessary to refer the construction of the Ambassador Bridge to the IJC.[399] In its letter, Canada informed the United States that:

> [CTC] is being advised that it is the view of the Canadian Government that the effect of the proposed bridge structure upon international waters will not be measurable, and that Canada does not, therefore, consider that a reference to the Commission be necessary. *This course is taken without prejudice to the interpretation which the Canadian Government has given to Articles 3 and 13 of*

[395] Letter from W.W. Cory (Deputy Minister of the Interior) to O.D. Skelton, Esq. (Under-Secretary of State for External Affairs) dated August 13, 1927, **Exhibit R-133** (emphasis added). See also Letter from O.D. Skelton, Esq (Under-Secretary of State for External Affairs) to W.W. Cory (Deputy Minister of the Interior) dated August 12, 1927, **Exhibit R-134**. Canada had held this view since the *Boundary Waters Treaty* came into force in 1910.

[396] Letter from Deputy Minister of the Interior to O.D. Skelton, Esq (Under-Secretary of State for External Affairs) dated August 13, 1927, **Exhibit R-133**.

[397] Letter from O.D. Skelton, Esq. (Under-Secretary of State for External Affairs) to McGiverin, Haydon & Ebbs dated August 17, 1927, **Exhibit R-135**.

[398] NAFTA Statement of Claim, ¶ 37.

[399] Letter No. 224 from Laurent Beaudry (Charge d'Affaires, Canadian Legation Washington) to Frank B. Kellogg, Secretary of State of the United States dated August 24, 1927, **Exhibit R-136**.

> *the Boundary Waters Treaty of 1909, and particularly to the interpretation of what notion is to be taken as constituting a "special agreement" between the parties to the treaty*.[400]

285. Canada's position above was acknowledged by the United States in a letter dated August 31, 1927.[401]

286. Thereafter, there is no corroborating evidence to show that Canada and the United States have considered there to be an "international treaty binding in international law" relating to the Ambassador Bridge under the *Boundary Waters Treaty* or otherwise. The alleged *Ambassador Bridge Treaty/*special agreement is not listed in any treaty database of Canada or the United States and has none of the formalities normally associated with the conclusion of an international treaty. This is not surprising, not only because of the correspondence described set out above, but because what DIBC alleges to be a "treaty binding in international law" and "has the force of a treaty as a matter of international law"[402] does not meet the criteria as to what constitutes a treaty in international law, including under the *Vienna Convention on the Law of Treaties*.[403] Nor does the alleged *Ambassador Bridge Treaty*/special agreement have any of the hallmarks of an international treaty having been "incorporated" into Canadian law.

C. The Tribunal has no Jurisdiction to Determine a Breach of the *Boundary Waters Treaty* and/or the *Ambassador Bridge Treaty*

287. To the extent that DIBC is alleging that Canada has violated the *Boundary Waters Treaty* Article XIII "special agreement" or *Ambassador Bridge Treaty*, it would be beyond the jurisdiction of this tribunal to make such a determination, not only because the very existence of the alleged international treaty is disputed (which would necessarily require a *Boundary Waters Treaty* and general international treaty law inquiry to resolve),

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[400] Letter No. 224 from Laurent Beaudry (Charge d'Affaires, Canadian Legation Washington) to Frank B. Kellogg, Secretary of State of the United States dated August 24, 1927 (emphasis added), **Exhibit R-136**.

[401] Letter No. 711.42157 D 482/16 from Secretary of State to Laurent Beaudry (Charge d'Affaires, Canadian Legation Washington) dated August 31, 1927, **Exhibit R-137**.

[402] Washington Complaint, ¶ 33, **Exhibit R-17**; NAFTA Statement of Claim, ¶ 39, DIBC's Response, ¶ 29.

[403] *Vienna Convention on the Law of Treaties*, 1969, C.T.S. 1980/37; 1155 U.N.T.S. 331; (1969) 63 A.J.I.L. 875, Article 2(1)(a), **RLA-10**.

but because this Tribunal's jurisdiction is limited to determining breaches of NAFTA, not other international treaties.

288. NAFTA Articles 1116 and 1117 state that an investor may only bring a claim on its own behalf or on behalf of an enterprise for a breach of Section A of Chapter 11 of the NAFTA, not any other treaty. Accordingly, a NAFTA tribunal has no jurisdiction to adjudicate on whether Canada has violated its obligations under any international treaty other than the NAFTA.

289. This issue has been examined by other NAFTA tribunals and each have concluded the same. As the NAFTA tribunal in *Grand River* noted in self-reference: "[it] is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA."[404]

290. In *Methanex*, the tribunal held that it did not have jurisdiction to decide on alleged violations of any treaty other than NAFTA.[405] As the tribunal explained, "[it] does not construe Article 1131 NAFTA as creating any jurisdiction to decide on alleged violations of the GATT" and the tribunal "disclaime[d] any power to decide Methanex's allegations that the USA has violated provisions of the GATT." [406]

291. The tribunal in *Bayview* was presented with arguments by the claimants that Mexico had violated their alleged rights under a 1944 U.S.-Mexico boundary waters treaty governing the Rio Grande/Rio Bravo. The *Bayview* tribunal stated that it had no jurisdiction to make a finding that Mexico had breached a treaty other than the NAFTA and wrote further:

> [I]f the interests of US nationals were thought to be prejudiced by any action alleged to amount to a violation of the [1944 Water Treaty], that is an issue which could be taking up by the U.S. government under the dispute resolution

[404] *Grand River Enterprises Six Nations, Ltd, et al v. United States of America* (UNCITRAL) Award (January 12, 2011), ¶ 71, **RLA-22**.

[405] *Methanex*, Award Part II, Chapter B, Page 2 ¶ 4-6, **RLA-23**.

[406] *Methanex*, Award Part II, Chapter B, Page 2 ¶ 5, **RLA-23**.

procedures in the [1944 Water Treaty].[407]

292. As noted above, DIBC is unclear as to whether it is arguing Canada has violated the *Boundary Waters Treaty*, *Ambassador Bridge Treaty*, or both. But the distinction is a false one in any event: the question of whether a *Boundary Waters Treaty* Article XIII "special agreement" alleged to "constitute a binding international agreement…under international law" exists,[408] what are the international rights and obligations derived therefrom, whether the "treaty" has been amended by Canada and the United States in accordance with the rules of international treaty law, whether the "treaty" has been breached by either Canada or the United States – these are all questions that necessarily requires an interpretation and determination of the provisions of the *Boundary Waters Treaty*, not the NAFTA.[409] To make such an inquiry and determination is beyond the jurisdiction of the Tribunal.

D. Conclusion

293. For the reasons set out above, the Tribunal has no jurisdiction to determine the existence or breach of the *Boundary Waters Treaty* special agreement/*Ambassador Bridge Treaty*.

VI. DOCUMENT DISCOVERY DURING JURISDICTIONAL PHASE

A. Canada's Request for Documents Relating to its Time Bar Defense is Appropriate and Necessary

294. In its Brief Statement, Canada requested the opportunity to present to the Claimant targeted document requests focused on evidence relevant and material to Canada's argument that the Highway 401 Road Access and IBTA claims are time barred

[407] *Bayview Irrigation District et al v. United Mexican States,* ICSID Case No. ARB(AF)/0501) Award, June 19, 2007, ¶ 121, **RLA-24**.

[408] NAFTA Statement of Claim, ¶ 39; DIBC's Response, ¶ 29.

[409] While unnecessary to elaborate here, even if there was a special agreement under Article XIII of the *Boundary Waters Treaty*, DIBC would have no standing *rationae personae* to allege a violation thereof either under international law or domestic law in Canada or the United States. Unless a treaty specifically confers upon individuals the right to enforce treaty rights before an international tribunal or in domestic proceedings, the claim for a breach of a treaty belongs only to the state for loss suffered by its national before an international body, in this case, the IJC. See Jennings & Watts, *Oppenheim's International Law*, Vol. 1 (1992), pp. 846-847, **RLA-25**.

under Articles 1116(2) and 1117(2).[410] In its Response, DIBC said that "there is no need to delay this case and burden the parties with unnecessary discovery."[411]

295. Pursuant to Procedural Order No. 4 and in the format specified by Procedural Order No. 3 paragraphs 34 and 35, Canada has attached as Annex A its document requests ("Schedule"). As set out in Canada's Schedule, Canada's requests are limited to DIBC's Highway 401 claims and the IBTA claim,[412] but they are certainly not "unnecessary" or burdensome as DIBC suggests. To the contrary, these requests are targeted, relevant and material to Canada's jurisdictional objections under NAFTA Articles 1116(2) and 1117(2). It would be unfair to deny Canada the opportunity to fully support its time bar objections with evidence that rests only in the possession of DIBC.

296. Article 3(14) of the 2010 IBA *Rules on the Taking of Evidence in International Arbitration* ("2010 IBA Rules") states:

> 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.[413]

297. Limiting document production to issues relevant to jurisdiction is appropriate to ensure efficient and orderly proceedings.

298. For example, in *Tidewater* v. *Venezuela*, relying on the IBA Rules, the tribunal limited document production to issues relevant and material for deciding jurisdiction and rejected document requests that were relevant only for determining damages.[414] In the *St.*

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[410] Canada's Brief Statement, ¶¶ 106-110.

[411] DIBC's Response, ¶ 18.

[412] Canada reserves the right to ask the Tribunal for permission to supplement its document requests based on DIBC's Counter Memorial, if necessary.

[413] International Bar Association Rules on Taking of Evidence in International Arbitration (2010), **RLA-1**. The IBA Rules are to be followed as guidelines with respect to document discovery in this NAFTA arbitration. See Procedural Order No. 3, ¶ 33.

[414] *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents, March 29, 2011, ¶¶ 6, 42, **RLA-26**.

Marys v. Canada NAFTA arbitration, the tribunal limited document production in the jurisdictional phase to issues relevant to jurisdiction only.[415]

299. Article 27(1) of the UNCITRAL Rules provides that "each Party shall have be burden of proving the facts relied on to support its claim or defense."[416]

300. Canada has exercised due diligence and proffered evidence available to it to demonstrate that 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" more than three-years prior to filing its First NAFTA NOA (i.e., prior to April 29, 2008) with respect to its Highway 401 Claims and IBTA Claim. Thus, if the evidence shows that DIBC and CTC *actually* knew of the breach and loss ("subjective" knowledge) regarding these claims, they are time barred. Alternatively, if the evidence shows that DIBC and CTC *should have known* of the breach and loss ("objective" or "constructive" knowledge) regarding these claims, Canada's time bar defence still succeeds.[417]

301. Any documentary evidence in possession or under the control of DIBC which further demonstrates when DIBC and CTC first acquired knowledge of the alleged breach and damage will be relevant and material for the Tribunal to determine whether the three-year time limitation in NAFTA Articles 1116(2) and 1117(2) bars DIBC's claims.

302. With respect to its Highway 401 claims, DIBC has already acknowledged in its Statement of Claim that it first acquired knowledge of the alleged breach and loss on October 3, 2007, which is more than three-years before it filed its First NAFTA NOA on April 29, 2011.[418] While this admission should automatically render DIBC's claim time barred, DIBC remained vague both in its Response and at the March 22, 2013 hearing as

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[415] *St. Marys VCNA, LLC v. Government of Canada*, Consent Award, April 12, 2013, ¶¶ 9-10, **RLA-27**.

[416] *Consolidated Lumber* Decision on the Preliminary Question, June 6, 2006, ¶ 176, **RLA-12**. ("where a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the Tribunal from deciding on the merits of the claim, the respondent has the burden of proof that the provision has the effect which it alleges."); See also *Vito G. Gallo* v. *Canada*, (UNCITRAL), Award, September 15, 2011, ¶ 277, **RLA-28**.

[417] *Grand River*, Decision on Jurisdiction, ¶¶ 38, 42, 58-59, **RLA-15.** See Part IV(B) above.

[418] NAFTA Statement of Claim ,¶ 190. See Canada's Brief Statement, ¶¶ 100-102 and Part IV(D) above.

to whether it was fully conceding the argument.[419] In light of DIBC's uncertainty as to its own position, Canada should be permitted to complete the evidentiary record in this jurisdictional phase with documents from DIBC's internal files.

303. It is reasonable to assume such documents exist. For example, with respect to DIBC's Highway 401 Claims, DIBC/CTC executives Messrs. Dan Stamper, Thomas "Skip" McMahon and Patrick Moran made public and written statements in 2006 and 2007 alleging that Canada reneged on its promise to spend $300 million to build a Highway 401-Ambassador Bridge connection.[420] Mr. Stamper stated in November 2006 that "the plan for the government-proposed bridge is to finish Highway 401 to the new bridge, *not to our bridge*."[421] It would be unfair to deny Canada the opportunity to fully support its time bar defense and complete the jurisdictional evidentiary record.

304. With respect to the IBTA claim, DIBC admits that it had knowledge of breach and loss in February 2009 when the IBTA Regulations were adopted and says this makes its claim timely.[422] In contrast, Canada argues that DIBC knew, or should have known, on February 1, 2007 of the alleged breach and damage with respect to the IBTA.

305. It is reasonable to assume such documents exist. As discussed in Part II(D) above, DIBC lobbied vigorously in 2006 to have the Ambassador Bridge exempted from the IBTA. After the IBTA was enacted on February 1, 2007, Canada gave DIBC and CTC further written notice on July 30, October 30 and November 23, 2007 that the IBTA applies to the Ambassador Bridge, which was concurrent with the time CTC executive Mr. Thomas "Skip" McMahon told the Windsor Star that CTC had commenced

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[419] See DIBC's Response, ¶¶ 20-26; Hearing Transcript, at pp. 8, 10, 11, 21-22.

[420] Ambassador Bridge Testimony by D. Stamper, May 11, 2006, at p. 3, **Exhibit R-107**; House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1st Sess., 39th Parliament, Tuesday, May 30, 2006, at p. 3, **Exhibit R-108**; "Ambassador Bridge Owners Forging Ahead With Second Crossing," Truck News, June 1, 2007, **Exhibit R-109**; "We're Building a Better Bridge," Ambassador Bridge advertisement, *Windsor Star*, August 22, 2007, **Exhibit R-110**; Letter from Patrick Moran to Jacques Pigeon, Q.C. dated August 24, 2007, at p. 2 **Exhibit R-111**.

[421] Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006, at p. 6 of 12, **Exhibit R-37**. (emphasis added)

[422] DIBC's Response, ¶ 26. See Part IV(E) above.

construction on the approach ramp pillars for its New Span.[423] It would be unfair to deny Canada the opportunity to fully support its time bar defense and complete the jurisdictional evidentiary record.

B. DIBC's Request for Discovery From Canada Is, By its Own Admission, Unnecessary

306. While Canada will respond more fully to DIBC's document requests if it makes any on August 23, 2013 pursuant to Procedural Order No. 4, some brief comments on DIBC's reasons for requesting discovery from Canada is appropriate at this juncture.

307. In its Response to Canada's Brief Statement, DIBC asked that it be permitted document discovery from Canada on "corollary issues identified by DIBC in this submission (*which we do not believe are necessary to resolve the jurisdictional dispute*, but which we would request to ensure that any jurisdictional discovery is not one-sided.)."[424] DIBC wants documents that show when "DIBC began suffering harm, or suffered increased harm, as a result of Canada's discriminatory and inequitable treatment within three-years before DIBC made its claim for arbitration" and documents that show "the extent to which Canada has made decisions within three-years before DIBC made its claim for arbitration (such as decisions to refuse to consider proposals to connect the Windsor-Essex Parkway to the Ambassador Bridge) that have caused DIBC to suffer harm."[425] At the March 22, 2013 hearing, DIBC said that it wants documents from Canada that demonstrate the quantum of damages which DIBC has suffered in the past three-years as a result of Canada's alleged breach of the NAFTA.[426]

308. DIBC's reasoning is not only flawed, but rendered moot by its own concession that it does not require discovery of documents from Canada in order to resolve the

[423] Letter from Jacques Pigeon, Q.C. to Patrick Moran dated July 30, 2007, **Exhibit R-39**; Letter from Brian Hicks to Dan Stamper dated October 30, 2007, **Exhibit R-122**; Letter from Paul Fitzgerald to Dan Stamper dated November 23, 2007, **Exhibit R-123**; "Bridge to Nowhere- Construction has begun on Ambassador's twin span, despite lack of gov't approvals", *Windsor Star* (August 24, 2007), **Exhibit R-124**.

[424] DIBC's Response, ¶ 9 (emphasis added).

[425] DIBC's Response, ¶ 19.

[426] Hearing Transcript, at p. 24 (seeking documents relating to "a quantification…of what harm we've suffered over the past three years.").

jurisdiction dispute – it wants documents from Canada simply to "ensure that any jurisdictional discovery is not one-sided."[427] This is not a rational basis for discovery, which must be aimed at documents which are "relevant and material to [the] outcome" of the case.[428] It is certainly not "efficient, economical and fair"[429] to compel Canada to produce documents which "we [DIBC] do not believe are necessary to resolve the jurisdictional dispute."[430] It is hard to conceive of a more compelling reason to deny document requests when the requestor itself admits the documents are unnecessary.

309. Furthermore, DIBC cannot request production of documents that have no connection to the jurisdictional phase. Knowing exactly how much loss or damage DIBC and CTC allegedly suffered is not relevant for the purposes of jurisdiction, as DIBC has already accepted.[431] The only documents that are relevant under Articles 1116(2) and 1117(2) are those which go to show when DIBC and CTC first acquired knowledge of the alleged breach and loss or damage. For DIBC to ask Canada to search its files and produce documents evidencing DIBC's knowledge turns the jurisdictional test upside down.

310. In accordance with Procedural Order No. 3 and the IBA Rules of Evidence, the Tribunal should deny any document request from DIBC that is not relevant and material to resolving whether the Tribunal has jurisdiction to hear the claims.

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[427] DIBC's Response, ¶ 9.

[428] IBA Rules Article 3(3)(b), **RLA-1**; Procedural Order No. 3, § 33; *Tidewater Inc.*, Procedural Order No. 1 on Production of Documents, ¶ 14, **RLA-26** ("[I]n deciding whether or not it is necessary to order production of a document, it should be guided by the tests of relevance and materiality in the IBA Rules.")

[429] IBA Rules Article 2(1), **RLA-1**.

[430] DIBC's Response, ¶ 9 (emphasis added).

[431] Hearing Transcript, at p. 25 ("We have to show the fact of damage, not the amount, for jurisdictional purposes."). See also *Grand River*, Jurisdiction Decision, ¶ 77, **RLA-15**; *Mondev*, Award, ¶ 87, **RLA-20**; *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents, ¶ 42, **RLA-26** (documents requests relating to accounts receivable not relevant to jurisdiction.).

VII. CONCLUSION

311. Since 2001, Canada, the United States, Ontario and Michigan have been working diligently and transparently to secure the long-term economic prosperity and security of their citizens by ensuring that the critical corridor at Windsor-Detroit remains a viable gateway for the trade in goods and serves for decades to come. The existing border crossings, including the Ambassador Bridge, are and will remain a vital part of that corridor. But after eight years of study and consultations on an unprecedented scale, there is wide-spread agreement on both sides of the border that building another bridge across the Detroit River which provides an "end-to-end" connection between Ontario Highway 401 and Michigan Interstate Highway I-75 is needed and should be built.

312. DIBC opposes this plan and its domestic lawsuits against Canada continue apace. But this is precisely the problem before this Tribunal: DIBC has simultaneously attempted to challenge the same measures using the investor-state arbitration mechanisms in NAFTA Chapter Eleven. DIBC cannot proceed in this arbitration, however, because Canada and the other the NAFTA Parties specifically conditioned their consent to arbitrate on several requirements. If there is no compliance with the procedures set out in the NAFTA, there is no consent.

313. One of these critical requirements is for DIBC and CTC to stop challenging the same measures in domestic courts and to forego the ability to challenge them in the future. This condition precedent does not suit DIBC and CTC, which want to maintain simultaneous domestic lawsuits against Canada, but their preferences are of no account because Article 1122(1) makes it clear that Canada's advance consent to NAFTA arbitration does not take effect until, as is plainly set out in Articles 1121, all domestic proceedings with respect to the impugned measures are terminated and a valid waiver of rights to pursue future domestic lawsuits is received and acted upon. This has not happened. For this reason, the Tribunal should decide that it has no jurisdiction over *any* of DIBC's claims.

314. Another critical requirement is that DIBC must bring its claims to arbitration within the three-year time limitations period set by NAFTA Articles 1116(2) and

1117(2). This requirement also does not suit DIBC, whose NAFTA claims regarding Canada's allegedly discriminatory Highway 401 road access planning and *International Bridges and Tunnels Act* are past their expiry date and thus also fall outside the jurisdiction of this Tribunal. DIBC's attempts at salvaging these untimely allegations are contrary to the evidence and contrary to the plain text of NAFTA Articles 1116(2) and 1117(2).

315. DIBC will undoubtedly attempt to obfuscate its thinly-veiled goal of maintaining this NAFTA arbitration and the ongoing domestic proceedings by drawing spurious distinctions between each of them. The Tribunal should see these attempts for what they truly are and decide that NAFTA Chapter Eleven does not allow for this to occur.

316. For the foregoing reasons, Canada respectfully requests that this Tribunal find in favour of Canada as the Tribunal has no jurisdiction to hear any of DIBC's claims and dismiss them all with prejudice.

VIII. COSTS

317. NAFTA Article 1135 allows a Tribunal to award costs in accordance with the applicable arbitration rules. Article 40 to 42 of the 2010 UNCITRAL Arbitration Rules address awards of cost in arbitrations conducted pursuant to those rules. They allow for costs indemnifying a disputing party for arbitration costs and for reasonable legal costs.

318. UNCITRAL Rule Article 42(1) provides that, in principle, the costs of arbitration are to be borne by the unsuccessful party. For example, after ruling that Canada had prevailed in the *Chemtura* arbitration, the tribunal held that it "finds it fair that the Claimant bear the entire costs of the arbitration."[432]

319. The Tribunal further found it "appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration."[433]

[432] *Chemtura Corporation v. Government of Canada*, Award, August 2, 2010, ¶ 272, **Exhibit RLA-29**.

[433] *Chemtura Corporation v. Government of Canada*, Award, August 2, 2010, ¶ 273, **Exhibit RLA-29**.

320. Canada requests that the Tribunal order DIBC to pay the arbitration costs for this NAFTA arbitration and to indemnify Canada for its legal fees and costs, especially in light of DIBC flagrant disregard for the waiver requirements in NAFTA Article 1121.

321. Canada respectfully requests the opportunity to submit a more detailed submission on costs in the future so that it can fully address all relevant considerations.

IX. ORDER REQUESTED

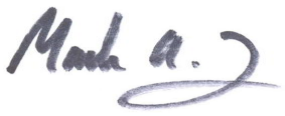
322. For the foregoing reasons, Canada respectfully requests that this Tribunal:

a. Dismiss the Claimant's claims in their entirety and with prejudice on the grounds of lack of jurisdiction;

b. Order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and

c. Grant any further relief it deems just and appropriate under the circumstances.

Respectfully submitted on behalf of
the Government of Canada
this 15th day of June, 2013



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