

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

Between

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant,

and

THE GOVERNMENT OF CANADA,

Respondent.

PCA Case No. 2012-25

**DIBC'S REJOINDER MEMORIAL ON JURISDICTION AND
ADMISSIBILITY**

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TABLE OF ABBREVIATIONS

BSTA	Bridge to Strengthen Trade Act
CTC	Canadian Transit Company
DDC	United States District Court for the District of Columbia
DIBC	Detroit International Bridge Company
DRIC	Detroit River International Crossing
FHWA	United States Federal Highway Administration
ILC	International Law Commission
IBTA	International Bridges and Tunnels Act
LGWEM	Let's Get Windsor-Essex Moving
NAFTA	North American Free Trade Agreement
NITC	New International Trade Crossing
VCLT	Vienna Convention on the Law of Treaties

PRELIMINARY STATEMENT

1. The Detroit International Bridge Company (“DIBC”) and its subsidiary the Canadian Transit Company (“CTC”) (collectively, “DIBC” or “Claimant”) respectfully submit this Rejoinder Memorial in response to the December 6, 2013 Reply Memorial on Jurisdiction and Admissibility (“Canada Reply”) submitted by the Government of Canada (“Canada”).

2. As explained in DIBC’s Counter-Memorial on Jurisdiction and Admissibility (“DIBC Counter-Memorial”), Claimant is an American-owned business that owns and operates the Ambassador Bridge between Detroit, Michigan and Windsor, Ontario, which is the single largest trade crossing between the United States and Canada. For many years, Claimant has been making plans and seeking approvals to build a twin span to the Ambassador Bridge (the “New Span”) in order to maintain its bridge crossing, to enhance and upgrade the infrastructure of the crossing, to increase its capacity to facilitate cross-border traffic, and to reduce costs and disruptions resulting from maintenance on the existing bridge.

3. This arbitration challenges specific acts taken by Canada that reflect its hostility to the American ownership of the Ambassador Bridge. While this hostility is longstanding (and previously gave rise to an attempted expropriation without just compensation in the 1980s, which had to be challenged through litigation), it subsided prior to the execution and implementation of the NAFTA. In the last few years, Canada’s hostility to the American ownership of the Ambassador Bridge has reemerged. Canada has recently taken a series of actions designed to harm the American-owned Ambassador Bridge, and to favor a proposed Canadian-owned bridge that would be located adjacent to the Ambassador Bridge—*i.e.*, the New International Trade Crossing (“NITC,” and formerly known in the United States and currently known in Canada as the Detroit River International Crossing or “DRIC,” and hereinafter referred to as the “NITC/DRIC”).

4. Canada has refused to make long-promised improvements to the Canadian approach to the American-owned Ambassador Bridge or construct a highway connection from that bridge to the region’s main thoroughfare, Highway 401. Canada *simultaneously* has embarked upon construction of a new highway connection between the unbuilt, not fully-approved Canadian-owned NITC/DRIC and Highway 401. As shown below, this highway travels a path directly from Highway 401 towards the Ambassador Bridge, but then a mere two miles from the Ambassador Bridge, veers towards the planned location for the NITC/DRIC instead.¹



5. Canada’s decision not to complete the last two miles of this critical connection between the Ambassador Bridge and Highway 401, while simultaneously redirecting the

¹ A full-page version of this map is available as Exhibit C-127.

connection towards the NITC/DRIC, comprises the discrimination known as the “Roads Claim” here. One illustration of the practical impact of Canada’s discrimination here is a mock highway sign created by Canada and published in Canada’s map of the proposed project. The sign, depicted below, shows that drivers approaching the Detroit-Windsor crossing from the Canadian side will see options to follow either (1) a multi-lane highway to the NITC/DRIC; or (2) a narrower, unimproved passage to the Ambassador Bridge.² This choice likely will be an easy one for most travelers, and a choice that will work to the Ambassador Bridge’s detriment.



6. Canada has also created a discriminatory legal regime with respect to the construction of the American-owned New Span and the Canadian-owned NITC/DRIC. Specifically, Canada has delayed and obstructed approvals for the American-owned New Span, while providing automatic approvals via legislative fiat for the Canadian-owned NITC/DRIC. This regulatory and legislative discrimination is referred to herein as the “New Span Claim.”

7. Evidence shows that Canada’s disparate treatment of the Ambassador Bridge/New Span and the NITC/DRIC is the product of a plan by Canada to harm the American-owned Claimant here. For example, in 2005, Michael Kergin, the former Canadian Ambassador to the United States and then Ontario Special Advisor on Border Issues (the so-called “Border Czar”), informed the Canadian Consul General Jessica LeCroy that he had “concerns about a

² This sign is included within a larger map of the proposed highway. Roll Plan, Public Information Open House #7 (August 8, 2012), Exhibit C-159.

possible twining [sic] of the existing Ambassador Bridge span, but suggested *Canada,s [sic] major way to influence a possible twining [sic] of the bridge is by not providing the improved road infrastructure needed to feed the additional traffic onto the bridge.*³ This document was not discovered by Claimant until after 2011, making it impossible for Claimant to know the nature of Canada's discriminatory intent in blocking the long-planned project to develop and improve the highway connections to the Ambassador Bridge.⁴

8. DIBC seeks redress for this and other discrimination by Canada in this arbitration. In response, Canada seeks to avoid jurisdiction based primarily on the affirmative defenses of waiver and time limitations. Canada has failed to meet its burden of proof on these affirmative defenses.

9. Canada first argues that DIBC has not complied with NAFTA Article 1121, which requires claimants to waive their right to seek money damages in domestic proceedings challenging the same measure as a NAFTA arbitration. Canada asserts this disingenuous defense knowing that Claimant does not seek to recover damages from Canada in any other proceeding based on the measures at issue here, and Canada bears no risk of paying duplicative damages awards. Unable to point to any genuine conflict or harm, Canada falls back upon several incorrect arguments that DIBC has failed to comply with Canada's self-interested reading of Article 1121. Canada does not even allege arguments that should be countenanced by this Tribunal.

³ "Bringing Order to the Border: Ontario's Border Czar Michael Kergin," Consulate Toronto, 05TORONTO3209 (December 9, 2005) (released August 30, 2011), Exhibit C-157 (emphasis added).

⁴ This document was released via Wikileaks. Claimant believes it is appropriate to use because it is the type of document that should be discoverable by Claimant in litigation.

10. Canada also argues that DIBC's claims are untimely. The basic facts dictate that DIBC could not possibly be late in challenging Canada's actions because DIBC could not have acquired knowledge of the Roads Claim until it was clear that Canada not only would refuse to construct a highway connection between the Claimant's American-owned Ambassador Bridge and Highway 401, but that it also would affirmatively construct such a connection to the proposed, Canadian-owned NITC/DRIC and *not* to the Ambassador Bridge. This initial act could not have occurred until, at the very earliest, May 1, 2008, when Canada announced the final plan for the Windsor-Essex Parkway (now known as the Rt. Hon. Herb Gray Parkway, and referred to herein as the "Parkway").

11. Moreover, the initial violation is just the beginning of a continuing harm, as the Parkway is not yet complete, and Canada has continued to make decisions with respect to the Parkway that have a discriminatory effect on Claimant. Although Canada's actions to date with respect to the Parkway have been discriminatory, Canada could still remedy its wrongs, in whole or in part, by simply completing the final two miles of the Parkway to the Ambassador Bridge, either in addition to or instead of the new highway to the proposed but not-yet-constructed NITC/DRIC. As such, DIBC cannot be untimely in its Roads Claim.

12. The New Span Claim cannot be untimely because Canada did not attempt to enforce the *International Bridges and Tunnels Act* ("IBTA") against DIBC until 2010. Moreover, as with the Roads Claim, Canada's discriminatory intent did not become apparent until Canada passed the *Bridge to Strengthen Trade Act* ("BSTA") in 2012, which completely exempted the Canadian-owned NITC/DRIC from the IBTA (and from numerous other regulatory requirements and attempted to insulate Canada from liability for its acts). DIBC's claims thus

could not have begun to run until Canada completed this final step in the discriminatory scheme that resulted in the New Span Claim.

13. Lastly, Canada argues that this Tribunal cannot consider the nature of DIBC's rights arising out of the Boundary Waters Treaty and/or the concurrent and reciprocal legislation which created a Special Agreement pursuant to that treaty. This argument is a distraction, as DIBC's claims do not turn on whether a Special Agreement exists. DIBC's Statement of Claim explains by way of background that the reciprocal, concurrent legislation passed by Great Britain and the United States in the 1920s formed a Special Agreement under the Boundary Waters Treaty. However, Canada's discrimination against the American-owned Ambassador Bridge and New Span and in favor of the Canadian-owned prospective NITC/DRIC violates the NAFTA regardless of the existence of the Special Agreement. Canada's discrimination further breaches DIBC's franchise rights to operate a bridge between Detroit and Windsor (and thereby violates the NAFTA) regardless of the existence of the Special Agreement. To the extent that there is any confusion regarding this issue, however, DIBC hereby withdraws any aspect of its claims before this Tribunal that turn on the question of whether a Special Agreement exists under the Boundary Waters Treaty.

14. For these reasons and the reasons discussed below and in DIBC's Counter-Memorial, Claimant respectfully asks this Tribunal to dismiss Canada's affirmative defenses, order Canada to pay all of DIBC's costs, and allow this arbitration to proceed to the merits phase.

ARGUMENT

I. INTERNATIONAL LEGAL PRINCIPLES FOR ESTABLISHING THE TRIBUNAL'S JURISDICTION.

A. Canada Bears The Burden Of Proof For Its Own Affirmative Defenses.

15. Article 27(1) of the UNCITRAL Arbitration Rules states “Each party shall have the burden of proving the facts relied on to support its claim *or defence*.”⁵ This arbitration is governed by the UNCITRAL Arbitration Rules.⁶ The limitations and waiver defenses brought by Canada are affirmative defenses, and therefore Canada bears the burden of proving those defenses and any facts relevant to those defenses.

16. Canada admits in its initial Memorial that it bears the burden of proof with respect to its defenses pursuant to UNCITRAL Article 27(1).⁷ However, Canada's Reply Memorial does not acknowledge either this admission or UNCITRAL Article 27(1). Instead, it argues the exact opposite of Article 27(1) is to be followed: that it is DIBC's burden to disprove Canada's own affirmative defenses.⁸

17. Canada's position is without merit. NAFTA and other international tribunals (both pursuant to the UNCITRAL Arbitration Rules and otherwise) have consistently held that when a respondent brings an affirmative defense, it is the respondent's burden to prove that defense. In addition, it is clear from these and other tribunals that defenses such as the limitations and waiver defenses advanced by Canada are affirmative defenses, and hence are defenses for which Canada bears the burden of proof.

⁵ UNCITRAL Arbitration Rules, Art. 27(1), Exhibit CLA-3 (emphasis added).

⁶ Procedural Order No. 1 ¶ 12.

⁷ Canada Memorial ¶ 299 and n. 416 (citing UNCITRAL Art. 27(1) and decisions finding that respondents have the burden of proof with respect to defences).

⁸ Canada Reply ¶ 50.

18. For example, the *Pope & Talbot* NAFTA tribunal (which was convened under the UNCITRAL Arbitration Rules) reasoned: “Canada’s contention that the Harmac claim is time barred is in the nature of an affirmative defence, and, as such, *Canada has the burden of proof of showing factual predicate to that defence . . . it is for Canada to demonstrate that the three-year period had elapsed prior to that date.*”⁹ The *Consolidated Lumber* NAFTA tribunal (also convened under the UNCITRAL Rules), in a decision cited by Canada in its original Memorial,¹⁰ similarly found that “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.”¹¹

19. This position is consistent in international law, even without the UNCITRAL Arbitration Rules. The *Pac Rim Cayman* tribunal reached the following conclusion:

As far as the burden of proof is concerned, in the Tribunal’s view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. . . . *if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.*¹²

20. The tribunal in *Siag v. Egypt* reached the same conclusion:

The Tribunal considers that the burden of proof in respect of all jurisdictional objections and substantive defences lies with Egypt. The Tribunal concurs with the opinion of Professor Reisman, that it is a widely-accepted principle of law that the party advancing a claim or defence bears the burden of establishing that claim or defence.¹³

⁹ *Pope & Talbot Inc. v. Government of Canada*, Award in Relation to Preliminary Motion ¶ 11 (Feb. 24, 2000), Exhibit CLA-14 (emphasis added).

¹⁰ Canada Memorial ¶ 299 n. 416.

¹¹ *Consolidated Lumber*, UNCITRAL, Decision on Preliminary Question ¶ 176 (June 6, 2006), Exhibit RLA-12.

¹² *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections (“*Pac Rim Cayman* Decision”) ¶ 2.11 (June 1, 2012), Exhibit CLA-30 (emphasis added).

¹³ *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award ¶ 318 (June 1, 2009), Exhibit CLA-54; *see also Teinver v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction FN 467 (Dec. 21, 2012), Exhibit CLA-55

21. The authority Canada now cites (in contradiction of its prior position) is not to the contrary. Each decision cited by Canada addresses only which party bears the burden with respect to claims, *not defenses*. The tribunals in each of *Apotex*,¹⁴ *Bayview*,¹⁵ and *Grand River*¹⁶ correctly imposed the burden on the claimant to prove it had an “investment,” as required for a treaty claim. The tribunals in *Methanex*,¹⁷ *Bayindir*,¹⁸ and *Impreglio*¹⁹ each considered whether

(“A number of tribunals have held that a respondent bears the burden of proof with respect to the facts alleged in its jurisdictional objections. *See, e.g., Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Jurisdiction, April 18, 2008 ¶ 75, Exhibit C-523. (‘It will be seen that the jurisdictional objection entails issues of fact (whether the investments were and are under Mr. Patriciu’s dominant control; whether the origin of the investment funds was Romanian), and issues of law (what effect such factual circumstances would have on the Tribunal’s jurisdiction to hear a complaint by the investor). The issues of fact are ones which the Respondent bears the burden of proving according to the requisite standard, in order to sustain the claims of law it bases on them. The Parties are in dispute over both the issues of fact and the issues of law.’); *Desert Line Projects LLC v. The Republic of Yemen* (ICSID Case No. ARB05/17), Award, February 6, 2008 ¶ 105 (LA AR 83) (‘the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent.’); *Hamester v. Ghana*, Award at ¶ 132 (‘Having carefully considered all the evidence, the Tribunal considers that the Respondent has not fully discharged its burden of proof’ with respect to respondent’s allegation of illegality in the inception of the investment’’”).

¹⁴ *Apotex Inc. v. United States*, UNCITRAL, Award on Jurisdiction and Admissibility, (“*Apotex* Jurisdictional Award”) ¶¶ 149-50 (June 14, 2013), Exhibit CLA-56 (“This issue obviously turns upon the precise (i) location and (ii) nature of each of the activities / property relied upon by Apotex as an ‘investment’ for the purposes of NAFTA Article 1139 . . . Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction in this regard”).

¹⁵ *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award ¶ 122 (June 19, 2007), Exhibit CLA-45 (“In the view of the Tribunal it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment *in Mexico*. That being the case, the Tribunal does not have the jurisdiction to hear any of these claims against Mexico because the Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven, as defined by NAFTA Article 1101”).

¹⁶ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award ¶ 122 (Jan. 12, 2011), Exhibit CLA-46. (“However, given the relatively restricted definition of ‘investment’ under Article 1139, the Claimants must nonetheless establish an investment that falls within one or more of the categories established by that Article”).

¹⁷ *Methanex Corporation v. United States of America*, UNCITRAL, Preliminary Award on Jurisdiction ¶ 84 (August 7, 2002), Exhibit RLA-3 (“It is however necessary to list the several challenges made by the USA . . . Challenge 1: Article 1116(1) NAFTA (No proximate cause) . . . Challenge IV: Article 1116(1) NAFTA (No loss); Challenge V: Article 1116(1) NAFTA (No claim for subsidiaries’ losses)”).

¹⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 186, 189 (November 14, 2005), Exhibit RLA-35 (“To answer the question whether the Treaty Claims are sufficiently substantiated for jurisdictional purposes, the Tribunal will first define the relevant standard . . . As to the standard of proof (bb.), Bayindir seems to accept that in the jurisdictional phase of this arbitration it has to establish that ‘the claims it pleads are sustainable on a *prima facie* basis’”).

the claimant had proved its *prima facie* case. The tribunal in *Tulip* analyzed whether claimant had given notice to the respondent as required under the treaty.²⁰ The *ICS Inspection* decision analyzed whether the claimant had proved that the treaty permitted claims to survive despite a jurisdictional defect.²¹ None of these cases found that claimants had the burden of proof with respect to an affirmative defense, and certainly not with respect to the waiver or limitations defenses at issue here.

22. Accordingly, Canada bears the burden to prove its Article 1121 waiver defense and Articles 1116/1117 time bar defenses. As discussed below, Canada fails to satisfy this burden, and the Tribunal has jurisdiction over DIBC's claims.

B. The Tribunal May Consider Events Subsequent To The Notice Of Arbitration In Its Jurisdictional Analysis.

23. Canada asserts that no events occurring after the Notice of Arbitration (here, April 29, 2011) are relevant for jurisdictional purposes.²² Although it is true that the relevant date for determining jurisdiction is generally said to be the date of filing of a Notice of Arbitration, international tribunals have made clear that this rule means only that subsequent events cannot *deprive* a tribunal of jurisdiction:

¹⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (April 22, 2005), Exhibit RLA-36 (“Impregilo adds that it has satisfied the burden of proof required at the jurisdictional phase and ‘has made the *prima facie* showing of Treaty breaches’ required by ICSID Tribunals”).

²⁰ *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue ¶ 53 (March 5, 2013), Exhibit RLA-34 (Respondent argued that “Claimant did not notify Respondent about the investment dispute or seek to engage in negotiations with respect to that dispute before filing its Request” as was required under a rule in bi-lateral investment treaty between the Netherlands and Turkey).

²¹ *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic*, UNCITRAL, Award on Jurisdiction ¶ 274 (February 10, 2012), Exhibit RLA-37 (“Having found that the Claimant has not complied with the requirement of prior submission to the Argentine courts, the Tribunal turns to the question of whether the Claimant may be exempted from its application through the effect of the MFN clause found at Article 3(2)”).

²² Canada Reply ¶¶ 55, 57.

[J]urisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.²³

24. Conversely, a tribunal may look at post-filing events to establish or inform jurisdiction. The tribunal in *Philip Morris* explained:

The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes *has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken)*. . . . 'It would not be in the interest of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. It is preferable except in special circumstances, to conclude that the condition has, from that point on, been fully met.' . . . 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.'²⁴

25. As explained in DIBC's Counter-Memorial and below, DIBC complied with all NAFTA jurisdictional requirements as of April 29, 2011, the date it filed its first Notice of Arbitration. The Tribunal cannot be divested of that jurisdiction by reference to later events. This does not mean, however, that the Tribunal is prohibited from considering events after that

²³ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002 ¶ 26, Exhibit CLA-57.

²⁴ *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction ¶¶ 144-45 (July 2, 2013), Exhibit CLA-58 (citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, pp. 441-442, para. 87; *Mavrommatis Palestine Concession* case, Judgment No. 2, 30 August 1924, PCIJ, Series A, No. 2, p. 34).

date to inform its jurisdictional analysis. In particular, as of April 29, 2011 the Tribunal was free to consider events establishing jurisdiction through reference to earlier or later events.²⁵

II. CLAIMANT HAS COMPLIED WITH THE WAIVER REQUIREMENTS OF NAFTA ARTICLE 1121.

A. Summary Of DIBC's Position On Rejoinder Regarding Canada's Affirmative Defense of Waiver

26. Canada fails to prove its affirmative defense that DIBC did not comply with NAFTA Article 1121. Canada both misinterprets the article itself and misrepresents the facts regarding waiver in this proceeding.

27. DIBC and Canada both agree that the NAFTA's waiver provision is premised on DIBC's waiver of its right to initiate or continue domestic proceedings that conflict with Article 1121. The first question for the Tribunal is how the NAFTA allocates the risk for each party in incorrectly assessing the scope of the NAFTA's waiver provision.

28. There are two possible regimes for allocating this risk. One regime – that advocated by Canada here – puts all risk on the claimant by conditioning jurisdiction on the absence of conflicting proceedings at the time of filing. Under this regime, a claimant must decide prior to arbitration, and without benefit of any judicial or arbitral review, whether any existing or anticipated domestic proceedings conflict with the required NAFTA waiver. Claimants would be forced to err on the side of dismissing more claims than actually required by the NAFTA (and not bringing future domestic proceedings that are close to the line), or risk dismissal of their arbitration for assessing the situation incorrectly.

²⁵ Canada repeatedly contradicts its own argument. For example, Canada alleges that the *CTC v. Canada* Litigation violates Article 1121 even though it was filed after April 29, 2011. Canada Reply ¶ 134. Canada also alleges that jurisdiction with respect to the IBTA should be determined after April 29, 2011. Canada Reply ¶ 200 n 339. Canada cannot argue both ways, and should not be given the dual benefit of its contradictory arguments.

29. The other regime is to condition submission of a claim to arbitration only upon the claimant's delivery of a legally enforceable document expressing a repudiation of rights in conflicting proceedings (*i.e.*, a waiver). When a question then arises regarding whether a domestic proceeding is in fact a conflicting proceeding, the claimant has not been forced to bear the risk of assessing the situation incorrectly. If the respondent State agrees with the claimant that the domestic case does not conflict, it can choose to do nothing with the waiver delivered by the claimant, and proceed with the arbitration. If the respondent State disagrees, it can present the waiver to the domestic court. If the proceeding is found to conflict, it will be dismissed, but the NAFTA arbitration will not have been dismissed in the interim.

30. Article 1121 itself facially requires only one affirmative act by claimant – delivery of a written waiver of existing and future rights in conflicting proceedings. The plain text of Article 1121 does not require tribunals to rule on the dismissal of specific actions in domestic courts. It does not facially require a claimant to certify that it has dismissed all such proceedings (or, as a practical matter, all proceedings that carry a risk of being deemed to be conflicting proceedings). Nor does it require a tribunal to police whether a claimant ever initiates a proceeding that a respondent may claim is a conflicting proceeding. Canada's assertions to the contrary are not supported either by its textual arguments, or by its citation to authority.

31. Tribunals have rejected the proposition that waiver provisions are a guarantee that only arbitral tribunals will determine the scope of waivers. In the *Vanessa Ventures* proceeding, the parties disputed whether a waiver provision similar to Article 1121 would be violated if a domestic case was dismissed without prejudice and could be reopened at a later date. The tribunal refused to resolve the dispute, explaining that the domestic court there had already

determined that the claimant had waived its claim when it filed arbitration and that “the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts.”²⁶

32. Canada interprets *Vanessa Ventures* to mean that claimants must terminate domestic proceedings, and the NAFTA tribunal’s jurisdiction rests on determining whether or not this termination occurred.²⁷ The *Vanessa Ventures* tribunal in fact held the opposite: it was not required to determine whether local proceedings violated the waiver because this was the responsibility of the local courts.

33. Canada misinterprets Article 1121 with respect to the scope of the waiver contained therein. As DIBC explained in its Counter-Memorial, the scope of the waiver in Articles 1121(1)(b) and (2)(b) extends only to “proceedings with respect to *the measure*” that is alleged to be a breach pursuant to Articles 1116 and 1117.²⁸ That is, claimants are not required to waive claims relating to *other measures* that are not alleged to breach the NAFTA, even where the claimant is asserting the same legal right in both claims, or where there is some overlap of facts between claims.²⁹ On reply, Canada reasserts its argument that “proceedings with respect to the measure” expands the concept of “measure” to broadly cover claims that bear any relationship at all to the subject matter of the arbitration.³⁰ This argument reads too much into the phrase “with respect to,” which merely ties the subject matter of the “proceeding” to the “measure” being arbitrated.

²⁶ *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction ¶ 3.4.4 (Aug. 22, 2008), Exhibit CLA-17.

²⁷ Canada Reply ¶ 69.

²⁸ DIBC Counter-Memorial ¶¶ 155-61.

²⁹ *Id.*

³⁰ Canada Reply ¶ 78.

34. Canada's proposed broad reading of the waiver also is inconsistent with the purpose of Article 1121, which Canada acknowledges is to avoid inconsistent outcomes and double recoveries by claimants.³¹ Waiver of other claims arising from the same measure at issue in arbitration is sufficient to accomplish this goal. It is unnecessary (and punitive) to require a claimant also to repudiate rights in proceedings that could not result in a double recovery, and Canada offers no argument to the contrary. A claimant's ability to recover damages for a measure that is not the subject matter of the NAFTA arbitration does not create a risk of double recovery; it is merely a claim relating to a different measure.

35. Canada also misinterprets the scope of the exceptions to the Article 1121 waiver. Article 1121 includes an exception to the waiver requirement for proceedings seeking declaratory or injunctive relief with respect to the same measure at issue in arbitration, as long as the challenge *to that measure* does not involve the payment of damages. Canada asserts on reply that—contrary to the language of Article 1121—the exception applies to proceedings where no damages are sought with respect to *any claim* – even claims wholly unrelated to the measure at issue in arbitration.³² The relevant sub-clauses of Articles 1121(1) and (2) provide an “except[ion]” to the Article 1121 waiver 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.” Accordingly, claims addressing measures other than those at issue in arbitration do not fall within the scope of the original waiver and thus do not need to comply with the exception to the waiver (*i.e.*, they can obviously be the subject of any kind of claim, including a claim for damages).

³¹ Canada Reply ¶ 76.

³² Canada Reply ¶¶ 84-86.

36. Canada's insistence to the contrary is again at odds with the purpose of Article 1121, which is to prevent duplicative damages claims. A claimant's ability to recover damages for a measure that is not the subject matter of the NAFTA arbitration does not create a risk of double recovery; it is merely a claim relating to a different measure.

37. Finally, as shown by DIBC in its Counter-Memorial, Article 1121 excepts from its scope any claims for declaratory or injunctive relief that challenge the same measure as is challenged in the NAFTA arbitration and that are brought "under the law of the disputing Party."³³ Canada argues that the phrase "under the law of the disputing Party" requires not only application of the disputing Party's law, but also that the proceeding be physically located within the jurisdiction of the respondent State.³⁴ This reading again contradicts the text of Article 1121. Article 1121 refers only to choice of law and says nothing at all about the forum of the declaratory and injunctive proceedings that are excepted from the waiver requirement of Article 1121. Canada's interpretation also is contrary to the *travaux préparatoires* ("preliminary documents" or drafts) of the NAFTA.

38. Applying the proper interpretation of Article 1121, it is clear that Canada has failed to prove its affirmative defense with respect to DIBC's waiver. DIBC's waivers comply with Article 1121. Both waivers were properly and timely delivered, and neither failed to waive rights to any proceedings covered by Article 1121.

39. The Washington Litigation³⁵ is consistent with Article 1121. First, it does not challenge the same "measures" as challenged in this arbitration. Second, it seeks only

³³ DIBC Counter-Memorial ¶¶ 162-71.

³⁴ Canada Reply ¶ 94.

³⁵ The "Washington Litigation" is the litigation in the U.S. District Court for the District of Columbia entitled *Detroit Int'l Bridge Co. v. U.S. Dep't of State*.

declaratory relief pursuant to Canadian law and hence under no circumstances could be inconsistent with Article 1121.

40. The *CTC v. Canada* Litigation³⁶ is also consistent with Article 1121. Again, CTC seeks only declaratory relief under Canadian law with respect to the measures at issue in that case. CTC's requests for money damages in that litigation relate solely to a measure that is not implicated by this arbitration: *i.e.*, it advances the alternative claim, not made here, for damages based on expropriation of the Ambassador Bridge franchise if, and only if, Canada actually completes the *future* construction of the NITC/DRIC. The construction of the NITC/DRIC is not challenged in this arbitration, and this arbitration contains no expropriation claim.

41. Finally, the Windsor Litigation³⁷ is consistent with Article 1121. It challenges different measures than at issue here: the numerous Windsor city by-laws enacted to prevent CTC from destroying property on its own land. CTC has taken no actions in that litigation since filing its Notice of Arbitration here, other than to *abandon* an appeal of a lower court decision.

42. DIBC has fully complied with NAFTA Article 1121, and Canada has failed in its burden to demonstrate otherwise. To the extent this Tribunal determines that the existence of any of these domestic proceedings deprives it of jurisdiction to proceed in this arbitration, the Tribunal should only dismiss the portions of this arbitration it concludes relate to the specific domestic proceedings found to conflict with Article 1121. Canada has shown no reason why a conflict as to one claim should deprive this Tribunal of jurisdiction with respect to all claims.

³⁶ The "*CTC v. Canada* Litigation" is the litigation in the Ontario Superior Court of Justice entitled *Canadian Transit Co. v. Attorney General of Canada*.

³⁷ The "Windsor Litigation" means the two lawsuits in the Canadian courts against the City of Windsor, the Mayor of Windsor, and members of the Windsor City Council. DIBC Counter-Memorial ¶ 216.

B. Canada Misinterprets The Requirements Of Article 1121.

1. Canada Misreads The Plain Text of Article 1121 To Require Affirmative Conduct By Claimant Beyond Delivery Of A Written Consent and Waiver.

43. NAFTA Articles 1121(1) and 1121(2) each provides that the claimant meet two conditions to submit a claim for arbitration: (1) *consent* to arbitration; and (2) *waiver* of its right to “initiate or continue” certain other proceedings.³⁸ Canada’s defense presents this Tribunal with the question of what *affirmative conduct* the claimant must undertake to manifest such consent and waiver.

44. With due respect to Canada, NAFTA Article 1121(3) very clearly answers this question:

A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.³⁹

The plain text of Article 1121 contains *no further requirement of affirmative conduct* by the claimant.

45. Canada does not dispute that DIBC physically provided the written document demanded by Article 1121.

46. Instead, Canada argues that to comply with Article 1121, a claimant must engage in *additional affirmative conduct* beyond submission of a written consent and waiver.

Specifically, Canada asserts that a claimant must both submit the written document required by

³⁸ NAFTA Art. 1121, Exhibit CLA-12.

³⁹ NAFTA Art. 1121(3), Exhibit CLA-12.

Article 1121(3) “*and refrain[] from initiating or continuing any domestic litigation proceedings*” covered by the written waiver.⁴⁰

47. No such requirement is contained in the plain text of Article 1121.

48. Canada appears to read this additional requirement into the phrase “required by this article” contained in Article 1121(3). Canada argues as follows:

[A] waiver “required by” Article 1121 is one that is consistent with the wording of Articles 1121(1)(b) and 2(b) without deviation or manipulation, as it must genuinely waive a claimant’s right to initiate or continue “any proceedings” with respect to any measures alleged to breach the NAFTA. As the Tribunal in *Commerce Group* stated, “[a] waiver must be more than just words; *it must accomplish its intended effect.*”⁴¹

49. To the extent this argument is intended to suggest that the plain language of Article 1121 requires additional affirmative conduct by the Claimant beyond delivery of an enforceable waiver, the argument is circular.⁴² The phrase “required by” in this context refers only to the content of the physical waiver document. Thus, a waiver that is “consistent with the wording of Articles 1121(1)(b) and 2(b)” is one in which the *text of the waiver* is consistent with the scope of the consent and waiver described in Articles 1121(1)(b) and (2)(b). A waiver that “genuinely waive[s]” a claimant’s rights is a document that is *legally enforceable* in a domestic proceeding. The plain language of Article 1121 simply contains no requirement of affirmative conduct by a claimant beyond delivery of a written document that the respondent State being sued in arbitration (Canada) can use to enforce the waiver in domestic proceedings.

50. Canada appears to read into Article 1121(3) a requirement that the claimant not only expressly submit a “waiver” that waives its rights to certain claims via a written document,

⁴⁰ Canada Reply ¶ 63 (emphasis in original).

⁴¹ Canada Reply ¶ 64 (emphasis added).

⁴² Canada makes no other argument with respect to the *text* of Article 1121 that could be plausibly interpreted as support for Canada’s claim that Article 1121 requires the Claimant to affirmatively dismiss conflicting proceedings.

but also that the claimant represent in that document that it: (1) has affirmatively dismissed any conflicting proceedings (*i.e.*, it will not “continue” such proceedings) and (2) will not “initiate” any such proceedings in the future.

51. Article 1121 contains no such additional requirements. It would have been easy for the NAFTA drafters to include such requirements had they so desired. For example, the NAFTA Parties could specifically have required claimants to “certify”⁴³ that, prior to initiating arbitration, they have dismissed any conflicting proceedings, and expressly state that they submit to the tribunal’s jurisdiction for policing any such future conduct that is alleged to be inconsistent with any such guarantee. The NAFTA contains numerous instances of the term “certify” and variations of that term, so it is clear that the NAFTA drafters knew how to use such language when desired.⁴⁴

52. The NAFTA Parties chose neither to use the term “certify” in describing the claimant’s obligations under Article 1121 nor to explicitly give the tribunal the duty of policing the claimant’s post-filing conduct. The NAFTA Parties instead chose to require only a document by which the claimant consents to jurisdiction and “waive[s]” its rights in other proceedings. A waiver is a voluntary repudiation of existing and future rights.⁴⁵ It is not a representation regarding conduct taken prior to the waiver (*i.e.*, dismissals of conflicting proceedings) or an agreement that the tribunal should be charged with policing any future conduct (*i.e.*, initiating

⁴³ To certify is to “attest as being true.” Definition of “Certify,” excerpted from BLACK’S LAW DICTIONARY (9th ed. 2009), Exhibit CLA-59.

⁴⁴ See, e.g., NAFTA Art. 501, Exhibit CLA-60 (regarding certificates of origin); NAFTA Art. 1001(5)(a), Exhibit CLA-61 (“Procurement does not include: non-contractual agreements or any form of government assistance, including . . . guarantees . . .”).

⁴⁵ To “waive” is “[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily.” Definition of “Waive,” excerpted from BLACK’S LAW DICTIONARY (9th ed. 2009), Exhibit CLA-62.

new conflicting proceedings). The Tribunal should interpret the article according to its plain meaning, and should not superimpose the additional requirements asserted by Canada.

53. Canada's interpretation of Article 1121 is inconsistent with the purpose of the written waiver. The waiver stands on its own under Article 1121. It is up to the parties to such various proceedings as may be affected to present the waiver to their respective courts and seek relief there. Canada would have this Tribunal assume the obligation to involve itself in various court proceedings to assure that Claimant's waiver is enforced. Canada cites no authority that empowers or requires this Tribunal to act on behalf of Canada in domestic proceedings. It is up to *Canada* to present the waiver to the courts in the domestic proceedings when and if Canada concludes that the Article 1121 waiver applies. The respective courts in the domestic proceedings then may determine whether the waiver affects the claims before them. The NAFTA does not burden its own Tribunals with the obligation to police the actions of litigants in domestic proceedings within the NAFTA States.

2. Canada's Legal Authorities In Support Of Its Interpretation Of Article 1121 Are Unpersuasive.

54. Canada relies on the *Commerce Group* decision (which was not brought pursuant to the NAFTA) to argue that claimants are required under waiver provisions proactively to dismiss domestic proceedings.⁴⁶ With respect, as explained above, the question is not which party bears the burden of making the waiver effective, but who bears the risk of incorrectly assessing whether a domestic proceeding is within the waiver. The regime that DIBC advocates here is fully supported by the text of Article 1121.

⁴⁶ Canada Reply ¶ 65.

55. Next, Canada cites *Waste Management I* and asserts that the tribunal there found it had no jurisdiction because the claimant failed to terminate domestic proceedings that fell within Article 1121's waiver provision.⁴⁷ Canada's representation of the decision is incorrect. The tribunal found only that the claimant had failed in the one affirmative requirement of Article 1121(3) – to deliver a legally enforceable waiver of its right to initiate or continue conflicting proceedings. The claimant failed to do so because it delivered a waiver that expressly excepted from its scope proceedings that clearly fell within the realm of Article 1211.⁴⁸ The claimant then later backtracked from the language in its waiver by asserting that “whatever the waiver means under NAFTA, WASTE MANAGEMENT intended to give and has given it.”⁴⁹ Given the conflict between the express language in claimant's waiver and its *post hoc* rationalization, the tribunal found it necessary to consider the claimant's conduct with respect to the concurrent domestic proceedings as a means of interpreting the content of the document delivered pursuant to Article 1121(3).⁵⁰ The claimant admitted bringing a domestic case challenging the same measure as it challenged in its NAFTA arbitration (which is *not* the case here), and therefore the tribunal found that the claimant's waiver was never intended to be coterminous with Article 1121.⁵¹

56. Thus, the *Waste Management I* tribunal did not dismiss the arbitration because the claimant failed to dismiss a conflicting domestic proceeding, as stated by Canada. Rather, the

⁴⁷ Canada Reply ¶ 65.

⁴⁸ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award (“*WMI Award*”) ¶ 4 (June 2, 2000), Exhibit CLA-15 (“This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico”).

⁴⁹ *WMI Award* ¶ 6, Exhibit CLA-15.

⁵⁰ *WMI Award* ¶ 25, Exhibit CLA-15.

⁵¹ *WMI Award* ¶ 27, Exhibit CLA-15.

tribunal dismissed the arbitration because the physical waiver delivered to the respondent did not in fact contain a legally enforceable repudiation of claimant's rights in conflicting litigation. Claimant's failure to terminate the conflicting litigation was relevant only to determine the actual meaning of the claimant's conflicting representations regarding the waiver it provided, *i.e.*, to determine whether claimant truly intended on waiving what was required under the NAFTA, or instead reserved its right to bring claims in violation of Article 1121.

57. As explained by the *Waste Management II* tribunal:

As an aspect of its power to determine its jurisdiction, the first Tribunal had to determine both that the waiver conformed to NAFTA requirements and that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged. *This did not mean that the Tribunal was entitled or required to ensure actual compliance with the waiver. That would be a matter for the Respondent to plead in any Mexican court before which proceedings were brought contrary to the terms of the waiver.* But it was for the Tribunal to determine that the waiver was valid as such; if it was not, then the Respondent had not consented to arbitration and the Tribunal lacked jurisdiction.⁵²

58. Further, neither the *Commerce Group* nor the *Waste Management I* decision addresses the concern raised by DIBC in its Counter-Memorial, that forcing claimants to withdraw from claims before they have even filed their Statement of Claim would result in over-enforcement of Article 1121 to the detriment of investors. DIBC Counter-Memorial ¶¶ 149-152. *See also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Highest Dissent ¶ 44 (June 2, 2000), Exhibit CLA-20 (“Indeed, it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims. This could not have been the reasonable intent of the NAFTA Parties”).

⁵² *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal regarding Mexico's Preliminary Objection ¶ 10 (June 26, 2002), Exhibit CLA-16 (footnotes omitted) (emphasis added).

59. Perhaps aware of the limitations of *Waste Management I*, Canada also argues that DIBC’s waiver is insufficient because it “carved-out” certain litigations from its scope.⁵³ This assertion is wrong because DIBC did not exclude from the scope of its waiver any proceedings covered by Article 1121. The Washington Litigation challenges measures different from those at issue in this arbitration. In addition, the Washington Litigation seeks only declaratory relief against Canada under Canadian law. Similarly, the portions of the *CTC v. Canada* Litigation that relate to the measures at issue here seek only declaratory relief under Canadian law; the only part of that litigation that seeks damages is an alternative claim for expropriation based on facts that have not occurred and are not challenged in this arbitration (the actual construction of the NITC/DRIC).⁵⁴

3. DIBC’s Interpretation Of The Plain Language Of Article 1121 Is Consistent With The Purpose And Intent Of The Written Waiver Requirement.

60. That Article 1121 only requires delivery of a legally enforceable consent and waiver (*i.e.*, without a certification of past dismissals or a statement that the Tribunal should police all future conduct that the respondent seeks to challenge) is consistent with the acknowledged purpose of the Article 1121(3) written waiver requirement, which is to provide the respondent State with documentary evidence of the claimant’s waiver to use before *other courts*.

61. This purpose has been recognized by other tribunals. For example, as explained in the *Waste Management II* decision, tribunals are not “entitled or required to ensure actual compliance with the waiver. That would be a matter for the Respondent to plead in any

⁵³ Canada Reply ¶ 71.

⁵⁴ See Sections II(B)(5) and II(C)(3) below.

[domestic] court before which proceedings were brought contrary to the terms of the waiver.”⁵⁵

Similarly, Canada’s acknowledgement that “the waiver must be genuinely enforceable in domestic courts”⁵⁶ is an implicit acceptance of this purpose.⁵⁷

62. Canada complains that it is under no obligation to seek dismissal of domestic proceedings.⁵⁸ It does not follow, however, that this Tribunal should determine whether domestic proceedings comply with the waiver. Rather, Article 1121 provides the respondent with a tool – a legally enforceable waiver document – that the respondent may use or not, at its own discretion.

4. The Scope Of The Article 1121 Waiver Does Not Include Proceedings Challenging Measures Other Than Those That Are The Subject Of Arbitration.

63. DIBC explained in its Counter-Memorial that the scope of the waiver in Articles 1121(1)(b) and 1121(2)(b) extends only to “proceedings with respect to *the measure*” that is alleged to be a breach pursuant to Articles 1116 and 1117, respectively.⁵⁹ There is no requirement that claimants waive claims relating to *other measures* that are not alleged to breach the NAFTA.⁶⁰

64. On reply, Canada merely reasserts its prior argument that “with respect to” in the phrase “proceedings with respect to the measure” expands the concept of “measure” to include

⁵⁵ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal regarding Mexico’s Preliminary Objection ¶ 10 (June 26, 2002), Exhibit CLA-16 (footnotes omitted). *See also* DIBC Counter-Memorial ¶¶ 142-46.

⁵⁶ Canada Reply ¶ 69.

⁵⁷ *See also Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction ¶ 3.4.4 (Aug. 22, 2008), Exhibit CLA-17 (refusing to determine whether a domestic case dismissed without prejudice would comply with Article 1121 because the domestic court should interpret the scope of the written waiver itself).

⁵⁸ Canada Reply ¶ 70.

⁵⁹ DIBC Counter-Memorial ¶¶ 155-161.

⁶⁰ *Id.*

factual allegations that bear any relationship to the subject matter of the arbitration.⁶¹ Thus, Canada claims that Article 1121 requires waiver of any domestic proceeding in which “the measure, its application, or its implications on a claimant’s rights are put into question *or are relevant* to the determination of the proceeding.”⁶²

65. Under this broad “relevance” based test proposed by Canada, any of the following domestic proceedings must be waived:

- a. Proceedings that involve any of the same facts as in a NAFTA arbitration;
- b. Proceedings that implicate the same legal rights asserted in a NAFTA arbitration (e.g., a franchise right) even if the government measure which infringed that right is entirely different.

66. Neither of these overreaching interpretations is supportable from the text of Article 1121, or from examination of the object and purpose of the provision. Relevant authority also contradicts Canada’s interpretation of Article 1121.

67. With respect to the text, Canada’s argument reads too much into the phrase “with respect to.” That phrase merely ties the subject matter of the “proceeding” to the “measure” being arbitrated, but does not expand the scope of the waiver beyond the “measure” itself. Had the NAFTA Parties intended to expand the scope of “proceedings with respect to the measure” to include all proceedings that bore *any relevance* to the measure, they could easily have done so, for example by requiring a waiver of rights in any “proceeding with respect to the measure or *in any way arising out of or relating to the measure or related measures.*” They did not include such language.

⁶¹ Canada Reply ¶ 73.

⁶² Canada Reply ¶ 78 (emphasis added).

68. Canada’s explanation of the “focus” of Article 1121 does not assist Canada’s argument. As Canada itself acknowledges, Article 1121 “is focused on the *underlying actions* of the respondent Party at issue”⁶³ and is meant to “preclude the pursuit of all other claims arising out of *the act of the host State* which is complained of.”⁶⁴ What Canada thereby acknowledges, however, is that the “focus” of Article 1121 is the government *measure* (*i.e.*, the government “act”) giving rise to the dispute,⁶⁵ not the legal rights of the claimant or facts that give historical or other context to the dispute.

69. Similarly unhelpful to Canada is its acknowledgement that Article 1121 is primarily intended to safeguard the respondent State from the “imminent risk that the Claimant may obtain the double benefit in its claim for damages.”⁶⁶ The elimination of duplicative proceedings with respect to the same measure logically satisfies this goal, and Canada offers no explanation why it is necessary also to eliminate cases that challenge *different* government measures, just because they either (a) have some overlap in background or other facts; or (b) infringe on similar legal rights (*e.g.*, a franchise) of claimant.

70. Canada’s interpretation also overreaches in the name of preventing “conflicting outcomes.”⁶⁷ There can only be conflicting outcomes if two courts or tribunals consider the *same measure*.⁶⁸ If they consider different measures, then regardless of whether certain findings of fact or ancillary decisions conflict, *the outcome of the cases themselves will not conflict*.

⁶³ Canada Reply ¶ 75 (emphasis in original).

⁶⁴ Canada Reply ¶ 76 (citation omitted) (emphasis added).

⁶⁵ Campbell McLachlan Q.C., Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at p. 109, Exhibit RLA-45.

⁶⁶ Canada Reply ¶ 76 (citation omitted).

⁶⁷ Canada Reply ¶ 76 (citation omitted).

⁶⁸ Even then, NAFTA tribunals have explained that conflicting outcomes between NAFTA arbitrations and domestic court proceedings are permissible in some cases because of the difference between NAFTA/international law and

71. Canada asserts that the *Commerce Group* tribunal determined that claims addressing merely related, rather than the same, measures can violate waiver provisions like Article 1121.⁶⁹ This assertion misreads *Commerce Group*. The tribunal actually found that the claims at issue in the domestic proceeding and the arbitration “could [not] be teased apart” and thus comprised *the same measure* in both proceedings.⁷⁰ (In addition, the tribunal found that one of the alleged measures identified by the respondent did not constitute a “measure” within the meaning of the treaty.⁷¹ It therefore could not have been a separate, but related measure, as suggested by Canada.)

72. Canada’s efforts to distinguish DIBC’s authority also must fail. As explained previously by DIBC, the *Waste Management I* tribunal acknowledged that domestic proceedings and NAFTA arbitrations can coexist.⁷²

73. Canada attempts to minimize this finding by arguing that the *Waste Management I* tribunal found that only proceedings that do not “relate” (in the most broad sense of the term) to the relevant measure could proceed.⁷³ Canada’s interpretation fails to acknowledge the very next sentence in the decision, in which the tribunal gives an exact view of what it believes to be

domestic law. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award ¶ 78 (Dec. 16, 2002) (“*Feldman Award*”), Exhibit CLA-22 (explaining that concurrent domestic proceedings related to the arbitration were permissible even though a decision in those cases had not yet been rendered (thus creating a risk of inconsistent judgments) because “an action determined to be legal under Mexican law by Mexican courts [may not] necessarily [be] legal under NAFTA or international law. At the same time, an action deemed to be illegal or unconstitutional under Mexican law may not rise to the level of a violation of international law”). Canada ignores the *Feldman* award because in that case “there was no conflict with Article 1121.” Canada Reply ¶ 81. DIBC did not cite *Feldman* as an example of a conflict with Article 1121, but as evidence that conflicting outcomes is not a forbidden or unexpected result given the difference between international and domestic law.

⁶⁹ Canada Reply ¶ 77.

⁷⁰ *Commerce Group Corp et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award ¶¶ 111-126 (March 14, 2011), Exhibit RLA-6.

⁷¹ *Id.* at ¶ 112, Exhibit RLA-6.

⁷² *WM I Award* ¶ 27, Exhibit CLA-15 (emphasis added).

⁷³ Canada Reply ¶ 80.

covered by the waiver, *i.e.* situations where “both legal actions have a legal basis *derived from the same measures.*”⁷⁴

74. Canada next asks the Tribunal to disregard *Genin* because *Genin* addressed a “fork-in-the-road” treaty provision rather than a “waiver” treaty provision.⁷⁵ This distinction is irrelevant. As DIBC previously has explained, a fork-in-the-road provision means only that the claimant cannot arbitrate a claim that has previously been filed elsewhere, regardless of whether the claim was later dismissed.⁷⁶ The scope of what constitutes a sufficiently related domestic claim to *trigger* the fork-in-the-road provision of a treaty is the same as the waiver provision in the NAFTA. Thus, Canada fails to respond at all to the on-point decision by the *Genin* tribunal refusing to deny jurisdiction because of the existence of a “related” proceeding.⁷⁷

5. Article 1121 Does Not Require Claimant To Waive Or Discontinue Its Right To Bring A Case Involving Monetary Damages With Respect To Different Measures.

75. Article 1121 includes an exception to the scope of its waiver provision permitting claimants to maintain parallel “proceedings with respect to the measure” alleged to breach the NAFTA where those excepted proceedings are for “injunctive, declaratory or other extraordinary relief, not involving the payment of damages.”⁷⁸ The plain meaning of this exception is that claimants can bring claims with respect to the NAFTA measures in domestic court, as long as they do not seek the payment of damages with respect to *those measures*.

⁷⁴ *WMI Award* ¶ 27, Exhibit CLA-15

⁷⁵ Canada Reply ¶ 82.

⁷⁶ DIBC Counter-Memorial ¶ 158.

⁷⁷ *Alex Genin, Eastern Credit Limited, Inc. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award ¶¶ 332, 334 (June 25, 2001), Exhibit CLA-23 (even though “certain aspects of the facts that gave rise to this dispute were also at issue in the [previous] litigation,” the claimant was not barred from arbitration).

⁷⁸ NAFTA Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

76. Canada asserts on reply that this exception applies only to proceedings where no damages are sought with respect to *any claim* – even claims wholly unrelated to the measure at issue in arbitration.⁷⁹ Canada offers no explanation of how the text of Article 1121 justifies this conclusion. Article 1121 is specific as to what claims are to be waived and does not generally preclude *all* causes of action for damages, regardless of the nature of the claims.

77. The plain text of Article 1121 supports DIBC’s interpretation. The relevant sub-clauses of Articles 1121(1) and (2) each provides an “except[ion]” to claimant’s waiver of rights in “proceedings with respect to the measure” at issue in arbitration. Accordingly, a claim challenging a measure *different* than the one at issue in arbitration is not covered under Article 1121 at all, and a claimant has no obligation to comply with the exceptions contained therein.

78. Canada’s insistence to the contrary is again at odds with the purpose of Article 1121, which is to prevent duplicative damages claims. A claimant’s ability to recover damages on a claim that is not the subject matter of arbitration does not create a risk of double recovery.

6. Article 1121 Does Not Require Claimant To Waive Or Discontinue Its Right To Seek Declaratory Or Injunctive Relief If There Is A Violation Of The Disputing Party’s Own Law.

79. Finally, DIBC argued in its Counter-Memorial that Article 1121 excepts from its scope claims for declaratory or injunctive relief, even if they challenge the same measure as in the NAFTA arbitration, so long as they are brought “under the law of the disputing Party.”⁸⁰

80. Canada argues that the phrase “under the law of the disputing Party” requires not only application of the disputing Party’s law, but also that the proceeding be physically located

⁷⁹ Canada Reply ¶¶ 84-86.

⁸⁰ DIBC Counter-Memorial ¶¶ 162-71.

within the jurisdiction of the respondent State.⁸¹ Under Canada’s reasoning, an injunction issued by a U.S. (or Mexican) court based on a violation of *Canadian law*, and enjoining Canada from violating a *Canadian statute*, would not result from a proceeding conducted “under the law of the disputing Party.”⁸²

81. This position has no basis in the text of Article 1121, which contains no reference to choice of forum. Nor does it demand that the court or tribunal “owe its existence to or operate”⁸³ under the law of the disputing Party.⁸⁴ This stands in contrast to many other international treaties, which do specifically limit the waiver exception to the forums in the respondent State.⁸⁵ The drafters of the NAFTA could have chosen to make this distinction, but did not.

82. Canada’s primary authority in support of this proposition is *Feldman*.⁸⁶ But the *Feldman* tribunal did not directly address whether Article 1121 includes a forum restriction on proceedings excepted from its waiver requirement. Rather, while examining the doctrine of exhaustion of local remedies, the *Feldman* tribunal observed that if a prospective claimant wants

⁸¹ Canada Reply ¶ 94.

⁸² Canada Reply ¶ 88.

⁸³ Canada Reply ¶ 90.

⁸⁴ NAFTA Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

⁸⁵ Central American-Dominican Republic-United States Free Trade Agreement (CAFTA), art. 10.18(3), May 28, 2004, 43 I.L.M. 514 (“Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal **of the respondent** . . .”), Exhibit CLA-63 (emphasis added); U.S.-Chile Free Trade Agreement, U.S.-Chile, art. 10.17(3), June 6, 2003, 42 I.L.M. 1026 (“Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.15(1)(a)) and the claimant or the enterprise (for claims brought under Article 10.15(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal **of the respondent** . . .”), Exhibit CLA-64 (emphasis added).

⁸⁶ Canada Reply ¶ 91 n.155.

to pursue arbitration, it has to “waive his rights to pursue damages in the local courts.”⁸⁷ A few paragraphs later, the tribunal also observed that Article 1121 left available to a claimant “proceedings for injunctive, declaratory or other extraordinary relief’ before the national courts.”⁸⁸ *Feldman* did not elaborate on the meaning either of “national courts” or “local courts,” much less limit the scope of Article 1121 as suggested by Canada here.

83. Canada also relies on Mexico’s Article 1128 submission in *Loewen*, in which Mexico asserted that the *Loewen* claimant could bring domestic cases “in the domestic courts of the United States [the disputing Party in that matter].”⁸⁹ But Mexico argued in *Feldman* that an investor “waives his right to initiate or continue court or administrative tribunal proceedings for damages *under domestic law*,” and did not reference a limitation with respect to forum.⁹⁰ Canada’s purported “evidence” with respect to Mexico’s position provides no basis to depart from the plain language of the text.

84. Canada also argues that DIBC misreads the preliminary drafts of the NAFTA.⁹¹ As an initial matter, it is not even necessary to look at the drafts where, as here, the text of the NAFTA is clear. In any event, it is unclear why Canada believes its own interpretation of the *travaux préparatoires* leads to a different conclusion than that of DIBC. As DIBC explained in its Counter-Memorial, the initial drafts of the NAFTA included the following provision regarding waiver and exception:

⁸⁷ *Feldman* Award ¶ 67, Exhibit CLA-22.

⁸⁸ *Feldman* Award ¶ 73, Exhibit CLA-22.

⁸⁹ Canada Reply ¶ 91.

⁹⁰ DIBC Counter-Memorial ¶ 164 n. 142 (citing *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Respondent’s Counter-Memorial on Preliminary Questions ¶ 206 (Sept. 8, 2000), Exhibit CLA-34 (emphasis added)).

⁹¹ Canada Reply ¶ 93.

By submitting the dispute to arbitration, the investor: a) consents to arbitration in accordance with the provisions of this Part; and b) waives its right to initiate or continue before any administrative tribunal or court [under the domestic law] of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach of this Chapter, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party.⁹²

A footnote after the first of the two instances⁹³ of bracketed text (“[under the domestic law]”) explained that *the choice presented by the brackets* was a “Choice between reference to administrative tribunal or court, on the one hand, or ‘under the domestic law’, on the other, to be made during scrubbing.”⁹⁴ A footnote after the second instance of the bracketed text, specifically referring to the exception to the waiver requirement, further explained that “The final drafting must make clear that . . . [this article] addresses domestic law other than the NAFTA.”⁹⁵ Thus, with respect to the second instance of the bracketed choice, the final version of the NAFTA selects the “under the [domestic] law of the disputing Party” option and rejects the “before an administrative tribunal or court of the disputing Party” option, making clear that the exception applied to the domestic law of the disputing Party, not the domestic courts.⁹⁶

85. Canada on reply asserts that DIBC misreads this drafting history because the choice before the drafters was “how to describe the ‘proceedings’ referred to in the clause.”⁹⁷ But there is no evidence this choice between two options was devoid of substance as Canada

⁹² INVEST.810, Watergate Daily Update (Aug. 4, 1992) at p. 17, Art. 2126(4), Exhibit CLA-24 (brackets in original; footnote references omitted). A later interim draft contained nearly identical phrasing. DIBC Counter-Memorial ¶ 169, citing Exhibit CLA-26.

⁹³ Although the footnote occurred only after the first of the two instances of the bracketed language, it appears to apply to both instances, and Canada does not dispute otherwise.

⁹⁴ INVEST.810, Watergate Daily Update (Aug. 4, 1992) 15, Art. 2126(4), at p. 17 n. 23, Exhibit CLA-24.

⁹⁵ INVEST.810, Watergate Daily Update (Aug. 4, 1992) 15, Art. 2126(4), at p. 17 n. 24, Exhibit CLA-24.

⁹⁶ NAFTA Art. 1121(1)(b), (2)(b), Exhibit CLA-12.

⁹⁷ Canada Reply ¶ 93.

suggests. Legal draftsmen are deemed to understand that the words used to describe a specific exception are important, and provide the specific definition for that exception. Here, the NAFTA Parties said they intended to “make clear that . . . [this article] addresses domestic law” and thus used the words “under the law of the disputing Party,” and chose to make *no reference* to the forum of the litigation, despite expressly considering whether to do so. The only reasonable inference from this drafting history is that the NAFTA Parties chose not to make the exception for suits seeking declaratory and injunctive relief at all dependent upon the forum in which such a suit is brought.

C. DIBC Has Complied With The Requirements Of Article 1121.

1. DIBC’s Waivers Are Consistent With Article 1121.

86. Both of DIBC’s waivers meet the requirements of Article 1121.⁹⁸ Each waiver was properly and timely delivered, and neither facially failed to waive rights covered by Article 1121. Canada’s “multiple letters” objecting to DIBC’s waivers do not change this fact.⁹⁹

a. The First NAFTA Waiver Is Consistent With Article 1121.

87. Canada argues that DIBC’s First NAFTA Waiver is inconsistent with Article 1121 because: (1) DIBC included a statement in the waiver that (correctly) informed Canada that the Washington Litigation fell outside the scope of Article 1121; and (2) the waiver allegedly was “narrower” than DIBC’s first Notice of Arbitration. Neither allegation has merit.

88. First, DIBC does not seek damages from Canada in the Washington Litigation nor does that litigation challenge the same Canadian measures challenged in this arbitration, and therefore the Washington Litigation is excepted from the waiver requirement of Article 1121.

⁹⁸ Exhibits C-140 (the “First NAFTA Waiver”) and C-116 (the “Second NAFTA Waiver”) and DIBC Counter-Memorial ¶¶ 138-41.

⁹⁹ Canada Reply ¶ 96.

DIBC's statement in the First NAFTA Waiver to this effect does not deprive Canada of the substance of anything to which it is entitled under Article 1121. Although Canada asserts that DIBC was required to "file a waiver that covers 'any proceeding,'"¹⁰⁰ Article 1121 contains no such requirement in its plain text and it is unclear what purpose such a requirement would serve.

89. Canada's assertion that DIBC would not have needed to specifically identify the Washington Litigation if it did not fall within the scope of Article 1121 is true.¹⁰¹ It does not follow, however, that the converse also is true – *i.e.*, that by identifying the Washington Litigation in the First NAFTA Waiver, DIBC substantively deprived Canada of a waiver of the scope required by Article 1121. Canada in effect argues that a waiver is *a fortiori* invalid if it contains any commentary, regardless of whether the commentary has any substantive effect on Canada's rights. There is no authority (or rationale) for such a punitive regime in the absence of actual substantive harm to the respondent.

90. Second, Canada also argues that the First NAFTA Waiver is impermissibly "narrower" than the first Notice of Arbitration because the waiver does not parrot the description contained in the notice of the measures at issue in the arbitration.¹⁰² This argument is erroneous. There is no requirement that the *language* included in the waiver and notice of arbitration be identical, so long as the *substance* of the repudiation is of the scope required by Article 1121.

91. Here, the substance of the phrasing Canada claims to be "missing" is in fact included in the First NAFTA Waiver. The Notice of Arbitration complains of the following measure:

¹⁰⁰ Canada Reply ¶ 101.

¹⁰¹ Canada Reply ¶ 102.

¹⁰² Canada Reply ¶¶ 103-104.

(a) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge; (b) to fail to provide comparable improvements in road access to the Ambassador Bridge because of its ownership by a United States investor....¹⁰³

92. The First NAFTA Waiver does not expressly contain the precise text of (b) in its formulation of the measure being challenged. Instead, it refers generally to Canada’s decision “to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge.”¹⁰⁴ But this does not mean that DIBC failed to include all relevant measures in its waiver. Section (b) does not describe a *separate* measure from (a), but merely elaborates on why the measure in (a) is improper under the NAFTA. Thus, the “measure” identified both in the Notice of Arbitration and the First NAFTA Waiver is the decision to locate the Parkway so that it both bypasses the Ambassador Bridge and steers traffic to the NITC/DRIC directly to and from the Canadian highway system. This measure is wrongful under the NAFTA because it fails to provide “comparable” treatment to the Ambassador Bridge. DIBC thus did not fail to include in its waiver any measure identified in the Notice of Arbitration.

93. More importantly, the actual *waiver* provided was fully consistent with the requirements of Article 1121:

[DIBC/CTC] hereby consent to arbitration in accordance with the procedures set out in NAFTA, and waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, *any proceedings with respect to the*

¹⁰³ Canada Reply ¶ 103. Canada asserts that DIBC has failed to present evidence that Canada committed to spend \$300 million for a highway connection to the Ambassador Bridge. Canada Reply ¶¶ 25-27. Although not relevant for jurisdictional purposes, Canada is incorrect. As DIBC explained in its Statement of Claim and Counter-Memorial, the 2002 Memorandum of Understanding between The Government of Canada and The Government of the Province of Ontario, the Joint Management Committee’s Windsor Gateway Action Plan, the nine-point “Windsor Gateway Action Plan,” and the “Let’s Get Windsor-Essex Moving Strategy,” all committed to spend \$300 million to improve road access to existing crossings, and specifically the Ambassador Bridge. DIBC Statement of Claim ¶¶ 91-102; DIBC Counter-Memorial ¶¶ 38-48. These plans included a truck-only parkway to the Ambassador Bridge. Exhibit C-124 at 23-24; Exhibit C-34 at 2. Canada later reneged on this commitment, as is clear from the fact that Canada has not yet built a highway connection to the Ambassador Bridge.

¹⁰⁴ Canada Reply ¶ 103.

*measure of the disputing Party that is alleged in the foregoing Notice of Arbitration.*¹⁰⁵

94. DIBC thus waived the measures described in an incorporated document, the Notice of Arbitration. The fact that DIBC may then have described the *content* of that document differently does not alter the fact that DIBC waived its rights with respect to the measures alleged in the *Notice of Arbitration*.

b. The Second NAFTA Waiver Complied With Article 1121.

95. As explained in Section I(B), Canada incorrectly argues that events occurring after DIBC's submission of its Notice of Arbitration are irrelevant to this Tribunal's jurisdiction. DIBC's First NAFTA Waiver is decisive only with respect to measures addressed in the notice of arbitration as it existed at that time. Because DIBC amended and expanded its claims in its amended Notice of Arbitration (to which Canada did not object), the Second NAFTA Waiver is the operative document with respect to new measures or claims addressed in the amended Notice of Arbitration.

96. Canada alleges that DIBC's Second NAFTA Waiver is inconsistent with Article 1121 because (1) DIBC included a statement in the waiver that informed Canada that the Washington Litigation and the *CTC v. Canada* Litigation fell outside the scope of Article 1121;¹⁰⁶ (2) DIBC did not expressly include the phrase "before an administrative tribunal or court under the law of the disputing Party" in the text of the waiver;¹⁰⁷ and (3) the waiver

¹⁰⁵ First NAFTA Waiver, Exhibit C-140 (emphasis added)

¹⁰⁶ Canada Reply ¶ 105.

¹⁰⁷ Canada Reply ¶ 106.

allegedly is “narrower” than DIBC’s amended Notice of Arbitration.¹⁰⁸ These arguments are meritless.

97. With respect to Canada’s first assertion, both the Washington Litigation and the *CTC v. Canada* Litigation are excepted from Article 1121 because DIBC does not seek damages from Canada in those proceedings with respect to the NAFTA measures and/or does not challenge the same measures by Canada.¹⁰⁹ In addition, as discussed above, nothing in the plain text of Article 1121 suggests a jurisdictional requirement that the claimant refrain from adding points of clarification in its waiver document.

98. Next, Canada asserts that DIBC’s omission of the phrase “before an administrative tribunal or court under the law of the disputing Party” is a *per se* violation of Article 1121 because the omission purportedly wrongfully gives DIBC the right to bring claims for injunctive or declaratory relief in the United States.¹¹⁰ As explained in Section II(B)(6) above, the exception in Article 1121 to its broad waiver provision does not include a choice of forum clause. Accordingly, Canada has not been deprived on any substantive right.

99. Finally, Canada again alleges that the Second NAFTA Waiver was “narrower” than the amended Notice of Arbitration because there was language in the amended notice not included in the Second NAFTA Waiver.¹¹¹ Specifically, Canada complains that the following language included in the amended Notice of Arbitration is not also included in the Second NAFTA Waiver:

¹⁰⁸ Canada Reply ¶ 107.

¹⁰⁹ See Sections II(C)(2)-(3).

¹¹⁰ Canada Memorial ¶¶ 120-21; Canada Reply ¶ 106.

¹¹¹ Canada Reply ¶ 107.

- “(1) to discriminate against DIBC, violating Claimant’s exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant’s franchise right by precluding the construction of the New Span”¹¹²
- “(4) to fail to provide comparable improvements in road access to the Ambassador Bridge as previously provided to the Blue Water Bridge and is currently being provided to the nonexistent NITC/DRIC Bridge, because the Ambassador Bridge is owned by a United States investor”¹¹³
- allegations specifically referencing the *BSTA*¹¹⁴

100. Again, there is no requirement that the *language* included in the waiver and notice of arbitration be identical, so long as the *substance* of the repudiation is of the scope required by Article 1121.¹¹⁵

101. In addition, as with the First NAFTA Waiver, DIBC included in the Second NAFTA Waiver language sufficient to encompass the measures identified in the amended Notice of Arbitration.¹¹⁶

102. For example, the *measure* identified in the first bullet (*i.e.*, “precluding the construction of the New Span”) is subsumed within the portion of the Second NAFTA Waiver identifying measures “to block and delay the approval *and construction* of the New Span.”¹¹⁷ There is no requirement that it be identified twice. The balance of the first bullet (*i.e.*, a violation of DIBC’s “franchise rights”) does no more than identify which of DIBC’s legal rights Canada violated, but not the *measures* by which it did so. Article 1121 contains no requirement that the

¹¹² Canada Reply ¶ 107.

¹¹³ Canada Reply ¶ 107.

¹¹⁴ Canada Reply ¶ 108.

¹¹⁵ See paragraph 94 above.

¹¹⁶ Second NAFTA Waiver, Exhibit C-116.

¹¹⁷ Second NAFTA Waiver, Exhibit C-116.

waiver identify which of claimant's legal rights was violated by "the *measure* of the disputing Party that is alleged to be a breach."¹¹⁸

103. With respect to the second bullet point, the measure identified in the amended Notice of Arbitration regarding "comparable improvements in road access" is included within the measure identified in the Second NAFTA Waiver regarding Canada's decision to "locate the Windsor Essex Parkway so as to bypass the Ambassador Bridge and towards the Detroit-Windsor Tunnel and the planned NITC/DRIC Bridge."¹¹⁹

104. Finally, although the Second NAFTA Waiver does not specifically reference DIBC's BSTA claims,¹²⁰ those measures are included within the waiver of rights "with respect to the measure of the disputing Party that is alleged in the foregoing Notice of Arbitration."¹²¹

2. The Washington Litigation Does Not Fall Within The Scope Of The Proceedings Prohibited By Article 1121.

105. DIBC did not violate Article 1121 by failing to dismiss the Washington Litigation. First, as discussed in Sections II(B)(1) and (3) above, so long as DIBC delivered a valid waiver, it had no further affirmative obligation to take action with respect to the waiver. Moreover, as explained in DIBC's Counter-Memorial, the Washington Litigation does not fall within the scope of Article 1121 because: (1) it involves measures different from those at issue in this arbitration; and (2) the Washington Litigation seeks only declaratory relief under Canadian law.¹²²

¹¹⁸ NAFTA Art. 1121, Exhibit CLA-12.

¹¹⁹ See Section II(C)(1)(a).

¹²⁰ Canada Reply ¶ 108.

¹²¹ Second NAFTA Waiver, Exhibit C-116 (emphasis added) and paragraph 94 above.

¹²² DIBC Counter-Memorial § I(C).

106. On reply, Canada asserts that the measures at issue in the Washington Litigation overlap with those at issue here because both the Notices of Arbitration here and the Washington First¹²³ and Second Amended Complaints¹²⁴ in the Washington Litigation include discussion of many of the same facts.¹²⁵ Although it is true that the operative documents stating DIBC’s claims in both proceedings recount many of the same events in the long relationship between Canada and the owners of the Ambassador Bridge, it does not follow that each proceeding challenges the same measure by Canada.

- a. The Measures At Issue In DIBC’s First Notice of Arbitration Are Not The Same As Those Addressed In The Washington First Amended Complaint.

107. Canada first claims that there is an overlap in the measures complained of in DIBC’s first Notice of Arbitration and the Washington First Amended Complaint. Canada first attempts to blur the lines between the proceedings by asserting that the “gravamen” of both proceedings is “the same: Canada’s decision to locate the DRIC Bridge, corresponding Parkway and customs plaza in proximity to the Ambassador Bridge.”¹²⁶ This assertion is wrong. It is not the *proximity* of the proposed NITC/DRIC and the Ambassador Bridge that constitutes the measure at issue in this arbitration, but the disparate treatment of Canadian-owned and U.S.-owned bridges.¹²⁷ DIBC’s Roads Claim is premised on Canada’s decisions to connect only the

¹²³ The “Washington First Amended Complaint” refers to Exhibit C-147, *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, First Amended Complaint, No. 10-cv-476-RMC (D.D.C. June 6, 2011).

¹²⁴ The “Washington Second Amended Complaint” refers to Exhibit C-117, *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Second Amended Complaint, 10-cv-476-RMC (D.D.C. Feb. 13, 2013).

¹²⁵ Canada Reply ¶¶ 115, 121-25.

¹²⁶ Canada Reply ¶ 113.

¹²⁷ Canada’s position in its waiver defense that the DRIC EA is the relevant measure for this arbitration is at odds with Canada’s position with respect to its limitations defense that DIBC purportedly first acquired knowledge of both breach and damages years before the DRIC EA was issued (Canada Reply ¶¶ 179-89) and that “DIBC also conflates the Nine Point Plan and LGWEM Strategy with the DRIC EA process,” with the former (and not the latter, *i.e.* the DRIC EA) being the “measures” Canada alleges are at issue for limitations purposes (Canada Reply ¶ 177).

NITC/DRIC bridge to Highway 401 and not the Ambassador Bridge or New Span.¹²⁸ DIBC's New Span Claim is premised on Canada's decisions to block construction of the U.S.-owned New Span while expediting construction of the Canadian NITC/DRIC.

108. Canada also attempts to link the measures at issue in this arbitration and the Washington Litigation by comparing the timing of the DRIC EA, DIBC's Washington Complaint¹²⁹ and its first notice of intent under the NAFTA.¹³⁰ With respect to Canada, the date upon which one initiates a proceeding does not alter the content of the document by which a claimant does so. Here, as explained in DIBC's Counter-Memorial, the operative complaints in the Washington Litigation on their face challenge particular measures taken by Canada *in the United States or directed towards the United States* to construct, promote and operate the NITC/DRIC; by contrast, DIBC's first Notice of Arbitration on its face challenges particular measures taken by Canada within its own borders to discriminate against the United States-owned Ambassador Bridge and favor the NITC/DRIC within Canada.¹³¹

109. In addition, while this arbitration challenges many of Canada's regulatory and legislative actions, the Washington Litigation is addressed solely towards *commercial* conduct by Canada as a prospective owner, constructor and operator of the NITC/DRIC. That DIBC was forced to seek relief in both proceedings is unfortunate, but that is a reflection of the fact that

¹²⁸ Canada asserts that it would be too difficult to build a highway connection to the Ambassador Bridge because of community impacts in Windsor. Canada Reply ¶ 29. This assertion cannot be reconciled with the fact that the Parkway itself is expected to displace approximately 360 homes, more than 50 businesses, a church, a school, and other cultural institutions, as well as harm wildlife, including potential mortality to at-risk species. DIBC Counter-Memorial ¶ 98. In fact, given the development in the Windsor region of Ontario, any highway connection between Highway 401 and a Detroit-Windsor crossing will adversely impact the community and environment.

¹²⁹ The "Washington Complaint" refers to Exhibit C-146, *Detroit Int'l Bridge Co. v. U.S. Dep't of State*, Complaint, No. 10-cv-476-RMC (D.D.C. Mar. 22, 2010).

¹³⁰ Canada Reply ¶ 114.

¹³¹ DIBC Counter-Memorial ¶¶ 177, 179.

Canada's actions with respect to the Parkway and the NITC/DRIC and Ambassador Bridge were: (1) conducted in and directed towards *two countries*; and (2) taken in both Canada's governmental and commercial capacities. That DIBC chose to pursue its claims at roughly the same time says nothing other than that DIBC was being injured by all of this conduct at the same time.

110. Canada further complains that certain factual allegations are pleaded in both proceedings.¹³² Canada's characterization of some of the purported overlap in allegations is factually incorrect. That is, the allegations from the Washington Litigation that Canada characterizes as relating to the DRIC EA do not refer to the Canadian environmental assessment process with respect to the proposed NITC/DRIC and X12 alternative, but instead refer to Canada's improper actions with respect to the *United States'* environmental assessment process relating to the *United States'* side of the crossing. *Compare* Canada Reply ¶ 115 (claiming that "Canada and FHWA have manipulated regulatory and other processes to speed the construction of the DRIC Bridge . . ." is an "Allegation[] with respect to the DRIC EA") *with* Washington Complaint ¶ 85 ("[H]aving been pressured by Canada to reject any solution that made use of the existing Ambassador Bridge or the planned Ambassador Bridge New Span, FHWA and the other DRIC Proponents acceded to Canada's demands as to the location for the new DRIC Bridge"); Washington First Amended Complaint ¶ 176 ("In 2008, having been pressured by Canada to reject the X12 solution that would twin the Ambassador Bridge . . . the members of the DRIC Partnership were left only with locations in downtown Detroit in close proximity to—but not directly twinning—the Ambassador Bridge").

¹³² Canada Reply ¶¶ 115, 121-23.

111. Nor is there a conflict in the “relief requested” in the first Notice of Arbitration and the Washington First Amended Complaint. Canada does not argue that the relief sought in both proceedings is the same, but instead argues that boilerplate language in each document referencing prior allegations before stating a prayer for relief is an admission that all factual allegations in a complaint or notice of arbitration form the actual “measures” challenged.¹³³ Canada proffers no authority for this remarkable position.

112. Canada also claims that because *draft* document requests in the Washington Litigation sought documents related to the DRIC EA, that litigation must necessarily challenge the DRIC EA, which Canada says is the same measure as at issue here.¹³⁴ As DIBC explained in its Counter-Memorial, those requests pre-date the first Notice of Arbitration, were in draft form, and DIBC was denied the right to serve them upon Canada.¹³⁵ More importantly, however, there is no obligation under U.S. law to limit discovery to the actual measures challenged in a particular action. Rather, information is discoverable under U.S. law so long as it “appears reasonably calculated to lead to the discovery of admissible evidence.”¹³⁶ These draft requests for discovery are therefore irrelevant to the question of what measures are challenged in the Washington Litigation.

b. The Amended Notice of Arbitration Did Not Add Measures To This Proceeding That Conflicted With The Washington Litigation.

113. Canada argues that DIBC’s amended Notice of Arbitration added measures to this proceeding that conflicted with the Washington Litigation.¹³⁷ That assertion is incorrect. When

¹³³ Canada Reply ¶ 115.

¹³⁴ Canada Reply ¶ 118.

¹³⁵ DIBC Counter-Memorial ¶ 188.

¹³⁶ Fed. R. Civ. Proc. 26(b)(1), Exhibit C-145.

¹³⁷ Canada Reply ¶¶ 121-24.

DIBC amended its Notice of Arbitration, it added claims with respect to the New Span.¹³⁸ The New Span Claim, which challenges disparate treatment by Canada of the New Span *in Canada*, has never been a part of the Washington Litigation, which challenges only Canada's wrongful conduct *in the United States* (and directed solely towards the United States) with respect to the NITC/DRIC and the New Span.

114. Canada nonetheless complains that DIBC's Washington Second Amended Complaint includes allegations that Canada: (1) delayed processing DIBC's Canadian application for environmental approval of the New Span; (2) enacted the IBTA to interfere with DIBC's rights with respect to the New Span; and (3) further enacted the BSTA to interfere with DIBC's rights with respect to the New Span by exempting the NITC/DRIC from the requirements of the IBTA.¹³⁹ As explained in DIBC's Counter-Memorial, these allegations of wrongdoing by Canada within its own borders are not the basis for any relief requested against Canada in the Washington Litigation; rather, they are background facts that inform the court in the Washington Litigation of the full extent of Canada's campaign against DIBC, and they may form a basis for DIBC's claim under the Equal Protection Clause of the United States Constitution against the United States government defendants.¹⁴⁰ They do not form the basis upon which the court is asked to rule against Canada. Canada makes no serious response to this argument, and just reiterates its position that mere mention of measures at issue in this

¹³⁸ Amended Notice of Arbitration ¶ 135 (adding to the "Points at Issue" Canada's measures "to discriminate against DIBC, violating Claimant's exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant's franchise rights by precluding construction of the New Span" and "to prevent or delay DIBC's ability to obtain Canadian approval to build the New Span").

¹³⁹ Canada Reply ¶¶ 121-23. Canada also again complains that DIBC referenced all prior allegations before stating a prayer for relief in both the Washington Second Amended Complaint and the amended Notice of Arbitration. This argument is meritless for the reasons set forth in paragraph 111 above.

¹⁴⁰ DIBC Counter-Memorial ¶¶ 198-200.

proceeding can render another proceeding violative of Article 1121. This argument has no support in the text of Article 1121 and does not serve the purpose of Article 1121, which, as Canada acknowledges, is to avoid double recovery and conflicting outcomes. Double recoveries and conflicting outcomes cannot result from domestic proceedings challenging conduct taken by Canada in different countries, even if the wrongdoing in one country is informed by Canada's conduct in the other.

c. The Washington Third Amended Complaint Also Is Consistent With Article 1121.

115. Canada's concerns regarding the Washington Third Amended Complaint¹⁴¹ also are invalid. Most of the issues raised by Canada with respect to the Washington Third Amended Complaint are identical to those addressed with respect to the Washington First and Second Amended Complaints, and are invalid for the reasons discussed above.¹⁴² In addition, Canada fastens on one allegation in the Third Amended Complaint concerning "Canada's acts within Canada," and claims that DIBC's articulated geographic distinction between the measures at issue in the two proceedings must be incorrect. But there is no discrepancy. As explained in DIBC's Counter-Memorial and reiterated above, the Washington Litigation challenges the propriety of Canada's conduct within the United States and its conduct within Canada that is specifically *directed toward* the United States.¹⁴³ In addition, the Washington Litigation challenges only Canada's commercial activity, while this arbitration challenges Canada's official legislative and regulatory activity.

¹⁴¹ The "Washington Third Amended Complaint" refers to Exhibit C-141, *Detroit Int'l Bridge Co. v. U.S. Dep't of State*, Third Amended Complaint, No. 10-cv-476-RMC (D.D.C. May 29, 2013).

¹⁴² Canada Reply ¶ 130 (regarding the Nine Point Plan, the DRIC EA, the IBTA, the New Span EA, and the BSTA).

¹⁴³ DIBC Counter-Memorial ¶ 177.

116. Canada also mistakenly claims that DIBC challenges measures in the Washington Litigation other than those specifically identified in paragraph 43 of the Washington Third Amended Complaint. In support of this assertion, Canada points to a list of occurrences set forth in paragraph 44 of the Washington Third Amended Complaint.¹⁴⁴ The allegations in that paragraph, however, are not the measures at issue in the litigation, but a list of the “direct effects” of Canada’s acts in the United States.¹⁴⁵ A recitation of harms caused by a measure are not the same as the measure itself. In any event, those harms occurred in the United States and are not the same as the measures challenged in this arbitration.

d. The Washington Litigation Challenges Violations Of Canadian Law And Does Not Seek Damages.

117. The Washington Litigation also does not conflict with Article 1121 because it is a proceeding for declaratory relief, not involving damages, brought under Canadian law.¹⁴⁶ Canada first argues that this cannot be true because the litigation is in a United States, rather than Canadian court.¹⁴⁷ This argument is misplaced for the reasons set for the reasons set forth in Section II(B)(6).

118. Second, Canada argues that the Article 1121 exception does not apply because the declaratory relief sought by DIBC in its Washington Second Amended Complaint (but notably not the Washington Third Amended Complaint)¹⁴⁸ includes a declaration that Canada’s actions

¹⁴⁴ DIBC Counter-Memorial ¶ 178.

¹⁴⁵ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Third Amended Complaint, No. 10-cv-476-RMC, ¶ 44 (D.D.C. May 29, 2013), Exhibit C-141.

¹⁴⁶ DIBC Counter-Memorial ¶¶ 202-208.

¹⁴⁷ Canada Reply ¶ 127 (“Injunctive and declaratory relief available in United States courts, *even if based on alleged violation of Canadian law*, is under the laws of the United States, not Canada”) (emphasis added).

¹⁴⁸ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Third Amended Complaint, No. 10-cv-476-RMC, pp. 98-101 (D.D.C. May 29, 2013), Exhibit C-141.

constitute a taking.¹⁴⁹ This argument is without merit.¹⁵⁰ DIBC has not asked the court in the Washington Litigation to award any damages against Canada for the taking or for any other misconduct.

119. Lastly, Canada asserts that because DIBC brings a claim in the Washington Litigation under the United States Declaratory Judgment Act, the claim is not brought pursuant to Canadian law.¹⁵¹ Canada is mistaken. The U.S. Supreme Court has long held that “the operation of the Declaratory Judgment Act is *procedural* only.”¹⁵² Accordingly, DIBC’s invocation of the Declaratory Judgment Act in no way affects the fact that the *substantive* law to be applied in the Washington Litigation is Canadian law.

3. The *CTC v. Canada* Litigation Does Not Violate Article 1121.

120. The *CTC v. Canada* Litigation also does not conflict with the written waiver. To the extent CTC challenges the same measures in that litigation as here,¹⁵³ CTC seeks only declaratory relief under Canadian law with respect to those measures. The only measure for which CTC seeks damages in that case is not a measure at issue in this arbitration, and thus cannot violate Article 1121.

¹⁴⁹ Canada Reply ¶ 126.

¹⁵⁰ DIBC Counter-Memorial ¶ 204.

¹⁵¹ Canada Reply ¶ 127.

¹⁵² *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 at 240 (1937), Exhibit CLA-65 (emphasis added). See also *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 at 674 (1950) (finding that given the “the limited procedural purpose of the Declaratory Judgment Act,” the “controversy as to which Phillips asked for a declaratory judgment is not one that ‘arises under the * * * laws * * * of the United States’” but instead arose under state law even though it was brought pursuant to the Declaratory Judgment Act), Exhibit CLA-66.

¹⁵³ Canada appears to assert that DIBC concedes that all the measures in the *CTC v. Canada* Litigation overlap with this litigation. Canada Reply ¶ 136. To the extent Canada intended to make such an assertion, it would be incorrect. As explained in DIBC’s Counter-Memorial, DIBC specifically denies that the *CTC v. Canada* Litigation implicates an identical set of “measures” as at issue in this arbitration. DIBC Counter-Memorial ¶ 209.

121. Canada does not dispute that CTC seeks damages only for *one* of the measures pleaded in the *CTC v. Canada* Litigation – the measure for “actual construction” of the NITC/DRIC. Canada argues, however, that (1) because DIBC seeks *any* damages in the litigation, the proceeding violates Article 1121, regardless of whether the damages sought relate to a measure at issue in this arbitration; and (2) the measure for “actual construction” of the NITC/DRIC cannot be separated from the other measures pleaded in the litigation. The first argument is incorrect for the reasons set forth in Section II(B)(5) above.

122. The second argument also is incorrect. In this arbitration, DIBC challenges Canada’s use of its role as a regulator and legislator to treat the U.S.-owned Ambassador Bridge and New Span differently from the proposed Canadian-owned NITC/DRIC. In the *CTC v. Canada* Litigation, the “actual construction” claim is an alternative claim asserting that if and when Canada ever builds the NITC/DRIC, such construction would constitute an expropriation under Canadian law. This is a logical distinction between measures for purposes of Article 1121. Canada’s argument to the contrary depends solely upon the success of its argument that all actions ever taken by Canada with respect to either the NITC/DRIC or the Ambassador Bridge constitute a single measure for purposes of Article 1121 (*i.e.*, the decision to locate the NITC/DRIC near the Ambassador Bridge). This argument is incorrect for the reasons set forth in Section II(B)(4) above.

123. It is worth observing, however, that in the Washington Litigation, Canada has taken the position that the construction and operation of the bridge are separate matters from Canada’s decision regarding the location of the NITC/DRIC. Canada argued to that court that:

“The location of the DRIC, *not its construction or operation*, is the gravamen of Plaintiffs’ claims against the Canadian Defendants.”¹⁵⁴

124. Canada has previously expressed its view as to what claims CTC should remove from the *CTC v. Canada* Litigation, and CTC subsequently withdrew those claims.¹⁵⁵ Specifically, CTC withdrew allegations with respect to a highway connection to the Ambassador Bridge, allegations regarding traffic impacts, and every other paragraph and allegation that Canada identified in its letter as not in compliance with the NAFTA waiver provision. While Claimant does not concede that any of these allegations actually caused a violation of Article 1121, even if they did, Canada cannot argue it is now suffering any prejudice given that all of the concerns it expressed have been addressed.

4. The Windsor Litigation Does Not Violate Article 1121.

125. The Windsor Litigation does not violate the NAFTA waiver provision because it does not challenge the measures at issue here. Moreover, CTC has not taken any steps to pursue the case since DIBC initiated this arbitration and the case is effectively over.

126. CTC has taken no steps to prosecute the Windsor Litigation since initiating this proceeding. The only affirmative action CTC has taken with respect to the Windsor Litigation since the first Notice of Arbitration was to *abandon* an appeal.¹⁵⁶ The case has otherwise been dormant for the entirety of this arbitration. DIBC further is willing to have CTC take affirmative steps to dismiss the action if required.

¹⁵⁴ *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Defendants Her Majesty the Queen in Right of Canada and the Windsor-Detroit Bridge Authority’s Consolidated Reply in Support of Their Joint Motion to Dismiss and in Opposition to Plaintiffs’ Motion for Partial Summary Judgment, No. 10-cv-476-RMC, p. 6 n. 4 (D.D.C. Dec. 20, 2013), Exhibit C-158 (emphasis added).

¹⁵⁵ Letter from Mark Luz to Donald F. Donovan and Carl Micarelli dated March 15, 2012, Exhibit R-23; *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Amended Statement of Claim (Feb. 19, 2013) Exhibit C-119.

¹⁵⁶ Canada Reply ¶ 141.

127. In any event, the Windsor Litigation does not violate Article 1121. First, the February 2010 Statement of Claim in the Windsor Litigation makes clear that CTC seeks damages *only as to certain individual defendants* and does not seek money damages from the City of Windsor.¹⁵⁷ As such, that Statement of Claim falls within the declaratory relief exception to Article 1121.

128. In addition, the measures at issue in the Windsor Litigation do not overlap with the measures at issue here. Canada assumes that every allegation alleged in the Windsor Litigation applies to the City of Windsor. That is incorrect. For example, the February 2010 Statement of Claim specifically identifies the measures relevant to Windsor: “The Plaintiff claims: a declaration that [the] by-laws . . . of the City of Windsor are unlawful and invalid . . . a declaration against all of the Defendants that the By-laws were enacted in bad faith and for an unlawful purpose.”¹⁵⁸ Thus, the only measures at issue in the Windsor Litigation with respect to Windsor (as opposed to the individual defendants) were the city by-laws.

129. Canada also wrongly claims that DIBC has refused to identify which Windsor measures it challenges in this arbitration.¹⁵⁹ In its NAFTA Statement of Claim, DIBC made clear that that “this arbitration arises from measures taken by . . . the City of Windsor . . . (5) to take *traffic measures with respect to Huron Church Road* to divert traffic away from the

¹⁵⁷ *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim ¶ 1 (Feb. 24, 2010), Exhibit C-120.

¹⁵⁸ *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim ¶ 1 (Feb. 24, 2010), Exhibit C-120. The June 2010 Statement of Claim is similarly limited. *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim ¶ 1(a)-(c) (June 21, 2010), Exhibit C-121.

¹⁵⁹ Canada demands in its statement of facts on reply that DIBC withdraw this claim, purportedly for lack of specificity. Canada Reply ¶ 35. Canada’s request is baseless. DIBC specified in its Statement of Claim and Counter-Memorial the details of the improper measures taken with respect to Huron Church Road (*e.g.*, stop lights, curb-cuts and driveway connections) and explained how those acts disparately impact the Ambassador Bridge. DIBC Statement of Claim ¶¶ 205-209; DIBC Counter-Memorial ¶¶ 31, 38 and citations therein. This is sufficient to comply with UNCITRAL Rule 20(4).

Ambassador Bridge and toward the Detroit-Windsor Tunnel and other crossings not owned by a U.S. investor.”¹⁶⁰ This measure was not challenged in the Windsor Litigation, which challenged only the Windsor by-laws. The traffic measures taken by Windsor were referenced only once in that litigation as background and never were identified as the basis for any legal claim or challenge in that litigation.¹⁶¹

5. To The Extent The Tribunal Finds Any Domestic Litigation Impermissibly Challenges Measures Challenged In This Arbitration, It Should Dismiss Only The Claims Challenging Those Specific Measures.

130. Because none of the domestic proceedings challenged by Canada here fall within the scope of Article 1121, Canada’s waiver defense should be dismissed. In the alternative, if this Tribunal finds that DIBC has violated Article 1121 with respect to a particular measure, it should dismiss only those portions of DIBC’s claims alleging wrongdoing with respect to that measure, but retain jurisdiction over the other claims.¹⁶² This outcome would promote the objective of the NAFTA to “create effective procedures for the implementation and application of this Agreement.”¹⁶³ It would be inefficient for the Tribunal to dismiss the entire arbitration even as to compliant claims. As such, the Tribunal should consider each measure separately and retain jurisdiction over any permissible claims.

¹⁶⁰ DIBC Statement of Claim ¶ 215 (emphasis added).

¹⁶¹ *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim ¶ 9 (Feb. 24, 2010), Exhibit C-120.

¹⁶² DIBC Counter-Memorial ¶ 223.

¹⁶³ NAFTA Art. 102(1)(e), Exhibit CLA-51.

III. DIBC’S CLAIMS ARE TIMELY AND CANADA HAS FAILED TO DEMONSTRATE OTHERWISE.

A. Summary of DIBC’s Position On Rejoinder Regarding Canada’s Affirmative Defense Of Timeliness

131. Both DIBC’s Roads Claim and the IBTA portion of its New Span Claim fall within the limitations period identified in Articles 1116(2) and 1117(2) of the NAFTA regardless of whether the claims are considered to be “one-time” acts, “continuing acts,” or “composite acts.”¹⁶⁴ Like its Memorial, Canada’s Reply Memorial fails to support Canada’s affirmative defense asserting otherwise.¹⁶⁵

132. Canada first argues that the doctrines of continuing acts and composite acts are not recognized under the NAFTA, and that the NAFTA Parties departed from well recognized international law on this point.¹⁶⁶ This argument is irrelevant if the claims at issue are timely even as one-time acts (as is the case here). It also is incorrect.

133. Canada does not dispute that established international law accepts that both doctrines can operate within time bar provisions in international treaties. Rather, it asserts that the *lex specialis* of the NAFTA superseded international law with respect to these doctrines.¹⁶⁷

134. Canada wholly fails to support – or even explain – this argument with respect to “composite acts,” but instead focuses the entirety of its discussion regarding this point on the “continuing acts” doctrine.¹⁶⁸

¹⁶⁴ DIBC Counter-Memorial §§ II(D), (E).

¹⁶⁵ Because the burden of proof for affirmative defenses falls upon the respondent, it is Canada’s obligation to make this demonstration, not DIBC’s burden to prove otherwise. See Section I(A).

¹⁶⁶ Canada Reply ¶¶ 153-56.

¹⁶⁷ Canada Reply ¶ 157.

¹⁶⁸ Canada Reply ¶¶ 153-64.

135. With respect to “continuing acts,” Canada argues that the NAFTA Parties chose to depart from customary international law by including the phrase “first acquired” in Articles 1116(2) and 1117(2),¹⁶⁹ each of which provides that a claimant may not make a claim if more than three years have elapsed from the date on which the investor or enterprise “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage.”¹⁷⁰ As shown below in Section III(B)(2)(a), numerous other treaties contain nearly identical language, including treaties that have been interpreted to recognize the continuing acts doctrine.

136. Thus, the existence of the phrase “first acquired” does not appear to differ from other international treaties that incorporate generally accepted international law with respect to continuing acts. Nor is there anything about the plain meaning of the “first acquired” language cited by Canada that would justify barring international law principles or the continuing acts doctrine. The mere fact that a limitations period runs from the time one “first acquires” knowledge of “breach” (*and* “loss or damages” in the case of the NAFTA) merely begs the question of what constitutes the “breach” at issue. International arbitral decisions interpreting this language – including the only NAFTA tribunal to consider the question directly – have explicitly determined that “continuing act” breaches renew limitations period for as long as the acts continue. The decisions Canada cites to the contrary are inapposite and do not address the question before this Tribunal.

137. As a fallback argument, Canada claims that the three NAFTA States have come to a “subsequent agreement” under the meaning of the Vienna Convention on the Law of Treaties

¹⁶⁹ Canada Reply ¶¶ 155-57.

¹⁷⁰ NAFTA Art. 1116(2), 1117(2), Exhibit CLA-12.

(“VCLT”). Canada’s evidence of such a subsequent agreement, however, consists solely of individual submissions filed by the NAFTA States in unrelated cases. These advocacy briefs do not satisfy the requirement of a joint interpretation necessary to create a “subsequent agreement” under the VCLT. In any event, the VCLT requires only that a tribunal “take into account” subsequent agreements, and does not require a tribunal to follow that agreement, particularly where (as here) the agreement is contrary to the plain text, object and meaning of the NAFTA.

138. Canada also misinterprets Articles 1116 and 1117 with respect to “one-time” acts. Canada argues that the limitations period should begin to run on claims of disparate treatment as soon as a claimant first acquires knowledge of unfavorable treatment – without regard for when the respondent improperly favors another in like circumstances.¹⁷¹ It similarly argues that the limitations period should begin to run as soon as a claimant recognizes that it *may be harmed* by a measure, as opposed to when the measure actually takes place and actual loss or damage occurs.¹⁷² Neither argument can be squared with the provisions in Articles 1116 and 1117 triggering the limitations periods when the claimant first acquires knowledge of both “breach” (*i.e.* a completed violation of the NAFTA) and “loss or damage” (*i.e.*, concrete, not speculative, harm).

139. Applying the proper interpretation of the NAFTA to DIBC’s Roads Claim, Canada has failed to demonstrate that the claim is untimely. As DIBC has previously explained, the Roads Claim involves both the failure to build a highway connection to the Ambassador Bridge and its New Span *and* the construction of a new highway connection to the NITC/DRIC. Even applying the one-time act doctrine to this scenario, DIBC’s claim is timely because it could

¹⁷¹ Canada Reply ¶¶ 178, 180.

¹⁷² Canada Reply ¶ 194.

not have acquired knowledge of the second part of this breach until, at the earliest, May 1, 2008, the date when Canada officially announced the Parkway. Applying either the continuing acts doctrine or the composite act doctrine to the Roads Claim pushes the time bar date even later.

140. The IBTA portion of DIBC's New Span Claim also is timely. Even under a one-time act theory of that claim, the time limitations period could not have begun to run until Canada had breached its obligations under the NAFTA and DIBC had suffered concrete harm from that breach. Canada did not apply and enforce the IBTA against DIBC until the October 2010 Ministerial Order,¹⁷³ and DIBC thus did not suffer concrete loss or harm from the measure until that time. This date falls within the three-year limitations periods in Articles 1116 and 1117, whether measured from the date of DIBC's initial arbitration submission, or from the date of its amended submission on January 15, 2013. Applying the continuing acts or composite acts doctrines merely confirms that DIBC's claims are timely.

B. Canada's Interpretation Of Articles 1116 And 1117 Is Incorrect.

141. As DIBC explained in its Counter-Memorial, three different types of acts can affect the operation of the limitations period. The simplest is the one-time act, where the respondent engages in a discrete act at a particular time and place. Next is the continuing act, where the wrongful conduct takes place *over time* and continues to harm the claimant while the conduct continues. The third is a composite act, where a series of acts *taken together* comprises the wrongful conduct.¹⁷⁴ These doctrines are well-established under international law.¹⁷⁵

¹⁷³ The "October 2010 Ministerial Order" refers to Exhibit C-137, Ministerial Order: Construction or Alteration: International Bridges and Tunnels, dated October 18, 2010.

¹⁷⁴ DIBC Counter-Memorial ¶¶ 241-260.

¹⁷⁵ *Id.*

142. Canada nonetheless asserts that the NAFTA does not recognize either the continuing acts or composite acts doctrines and treats all claims as one-time acts for purposes of the limitations provisions.¹⁷⁶ Canada thus insists that the limitations periods in this proceeding began to run on: (1) March 11, 2004 for the Roads Claim (the date that Canada incorrectly asserts DIBC first should have known Canada would not connect the Ambassador Bridge to Highway 401)¹⁷⁷ and (2) February 1, 2007 for the IBTA portion of the New Span Claim (the date on which the IBTA was enacted).¹⁷⁸ According to Canada, claims filed more than three years after these dates are untimely “*regardless* of whether a measure is continuing or not.”¹⁷⁹ Canada’s opposition to these doctrines is without merit.

1. Canada Fails To Challenge The NAFTA’s Recognition Of The “Composite Acts” Doctrine.

143. Although Canada cursorily asserts that DIBC’s reliance upon the composite act doctrine is “wrong,”¹⁸⁰ it fails to provide any authority to support the proposition that composite acts are not in fact recognized under the NAFTA. Rather, Canada challenges only whether the conduct in question constitutes a composite act.¹⁸¹

144. To the extent that Canada intends to subsume the doctrine of composite acts within its discussion of the NAFTA’s treatment of the doctrine of “continuing acts,” such an

¹⁷⁶ Canada Reply § V(B)(1).

¹⁷⁷ Canada Reply ¶ 178.

¹⁷⁸ Canada Reply ¶ 203. Note that the IBTA was not effective until April 25, 2007, further calling into doubt Canada’s proposed time bar date. *International Bridges and Tunnels Act*, S.C. 2007, ch. 60, Exhibit C-94.

¹⁷⁹ Canada Reply ¶ 155 (emphasis in original).

¹⁸⁰ Canada Reply, Heading for § V.B.1.

¹⁸¹ As discussed in Sections III(C)(1)(c) and III(D)(3) below, Canada is incorrect in asserting that the acts in question here are not composite acts.

approach would be inappropriate. The two concepts are distinct, as explained by the tribunal in

Pac Rim Cayman:

In any particular case, three different situations can arise: (i) a measure is a “one-time act” ... or (ii) it is a “continuous” act ... or, (iii) it is a “composite” act These important and well-established distinctions under customary international law are considered in the Commentaries of the ILC Articles on State Responsibility.¹⁸²

Canada appears to recognize that there is a distinction, as Canada cites the definition of “composite act” from the ILC Articles to contrast it with a “completed act.”¹⁸³

2. The NAFTA Recognizes The Doctrine Of “Continuing Acts.”

a. Articles 1116(2) and 1117(2) Do Not Displace Customary International Law.

145. Canada first argues that through Articles 1116 and 1117, the NAFTA Parties created a *lex specialis* and opted out of the consensus of international law recognizing the continuing acts doctrine.

146. The doctrine of continuing acts is well established through the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), the decisions of other arbitral tribunals, and the decision of the only NAFTA tribunal ever to consider the question directly – *UPS v. Government of Canada*.¹⁸⁴ Canada nonetheless argues that the NAFTA chose to depart from customary international law by including the word “first” in Articles 1116(2) and 1117(2),¹⁸⁵ each of which provides that a claimant may not make

¹⁸² *Pac Rim Cayman* Decision ¶ 2.67, Exhibit CLA-30.

¹⁸³ Canada Reply ¶ 166 n. 269.

¹⁸⁴ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), Art. 14, 15, Exhibit CLA-32; *Pac Rim Cayman* Decision ¶ 2.67, Exhibit CLA-30; *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits (“UPS Award”) ¶¶ 26, 28 (May 24, 2007), Exhibit CLA-13.

¹⁸⁵ Canada Reply ¶¶ 155-157.

a claim if more than three years have elapsed from the date on which the investor or enterprise “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage.”¹⁸⁶ This argument is unsupportable.

147. Canada’s argument is inconsistent with the fact that numerous other international treaties contain virtually identical limitations provisions. As but a few examples, the CAFTA (the treaty at issue in the *Pac Rim Cayman* decision recognizing the continuing acts doctrine¹⁸⁷) also uses the “*first* acquired, or should have first acquired” language.¹⁸⁸ The Canada-Chile Free Trade Agreement provides that “[a]n 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.”¹⁸⁹ Nearly identical language appears in the Canada-Panama Free Trade Agreement¹⁹⁰ and the Canada-Peru Free Trade Agreement.¹⁹¹ Similarly, the United States-Chile Free Trade Agreement also provides that “[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant *first* acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.”¹⁹² In short, the phrasing of Articles 1116(2) and

¹⁸⁶ NAFTA Art. 1116(2), 1117(2), Exhibit CLA-12.

¹⁸⁷ *Pac Rim Cayman* Decision ¶ 1.10, Exhibit CLA-30.

¹⁸⁸ Central American-Dominican Republic-United States Free Trade Agreement (CAFTA), art. 10.18(1), May 28, 2004, 43 I.L.M. 514, Exhibit CLA-63.

¹⁸⁹ Canada-Chile Free Trade Agreement, art. G-17(2), July 5, 1997, 36 I.L.M. 1079, Exhibit CLA-67 (emphasis added).

¹⁹⁰ Canada-Panama Free Trade Agreement, art. 9.22(2)(e)(i), Apr. 1, 2013, Exhibit CLA-68.

¹⁹¹ Canada-Peru Free Trade Agreement, art. 823(1)(c), Aug. 1, 2009, Exhibit CLA-69.

¹⁹² U.S.-Chile Free Trade Agreement, art. 10.17(1), June 6, 2003, 42 I.L.M. 1026, Exhibit CLA-64 (emphasis added).

1117(2) is not unique to the NAFTA, but a routine phrasing of time limitations provisions in international law.

148. Canada notably retreats from its reliance on *Marvin Feldman v. Mexico*, to support its argument regarding the “first acquired” language. Canada originally had cited *Feldman* for the proposition that Articles 1116(2) and 1117(2) are “not subject to any suspension [...], prolongation or other qualification.”¹⁹³ When confronted with the fact that *Feldman* permitted a claim to go forward that was initiated six years after the respondent’s pattern of denying tax rebates began,¹⁹⁴ Canada asked this Tribunal to ignore the decision because, “[i]n the *Feldman* decision, the time bar issues considered by the tribunal did not address the ‘first acquired’ language under Article 1116(2).”¹⁹⁵

b. Canada’s “Plain Meaning” Argument Is Unduly Narrow.

149. Also meritless is Canada’s argument that the “ordinary meaning” of the phrase “first acquired” in Articles 1116(2) and 1117(2) inherently precludes the doctrine of continuing acts. The limitations period in the NAFTA begins to run when the claimant “first acquired ... knowledge of the alleged breach and knowledge [that claimant has] incurred loss or damage.”¹⁹⁶ The inclusion of “first acquired” does nothing to preclude recognition of continuing acts because it begs the question of what constitutes a “breach” in the same provision. Under the continuing acts doctrine, “on-going conduct constitutes a new violation of NAFTA each day so that, for

¹⁹³ Canada Memorial ¶ 190.

¹⁹⁴ DIBC Counter-Memorial ¶ 251.

¹⁹⁵ Canada Reply ¶ 164.

¹⁹⁶ NAFTA Art. 1116(2), 1117(2), Exhibit CLA-12.

purposes of the time bar, the three year period begins anew each day.”¹⁹⁷ Thus, one can “first acquire” knowledge of a “breach” arising from a continuing act multiple times.

150. Canada’s assertion that the phrase “first acquired” unambiguously precludes recognition of the continuing acts doctrine also is inconsistent with multiple courts in the NAFTA States that have found otherwise. For example, United States federal and state courts that have interpreted “first acquired” language similar to that contained in the NAFTA repeatedly have held that claims based on continuing acts that began outside of a limitations period defined by “first acquired” language may proceed.¹⁹⁸ Although the Tribunal is not bound by U.S. courts’ interpretation of this language, the fact that these courts have seen no inconsistency between the “first acquired” language and the continuing acts doctrine is evidence against Canada’s plain language arguments regarding Articles 1116 and 1117.

151. Not only is there nothing in Articles 1116 and 1117 to suggest that the NAFTA Parties intended to depart from international law by creating a *lex specialis*, but NAFTA Article

¹⁹⁷ UPS Award ¶ 24, Exhibit CLA-13.

¹⁹⁸ For example, in *In re Matthews Enterprises, Inc.*, 51 B.R. 333 at 337 (S.D. Ind. 1985), Exhibit CLA-70, a United States bankruptcy court addressed a case arising under the Petroleum Marketing Practices Act, which has a 120 day limitations period running from when the franchisor “first acquired actual or constructive knowledge” of a failure by the franchisee to comply with a material provision of the franchise. The franchisor in *Matthews*, Shell Oil Co., admitted that it knew of the franchisee’s ongoing failure to pay sales taxes (a material breach of the franchise agreement) more than 120 days prior to filing suit. The bankruptcy court held that Shell’s claim was not time-barred, however, because “[e]ach new default in payment . . . would constitute new grounds” for triggering the limitations period. *Id.* at 337, Exhibit CLA-70. A United States federal district court sitting in Michigan reached a similar conclusion with respect to the same statute. *Gruber v. Mobil Oil Corp.*, 570 F. Supp. 1088 at 1092 (E.D. Mich.1983), Exhibit CLA-71 (“When the alleged failure to conform . . . is ongoing, occurring within and prior to the [time] limitation, then the breaching event is not considered stale, but rather, viewed as a new ground for [charging a breach] each time there is a failure to comply”).

Similarly, the Supreme Court of Alabama addressed a claim arising under the state’s Motor Vehicle Franchise Act that provided for a limitations period of 180 days from the time the franchisor “first acquired actual or constructive knowledge” of a failure to comply with the franchise agreement. *Smith’s Sports Cycles, Inc. v. American Suzuki Motor Corp.*, 82 So.3d 682 at 687 (Ala. 2011), Exhibit CLA-72. Suzuki claimed that its franchisee had failed to properly maintain the premises of its Suzuki dealership and asserted a claim, despite having had knowledge prior to the 180-day period that the franchisee’s facility was deteriorating. The Alabama Supreme Court too found no conflict between the “first acquired” language and a continuing act theory. It thus permitted the claim to go forward because the breaches “were both evolving and continuous.” *Id.* at 689, Exhibit CLA-72.

1131(1) specifically requires tribunals to “decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”¹⁹⁹ This provision, coupled with the absence of an express indication by the NAFTA Parties that they intended to depart from international law with respect to time limitations provisions, strongly suggests that the NAFTA’s time limitation provisions are fully consistent with the rest of international law.

c. Canada’s Proffered Legal Authority Does Not Support Its Arguments Regarding The Continuing Acts Doctrine.

152. Canada also fails to provide any authority that supports its interpretation of Articles 1116 and 1117. It tries to invoke the recent decision of *Apotex Inc. v. United States*,²⁰⁰ claiming that *Apotex* “concluded that a continuing course of conduct does not toll the NAFTA’s three-year time limitation period.”²⁰¹ Canada misinterprets *Apotex*, however. The *Apotex* tribunal determined that there was no continuing act at issue *in that case*, and thus did not opine on whether NAFTA’s time limitation provisions would apply to such acts had they existed.

153. Specifically, claimant Apotex challenged an adverse decision from the U.S. Food and Drug Administration (“FDA”) regarding a generic drug it manufactured.²⁰² Apotex did not immediately commence arbitration under the NAFTA, but instead unsuccessfully litigated the propriety of the decision in United States district and circuit courts prior to commencing its NAFTA claim. The respondent United States argued that the NAFTA claim was untimely because the FDA decision itself had occurred more than three years before Apotex commenced arbitration.²⁰³ Apotex responded that the FDA decision and the subsequent court proceedings

¹⁹⁹ NAFTA Art. 1131, Exhibit CLA-12 (emphasis added).

²⁰⁰ *Apotex* Jurisdictional Award, Exhibit CLA-56.

²⁰¹ Canada Reply ¶ 158.

²⁰² *Apotex* Jurisdictional Award ¶ 124, Exhibit CLA-56.

²⁰³ *Apotex* Jurisdictional Award ¶ 310, Exhibit CLA-56.

and rulings formed a “‘single, continuous set’ of underlying factual bases leading to the Respondent’s breach.”²⁰⁴

154. The tribunal did not reject Apotex’s legal argument that a “single continuous set” of acts would affect the operation of the NAFTA’s time limitation, but instead rejected Apotex’s *factual* assertion that the FDA decision and later litigation were a single continuous set of acts. Specifically, the tribunal rejected Apotex’s argument “in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure.”²⁰⁵ The tribunal explained that “the limitation period applicable to a *discrete government action or administrative measure* (such as the FDA decision of 11 April 2006) is not tolled by litigation, or court decisions relating to the measure.”²⁰⁶ The tribunal thus determined only that the FDA decision was a one-time act, not that the continuing acts doctrine is inconsistent with the NAFTA’s time limitation provisions. DIBC is not challenging a “discrete government action or administrative measure” like the single adverse FDA ruling in *Apotex*. Rather, both the Roads Claim and the New Span Claim encompass numerous, ongoing actions and decisions by Canada to discriminate against the Ambassador Bridge and New Span and in favor of the NITC/DRIC.

155. The *Apotex* tribunal also held that a challenge by Apotex to the court actions themselves would *not* be time-barred, despite the fact that “any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions.”²⁰⁷ The tribunal supported this proposition by noting

²⁰⁴ *Apotex* Jurisdictional Award ¶ 313(d), Exhibit CLA-56.

²⁰⁵ *Apotex* Jurisdictional Award ¶ 325, Exhibit CLA-56.

²⁰⁶ *Apotex* Jurisdictional Award ¶ 328, Exhibit CLA-56 (emphasis added).

²⁰⁷ *Apotex* Jurisdictional Award ¶ 333, Exhibit CLA-56.

that claimants “of course, may refer to facts that predate [the three-year limitations period] as background for its claims.”²⁰⁸ Although Canada paints *Apotex* as a decision that creates hard and fast rules about Articles 1116(2) and 1117(2), in reality, that tribunal determined that, even when a time bar is implicated, activities that are seemingly time barred have an integral role in a proceeding.

156. Canada also relies upon the decision of the tribunal in *Grand River Enterprises Six Nations Ltd. v. The United States of America* for the proposition that “a continuing course of conduct does not toll the NAFTA’s three-year time limitation period.”²⁰⁹ This argument is inapposite first because it does not relate to the doctrine of continuing acts.²¹⁰ In addition, the *Grand River* tribunal specifically *declined to address the question* of whether “there is not one limitations period, but many” arising from the conduct at issue because the claimant failed to plead or brief the argument, raising it for the first time at hearing.²¹¹ Thus, *Grand River* says nothing one way or the other regarding the doctrine of continuing acts.

157. Not only does Canada rely on inapposite authority, but it also fails to distinguish DIBC’s authority supporting the continuing acts doctrine.²¹² The most notable such authority is the decision by the *UPS* tribunal that directly analyzed NAFTA’s time limitations provisions and determined that –

²⁰⁸ *Apotex* Jurisdictional Award ¶ 333 n. 200, Exhibit CLA-56 (quoting *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 2 ¶ 19 (31 May 2005)).

²⁰⁹ Canada Reply ¶ 158 n. 253 (citing *Grand River Enterprises Six Nations Ltd. v. The United States of America* (UNCITRAL) Decision on Objections to Jurisdiction ¶ 81 (July 20, 2006), RLA-15).

²¹⁰ See Section III(B)(2)(e).

²¹¹ *Grand River Enterprises Six Nations Ltd. v. The United States of America*, UNCITRAL, Decision on Objections to Jurisdiction ¶ 81 (July 20, 2006), Exhibit RLA-15.

²¹² Canada Reply ¶ 164.

continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here.²¹³

Canada argues only that the decision was “incorrect and should not be followed by this Tribunal.”²¹⁴ Canada offers no persuasive NAFTA or other authority to support its assertion that the *UPS* tribunal was wrong in this interpretation.

158. Canada also fails to distinguish DIBC’s other authority. Contrary to Canada’s arguments, the *Feldman* decision supports the doctrine of continuing acts generally and DIBC’s case more specifically. In *Feldman*, the owner of a company engaged in the export of tobacco initiated NAFTA proceedings in April 1999 against Mexico, asserting that Mexico’s “continuing refusal” to rebate the company for taxes on prospective cigarette exports as early as 1990 constituted a breach under the NAFTA.²¹⁵ Despite the fact that under Article 1117 the proceeding could address only matters for which the claimant first acquired knowledge of breach and damages between April 1996 and April 1999, and the “measures complained of by the Claimant practically extend over the whole period starting in the years 1990 or 1991,”²¹⁶ the claim was allowed to proceed. That is, even though the discriminatory conduct *Feldman* complained about began six years prior to the Article 1117(2) cutoff date, *Feldman* was allowed to initiate a NAFTA arbitration.

159. Canada asserts that *Feldman* is not persuasive because “the time bar issues considered by the tribunal did not address the ‘first acquired’ language under Article 1116(2) in

²¹³ *UPS Award* ¶ 28, Exhibit CLA-13.

²¹⁴ Canada Reply ¶ 163.

²¹⁵ *Feldman Award* ¶ 1, Exhibit CLA-22.

²¹⁶ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 43 (Dec. 6, 2000), Exhibit CLA-28.

connection with a continuing course of conduct.”²¹⁷ That the tribunal did not address the issue suggests that neither Mexico nor the tribunal saw the “first acquired” language as a bar to Feldman’s continuing act claim.²¹⁸

160. Canada similarly fails to distinguish *Pac Rim Cayman*.²¹⁹ Canada argues that the Tribunal should disregard the *Pac Rim Cayman* tribunal’s reasoned discussion and approval of the doctrines of continuing and composite acts purely because the tribunal explicated its reasoning within the physical portion of its opinion that addressed abuse of process, “and not in its *rationae temporis* analysis.”²²⁰ Canada’s argument fails to disclose, however, that when the *Pac Rim Cayman* tribunal did turn to the issue of *rationae temporis*, it cross-referenced the continuous and composite acts discussion cited by DIBC, stating that *rationae temporis* “has already been addressed in material part by the Tribunal in Part 2 above (in regard to the Abuse of Process issue).”²²¹ Canada thus provides no legitimate reason to disregard the findings of the *Pac Rim Cayman* tribunal’s decision here.

- d. There Is No “Subsequent Agreement” That The NAFTA Will Depart From Generally Recognized International Law On The Issue Of Continuing And Composite Acts.

161. Canada also argues that because the NAFTA States have at various times argued in unrelated NAFTA proceedings that the NAFTA does not recognize the continuing acts

²¹⁷ Canada Reply ¶ 164.

²¹⁸ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Mexico’s Counter-Memorial on Preliminary Questions (September 8, 2000), Exhibit CLA-34; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Mexico’s Additional Observations on the Preliminary Questions (Sept. 28, 2000), Exhibit CLA-74; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Mexico’s Counter-Memorial (undated), Exhibit CLA-75; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Mexico’s Rejoinder (June 25, 2001), Exhibit CLA-76.

²¹⁹ *Pac Rim Cayman* Decision, Exhibit CLA-30.

²²⁰ Canada Reply ¶ 164.

²²¹ *Pac Rim Cayman* Decision ¶¶ 2.101-109, 3.1, Exhibit CLA-30.

doctrine, there exists a “subsequent agreement” for purposes of the VCLT that is entitled to significant deference.²²²

162. Canada’s effort to transform the filing of unrelated advocacy briefs into intent by the NAFTA States to enter into a subsequent agreement regarding international law must fail. There is no evidence that the NAFTA States intended to accomplish anything other than zealous advocacy in their submissions, or even any evidence that the NAFTA States ever consulted one another with respect to their submissions.

163. A “subsequent agreement” under the VCLT requires joint, not unilateral, interpretation by the relevant parties.²²³ Here, there is no more than a series of unilateral pronouncements by attorneys for the NAFTA States with respect to continuing acts in the context of various specific disputes. In the absence of a jointly issued interpretation of the NAFTA, there is no basis for rejecting the plain meaning of the NAFTA’s text, the object and purpose of the NAFTA, and general international law regarding the continuing acts doctrine.

164. Canada’s reliance on *Canadian Cattlemen for Fair Trade v. United States of America* in support of this argument is misplaced.²²⁴ The United States in *Cattlemen* made a virtually identical argument to that made by Canada here, *i.e.*, that unrelated NAFTA State briefs should be interpreted as a “subsequent agreement” under the VCLT.²²⁵ The tribunal *rejected* this argument and held “all of this does not rise to the level of a ‘subsequent agreement’ by the

²²² Canada Reply ¶¶ 160-61.

²²³ DIBC Counter-Memorial ¶ 311.

²²⁴ Canada Reply ¶ 161 n. 262.

²²⁵ *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (“*Canadian Cattlemen Award*”) ¶ 186 (January 28, 2008), Exhibit RLA-55.

NAFTA Parties”²²⁶ and “there [was] no ‘subsequent agreement’ on this issue within the meaning of Article 31(3)(a) of the Vienna Convention.”²²⁷

165. It is not surprising that counsel for the NAFTA States (which are almost always *respondents* in NAFTA arbitrations) would uniformly argue for a pro-respondent interpretation of Articles 1116(2) and 1117(2). But self-interested legal arguments do not dictate the meaning of the NAFTA. Here, the plain language of the NAFTA, as well as the weight of authority, are against Canada’s interpretation of the treaty. The mere fact that litigation counsel for the NAFTA States may wish for a different interpretation does not change the meaning of the NAFTA itself.

e. DIBC Does Not Argue For “Tolling” The Limitations Period Through Litigation Or Otherwise.

166. Canada next misrepresents DIBC’s arguments with respect to the continuing and composite acts doctrine. Specifically, Canada claims that DIBC argues for “tolling” the NAFTA’s limitations periods.²²⁸ This is incorrect. To “toll” is “to stop the running of; to abate.”²²⁹ DIBC argues that, under the doctrine of continuing acts, “on-going conduct constitutes a new violation of [the] NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day.”²³⁰ This is consistent with relevant authority. As the *UPS* tribunal explained, “continuing courses of conduct constitute continuing breaches of legal obligations and *renew* the limitation period accordingly.”²³¹

²²⁶ *Canadian Cattlemen Award* ¶ 187, Exhibit RLA-55.

²²⁷ *Canadian Cattlemen Award* ¶ 187, Exhibit RLA-55.

²²⁸ *Canada Reply* ¶ 168.

²²⁹ Definition of “Toll,” excerpted from *BLACK’S LAW DICTIONARY* (9th ed. 2009), CLA-77.

²³⁰ *DIBC Counter-Memorial* ¶ 252 (citing *UPS Award* ¶ 24, Exhibit CLA-13).

²³¹ *UPS Award* ¶ 28, Exhibit CLA-13 (emphasis added).

167. Canada also mistakenly argues in the context of DIBC’s IBTA allegations that DIBC seeks to toll the limitations period through reference to ongoing litigation.²³² DIBC’s references to litigation in its Counter-Memorial solely are intended to demonstrate the point in time at which DIBC “first acquired . . . knowledge of the alleged breach and knowledge that [it] has incurred loss or damage” under Articles 1116 and 1117 with respect to the IBTA portion of DIBC’s New Span Claim. That is, because Canada had not sought to apply the IBTA to DIBC or CTC until the 2010 Ministerial Order, the limitations provisions of Articles 1116 and 1117 were not triggered until that time.²³³

3. For A Claimant To Have “Knowledge of a Breach” There Must Be A Measure And The Breach Must Be *Complete*.

168. Canada’s reply also misconstrues the measures and the “breaches” alleged by DIBC. Specifically, Canada appears to assert that the alleged measures and “breaches” in this proceeding were complete at the time DIBC received unfavorable treatment, and that it was neither necessary nor appropriate for DIBC to wait to see if Canada treated Canadian-owned businesses in an equally unfavorable manner.²³⁴ Of course, the discrimination complained of by DIBC did not occur by the failure of Canada to improve Huron Church Road. The discrimination occurred when Canada determined to have the Parkway travel to the NITC/DRIC and away from the Ambassador Bridge.

²³² Canada Reply ¶ 168.

²³³ In fact, the application of the IBTA to DIBC/CTC remains unclear to this day.

²³⁴ Canada Reply ¶ 178 (asserting an accrual date for the Roads Claim of March 11, 2004, because DIBC allegedly became aware on that date that Canada would not spend \$300 million on extending Highway 401 to the Ambassador Bridge); ¶ 180 (asserting an accrual date for the Roads Claim of November 15, 2005, because DIBC allegedly knew or should have known that as of that date that there would be no highway built between Highway 401 and the Ambassador Bridge).

169. Canada’s argument is inconsistent with DIBC’s Statement of Claim, which pleads breaches of NAFTA Articles 1102 (“National Treatment”), 1103 (“Most-Favored Nation Treatment”) and 1105 (“Minimum Standard of Treatment”).²³⁵ These substantive NAFTA provisions give investors the rights to be treated *the same as others*, or in an *equitable* fashion. They were violated when Canada chose to treat the Canadian-owned NITC/DRIC more favorably than the United States-owned Ambassador Bridge and its New Span.

170. Article 1102 requires each Party to accord investors of another party treatment “no less favorable” than it provides to its own investors.²³⁶ Article 1103 similarly requires that a Party accord investors of another Party treatment “no less favorable” than it provides to investors of another Party or investors of a non-Party.²³⁷ Article 1105 requires each Party to accord “fair and *equitable* treatment” to investors of another Party.²³⁸

171. Had DIBC commenced proceedings pursuant to these Articles prior to Canada treating DIBC *differently* than it treats the Canadian-owned NITC/DRIC, Canada might well have claimed that DIBC had failed to allege an actual breach of these provisions. Accordingly, with respect to the limitations period, DIBC could not have acquired knowledge of a breach of the NAFTA until, at the earliest, DIBC learned that Canada was treating another entity (for example, the Canadian owned NITC/DRIC) differently from how it was treating DIBC.²³⁹

²³⁵ DIBC Statement of Claim ¶ 216.

²³⁶ NAFTA Art. 1102, Exhibit CLA-12.

²³⁷ NAFTA Art. 1103, Exhibit CLA-12.

²³⁸ NAFTA Art. 1105, Exhibit CLA-12 (emphasis added).

²³⁹ Even upon completion of the breach, of course, the limitations period could not begin until DIBC suffered loss or damage from that breach. *See* Sections III(C)(1)(a) and III(D)(1) below.

4. DIBC Does Not Argue That Knowledge Of The Entire Extent Of The Loss Suffered Is Necessary For The Limitations Period To Begin.

172. According to the text of Articles 1116 and 1117, the limitations periods accrue when an investor first acquires (1) “knowledge of the alleged breach” and (2) “knowledge that the investor has incurred loss or damage.”²⁴⁰ Canada argues that DIBC reads these provisions to require a claimant to have knowledge of the full “extent” or “amount” of the loss or damage before the limitations periods begin to run.²⁴¹ Canada misconstrues DIBC’s argument.

173. As DIBC explained in its Counter-Memorial, “the investor must have *actually* been harmed and have *specific* knowledge of that harm for the limitations period to run.”²⁴² That is, DIBC asserts that harm must be *concrete*, not merely *anticipated or potential*. DIBC has not argued (and does not now argue) that such concrete harm must be fully quantifiable before a claim may accrue under the NAFTA. Accordingly, Canada’s authorities rejecting such arguments in other proceedings are irrelevant.²⁴³

5. Canada’s Interpretation Of Articles 1116 And 1117 Is Contrary To The Object And Purpose Of The NAFTA.

174. Finally, Canada’s interpretation of Articles 1116 and 1117 as set forth in its memorials is contrary to the object and purpose of the NAFTA itself. A primary object and purpose of NAFTA Chapter 11 is to protect foreign investors.²⁴⁴ But Canada’s interpretation of Articles 1116 and 1117 would permit NAFTA States to engage in years – or even decades – of continuing discrimination towards a foreign investor merely because the investor did not

²⁴⁰ NAFTA Art. 1116(2), 1117(2), Exhibit CLA-12.

²⁴¹ Canada Reply ¶ 167.

²⁴² DIBC Counter-Memorial ¶ 239 (emphasis added).

²⁴³ Canada Reply ¶ 167.

²⁴⁴ DIBC Counter-Memorial ¶ 150 n. 122.

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

175. Canada's interpretation of Articles 1116 and 1117 also affirmatively limits investors' ability to seek relief under the NAFTA. Thus, Canada would have claims accrue under Article 1116 and 1117 so quickly that foreign investors would be required to begin NAFTA proceedings prior to suffering treatment *disparate* from that of another investor, and upon mere *suspicion* of future harm rather than concrete harm. Such claims would run the risk of being rejected on the merits, thus leaving foreign investors without a remedy.

C. The Roads Claim Is Timely And Canada Has Failed To Show Otherwise.

176. Canada has failed to demonstrate (or in some instances even argue) that the Roads Claim is untimely. Nor could it. The Roads Claim is timely because: (1) there was no demonstrated measure, and no demonstrated discrimination (*i.e.*, breach), until after April 29, 2008; (2) there was no loss or damage until after April 29, 2008; (3) alternatively, the Roads Claim is a continuing act; and (4) alternatively, the Roads Claim is a composite act.

1. The Roads Claim Could Not Accrue Until Canada Had Both Disfavored The American-Owned Ambassador Bridge (and New Span) And Favored Canadian-Owned Bridges (including the NITC/DRIC) With Respect to Highway Access.

177. The Parkway as currently designed travels directly towards the Ambassador Bridge. The last two miles, however, veer off to the site of the proposed NITC/DRIC and away from the Ambassador Bridge. This means that a traveler going from Canada to the United States would travel along a direct highway connection from Highway 401 to both bridges, but would then only use the Ambassador Bridge to cross the border if she chose to exit this highway and instead travel along a road with numerous traffic lights and cross-streets. DIBC challenges this

disparate impact to travelers crossing the U.S.-Canada border (the Roads Claim) in this arbitration.

178. Canada initially argues that DIBC first acquired knowledge of the breach underlying its Roads Claim when DIBC knew or should have known that Canada would not improve the roads to the Ambassador Bridge or New Span. Canada alternatively sets this date at March 11, 2004,²⁴⁵ November 15, 2005,²⁴⁶ and various dates in 2007.²⁴⁷

179. As of those proffered dates, however, there is no serious dispute that Canada had not yet announced that it would build a highway connection to the Canadian-owned NITC/DRIC, a critical part of the breach alleged by DIBC. DIBC's knowledge of breach with respect to the Roads Claim could not have begun to run until May 1, 2008 at the very earliest, when Canada established the measure at issue by first officially announcing the preferred alternative for the Parkway, which included a connection to the NITC/DRIC, but not to the Ambassador Bridge.²⁴⁸

180. As discussed in Section II(B)(3) above, Canada's disregard of this second portion of DIBC's claims – *i.e.*, that Canada treated the Canadian-owned NITC/DRIC more favorably than the American-owned Ambassador Bridge and New Span with respect to access to Highway 401 – reflects a misunderstanding of what constitutes a “breach” under the NAFTA and the measures complained of in DIBC's Statement of Claim. Canada's breach of the NAFTA was not complete (and the limitations period thus could not begin to run) until Canada completed the

²⁴⁵ Canada Reply ¶ 178 (the date the Nine Point Plan was replaced by the LGWEM Strategy).

²⁴⁶ Canada Reply ¶ 180 (the date option X12 (*i.e.*, the New Span) was eliminated from consideration by the DRIC Partnership).

²⁴⁷ Canada Reply ¶ 183 (May 24, 2007, when the Ontario Ministry of Transportation said it had no plans to provide a direct connection to the Ambassador Bridge); ¶ 186 (July 4, 2007, when Helena Borges met with DIBC officials and purportedly said that the community and environmental impacts of building a direct Highway 401-Ambassador Bridge connection were too serious to consider further).

²⁴⁸ News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road” (May 1, 2008), Exhibit C-125.

measure of impermissibly favoring the NITC/DRIC over the Ambassador Bridge with respect to highway access. This is true no matter how much time elapsed between the time that DIBC was aware of Canada's official decision not to build a connection between Highway 401 and the Ambassador Bridge.

181. For this reason, Canada's reliance on DIBC letters from November 2005 complaining of "delay and damage" arising from the elimination of the New Span (the X12 option) from the DRIC EA process prove nothing.²⁴⁹ The fact that DIBC already was being harmed by Canada's actions does not mean that Canada's actions at that time constituted the measure being challenged as a breach of the NAFTA.

182. The same is true with respect to Canada's citation to various exhibits showing DIBC's purported knowledge of Canada's decision not to build a highway between Highway 401 and the Ambassador Bridge.²⁵⁰ These exhibits fail to demonstrate that Canada both had refused to connect the Ambassador Bridge to Highway 401, and had definitively chosen to build such a connection to the NITC/DRIC.²⁵¹

- a. It Was Not Established That Canada Would Build A Connection Between Highway 401 And The Canadian-Owned NITC/DRIC Until May 1, 2008 At The Earliest.

183. Perhaps recognizing that its failure to address the issue of when DIBC had knowledge that the Ambassador Bridge and New Span were being treated *differently* from Canadian-owned bridges with respect to road access is fatal to its limitations argument regarding the Roads Claim, Canada asserts an alternative argument: *i.e.*, if the breach asserted in the Roads

²⁴⁹ Canada Reply ¶ 166, citing Exhibits R-35 and R-36.

²⁵⁰ Canada Reply ¶¶ 179-187 and exhibits cited therein.

²⁵¹ Most do not even discuss the concept of a highway between the NITC/DRIC and Highway 401. The few cited exhibits that reflect interim decisions with respect to a highway between the NITC/DRIC and Highway 401 are discussed in Section III(C)(1)(a) below.

Claim necessarily includes Canada's disparate, favorable treatment of the NITC/DRIC, then DIBC knew of that treatment prior to May 1, 2008.

184. In support of this argument, Canada first cursorily argues that the *same* evidence it presented in its lengthy discussion of DIBC's knowledge that Canada would not build a connection to the Ambassador Bridge also prevents DIBC from claiming that "it did not know that the new highway was going to be connected to the new DRIC bridge and not to the Ambassador Bridge until May 1, 2008."²⁵²

185. The cited documents have nothing to do with a final decision with respect to the Parkway or the NITC/DRIC, but relate to the Ambassador Bridge and/or the progress and developments of the border study and its relationship to the Ambassador Bridge.²⁵³ Even the few that do directly address the actual NITC/DRIC reflect no more than interim planning and study, and do not reflect a final decision to build the NITC/DRIC – much less a final decision to build a road to that bridge.²⁵⁴

²⁵² Canada Reply ¶ 188.

²⁵³ See, e.g., 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; Letter from Dan Stamper (DIBC/CTC) to M. Alghurabi (MDOT) dated January 31, 2006, Exhibit R-114; House & Senate Transportation Committee Hearings Ambassador Bridge Testimony by Dan 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, Exhibit R-108; Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006, Exhibit R-37; "Ambassador Bridge Owners Forging Ahead With Second Crossing," Truck News, June 1, 2007, Exhibit R-109; Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon, Q.C. (Transport Canada) dated July 9, 2007, Exhibit R-38; Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon, Q.C. (Transport Canada) dated August 24, 2007, Exhibit R-111; "We're Building a Better Bridge," Ambassador Bridge advertisement, Windsor Star, August 22, 2007, Exhibit R-110; Letter from Dan Stamper to Prime Minister Stephen Harper dated August 9, 2007, Exhibit R-155; Letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC, October 3, 2007, Exhibit C-110; DIBC Presentation to The Honourable Lawrence Cannon, October 25, 2007, Exhibit R-156; Letter from Manuel J. Moroun to Hon. Lawrence Cannon dated November 6, 2007, Exhibit R-157; Letter from Manuel J. Moroun to Hon. Lawrence Cannon dated December 1, 2007, Exhibit R-161; Letter from Manuel J. Moroun to Hon. Lawrence Cannon dated December 14, 2007, Exhibit R-162.

²⁵⁴ See, e.g., "Welcome to the Second Public Information Open House for the Detroit River International Crossing Environmental Assessment," November 29, 30 and December 1, 2005, Exhibit R-53 (discussing the various alternatives still being considered); DRIC Video Presentation, Second Public Information Open House

186. To be sure, in April 2007, a DIBC representative wrote to Transport Canada to complain of a hearsay report by “DRIC” that “the government has promised to connect 401 with a new DRIC bridge.”²⁵⁵ This statement of extreme apprehension by DIBC arising from an unidentified (and almost certainly unofficial) “report” by some member of the DRIC Partnership is not the equivalent of a formal commitment by the government to build *either* the NITC/DRIC *or* the Parkway connecting it to Highway 401. Given that the NITC/DRIC site had not yet even

(November/December 2005) Exhibit R-53(a) (discussing the various alternatives still being considered); DRIC EA Report, Exhibit R-47 (discussing the preliminary “Recommended Plan”); Third Public Information Open House, Display Board March 28 and 30, 2006, Exhibit R-116 (discussing the various options still being considered); Third Public Information House, DRIC-Why not other alternatives, March 28, 2006, Exhibit R-117 (discussing how some, but not all, of the alternative crossings were eliminated from consideration); Fourth Public Information Open House Display Boards Handouts, Dec 6, 2006, Exhibit R-118 (showing multiple options for a potential crossing); DRIC EA Public Information Open House #5 Handouts, Exhibit R-150 (showing multiple options for a potential crossing); DRIC EA Public Information House #5 Summary Report (August 2007), Exhibit R-151 (showing Highway 401 access routes under consideration); DRIC EA Public Information House #5 Frequently Asked Questions (August 2007) Exhibit R-152 at p. 2 (explaining why a “final end-to-end solution” has not yet been announced); Letter from Len Kozachuk to Skip McMahon (DIBC/CTC) dated January 27, 2006, Exhibit R-112 at p. 4 (discussing that “possible unforeseen events may include impacts to both a new crossing as well as the Ambassador Bridge, whether the new crossing is a separate crossing or a companion span to the existing bridge”); Letter from Roger Ward (MTO) to Dan Stamper (DIBC/CTC) dated January 31, 2006, Exhibit R-113 (discussing “specific alternatives” that would later be released to the public); 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 (discussing “Specific Options for Further Study”); Generation and Assessment of Illustrative Alternatives (November 2005), Exhibit 3.19 “Recommended Area of Continued Study, Canadian Side,” Exhibit R-52 (showing multiple potential crossings); Dave Battagello, “Bridge Forges Ahead With Twin Span,” *The Windsor Star*, Apr. 27, 2006, p. 2, Exhibit R-153 (describing DRIC as “the government effort to determine the next crossing location”); Peter Kenter, “Gateway bridge to spur new highway building,” *Daily Commercial News*, May 24, 2007, Exhibit R-154 (noting that DRIC was still “currently looking at three bridge sites”); Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon Q.C. (Transport Canada) dated April 26, 2007, Exhibit R-119 (speaking of DRIC’s projections and future plans); Letter from Jacques Pigeon Q.C. (Transport Canada) to Patrick Moran (DIBC/CTC) dated July 30, 2007, Exhibit R-39 (speaking of the new bridge in terms of future plans); Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon Q.C. (Transport Canada) dated August 24, 2007 at p. 2, Exhibit R-111 (speaking of a DRIC bridge that “does not exist”); “Notes for a Speech by Hon. Lawrence Cannon, M.P., P.C. Minister of Transport, Infrastructure and Communities to the Canadian Council for Public-Private Partnerships 2007 National Conference” (Nov. 27, 2007), at p. 3, Exhibit R-160 (discussing the ongoing “planning and environmental assessment process”).

²⁵⁵ Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon, Q.C. (Transport Canada) dated April 26, 2007, at p. 2, Exhibit R-119.

been identified by this point,²⁵⁶ this DIBC letter represents no more than an effort by DIBC to persuade Canada not to take further steps towards a breach in this respect.

187. Even as late as November 27, 2007, the United States and Canada still had done no more than enter into a “Memorandum of Cooperation” agreeing that development of an “enhanced capacity of the border crossing infrastructure in the Detroit-Windsor region” was a “high priority” for both countries.²⁵⁷ The agreement contained no *concrete* commitments with respect to this enhanced capacity more significant than that the participants would hold regular meetings and keep each other informed of developments.²⁵⁸ The press release related to this agreement attached a “backgrounder” sheet clarifying that the project for enhanced border capacity: (1) had not yet identified a “single preferred alternative” for the project; (2) was still in the environmental assessment process; (3) significant “technical work” remained; (4) a “governance regime” (*i.e.*, ownership) had yet to be worked out; and (5) that “formal approvals” were not expected until at least 2009.²⁵⁹ Neither the press release nor the memorandum referred to a highway between the NITC/DRIC and Highway 401.²⁶⁰

188. The “Notes for a speech” given by the Canadian Minister of Transport the day after the Memorandum of Cooperation further reflected the interim status of the project:

²⁵⁶ Peter Kenter, “Gateway bridge to spur new highway building,” *Daily Commercial News*, May 24, 2007, Exhibit R-154 (noting that DRIC was still “currently looking at three bridge sites”).

²⁵⁷ Memorandum of Cooperation Between the Department of Transportation of the United States of America and the Department of Transport of Canada on the Development of Additional Border Capacity at the Detroit-Windsor Gateway, executed at Washington, D.C., November 26, 2007, at 1, Exhibit R-158.

²⁵⁸ *Id.* at 2. *See also* Transport Canada News Release No. H221/07, dated November 26, 2007, Exhibit R-159 (Press release regarding Memorandum of Cooperation, attaching “backgrounder” on the Detroit River International Crossing Project).

²⁵⁹ Transport Canada News Release No. H221/07, dated November 26, 2007, at 2, Exhibit R-159.

²⁶⁰ *Id.*

In Canada, the federal government has constitutional authority for international crossings and border inspection plazas, and we will be working with our American partners for a P3 for the bridge and plazas, as I announced at last year's conference. I've since *had a very positive discussion* with Governor Granholm of Michigan about this opportunity. *We talked about pursuing a partnership with the private sector to design, build, finance and operate the new crossing over the Detroit River.*

At the same time, we are working closely with Ontario on the new highway that will link the 401 to the new crossing. Canada, through Budget 2007, has committed to pay for 50 percent of the eligible capital costs of the Ontario highway connection, and has already set aside an initial \$400 million towards this road.²⁶¹

Thus, although the Minister casually refers to a purported new highway to "the new crossing," the crossing itself is merely subject of "discussion" and "talks" with U.S. and Michigan officials. When reviewed with the Memorandum of Cooperation itself, it is clear that nothing about either the NITC/DRIC or any purported new highway leading to the bridge is final in any way.

189. In short, none of the evidence proffered by Canada demonstrates that Canada had taken a measure or completed its breach prior to May 1, 2008. Rather, it merely reinforces the interim status of the Parkway decisions as of that date.

190. Canada's argument that DIBC must have known that Canada would build a highway to the Canadian-owned NITC/DRIC prior to May 1, 2008 also cannot be squared with the position that Canada takes in its Reply Memorial with respect to the issue of waiver: *i.e.*, that "*the measure which approved the location of the DRIC Bridge and the Parkway is one in the same: the DRIC EA.*"²⁶² The DRIC EA was not even released as a draft for public comment

²⁶¹ "Notes for a Speech by Hon. Lawrence Cannon, M.P., P.C. Minister of Transport, Infrastructure and Communities to the Canadian Council for Public-Private Partnerships 2007 National Conference" (Nov. 27, 2007), at p. 3-4, Exhibit R-160 (emphasis added).

²⁶² Canada Reply ¶ 113 (emphasis added). Relatedly, Canada concedes that "CTC initiated a judicial review of the DRIC EA in the Federal Court of Canada on December 31, 2009" and "DIBC and CTC [] launched the Washington Complaint against Canada on March 22, 2010, and filed a notice of intent under the NAFTA on March 23, 2010" only after the DRIC EA was actually approved by Ontario and Canada. Canada Reply ¶ 114. Both dates of approval fall well within the time limits established in Articles 1116(2) and 1117(2).

until November 12, 2008,²⁶³ well within the limitations period for this proceeding. It was not finally approved by Ontario and Canada until “August and December 2009, respectively.”²⁶⁴ If “the measure which approved the location of the DRIC Bridge and the Parkway”²⁶⁵ did not occur until December 2009, then there could not have been a breach arising from that measure prior to that date.

191. Finally, Canada’s position amounts to an argument that claims should accrue under the NAFTA upon an investor’s mere *suspicions* regarding future government action. This proposal is unworkable as a matter of NAFTA policy. Such an irrational requirement would force investors to commence proceedings under the NAFTA based on claimants’ suspicions upon hearing rumors or hearsay.

b. Alternatively, The Roads Claim Is A Continuing Act.

192. Canada does not directly address DIBC’s characterization of the Roads Claim as a continuing act. As explained in DIBC’s Counter-Memorial, numerous events in connection with the Parkway have occurred since May 2008 that demonstrate continuing discrimination against DIBC and in favor of the NITC/DRIC. These events include environmental approvals in 2008, 2009 and 2010, and the beginning of construction in 2011.²⁶⁶ (Parkway construction has begun from near Highway 401 towards the border, and its plans could still be revised to allow its final completion to include the creation of a highway connection to the Ambassador Bridge.) This

²⁶³ Ontario Government Notice, “Detroit River International Crossing Study Draft Environmental Assessment Report Available for Review,” (noting that “The Draft EA Report will be available for review as of Wednesday, November 12, 2008”), Exhibit R-147.

²⁶⁴ Canada Reply ¶ 114.

²⁶⁵ Canada Reply ¶ 113.

²⁶⁶ DIBC Counter-Memorial ¶ 271.

continuum of events constitutes a continuing breach of Canada's obligations under the NAFTA. The Roads Claim thus is based on a continuing act and would be timely even if filed today.

c. Alternatively, The Roads Claim Is A Composite Act.

193. The Roads Claim also is a composite act. Because the nature of the breach is comparative, the claim necessarily is based on multiple acts (*i.e.*, favoring the NITC/DRIC and disfavoring the Ambassador Bridge and New Span with respect to highway access), each of which may or may not have been permissible standing alone. That in and of itself is a composite act.

194. In addition, Canada's ongoing favoritism of the NITC/DRIC via the Parkway continues to manifest itself through successive decisions and actions regarding the Parkway. Thus, since May 2008, Canada has announced the Parkway, engaged in multiple environmental studies and approvals, commenced construction, and maintained construction. Until the Parkway is completed, Canada will continue to engage in acts that, in the composite, create a breach of Canada's obligations under the NAFTA. Thus, the last event in the composite act that forms DIBC's Roads Claim necessarily occurred after May 2008, and may not yet have occurred even today.

195. Canada's sole response to this argument is to restate its fundamental misunderstanding of a disparate treatment claim. Thus, Canada asserts that DIBC's composite act theory is "redundant," because prior to "the announcement of the exact route of the Parkway on May 1, 2008 ... there had not been a possibility that it would have included a connection to the Ambassador Bridge since November 2005."²⁶⁷ As an initial matter, that is factually incorrect. But it is also irrelevant because DIBC does not claim in this case that the failure to

²⁶⁷ Canada Reply ¶ 196.

provide a highway connection between the Ambassador Bridge and Highway 401 is a breach *in the absence* of a decision to connect the NITC/DRIC to Highway 401.

d. DIBC Has Not Vacillated On When It Acquired Knowledge Of Both Breach And Loss.

196. Finally, Canada complains that DIBC has changed its position on when it first acquired knowledge of breach and loss with respect to the Roads Claim.²⁶⁸ As an initial matter, this complaint is irrelevant because Canada bears the burden of showing when DIBC acquired knowledge of breach and loss and that DIBC failed to bring its claim in time.²⁶⁹ More importantly, DIBC has never vacillated regarding whether the Roads Claim accrued prior to April 29, 2008 (the bar date for this claim).

D. The IBTA Portion Of The New Span Claim Is Timely And Canada Has Failed To Show Otherwise.

197. Canada does not question the timeliness of the entirety of DIBC's New Span Claim, but challenges only that portion of the claim that alleges disparate and wrongful application of the IBTA to DIBC.²⁷⁰ Accordingly, all other aspects of the New Span Claim are timely, including those portions of the claim related to the BSTA.

198. As with the Roads Claims, Canada's assertions with respect to the IBTA portion of the New Span Claim are meritless. First, Canada wrongly equates knowledge of the existence of the IBTA with knowledge of loss or damage. Second, Canada fails to address the continuing nature of the IBTA portion of the New Span Claim. Finally, Canada fails to address the composite nature of the New Span Claim.

²⁶⁸ Canada Reply § V.C.1, ¶ 175.

²⁶⁹ Canada Memorial ¶ 299 n. 416.

²⁷⁰ Canada Reply § V.D.

1. Canada Fails To Show That DIBC Had Knowledge Of Breach “And Knowledge Of Loss Or Damage” Prior To April 29, 2008 With Respect To The IBTA Part Of The New Span Claim.

199. Canada first argues that the IBTA portion of the New Span Claim accrued when the IBTA was enacted, because DIBC knew at that time that the IBTA would apply to the Ambassador Bridge and New Span.²⁷¹ Even if true, such knowledge relates only to a “breach” of the NAFTA, not knowledge of loss or damage, which also is required under Articles 1116 and 1117.

200. Perhaps recognizing the flaw in its argument, Canada next attempts to collapse knowledge of breach with knowledge of loss or damage. Thus Canada argues that because DIBC publicly opposed the IBTA *prior to its passage*, DIBC must have had “knowledge of general loss” at the time the statute actually was enacted.²⁷² This argument, too, is meritless. Knowledge of a high likelihood of future loss is not the same as knowledge of actual damage.²⁷³

2. The IBTA Portion Of The New Span Claim Is Based On A Continuing Act.

201. As with DIBC’s Roads Claim, Canada offers no response to DIBC’s argument that the IBTA portion of its New Span Claim is premised on a continuing act. Canada thus apparently concedes the point subject to its arguments that NAFTA does not recognize continuing acts.

202. Nor could Canada seriously contest the issue. As DIBC explained in its Counter-Memorial, the paradigm continuing act is “the maintenance in effect of legislative provisions

²⁷¹ Canada Reply ¶ 203.

²⁷² Canada Reply ¶ 203.

²⁷³ See Section III(B)(4).

incompatible with treaty obligations of the enacting state.”²⁷⁴ That is what has been alleged by DIBC here. The IBTA has been continuously in effect since its passage, and to the extent DIBC remains subject to its provisions while the NITC/DRIC is excluded, Canada is maintaining a legislative provision incompatible with the NAFTA. The IBTA portion of DIBC’s New Span Claim thus is timely as a continuing act.²⁷⁵

3. Alternatively, The IBTA Portion Of The New Span Claim Is A Part Of A Composite Act.

203. Alternatively, the IBTA portion of the New Span Claim is timely as a part of a composite act, along with the October 2010 Ministerial Order and the BSTA.²⁷⁶ Canada deems this argument “illogical” because DIBC purportedly has previously asserted that the mere passage of the IBTA breached DIBC’s rights and caused it damage.²⁷⁷ This assertion is both incorrect and irrelevant.

204. First, DIBC never has represented that mere passage of the IBTA could give rise to a NAFTA claim against Canada. Nor has it asserted that concrete harm would arise from mere knowledge that the Ambassador Bridge and New Span could fall within the scope of the statute. Rather, DIBC has always asserted that its NAFTA claim arose only after affirmative application of the law to DIBC through enforcement against CTC and DIBC.²⁷⁸

²⁷⁴ DIBC Counter-Memorial ¶ 297 (citing Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at 60, Exhibit CLA-32).).

²⁷⁵ DIBC Counter-Memorial § II.E.2.

²⁷⁶ DIBC Counter-Memorial § II.E.3.

²⁷⁷ Canada Reply ¶ 208.

²⁷⁸ To the extent Canada suggests that mere theoretical application of the IBTA to DIBC (rather than application via affirmative enforcement of the statute against DIBC) is sufficient to trigger the limitations periods in the NAFTA (Canada Reply ¶ 206), such an argument is misplaced. Mere knowledge that a government measure may be applied in the future does not equate to actual harm suffered. By way of example, the tribunal in *Glamis Gold* held that (in the expropriation context) “mere threats of expropriation or nationalization are not sufficient to make such a claim ripe . . . the governmental act must have directly or indirectly taken a property interest resulting in actual present

205. Canada relies on three documents for its contrary assertion: DIBC’s first Notice of Intent, DIBC’s Response to Canada’s Brief Statement on Jurisdiction, and DIBC’s Statement of Claim.²⁷⁹ Canada misreads these documents. In the Notice of Intent (which is not even the basis for DIBC’s current case), DIBC states that harm arises only if the IBTA were “interpreted *and applied* as Canada contends.”²⁸⁰ Similarly, in DIBC’s Response to Canada’s Brief Statement on Jurisdiction, DIBC states that “the *application* of the IBTA” interferes with DIBC’s rights.²⁸¹ Finally, in DIBC’s Statement of Claim, DIBC states that “by enacting the IBTA *and seeking to apply it to the Ambassador Bridge*, Canada is attempting to resurrect FIRA, the Sharp Policy, and the Amended Sharp Policy, contrary to settlement of the FIRA litigation of 1990.”²⁸² Each of those statements makes clear that the mere existence or “interpretation” of the IBTA did not cause harm to DIBC, but rather it was the affirmative “application”²⁸³ of the law to DIBC through enforcement that led to an actionable claim.

206. In addition, even if the enactment of the IBTA were independently actionable, that would not prevent the IBTA from being considered part of a composite claim that includes later acts. A composite act is comprised of a *series* of events. In this case, the composite act is the IBTA, 2010 Ministerial Order, and the BSTA. These three events combine to form their own, composite measure: Canada’s creation of a legally discriminatory approval regime that

harm to an investor.” *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award ¶ 328 (June 8, 2009), Exhibit CLA-73.

²⁷⁹ Canada Reply ¶ 208 n. 363.

²⁸⁰ First NAFTA Notice of Intent ¶ 38, Exhibit R-44 (emphasis added). *See also id.* at ¶ 39 (“if the IBTA *applies* [to DIBC], the Ambassador Bridge, as a privately owned international bridge located in Canada would be affected based solely on its private ownership.”), Exhibit R-44 (emphasis added).

²⁸¹ DIBC Response to Brief Statement on Jurisdiction and Admissibility ¶ 24 (emphasis added).

²⁸² DIBC Statement of Claim ¶ 179 (emphasis added).

²⁸³ Canada attempts to obfuscate this issue by referring to documents notifying DIBC that the Ambassador Bridge fell within the scope of the IBTA as evidence that the IBTA had been “applied” to DIBC. Canada Reply ¶ 206 and exhibits cited therein. Mere knowledge of likely future harm, though, is not the same as actual loss or damage.

discriminates against the American-owned Ambassador Bridge and its New Span, and in favor of the Canadian-owned NITC/DRIC.

207. The various actions by Canada that comprise this composite act are inherently interrelated: the IBTA creates new barriers that, as applied under the 2010 Ministerial Order, impose unlawful restrictions on the New Span; the BSTA then *exempts* the NITC/DRIC from those same barriers (as well as numerous other regulatory requirements), thus creating a discriminatory legal regime as applied between the American-owned New Span and the Canadian-owned NITC/DRIC. These actions together form a composite act of discrimination and inequitable treatment. Because the last action within the composite set of acts (the passage of the BSTA in 2012) occurred well within the limitations period, the portion of the claim challenging the IBTA is timely because the IBTA forms a part of this composite act.²⁸⁴

4. The Correct Date For Measuring The Timeliness Of The IBTA Portion Of The New Span Claim Is The Date Of DIBC's Notice Of Arbitration.

208. The correct time bar date for the IBTA portion of the New Span Claim is the date of DIBC's Notice of Arbitration – April 29, 2011. Canada argues that timeliness should be measured instead from the date of DIBC's amended Notice of Arbitration on January 15, 2013 because the IBTA portion of the New Span Claim was not included in the original notice.²⁸⁵

209. Presumably Canada makes this argument because it believes that the IBTA portion of the New Span Claim then would be time barred by Articles 1116 and 1117. Canada would be mistaken. Even were Canada correct in its assertion, measuring three years from January 15, 2013 permits claims that accrued any time after January 15, 2010. Because the

²⁸⁴ *Pac Rim Cayman* Decision ¶ 2.74, Exhibit CLA-30 (“[T]he unlawful composite act is composed of aggregated acts and takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule”).

²⁸⁵ Canada Reply ¶ 200 n. 339.

IBTA was not enforced against Claimant until October 2010 at the earliest, the IBTA portion of the New Span Claim remains timely even if the correct cut-off date is January 15, 2010, as Canada argues.

210. Even if the IBTA portion of the New Span Claim were analyzed only as a one-time act, the claim still would fall within the limitations period because DIBC did not suffer damage from the enactment of the IBTA until the October 2010 Ministerial Order first enforced the IBTA against DIBC and the New Span. It also would fall within the three year span commencing from either of (1) DIBC's filing of the Washington Litigation on March 22, 2010, or (2) DIBC's filing of its first Notice of Intent to Arbitrate on January 25, 2010. Accordingly, Canada's complaints regarding DIBC's purported admissions of harm in these documents are irrelevant.²⁸⁶

211. Canada attempts to distract this Tribunal from these facts through reference to letters by which Canada purportedly informed DIBC prior to 2010 that the IBTA would apply to the Ambassador Bridge.²⁸⁷ None of these letters, however, sought to actually enforce the IBTA vis-à-vis CTC or DIBC, or to require DIBC to seek regulatory approval under the IBTA. The first such letter states only Canada's "view" that "the *International Bridges and Tunnels Act* applies [to] Centra, Inc. and the related companies in accordance with its terms" and does not violate previous settlement agreements between the parties.²⁸⁸ The second letter explains Canada's view of the IBTA requirements, but does not even directly state that the IBTA applies to DIBC/CTC. Instead, Canada states only that it "would like to ensure that the work has not

²⁸⁶ Canada Reply ¶¶ 201-202.

²⁸⁷ Canada Reply ¶ 206.

²⁸⁸ Letter from Jacques Pigeon, Q.C. (Transport Canada) to Patrick Moran (DIBC/CTC) dated July 30, 2007, Exhibit R-39.

inadvertently been undertaken without the necessary regulatory approvals.”²⁸⁹ Notably, Canada does not demand that DIBC/CTC seek IBTA approval, but instead requests only “a detailed description of the work undertaken.”²⁹⁰ The third letter, which Canada alleges “told DIBC again on November 23, 2007 that IBTA approval was required for its New Span,”²⁹¹ does no more than mention the IBTA in passing as a law Transport Canada “is charged with administering in respect of your project.”²⁹² At most this correspondence establishes that Canada took the position the IBTA applied to DIBC/CTC. It did not seek to enforce the IBTA against DIBC/CTC. Canada waited another three years to even attempt to enforce the IBTA against DIBC, which delay strongly suggests Canada did not believe there was reason to apply the IBTA to DIBC in 2007.

212. The only remaining “evidence” that Canada offers to support its argument that DIBC has admitted it suffered harm prior to January 15, 2010 is a statement by DIBC’s Matthew Moroun to the House of Commons *prior to enactment* of the IBTA, in which Mr. Moroun expresses concern about *future* harm that could arise from the IBTA.²⁹³ This forecasting of future harm is not evidence of the date on which actual harm was incurred. In any event, of course, the January 15, 2010 date is critical only to the extent that the IBTA portion of the New Span Claim is considered to be a one-time act claim. To the extent it is a continuing act or composite act claim, the January 15, 2010 bar date allegedly caused by DIBC’s amendment of its claims is irrelevant.

²⁸⁹ Letter from Paul Fitzgerald to Dan Stamper dated October 30, 2007, Exhibit R-122.

²⁹⁰ *Id.*

²⁹¹ Canada Reply ¶ 206.

²⁹² Letter from Brian E. Hicks to Dan Stamper dated November 23, 2007, Exhibit R-123.

²⁹³ Canada Reply ¶ 203, citing Exhibit R-108.

213. Treating the IBTA more properly as a paradigm of a continuing act,²⁹⁴ the limitations period remains open today.²⁹⁵ Finally, were one to examine the claim as a composite act, the earliest the claim could have accrued would be at the time of the 2012 enactment of the BSTA.

5. DIBC Has Not Vacillated On When It Acquired Knowledge That The IBTA Would Be Enforced Against It And Result In Loss Or Damage.

214. Finally, Canada complains that “DIBC does not proffer an alternative date [for the time bar for the IBTA] and instead adopts multiple positions intended to render its claim timely.”²⁹⁶ This argument is meritless. First, it is not DIBC’s burden to prove that its claim is timely, but Canada’s burden to demonstrate otherwise. Accordingly, DIBC has no obligation to identify a time bar date (or refrain from asserting alternative positions).²⁹⁷ Moreover, because the IBTA portion of the New Span Claim is a continuing and/or composite act claim, there is not necessarily a specific time bar date yet in existence.²⁹⁸ To the extent the IBTA portion of the New Span Claim were to be considered a one-time act, DIBC’s purported vacillations are relevant only to the extent that DIBC ever argued that the time bar date was earlier than January 15, 2010, which, as discussed in Section III(D)(4) above, DIBC has not. Canada’s complaints regarding DIBC’s purported indecision regarding the date upon which the IBTA portion of the

²⁹⁴ See Section III(D)(2).

²⁹⁵ See also *Grand River Enterprises Six Nations Ltd. v. The United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 ¶ 101, Exhibit RLA-15. In the *Grand River* proceeding, claimants requested to amend their Notice of Intent. Respondent objected on the ground that the claim as amended would fall outside the tribunal’s jurisdiction under Articles 1116(2) and 1117(2). The tribunal permitted the amendment, reasoning the time bar should not apply “to preclude Claimants from seeking to show that they suffered legally distinct injury on account of legislative actions occurring within the three years prior to the filing of their claim (or even after it was filed).” *Id.*, Exhibit RLA-15.

²⁹⁶ Canada Reply ¶ 197.

²⁹⁷ See Section I(A).

²⁹⁸ DIBC Counter-Memorial §§ II.E.2, 3 and Sections III(D)(2)-(3).

New Span Claim accrued thus are no more than a deflection from the real issues before this Tribunal.

IV. RELIEF REQUESTED

215. For the reasons set forth above and in Claimant's Counter-Memorial on Jurisdiction and Admissibility, Claimant respectfully requests that the Tribunal dismiss Canada's defenses with respect to jurisdiction and admissibility and award costs to Claimant and grant such other relief as is appropriate.

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Respectfully submitted,

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