

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

**BETWEEN:**

**DETROIT INTERNATIONAL BRIDGE COMPANY**

**Claimant / Investor**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent / Party**

**PCA Case No. 2012-25**

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**GOVERNMENT OF CANADA  
REPLY MEMORIAL ON JURISDICTION AND ADMISSIBILITY**

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**December 6, 2013**

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Foreign Affairs, Trade and  
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## TABLE OF ABBREVIATIONS

BSTA	Bridge to Strengthen Trade Act
CAFTA	Dominican Republic-Central America Free Trade Agreement
CEAA	Canadian Environmental Assessment Act
CTC	Canadian Transit Company
DIBC	Detroit International Bridge Company
DRIC	Detroit River International Crossing
FCC	Federal Court of Canada
FHWA	Federal Highway Administration
IBTA	International Bridges and Tunnels Act
IJC	International Joint Commission
ILC	International Law Commission
LGWEM	Let's Get Windsor-Essex Moving Strategy
MDOT	Michigan Department of Transportation
MTO	Ontario Ministry of Transportation
NAFTA	North American Free Trade Agreement
NEPA	National Environmental Policy Act
ONSC	Ontario Superior Court
P/NF Study	Planning, Need and Feasibility Study
TC	Transport Canada
VCLT	Vienna Convention on the Law of Treaties

## **I. PRELIMINARY STATEMENT**

1. Canada respectfully submits this Reply Memorial on Jurisdiction and Admissibility and the witness statement of Helena Borges, Associate Deputy Minister of Transport, Infrastructure and Communities at Transport Canada in response to the Counter-Memorial on Jurisdiction and Admissibility filed by the Detroit International Bridge Company (“DIBC” or “Claimant”) on August 23, 2013.

2. Canada, the United States, Ontario and Michigan have worked together for more than a decade to determine the best means of securing the long-term prosperity of the millions of Canadian and American citizens who rely on the Windsor-Detroit border for international trade and commerce. Together, they decided that a new bridge with a new highway and customs plaza was in the national interest of both countries. But DIBC and its enterprise Canadian Transit Company (“CTC”) are intent on stopping this from happening. DIBC and CTC have launched multiple proceedings against Canada in Canadian and American courts seeking billions of dollars in compensation for breach of alleged rights they do not have and for alleged unfair and discriminatory treatment which they have not suffered. All of DIBC’s allegations are without merit.

3. However, DIBC is not even entitled to have the merits of its claim heard in this NAFTA proceeding. Canada’s consent to arbitrate under NAFTA Chapter Eleven is not unconditional – a claimant must fulfill certain conditions before an arbitration agreement is formed. DIBC has ignored these conditions and has demonstrated its continued willingness to flout them in order to bring yet another vexatious lawsuit in yet another fora.

4. Canada’s Memorial on Jurisdiction and Admissibility raised three arguments with respect to this Tribunal’s jurisdiction. First, DIBC failed to comply with NAFTA Article 1121 as of the date it commenced this NAFTA arbitration (April 29, 2011) because it failed to submit a valid waiver nor refrain from pursuing domestic proceedings with respect to measures it alleges violate the NAFTA. Second, in the event the Tribunal decides that DIBC has complied with Article 1121, the Tribunal is nonetheless without

jurisdiction *rationae temporis* over DIBC's claims regarding a Highway 401-Ambassador Bridge highway connection and the *International Bridges and Tunnels Act* ("IBTA"). Third, this Tribunal's jurisdiction does not extend to determining the existence of, or breach of an alleged "international treaty" relating to the Ambassador Bridge purported to exist as a "special agreement" under Article XIII the Canada-U.S. *Boundary Waters Treaty*.

5. DIBC failed to establish in its Counter-Memorial on Jurisdiction and Admissibility, as is *DIBC's* burden to do, that it met the preconditions to Canada's consent to arbitrate under the NAFTA and that the Tribunal therefore has jurisdiction to hear its claims. Instead, DIBC constructed flawed legal theories, ignored and misconstrued the evidence and reversed course on its previous positions.

6. Both Canada and DIBC agree that compliance with the waiver provision in Article 1121 is a "prerequisite to arbitration."<sup>1</sup> But DIBC's Counter-Memorial offers an interpretation of that provision which is completely at odds with its plain meaning, context and the object and purpose of the NAFTA.

7. DIBC argues that Article 1121 requires nothing more from a claimant than to submit a written waiver with its notice of arbitration but that content and compliance therewith is irrelevant. DIBC also argues that Article 1121 allows it and CTC to simultaneously pursue injunctive and declaratory relief in U.S. courts for Canadian measures that it alleges breach the NAFTA. DIBC proffers these flawed interpretations to justify its continued pursuit of three ongoing domestic court proceedings before the United States District Court for the District of Columbia and the Ontario Superior Court of Justice (the "Washington Litigation," "CTC Litigation," and "Windsor Litigation"). Each of these proceedings are plainly with respect to measures alleged to breach the NAFTA and do not fall within the limited exceptions permitted under Article 1121. A good faith interpretation of Article 1121 does not countenance DIBC's litigation strategy.

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<sup>1</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 135.

8. In its Counter-Memorial, DIBC ignores the rule under the NAFTA and general international law that jurisdiction must be established on the date a claim is submitted to arbitration. DIBC started this NAFTA arbitration by filing a NAFTA Notice of Arbitration on April 29, 2011 (“First NAFTA NOA”). Thus, as of that date, DIBC and CTC were required to file a written waiver consistent with Articles 1121(1)(b) and 2(b) *and* to refrain from initiating or continuing domestic proceedings involving the payment of damages with respect to measures alleged to breach NAFTA. DIBC and CTC did neither. First, the waiver they filed is inconsistent with Articles 1121(1)(b) and (2)(b) as it only applies to a narrow set of measures and expressly carves-out the Washington Litigation. Second, DIBC and CTC continued the Washington Litigation past the date DIBC commenced this NAFTA arbitration.<sup>2</sup> Since the Washington Litigation was a proceeding for damages with respect to measures alleged to breach the NAFTA, DIBC and CTC were in violation of NAFTA Article 1121 *ab initio*. The consequence of DIBC and CTC’s actions is decisive under NAFTA Chapter Eleven and international law: there is no consent to arbitrate and this Tribunal is without jurisdiction over DIBC’s claims.

9. DIBC’s Counter-Memorial continues to argue that none of the ongoing litigations before the domestic courts in Washington D.C., Toronto and Windsor are “with respect to” any measures alleged to breach the NAFTA. This is demonstrably false. The measures that DIBC alleges breach the NAFTA are the following:<sup>3</sup>

(i) **Nine Point Plan/Let’s Get Windsor Essex Moving Strategy.**<sup>4</sup> DIBC alleges Canada reneged on a 2003 promise to spend \$300 million on a direct Highway 401-Ambassador Bridge highway connection.<sup>5</sup>

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<sup>2</sup> *DIBC et al. v. Canada et al.*, (D.D.C. File No. 10-CV-00476-RMC), Complaint, March 22, 2010 (hereinafter “Washington Complaint”), **Exhibit R-17**; *DIBC et al. v. Canada et al.*, (D.D.C. File No. 10-CV-00476-RMC), First Amended Complaint, June 6, 2011 (hereinafter “Washington First Amended Complaint”), **Exhibit R-18**; *DIBC et al. v. Canada et al.*, (D.D.C. File No. Docket 1:10-CV-00476-RMC).

<sup>3</sup> Canada’s Memorial used the labels “Franchise Measures,” “New Span Measures,” and “Highway 401 Measures” for convenience given the substantial overlap of DIBC’s allegations with respect to each measure. See Canada’s Memorial on Jurisdiction, ¶ 5, n. 3. For example, DIBC alleges that Canada’s failure to build a highway to the Ambassador Bridge is by itself a breach of the NAFTA and is also a measure intended to prevent the construction of the New Span (NAFTA Statement of Claim, ¶¶ 133, 201).

<sup>4</sup> News Release, “Canada and Ontario Announce Next Steps at Windsor Gateway,” May 27, 2003 (“Nine Point Plan”), **Exhibit C-32**; “A New Solution for the Windsor Gateway Announced By All Three Levels of Government,” News Release, March 11, 2004 (“LGWEM Strategy”), **Exhibit R-34**.

(ii) **Detroit River International Crossing Environmental Assessment.**<sup>6</sup> DIBC alleges the DRIC EA is discriminatory because it steers the Parkway towards the DRIC Bridge but not to the Ambassador Bridge, violates DIBC's "exclusive franchise rights" by approving the location of a new bridge and that it "unlawfully eliminated" DIBC's proposal to build a new span next to the Ambassador Bridge ("New Span").<sup>7</sup>

(iii) **Huron Church Road "traffic measures."** DIBC alleges that Windsor has impeded access to the Ambassador Bridge in favour of the Windsor-Detroit Tunnel and the DRIC Bridge.<sup>8</sup>

(iv) **International Bridges and Tunnels Act.**<sup>9</sup> DIBC alleges the *IBTA* was enacted to interfere with its franchise rights and its right to build a new bridge, to violate its 1990/1992 settlement agreement with Canada and to damage the value of the Ambassador Bridge.<sup>10</sup>

(v) **Ambassador Bridge New Span Environmental Assessment.**<sup>11</sup> DIBC alleges that Canada has wrongfully delayed regulatory approval of its plan to build a New Span next to the Ambassador Bridge.<sup>12</sup>

(vi) **Bridge to Strengthen Trade Act.**<sup>13</sup> DIBC alleges the *BSTA* is discriminatory because it accelerates approval for the DRIC Bridge but not for the New Span.<sup>14</sup>

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<sup>5</sup> First NAFTA NOA, ¶¶ 30-32; Amended NAFTA NOA, ¶¶ 92; NAFTA Statement of Claim, ¶ 158; DIBC Counter-Memorial on Jurisdiction, ¶¶ 46-48.

<sup>6</sup> Detroit International River Crossing Environmental Assessment Report (Ontario) (December 2008) (hereinafter "DRIC EA Report"), **Exhibit R-47**; Detroit River International Crossing Study CEEA Screening Report (Federal) (November 2009) (hereinafter "CEEA Screening Report"), **Exhibit C-92** (collectively, the "DRIC EA").

<sup>7</sup> First NAFTA NOA, ¶¶ 5, 33-42; Amended NAFTA NOA, ¶¶ 64-96; NAFTA Statement of Claim, ¶¶ 103-167; DIBC Counter-Memorial on Jurisdiction, ¶¶ 84-102.

<sup>8</sup> First NAFTA NOA, ¶¶ 43-47; Amended NAFTA NOA, ¶¶ 125-129; NAFTA Statement of Claim, ¶¶ 215, 205-209; DIBC Counter-Memorial on Jurisdiction, ¶¶ 30, 175, 280.

<sup>9</sup> *International Bridges and Tunnels Act*, S.C. 2007, c.1 (in force April 25, 2007) (hereinafter "*IBTA*"), **Exhibit C-94**.

<sup>10</sup> NAFTA Statement of Claim, ¶¶ 179-180; Amended NAFTA NOA, ¶¶ 104-108; NAFTA Statement of Claim, ¶¶ 173-181; DIBC Counter-Memorial on Jurisdiction, ¶¶ 17, 104-115.

<sup>11</sup> Ambassador Bridge Enhancement Project Environmental Impact Statement (hereinafter "New Span EA"), **Exhibit C-89**.

<sup>12</sup> NAFTA Statement of Claim, ¶ 168-172; DIBC Counter-Memorial on Jurisdiction, ¶¶ 122-125.

<sup>13</sup> *Bridge To Strengthen Trade Act*, S.C. 2012, c.31, s. 179 (in force December 14, 2012) (hereinafter "*BSTA*"), **Exhibit C-1**.

<sup>14</sup> NAFTA Statement of Claim, ¶ 182; Amended NAFTA NOA, ¶¶ 109-110; DIBC Counter-Memorial on Jurisdiction, ¶¶ 116-118.

10. There is no doubt that the Washington, CTC and Windsor Litigations were and continue to be “proceedings with respect to” all or some of these measures within the meaning of Articles 1121(1)(b) and (2)(b).<sup>15</sup> For example, DIBC’s allegations regarding Canada’s actions in connection with the DRIC EA were and continue to be virtually identical in this NAFTA arbitration and in the Washington and CTC Litigations.<sup>16</sup> The DRIC EA approved the location of the new bridge (“DRIC Bridge”) and its Highway 401 connection (Windsor-Essex, now Rt. Hon. Herb Grey Parkway (“Parkway”)), as well as a new customs plaza. The DRIC Bridge and the Parkway (and customs plaza) are not separate and distinct but were conceived and endorsed as a single decision within the confines of the DRIC EA as Canada’s plan for a comprehensive “end-to-end” solution to connect Ontario Highway 401 to the interstate highways in Michigan at the Windsor-Detroit border. This is confirmed on the very first page of the DRIC EA:

After evaluating the practical alternatives for the access road, Canadian inspection plaza, and the international bridge crossing, the Technically and Environmentally Preferred Alternative (TEPA) was selected. The TEPA includes the Windsor-Essex Parkway, Plaza B1 and Crossing X-10B.<sup>17</sup>

11. When DIBC commenced this NAFTA arbitration on April 29, 2011 it sought to evade NAFTA Article 1121 by artificially segregating the DRIC Bridge and Parkway components of the DRIC EA. In its First NAFTA NOA, DIBC alleges “in excess of U.S. \$3.5 billion” in damages as a result of the DRIC EA’s chosen location of the Parkway while simultaneously suing Canada for damages in the Washington Litigation as a result

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<sup>15</sup> DIBC makes numerous other allegations about Canada’s subsequent activities arising from the DRIC process which either not measures in and of themselves or are inextricably intertwined with the measures alleged to breach the NAFTA. For example, DIBC alleges the Canada-Michigan Crossing Agreement dated June 15, 2012 (**Exhibit C-64**) is the “culmination” of Canada’s discriminatory actions against DIBC. See DIBC Counter-Memorial on Jurisdiction, ¶ 119.

<sup>16</sup> The DRIC EA is also an integral part of the Windsor Litigation, but DIBC refuses to clarify the nature of its NAFTA claims in this regard. See Part II-C below.

<sup>17</sup> DRIC EA Report, Executive Summary at (i), **Exhibit R-47**. Crossing X-10B is the location of the DRIC Bridge. See also DRIC EA Report, Chapter 9, **Exhibit R-47** which describes the recommended plan for the Parkway, the DRIC Bridge and the customs plaza. See also CEAA Screening Report at 7, **Exhibit C-92** (“The scope of the project for Transport Canada and the Windsor Port Authority includes the construction, operation, modification and any decommissioning work in relation to the project, including *the Windsor-Essex Parkway between Highway 401* and the proposed border services plaza, the proposed border services plaza *and the Canadian portion of a new six-lane international bridge crossing over the Detroit River.*”) (emphasis added).

of the DRIC EA's chosen location of the DRIC Bridge.<sup>18</sup> To sustain these parallel proceedings, DIBC carved-out the Washington Litigation from the waiver it submitted with its NAFTA Notice of Arbitration. DIBC's actions are precisely what the NAFTA Parties intended to prevent under Article 1121. Accordingly, DIBC and CTC's failure to comply with NAFTA Article 1121 as of April 29, 2011 deprives the Tribunal of jurisdiction entirely.

12. DIBC's Amended NAFTA Notice of Arbitration of January 15, 2013 ("Amended NAFTA NOA") and Second NAFTA Waiver are therefore not relevant because DIBC cannot amend a claim over which the Tribunal had no jurisdiction in the first place. But even if the Amended NAFTA NOA were considered, DIBC only aggravated its failure to comply with the requirements set out in Articles 1121(1)(b) and (2)(b) by filing another defective waiver and continuing its ongoing domestic proceedings against Canada with respect to measures alleged to breach the NAFTA. DIBC tries to characterize its allegations against these measures in the Washington Litigation as mere "context" necessary to "corroborate Canada's discriminatory intent," but there is no question that the Washington Litigation is still a "proceeding with respect to" measures that DIBC alleges breach the NAFTA within the meaning of Articles 1121(1)(b) and (2)(b).<sup>19</sup>

13. DIBC also misrepresents the nature of the ongoing CTC and Windsor Litigations against Canada in the Ontario Superior Court of Justice. DIBC attempts to characterize the CTC Litigation as not seeking damages "with respect to" measures alleged to breach the NAFTA.<sup>20</sup> Reading its complaints in that proceeding leads to precisely the opposite conclusion because, among other measures, the DRIC EA was and remains as central to the CTC Litigation as it is to this NAFTA arbitration. DIBC has no credible explanation

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<sup>18</sup> See Part IV-C-2 below.

<sup>19</sup> Second Amended Complaint, November 9, 2012 (hereinafter "Washington Second Amended Complaint"), **Exhibit R-19**; *DIBC et al. v. Canada et al.*, (D.D.C. File No. 1:10-CV-00476-RMC), Third Amended Complaint, May 29, 2013 (hereinafter "Washington Third Amended Complaint"), **Exhibit C-141**.

<sup>20</sup> *The Canadian Transit Company v. Attorney General of Canada* (Ontario Superior Court of Justice Court File No. CV-12-446428), Statement of Claim, February 15, 2012 (hereinafter "CTC Litigation Statement of Claim"), **Exhibit R-20**; *Canadian Transit Co. v Attorney General of Canada*, Ontario Superior Court of Justice No. CV-12-446428, Amended Statement of Claim, February 19, 2013 (hereinafter "CTC Litigation Amended Statement of Claim"), **Exhibit C-119**.

of how CTC Litigation can possibly be construed as being consistent with the limited exception permitted by Articles 1121(1)(b) and 2(b).

14. DIBC is even more evasive with respect to the Windsor Litigation.<sup>21</sup> CTC's still-pending February 2010 complaint for damages against Windsor was continued past DIBC's commencement of this NAFTA arbitration and makes sweeping allegations with respect to Windsor's alleged support for a new bridge and highway and opposition to the Ambassador Bridge New Span.<sup>22</sup> DIBC simply refuses to identify what "other measures, not challenged in the Windsor Litigation, which evidence Canada's consistent discrimination against Claimant" form the basis of its NAFTA claim.<sup>23</sup> DIBC's refusal to clarify the basis of its NAFTA claim with respect to Windsor must result either in a finding that DIBC has failed to comply with Article 1121 by continuing the Windsor Litigation or a finding that DIBC is barred from including any measure from the Windsor Litigation in its NAFTA claim.

15. In the event that the Tribunal does find that DIBC has complied with NAFTA Article 1121, it would still be without jurisdiction to hear the merits of DIBC's Highway 401 and *IBTA* claims because each are untimely under Articles 1116(2) and 1117(2).

16. With respect to its Highway 401 claims, DIBC abandons its previous concession that it first learned Canada would not construct a direct Highway 401-Ambassador Bridge connection on October 3, 2007 as this admission would render the claim untimely.<sup>24</sup> DIBC now identifies May 1, 2008 – the day the route of the Parkway was announced – as

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<sup>21</sup> Canadian Transit Company v. Corp. of the City of Windsor, Edgar Francis, Dave Brister, Drew Dilkens, Ron Jones, Caroline Postma, Alan Halberstadt, Fulvio Valentinis, Ken Lewenza, JR., Biago Marra, Jo-Anne Gignac and Percy Hatfield, Ontario Superior Court of Justice (Court File No. CV -10-395654), Statement of Claim, February 24, 2010 ("CTC v. Windsor Statement of Claim, February 2010"), **Exhibit R-29**; Canadian Transit Company v. Corp. of the City of Windsor, Ontario Superior Court of Justice (Court File No. CV -10-405347), Statement of Claim, June 22, 2010 (Ont. Sup. Ct.) ("CTC v. Windsor Statement of Claim, June 2010"), **Exhibit R-30**.

<sup>22</sup> See Canada Memorial on Jurisdiction, ¶¶ 176-177 and sources cited therein.

<sup>23</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 215. DIBC has effectively abandoned its claim against Windsor's so-called Huron Church Road "traffic measures" alleged to favour the Windsor-Detroit Tunnel. See Part II-C below.

<sup>24</sup> NAFTA Statement of Claim, ¶ 190, *ref.* Letter from Minister Lawrence Cannon to Dan Stamper, October 3, 2007, **Exhibit C-110**. See also DIBC Response to Canada's Brief Statement on Jurisdiction, ¶¶ 22-23.

the date when the limitations period started, purportedly saving its claim from being untimely by two days. However, DIBC ignores all of the evidence between March 11, 2004 (the day the Nine Point Plan was replaced by the *Let's Get Windsor Essex Moving* Strategy), November 14, 2005 (the day the twin Ambassador Bridge option X12 was dropped from the DRIC EA) and May 1, 2008 which confirm that DIBC "first acquired knowledge" of the alleged NAFTA breach and loss more than three years prior to its First NAFTA NOA. Further, DIBC's attempts at devising "preparatory" and "composite" act legal theories in the hopes of evading the NAFTA's three-year limitations period are not supported by the text of Articles 1116(2) and 1117(2) or by the facts.

17. To respond to DIBC's new arguments in its Counter-Memorial, Canada submits the witness statement of Helena Borges, Associate Deputy Minister of Transport, Infrastructure and Communities at Transport Canada. Combined with the documentary evidence, Ms. Borges' witness statement establishes that DIBC was well-aware of Canada's position with respect to a Highway 401-Ambassador Bridge connection before May 1, 2008. DIBC's characterizations of the facts are simply not credible.

18. In its Counter-Memorial, DIBC takes a similar approach of ignoring evidence regarding its *IBTA* claim in order to evade the NAFTA's three-year limitations period. DIBC now alleges that October 10, 2010 (the date Canada issued CTC an order to stop unauthorized construction of the New Span without *IBTA* approval) was the date it "first acquired knowledge" of the alleged NAFTA breach and loss. But this new allegation is untenable: DIBC had in January 2010 *already* alleged that the *IBTA* breached the NAFTA and alleged "not less than U.S. \$1.5 billion" in damages because of the *IBTA*.<sup>25</sup> DIBC also ignores all of the evidence that establishes beyond doubt that, as of the day of its enactment in February 2007, the *IBTA* applied to the Ambassador Bridge and its New Span in a manner that DIBC has already alleged breached NAFTA and caused it damage. DIBC simply ignores the evidence showing that Canada made it absolutely clear on multiple occasions after the *IBTA* was enacted that it applied to the Ambassador Bridge

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<sup>25</sup> First NAFTA NOI, ¶ 44, **Exhibit R-44**. DIBC also alleged that it had suffered damages arising from the *IBTA* when it initiated the Washington Litigation on *March 22, 2010*. Washington Complaint, ¶¶ 173-179, **Exhibit R-17**.

and its New Span. DIBC's attempts to characterize the evidence otherwise is not credible and its legal theories designed to evade the limitations period are inconsistent with the ordinary meaning of NAFTA Articles 1116(2) and 1117(2). The Tribunal lacks jurisdiction *rationae temporis* with respect to the *IBTA*.

19. Finally, instead of abandoning its unsupported contention that there is an "international treaty" between Canada and the United States relating to the Ambassador Bridge, DIBC's Counter-Memorial simply asks the Tribunal to leave this issue for the merits. But this is *not* an issue for the merits. Not only is there a lack of *prima facie* evidence to show that an international treaty between Canada and the United States even exists, international law places limitations on the jurisdiction of international tribunals to make determinations relating to the rights and obligations of an absent third party (in this case, the United States).

20. Canada respectfully submits that the Tribunal find that it has no jurisdiction over any of DIBC's claims in this arbitration and requests an order that DIBC pay all of Canada's costs.

21. This Reply Memorial is organized as follows. Part II is a review of the facts and the standard of review relevant for the jurisdictional phase. Part III describes the international legal rules for determining the jurisdiction of this Tribunal. Part IV sets out Canada's objections with respect to NAFTA Article 1121 and establishes that DIBC and CTC have been, as of the date NAFTA arbitration commenced and continuing today, in violation of that provision. Part V sets out Canada's objections that DIBC's Highway 401 and *IBTA* claims are time barred under NAFTA Articles 1116 and 1117. Part VI argues that it is beyond this Tribunal's jurisdiction to determine the existence of or violation of the alleged "international treaty" between Canada and the United States under Article XIII of the *Boundary Waters Treaty*. Finally, Part VII provides a summary conclusion and request for relief.

## II. FACTS

22. At the jurisdictional phase of an arbitration, the Tribunal “cannot take all the facts as alleged by [a] claimant as granted facts.”<sup>26</sup> Instead, a tribunal must “look at the role these facts play either at the jurisdictional level or at the merits level.”<sup>27</sup> As the tribunal noted in *Phoenix Action*:

If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.<sup>28</sup>

23. In assessing those facts, which, if proven, would amount to a violation of the NAFTA, the Tribunal may apply a *prima facie* standard at the jurisdictional stage.<sup>29</sup> However, facts on which the jurisdiction of this Tribunal depends cannot simply be accepted as they are pled by DIBC.<sup>30</sup> With this principle in mind, Canada will not engage in a point-by-point refutation of the many distortions of fact perpetuated by DIBC in its Counter-Memorial. However, factual issues that are directly relevant for the Tribunal's determination of jurisdiction are addressed below.

### A. DIBC Fails to Show the Existence of an “International Treaty Binding in International Law” Relating to the Ambassador Bridge

24. DIBC alleges that a source of its alleged exclusive franchise rights stem from a *Boundary Waters Treaty* Article XIII “special agreement” (or, as DIBC called it in its

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<sup>26</sup> *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, April 15, 2009 (hereinafter “*Phoenix Action, Award*”), ¶ 60, **RLA-32**.

<sup>27</sup> *Phoenix Action, Award*, ¶ 60, **RLA-32**.

<sup>28</sup> *Phoenix Action, Award*, ¶ 61, **RLA-32**.

<sup>29</sup> *Phoenix Action, Award*, ¶ 62, **RLA-32**.

<sup>30</sup> *Phoenix Action, Award*, ¶ 63, n. 42, **RLA-32** (quoting Sir Franklin Berman QC in his dissenting opinion *Industria Nacional de Alimentos*: “Factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?”, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, Dissenting Opinion of Franklin Berman QC, September 5, 2007, § 17).

First NAFTA NOI, the *Ambassador Bridge Treaty*,<sup>31</sup>) between Canada and the United States binding in international law as an international treaty.<sup>32</sup> But DIBC's Counter-Memorial provides no evidence that either Canada or the United States considered there to be an international treaty relating to the Ambassador Bridge. DIBC had no answer to the evidence presented in Canada's Memorial on Jurisdiction which discredited the entire premise of DIBC's argument.<sup>33</sup> DIBC merely says the existence of the alleged international treaty is a question for the merits phase.<sup>34</sup> As described in Part IV below, DIBC is wrong. The question touches on core principles of international law affecting the jurisdiction of any international tribunal.<sup>35</sup>

### **B. DIBC Fails to Show the Existence of a Commitment by Canada to Build a Highway 401-Ambassador Bridge Connection**

25. DIBC's Counter-Memorial continues to allege that the May 27, 2003 press release by Canada and Ontario constituted a \$300 million "commitment" to build a direct Highway 401-Ambassador Bridge connection.<sup>36</sup> DIBC says it relied on the Nine Point

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<sup>31</sup> DIBC says its First NAFTA NOI is "inoperative" because DIBC "never pursued a NAFTA arbitration on the basis" thereof and only the Second NAFTA NOI is relevant (DIBC Counter-Memorial on Jurisdiction, ¶ 322). This is not true: DIBC wrote to Canada on April 8, 2010 to confirm that the Second NAFTA NOI "is in addition to, and does not replace" the First NAFTA NOI and that DIBC's new lawyers "represents DIBC with respect to both notices of intent." See Letter from DIBC to Canada dated April 8, 2010, **Exhibit R-43** (emphasis added). In other words, DIBC itself expressly kept the First NAFTA NOI "operative." In any event, DIBC has never renounced the contents of its First NAFTA NOI and cannot do so now since all of its allegations regarding the *IBTA* are replicated in its Amended NAFTA NOA and Statement of Claim.

<sup>32</sup> First NAFTA NOI, ¶ 26, **Exhibit R-44**; Amended NAFTA NOA, ¶¶ 33, 35; NAFTA Statement of Claim, ¶ 39; DIBC Response to Canada's Brief Statement, ¶ 29.

<sup>33</sup> Canada's Memorial on Jurisdiction, ¶¶ 276-285 and exhibits cited therein.

<sup>34</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 323.

<sup>35</sup> The question of whether DIBC and CTC enjoy "exclusive franchise rights" to all toll bridges across the Detroit River under Canadian law is currently pending before the Ontario Superior Court and before the United States Federal District Court in Washington D.C. See CTC Litigation Amended Statement of Claim, ¶ 1, **Exhibit C-119**; Washington Third Amended Complaint, ¶ 2, 7, 65, 74, 139, **Exhibit C-141**. As such, Canada need not provide a rebuttal to DIBC's allegations at this time other than to say they are completely unfounded.

<sup>36</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 43-44. See News Release, Canada and Ontario Announce Next Steps at Windsor Gateway, May 27, 2003, **Exhibit C-32**. See also Government of Canada and Government of Ontario, Memorandum of Understanding, "Windsor Gateway Short and Medium Term Improvements", September 25, 2002 ("2002 MOU"), **Exhibit R-4 and C-126**. DIBC refers to the Nine Point Plan as the "2003 Canada-Ontario Action Plan" in its Counter-Memorial.

Plan's "promise" when it decided to spend "hundreds of millions" on the Gateway Project in Detroit.<sup>37</sup>

26. DIBC has failed to provide any *prima facie* evidence supporting its allegation that the Nine Point Plan committed Canada to spend \$300 million on a highway to the Ambassador Bridge. Other than the press release itself, which on its face plainly makes no such commitment or promise, DIBC has not provided any other corroborating documentation that would meet the *prima facie* standard required at the jurisdictional phase.<sup>38</sup>

27. DIBC's credibility deficit is compounded because the only "evidence" presented in its Counter-Memorial is actually an amalgamation of two unrelated, non-consecutive and incomplete documents. DIBC's Counter-Memorial represents Exhibit C-34 as the "March 12, 2004 report of the Canadian government's Business Transportation Task Force" and says the document evidences Canada's commitment to build a highway to the Ambassador Bridge.<sup>39</sup> In reality, the "Business Transportation Task Force Situational Analysis" (i.e., the first page of DIBC's Exhibit C-34) was written by the Windsor Chamber of Commerce, *not* the Canadian government, in September 2002, *eight months before the Nine Point Plan even existed*.<sup>40</sup> The document has been available on the Windsor Chamber of Commerce website for more than a decade and merely summarizes the views of CTC and other interested parties on options for improvements to the Windsor-Detroit border. The remaining two pages of DIBC's Exhibit C-34 is clearly from a completely different document that was apparently written almost two years later (March 12, 2004) and states that Windsor's opposition to the Nine Point Plan "had the

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<sup>37</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 48.

<sup>38</sup> One of the many reasons for why DIBC's allegation is so implausible is that it is unrealistic to imagine building a 14 kilometer highway through a major metropolitan area with capacity for the more than 10,000 vehicles that cross the Ambassador Bridge daily for only \$300 million. The Rt. Hon. Herb Gray Parkway, which will be approximately the same distance is expected to cost at least \$1.6 billion. See "News Release Communiqué: The Detroit River International Crossing Study Team Announces Preferred Access Road", May 1, 2008, **Exhibit C-125**.

<sup>39</sup> DIBC Counter-Memorial on Jurisdiction ¶ 45; Business Transportation Task Force Situational Analysis, March 12, 2004, **Exhibit C-34**.

<sup>40</sup> Windsor & District Chamber of Commerce Business Transportation Task Force, September 2002, available at [www.wincom.net/whidsorchamber/btff.htm](http://www.wincom.net/whidsorchamber/btff.htm), **Exhibit R-138**.

effect of killing it” and it was replaced by the LGWEM Strategy.<sup>41</sup> DIBC’s reliance on Exhibit C-34 is indicative of the absence of any so-called “commitment” by Canada.

28. DIBC’s assertion that Canada’s alleged 2003 “commitment” somehow induced it to invest “hundreds of millions of dollars” in the Gateway Project on the Detroit-side of the Ambassador Bridge is also untenable.<sup>42</sup> DIBC and the Michigan Department of Transportation (“MDOT”) entered into a Memorandum of Understanding for the Gateway Project in July 1996, almost seven years before the Nine Point Plan.<sup>43</sup> The United States Congress authorized and appropriated monies for the Gateway Project starting in 1998, long before the Nine Point Plan was ever conceived.<sup>44</sup> MDOT itself has discredited DIBC’s assertion by noting “no one from Transport Canada, nor the Ontario Ministry of Transportation, nor the City of Windsor were involved” in the Gateway Project.<sup>45</sup> The Gateway Project sought to alleviate Detroit’s own long-standing problem with the interstate highway system being located less than a half a kilometer away but accessible from the Ambassador Bridge only by traversing local streets.<sup>46</sup>

29. In contrast, the Windsor-side of the Ambassador Bridge had a more difficult problem to resolve: Highway 401 is approximately 14 kilometers away and the stretch of Huron Church Road north of E.C. Row Expressway to the Ambassador Bridge is densely populated and highly urbanized. This is why as Canada explained in its Memorial and explains further below, the DRIC EA concluded in November 2005 that a highway to the Ambassador Bridge would have a “high” negative impact on Windsor neighbourhoods.

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<sup>41</sup> The first page of Exhibit C-34 corresponds to the first page of the September 2002 Windsor Chamber of Commerce Situational Analysis, **Exhibit R-138**. The second and third pages of DIBC’s Exhibit C-34 appear to be excerpts from an unidentified document apparently dated March 12, 2004.

<sup>42</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 48.

<sup>43</sup> Ambassador Bridge Gateway Project Memorandum of Understanding (DIBC and MDOT), July 26, 1996, **Exhibit C-19**.

<sup>44</sup> See NAFTA Statement of Claim, ¶ 92.

<sup>45</sup> See Letter from Kirk Steudle (MDOT) to Dan Stamper (DIBC/CTC) dated February 27, 2008, **Exhibit R-49**.

<sup>46</sup> As noted in Canada’s Memorial, the courts in Michigan enforcing MDOT’s Gateway Project contract against DIBC had to resort to civil contempt fines and incarceration of DIBC’s owner and President in 2011 and 2012 to compel compliance with orders to, among other things, tear down the unauthorized approach ramps DIBC had built for its Ambassador Bridge New Span. See Canada Memorial on Jurisdiction, ¶ 69 and exhibits cited therein.

DIBC continues to assert in its Counter-Memorial that “with relatively minor modifications” it would be possible to continue the Parkway all the way to the Ambassador Bridge.<sup>47</sup> This statement is not only unrealistic but disregards all the other significant factors involved in making such a decision, including the legitimate concerns of thousands of Windsor residents whose homes, schools, community centers, stores and other services surround the Ambassador Bridge and abut Huron Church Road.

30. Even assuming DIBC's allegation to be true, the so-called “promise” arising out of the Nine Point Plan was publically revoked less than ten months later. The March 11, 2004 Memorandum of Understanding between Canada, Ontario and Windsor (“2004 MOU”) and LGWEM Strategy expressly replaced the Nine Point Plan as the new plan for spending the \$300 million that had been set aside to improve traffic infrastructure at the Windsor-Detroit border.<sup>48</sup> The money was spent on various traffic projects announced in two phases (March 11, 2004 and April 21, 2005).<sup>49</sup> None of these projects included building a highway to the Ambassador Bridge.

31. DIBC's Counter-Memorial argues for the first time that Canada “renamed” its alleged \$300 million commitment in 2004 and that the LGWEM Strategy was merely a “reformulation” of the 2002 MOU and Nine Point Plan which “still committed” Canada to building a highway to the Ambassador Bridge.<sup>50</sup> This is simply not credible. The 2004 MOU stated explicitly that it “replaces” – not “renames” or “reformulates” – the Nine Point Plan.<sup>51</sup> The LGWEM Strategy was described as a “*new solution*” for the Windsor

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<sup>47</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 16. See also NAFTA Statement of Claim, ¶ 5.

<sup>48</sup> Press Release: A new Solution for the Windsor Gateway Endorsed by all Three Levels of Government, March 11, 2004 (“2004 MOU”), **Exhibit R-8**.

<sup>49</sup> News Release: A New Solution for the Windsor Gateway Endorsed by all Three Levels of Government, March 11, 2004 (“2004 MOU”), **Exhibit R-8**; “Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway,” Ontario News Release, April 21, 2005, **Exhibit R-91**. See also Canada Memorial on Jurisdiction n. 301 and exhibits cited therein.

<sup>50</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 46-47.

<sup>51</sup> Press Release: A New Solution for the Windsor Gateway Endorsed by all Three Levels of Government, March 11, 2004 (“2004 MOU”) at 2, **Exhibit R-8** (“This new approach replaces the nine-point Windsor Gateway Action Plan.”).

Gateway, not a “renamed” or “reformulated” solution.<sup>52</sup> The Nine Point Plan was described as “done” and “kill[ed]” – not “renamed” or “reformulated.”<sup>53</sup> DIBC’s Counter-Memorial says the mention of “consideration of...improvements to Huron Church Road” in the LGWEM Strategy equals a \$300 million commitment to build a highway to the Ambassador Bridge but this is concocted and, as with the DIBC’s allegation respecting the Nine Point Plan, completely unsupported.<sup>54</sup>

32. In summary, DIBC’s failure to adduce even a *prima facie* level of evidence to support its allegation that Canada made a commitment in the Nine Point Plan or at any other time to build a highway to the Ambassador Bridge means the allegation should not even be accepted *pro tempore* in this jurisdictional phase. But even if it were assumed to be true for jurisdictional purposes, as discussed below, it is too late to allege that this measure is a breach of the NAFTA.

**C. DIBC Fails to Show the Existence of Any Huron Church Road “Traffic Measures” Which Divert Traffic to the Windsor-Detroit Tunnel and/or Other Crossings**

33. DIBC’s NAFTA claim includes, among other things, the allegation that the City of Windsor has interfered with traffic on Huron Church Road to divert traffic away from the Ambassador Bridge to the Windsor-Detroit Tunnel and, ultimately, to the DRIC Bridge.<sup>55</sup> However, DIBC has never identified the nature of such measures and how they favour the Windsor-Detroit Tunnel or the DRIC Bridge other than complaining generally that there are stoplights, driveway entrances and “curb cuts” on Huron Church Road.

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<sup>52</sup> Press Release: A New Solution for the Windsor Gateway Endorsed by all Three Levels of Government, March 11, 2004 (“2004 MOU”), **Exhibit R-8**.

<sup>53</sup> “Border Fix Launch Gets Green light: \$82M for five projects of \$300M program,” Windsor Star, March 12, 2004, **Exhibit R-89**; Unidentified document dated March 12, 2004, **Exhibit C-34** (referring to the 2002 MOU: “[F]earing that it would increase the amount of truck traffic going through the city, the Windsor City Council strongly opposed most of the action plan, *which had the effect of killing it.*” (emphasis added)).

<sup>54</sup> In fact, several improvements to Huron Church Road were undertaken as part of LGWEM Strategy and which benefitted the Ambassador Bridge, including a pedestrian bridge, intersection improvements and installation of traffic monitoring cameras. See Project No. 1, Project No. 3 and Project No. 4b, Ontario Ministry of Transportation Website, **Exhibit R-92**; “Canada and Ontario Improving Safety at Windsor Border,” Transport Canada News Release No. H118/05, May 27, 2005, **Exhibit R-99**.

<sup>55</sup> First NAFTA NOA, ¶¶ 43-48; Amended NAFTA NOA, ¶¶ 125-129, 135; NAFTA Statement of Claim, ¶¶ 205-209, 215.

34. DIBC's Counter-Memorial does nothing to clarify its claim. It does not even mention the Windsor-Detroit Tunnel, let alone how it is being favoured by Windsor.<sup>56</sup>

35. DIBC's failure to identify any Huron Church Road "traffic measure" favouring the Windsor-Detroit Tunnel or DRIC Bridge means, first, it has failed to make out even a *prima facie* claim. Second, in light of DIBC's failure to comply with Article 20(4) of the UNCITRAL Arbitration Rules, DIBC's Huron Church Road claim should be declared inadmissible. Canada asked the Tribunal in its Memorial to consider this claim withdrawn.<sup>57</sup> DIBC made no protest to this request in its Counter-Memorial, which should be taken as acquiescence. It is too late for DIBC to revive this claim in any event since Canada no longer has the opportunity to respond.<sup>58</sup>

**D. DIBC's Factual Description of the DRIC EA and Measures Alleged to Block or Delay the Ambassador Bridge New Span Supports Canada's Waiver and Time Bar Objections**

**1. DRIC Environmental Assessment**

36. As Canada described in its Memorial, the DRIC EA was a comprehensive review of an "end-to-end" solution to transportation issues in the Windsor-Detroit corridor. The assessment required the consideration of a bridge, customs plaza and Highway 401 road access on the Canadian and American sides of the border in unison.<sup>59</sup>

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<sup>56</sup> As described at Part IV-C-4 below, DIBC refuses to clarify the nature of *any* of its allegations against the City of Windsor.

<sup>57</sup> Canada Memorial on Jurisdiction, ¶¶ 240-241. UNCITRAL Arbitration Rules Article 20(4) states: "The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them." None of DIBC's submissions cite to a single document, event or circumstance of favouritism to the Windsor-Detroit Tunnel or DRIC Bridge by virtue of "traffic measures" on Huron Church Road. As noted in Canada's Memorial (¶ 241), the last stoplight installed on Huron Church Road was in 1991.

<sup>58</sup> Allowing DIBC to pursue this claim any further would deprive Canada of the reasonable opportunity to present its case per Article 17(1) of the UNCITRAL Rules. By failing to identify the nature of its claim, Canada cannot respond or know whether it has jurisdictional or other objections that could be raised.

<sup>59</sup> Canada Memorial on Jurisdiction, ¶¶ 28-46. See Detroit International River Crossing Environmental Assessment Report (Ontario) (December 2008), **Exhibit R-47**; Detroit River International Crossing Study CEAA Screening Report (Ontario) (November 2009), **Exhibit C-92**.

37. DIBC's recitation of the facts relating to the DRIC EA in its Counter-Memorial, while inaccurate or misleading on certain points, serves to confirm Canada's position by highlighting how central this measure is for determining the jurisdiction of this Tribunal.

38. DIBC is correct that at the Illustrative Alternatives stage (June 2005 - November 2005), the DRIC EA examined the option of building a highway from Highway 401 to a twinned Ambassador Bridge (option X12).<sup>60</sup> As already documented in Canada's Memorial, the feasibility of option X12 depended not only upon the crossing itself, but also on customs plaza and Highway 401 road access options. Option X12 was not, and could not be, examined in a vacuum given the "end-to-end" purpose of the DRIC EA. All reasonably possible road access routes from Highway 401 to option X12, i.e., the Ambassador Bridge, were evaluated: turning the entire length of Huron Church Road into a dedicated highway, building a "ring road" through Sandwich Towne or by converting the Essex Terminal Railway line into a dedicated truck route.<sup>61</sup> Each of these road access options had high negative environmental and community impacts on the Windsor neighbourhoods surrounding the Ambassador Bridge.

39. For these and other reasons explained in the DRIC EA, option X12 was dropped from the environmental assessment in November 2005.<sup>62</sup> The Federal Court of Canada reviewed this decision and found that the elimination of option X12 from the DRIC EA was reasonable, unbiased and based on rational criteria.<sup>63</sup>

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<sup>60</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 51-52. See DRIC EA Report, Executive Summary at (vii) and Chapter 6 at 6-1, 6-34 to 6-36, **Exhibit R-47**; Generation and Assessment of Illustrative Alternatives Report (November 2005) at 102-113, **Exhibit R-52**. As Canada noted in its Memorial (n. 50), the DRIC EA's consideration of option X12 was separate and distinct from DIBC's pending application to build the New Span.

<sup>61</sup> Canada Memorial on Jurisdiction, ¶¶ 34-39. DRIC EA Report, Chapter 6 at 6-1, 6-34 to 6-36, **Exhibit R-47**. See also Generation and Assessment of Illustrative Alternatives Report (November 2005) at 102-113, **Exhibit R-52**.

<sup>62</sup> News Release: *Border Transportation Partnership Identifies Central Area of Analysis for a New Detroit-Windsor Border Crossing*, November 14, 2005, **Exhibit R-13**; DRIC EA Report, Chapter 6 at 6-34-6-42, 6-46-6-49, **Exhibit R-47**; Generation and Assessment of Illustrative Alternatives Report (November 2005) at 102-115, **Exhibit R-52**. Second Public Information Open House DRIC Video Presentation (November/December 2005), **Exhibit R-53(a)**.

<sup>63</sup> *Canadian Transit Co. v. Canada (Minister of Transport)*, (2011) 59 C.E.L.R. (3d) 127, 2011 FC 515, Reasons for Order and Order, May 4, 2011 (hereinafter "EA JR (Can.)"), ¶ 108, **Exhibit R-9**.

40. DIBC's Counter-Memorial concedes that the DRIC EA's November 14, 2005 area of continued analysis "limited the area in which a crossing and its highway connection would be considered."<sup>64</sup> There could be no other conclusion: in addition to the area of continued analysis map itself,<sup>65</sup> the November 2005 *Generation and Assessment of Illustrative Alternatives* report shows the precise Highway 401 route connections still under consideration as of that time and *none* of them were going to the Ambassador Bridge.<sup>66</sup>

41. DIBC's Counter-Memorial pays virtually no attention to the period between November 2005 and May 2008 because after November 14, 2005, there was no further consideration of a highway to the Ambassador Bridge and DIBC knew it.<sup>67</sup> Instead, DIBC skips forward to the announcement of the Parkway on May 1, 2008 and suggests that it was surprised that the Parkway was not connected to the Ambassador Bridge.<sup>68</sup> DIBC says that "even then...it was not clear that the Parkway would run only to the NITC/DRIC."<sup>69</sup> As described below, this is simply not credible. Wherever the Parkway was going to end up going by virtue of the DRIC EA, as of November 2005, it was undoubtedly *not* going to the Ambassador Bridge. It is too late under NAFTA Articles 1116(2) and 1117(2) to allege that Canada's actions regarding the Parkway violate the NAFTA.

42. Under the heading "Canada unlawfully eliminated the New Span location from Consideration in the NITC/DRIC Partnership Process,"<sup>70</sup> DIBC's Counter-Memorial repeats all the same allegations and relies on the same documents regarding the

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<sup>64</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 53. MTO confirmed this to DIBC in its letter dated January 31, 2006. See Letter from Roger Ward (MTO) to Dan Stamper (DIBC/CTC) dated January 31, 2006, **Exhibit R-113**.

<sup>65</sup> Detroit River International Crossing Study, Area of Continued Analysis, **Exhibit R-13.1**.

<sup>66</sup> Generation and Assessment of Illustrative Alternatives (November 2005), Exhibit 3.19 "Recommended Area of Continued Study, Canadian Side" at 121, **Exhibit R-52**.

<sup>67</sup> See Witness Statement of Helena Borges (Transport Canada) dated December 6, 2013 ("Borges Statement").

<sup>68</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 57-78.

<sup>69</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 270.

<sup>70</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 84-102.

elimination of option X12 as it did when CTC sought judicial review of the DRIC EA before the Federal Court of Canada. Justice Kelen has already declared CTC's allegations to be "without any merit."<sup>71</sup> Having lost its appeal to the Federal Court of Appeal,<sup>72</sup> DIBC is apparently looking to this Tribunal to act as yet another court of appeal. DIBC and CTC also make the same allegations and rely on the same documents in the Washington Litigation.<sup>73</sup> Canada need not present a further response to DIBC's allegations at this stage other than to say the Federal Court of Canada has already heard them all and rejected them.

## 2. *IBTA*, New Span Environmental Assessment and *BSTA*

43. In addition to its allegations regarding the elimination of option X12, DIBC's Counter-Memorial describes three other measures which it alleges are intended to block or delay its New Span: the *IBTA*, alleged delay of environmental approval of the New Span and the *BSTA*.

44. It is undisputed that the *IBTA* was enacted on February 1, 2007 and it is self-evident from its schedule that it applied to the Ambassador Bridge.<sup>74</sup> DIBC's Counter-Memorial alleges that the *IBTA* was "driven by the desire to promote the NITC/DRIC and to oppose the New Span" and that its application to the Ambassador Bridge violated DIBC's 1990 settlement agreement with Canada.<sup>75</sup> DIBC also complains about the

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<sup>71</sup> EA JR (Can.), ¶ 3, **Exhibit R-9**. See also Canada Memorial on Jurisdiction, ¶¶ 50-51 (Justice Kelen explaining his rejection of CTC's allegations for the elimination of option X12).

<sup>72</sup> *The Canadian Transit Company v. Minister of Transport, et al.*, 2012 FCA 70, Reasons for Judgment, March 1, 2012 (hereinafter "EA JR (Can.) Appeal"), **Exhibit R-15**.

<sup>73</sup> Washington Third Amended Complaint, ¶¶ 192-206, **Exhibit C-141**; *DIBC et al. v. Canada et al.*, (D.D.C. File No. 10-CV-00476-RMC), Plaintiffs' Memorandum of Points and Authorities in Opposition to the Motions to Dismiss and in Support of Plaintiffs' Cross-motion for Partial Summary Judgment on Counts 1, 3, 6 and 7, November 8, 2013 (hereinafter "Washington Litigation Motion for Summary Judgment November 2013"), **Exhibit R-139**.

<sup>74</sup> *International Bridges and Tunnels Act*, S.C. 2007, c. 1 (Schedule), **Exhibit C-94** (including the CTC Act). See DIBC Counter-Memorial on Jurisdiction, ¶ 104.

<sup>75</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 103, 106.

*IBTA*'s purported authority to limit tolls and set approval requirements for the alterations and repairs and says the *IBTA* harms the value of the Ambassador Bridge.<sup>76</sup>

45. DIBC has completely mischaracterized Canada's motivations behind the *IBTA*. Nevertheless, what is notable for the purposes of jurisdiction is that DIBC's Counter-Memorial completely ignores the correspondence between Canada and DIBC between July and November 2007. In this correspondence Canada specifically told DIBC that the *IBTA* applied to the Ambassador Bridge and that its New Span required *IBTA* approval before any construction could begin.<sup>77</sup> DIBC also fails to mention any of the meetings it had with Transport Canada where DIBC was told in no uncertain terms that the *IBTA* applied to the Ambassador Bridge and its New Span project.<sup>78</sup> DIBC also fails to mention that the reason why Canada issued CTC with an order in October 2010 requiring it to stop work on the New Span until it applied for and received *IBTA* approval (DIBC's new alleged date of "first acquired knowledge") was because, despite Canada's notifications to DIBC/CTC in 2007 that it could not do so without authorization, DIBC/CTC went ahead and built the approach ramps for the New Span anyway.<sup>79</sup> DIBC's avoidance of all of these facts further proves that its *IBTA* claim is time-barred.

46. DIBC's Counter-Memorial also alleges that Canada has intentionally delayed approval of its New Span, for which it first sought formal environmental approval in December 2007.<sup>80</sup> While Canada need not present the full weight of argument and evidence against this meritless accusation in this jurisdictional phase, Canada's Memorial already noted that it is CTC that bears the responsibility for any delay because it refused

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<sup>76</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 107-108, 115.

<sup>77</sup> See Canada Memorial on Jurisdiction, ¶¶ 257-262 and exhibits cited therein. See also Borges Witness Statement, ¶ 10, n. 4. DIBC also fails to mention that it participated in the drafting of the *IBTA Regulations* knowing full well that the *IBTA* applied to the Ambassador Bridge. Letter from Dan Stamper (DIBC/CTC) to Jay Rieger (Transport Canada), dated January 18, 2008, **Exhibit R-141**; Letter from Brian Hicks (Transport Canada) to Dan Stamper (DIBC/CTC), dated May 5, 2008, **Exhibit R-140**.

<sup>78</sup> Borges Statement, ¶ 10, n. 4 ("During the July 4, 2007 meeting [with DIBC], Transport Canada's legal counsel also confirmed that Canada disagreed with DIBC's interpretation of the settlement agreement with Canada and confirmed the *IBTA* applied to the Ambassador Bridge in accordance with its terms").

<sup>79</sup> See Canada Memorial on Jurisdiction, ¶¶ 263-265.

<sup>80</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 122-125. Ambassador Bridge Enhancement Project Environmental Impact Statement (hereinafter "New Span EA"), **Exhibit C-89**.

to undertake the required environmental studies for more than three years.<sup>81</sup> It was actually Canada's own good faith efforts to assist CTC to complete the required studies that actually allowed the New Span EA to go forward.

47. As for the *BSTA*, DIBC's Counter-Memorial adds nothing further to the baseless allegations it has made in its previous submissions. At this juncture, Canada need only draw to the Tribunal's attention that, like the alleged delay to the New Span EA, DIBC and CTC make the same allegations in the Washington Litigation as DIBC does here.<sup>82</sup>

### **III. INTERNATIONAL LEGAL PRINCIPLES FOR ESTABLISHING THE TRIBUNAL'S JURISDICTION**

48. The jurisdiction of any international arbitral tribunal rests on the consent of the parties before it to arbitrate. The following section will discuss the general legal principles for establishing the Tribunal's jurisdiction and will demonstrate, first, that it is DIBC's burden to prove that the pre-conditions to Canada's consent to arbitrate under NAFTA Chapter Eleven have been met; second, jurisdiction must be determined as of the date that a NAFTA notice of arbitration is filed; and third, jurisdiction cannot be *ex post facto* created nor can a claim be amended in a manner to fall outside the jurisdiction of the Tribunal.

#### **A. The Claimant Bears the Burden of Proof to Show that it has Met the Jurisdictional Requirements of the NAFTA**

49. The NAFTA Parties only consent to arbitrate under NAFTA Chapter Eleven "in accordance with the procedures set out in this Agreement."<sup>83</sup> Canada's consent is therefore contingent on certain requirements being met, including that the claimant and its enterprise waive their right to pursue and actually refrain from domestic proceedings for damages with respect to the measure(s) alleged to breach the NAFTA (Article 1121)

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<sup>81</sup> Canada Memorial on Jurisdiction, ¶¶ 64-66. See Email/Letter from Kaarina Stiff (Transport Canada) to Dan Stamper (DIBC/CTC) dated January 18, 2008, **Exhibit R-63**; Letter from Bryce Conrad (Transport Canada) to Dan Stamper (DIBC/CTC) dated February 8, 2008, **Exhibit R-64**.

<sup>82</sup> See Part IV-C-2 below.

<sup>83</sup> NAFTA Article 1122(1). An investor and its enterprise must also consent to arbitrate in accordance with the procedures in NAFTA before it is permitted to submit a claim to arbitration. See NAFTA Articles 1121(1)(a) and (2)(a).

and the claim must be timely (Article 1116(2) and 1117(2)).<sup>84</sup> Failure to comply with these requirements means there is no arbitration agreement and, thus, no jurisdiction for the tribunal.<sup>85</sup>

50. DIBC argues in its Counter-Memorial that it is Canada's burden to prove that DIBC has *not* fulfilled the conditions necessary to establish Canada's consent to arbitrate.<sup>86</sup> This is not correct. An investor bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions necessary to commence arbitration and that the tribunal has jurisdiction over the dispute.

51. NAFTA tribunals have consistently upheld this principle. For example, the tribunal in the most recent NAFTA Chapter Eleven arbitration – *Apotex v. United States* – stated: “Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction in this regard.”<sup>87</sup> Other NAFTA tribunals, including *Methanex*, *Bayview* and *Grand River*, also affirmed that it is for the claimant to establish that its claims fall within NAFTA Chapter Eleven and within the tribunal's jurisdiction.<sup>88</sup>

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<sup>84</sup> *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002, (hereinafter “*Methanex*, Partial Award”), ¶ 120, **RLA-3**.

<sup>85</sup> See Canada's Memorial on Jurisdiction, ¶ 84 and citations in n.125-126.

<sup>86</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 133 (“Canada has failed to satisfy its burden of proof with respect to its waiver defense.”).

<sup>87</sup> *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, June 14, 2013 (hereinafter “*Apotex*, Jurisdictional Award”), ¶ 150, **RLA-33** (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, April 15, 2009, ¶¶ 58-64, **RLA-32** (summarizing previous decisions and concluding (“if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase.”)).

<sup>88</sup> *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, August 7, 2002 (hereinafter “*Methanex*, Partial Award”), ¶¶ 120-121, **RLA-3** (finding that a claimant must establish that the requirements of NAFTA Articles 1116-1121 have been met); *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, June 19, 2007 (hereinafter “*Bayview*, Award”), ¶¶ 63, 122, **RLA-24** (finding that “Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven” and rejecting claimant's submission that “Respondent bears the burden of demonstrating that the Tribunal should not hear the claim...”); *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL) Award, January 12, 2011 (hereinafter “*Grand River*, Award”), ¶ 122, **RLA-22** (“Claimants must...establish an investment that falls within one or more of the categories established by that Article [1139]”).

52. Other international tribunals have also confirmed that the onus is on the claimant to establish that an arbitral tribunal has jurisdiction over the dispute. For example, the tribunal in *Tulip Real Estate* recently held: “[a]s a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase.”<sup>89</sup> This same was confirmed by the tribunal in *ICS Inspection*:

[A] State’s consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. *The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.*<sup>90</sup>

53. It is axiomatic that an arbitral tribunal must determine whether it has jurisdiction over the dispute.<sup>91</sup> NAFTA and other international tribunals have confirmed that a “[t]ribunal must satisfy itself of the existence and extent of its jurisdiction.”<sup>92</sup> Thus, in the context of this dispute, the Tribunal must assess whether the Claimant has fulfilled all of

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<sup>89</sup> *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48, **RLA-34**. See also Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192, **RLA-35** (“[Claimant] has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction.”); *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction, 22 April 2005, ¶ 79, **RLA-36** (“Claimant acknowledged it had the burden of proving jurisdiction”).

<sup>90</sup> *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280, **RLA-37** (emphasis added). This principle has been long established at the International Court of Justice. See *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J Reports, 4 June 2008, ¶ 62, **RLA-38** (“The consent allowing for the Court to assume jurisdiction must be certain... whatever the basis of consent, the attitude of the respondent State must ‘be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable manner’” (internal citations omitted)).

<sup>91</sup> UNCITRAL Rules (2010), Article 23(1) (“The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”).

<sup>92</sup> *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)* (UNCITRAL) Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219, **RLA-39**; *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002 (hereinafter “*Methanex, Partial Award*”), ¶¶ 107, **RLA-3**. (“Tribunal has the express power to rule on objections that it has no jurisdiction.”).

the pre-conditions to arbitration, including Articles 1121 and 1116(2) and 1117(2).<sup>93</sup> If the Tribunal is not satisfied that the Claimant has met its burden, then jurisdiction must be denied.

### **B. Jurisdiction is Determined on the Date that the Notice of Arbitration is Filed**

54. In its Counter-Memorial, DIBC assumes that the Tribunal's jurisdiction can be established after the date DIBC submitted its claim to arbitration, that is, April 29, 2011. For example, in the context of Article 1121, DIBC assumes that the jurisdiction of the Tribunal is determined by reference to its most recent domestic legal pleadings as amended.<sup>94</sup>

55. DIBC's assumption is incorrect at law. Under NAFTA Chapter Eleven the jurisdiction of a tribunal is determined on the date the claim is submitted to arbitration, not after.<sup>95</sup> For example, Article 1121 stipulates that a claim may be submitted to arbitration "*only if*" an investor and its enterprise file a valid waiver and comply with that waiver as of the date the notice of arbitration is submitted.<sup>96</sup> Also, NAFTA Articles 1116(2) and 1117(2) measures the timeliness of an investor's claim from the date on which it filed the notice of arbitration.

56. This general rule of international law has been confirmed by NAFTA and other international courts and tribunals.<sup>97</sup> For example the *Waste Management I* tribunal stated

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<sup>93</sup> Canada Memorial on Jurisdiction, ¶ 81 and cases cited therein. DIBC agrees that Article 1121 is a prerequisite to arbitration. See DIBC Counter-Memorial on Jurisdiction, ¶ 135.

<sup>94</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 178.

<sup>95</sup> Canada Memorial on Jurisdiction, ¶ 88.

<sup>96</sup> *Waste Management Inc. v. United Mexican States* (UNCITRAL) Award, 2 June 2000 (hereinafter "*Waste Management I*, Award"), ¶¶ 19, 24, **RLA-4**.

<sup>97</sup> See e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*) (ICSID Case No. ARB/97/3) Decision on Jurisdiction, November 14, 2005 (hereinafter "*Vivendi III*, Jurisdictional Award"), ¶¶ 60-63, **RLA-40**, ("[i]t is generally recognized that the determination of whether a party has standing in an international judicial forum, for the purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this rule."); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judgment, February 14, 2002, ¶ 26, **RLA-41**

that, as of the date of filing the NAFTA notice of arbitration, the claimant must prove that it has fully complied with Article 1121 otherwise the tribunal is without jurisdiction.<sup>98</sup> Similarly, the tribunal in *Commerce Group* also found that compliance with a waiver provision must be examined as of the date the claim to arbitration was filed, not later.<sup>99</sup>

57. DIBC submitted its claim to arbitration against Canada on April 29, 2011 and the Tribunal must use this date to determine whether it has jurisdiction over this dispute.<sup>100</sup> DIBC cannot *ex post facto* create jurisdiction after it has submitted its NAFTA claim to arbitration without the express consent of Canada,<sup>101</sup> which Canada has not and will not provide.<sup>102</sup>

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(“[t]he Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed.”); See also Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009) at 92, **RLA-42** (“[a]part from specific rules about critical dates, the date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met.”).

<sup>98</sup> *Waste Management I*, Award, ¶¶ 19, 24, **RLA-4** (“[I]t is evident that submission of the waiver must take place in conjunction with that of the notice mandated by Article 2 of the Additional Facility Arbitration Rules, and from this date it will come into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof [...] such an abdication of rights ought to have been made effective as from the date of the submission of the waiver...”)

<sup>99</sup> *Commerce Group Corp et al. v. The Republic of El Salvador* (ICSID Case No. ARB/09/17) Award, March 14, 2011 (hereinafter “*Commerce Group*, Award”), ¶¶ 96-97, **RLA-6** (rejecting the claimant’s argument that the date the Tribunal was constituted (a year after the NOA was filed) is the date to determine compliance with the waiver provision).

<sup>100</sup> Canada has objected to the jurisdiction of the Tribunal continuously since that time. See Canada’s letter to the Tribunal dated November 2, 2012 attaching Canada’s letters to DIBC dated June 6, 2011 (**Exhibit R-22**), October 3, 2011 (**Exhibit R-21**), December 28, 2011 (**Exhibit R-25**) and March 15, 2012 (**Exhibit R-23**). Canada’s objections were made explicitly with respect to DIBC’s non-compliance with Article 1121. Canada also reserved its right to raise other jurisdictional objections, which Canada has done with respect to NAFTA Articles 1116(2) and 1117(2).

<sup>101</sup> See *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶ 61, **RLA-7**. (“The Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. *It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied...*”). See *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, August 7, 2002, ¶ 93 (hereinafter “*Methanex*, Partial Award”), **RLA-3** (where the challenge to the defective waiver submitted by the Claimant was amicably settled by the disputing parties.).

<sup>102</sup> See Canada Memorial on Jurisdiction, ¶ 2, n. 1.

**C. The Claimant Cannot Amend its Claim to Include Claims over which the Tribunal has no Jurisdiction**

58. If the Tribunal did not have jurisdiction as of the date of DIBC's First NAFTA NOA (April 29, 2011) due to DIBC's failure to comply with Article 1121, then the Tribunal cannot have jurisdiction over the claims in DIBC's amended submission. Under the NAFTA the Tribunal cannot have jurisdiction over an amended claim that was not validly submitted to arbitration in the first place. In any event, an amended claim could only be valid to the extent that it is not "amended or supplemented in such a manner that the amended or supplemented claim or defense falls outside the jurisdiction of the arbitral tribunal."<sup>103</sup> UNCITRAL Rule Article 22 establishes "an overall and absolute prohibition against introducing amendments which go beyond the scope of the arbitration clause."<sup>104</sup>

59. As described below, in addition to filing a waiver even more defective than the first, DIBC's Amended NAFTA NOA is an amendment of its original claim in a manner that falls outside the Tribunal's jurisdiction. For example, DIBC's amended claim is with respect to measures at issue in domestic proceedings which DIBC and CTC initiated and continued in contravention of Article 1121. DIBC's Amended NAFTA NOA also includes a new claim against the *IBTA* that was, even as of April 29, 2011, already time-barred under Article 1116(2) and 1117(2).

**IV. DIBC HAS FAILED TO ESTABLISH THAT IT HAS COMPLIED WITH NAFTA ARTICLE 1121**

**A. Summary of Canada's Position**

60. It cannot be disputed that the conditions set out in Article 1121 must be fulfilled in order to perfect the consent of a NAFTA Party offered by Article 1122(1). Even DIBC

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<sup>103</sup> UNCITRAL Arbitration Rules (2010), Article 22.

<sup>104</sup> *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Decision on Motion to Add a New Party, January 31, 2008 (hereinafter "*Merrill & Ring*, Decision to Add a New Party"), ¶ 18, **RLA-43**. See also *Methanex v. The United States of America* (UNCITRAL) Award, August 3, 2005 (hereinafter "*Methanex*, Award"), Part II, Chapter F, ¶¶ 21-25, **RLA-23** (rejecting claimants attempt to amend its claim without having provided a waiver under NAFTA Article 1121). See generally David Caron, Lee M. Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules, A Commentary*, (Oxford: Oxford University Press, 2006) at 468, **RLA-44**.

agrees that compliance with Article 1121 is a prerequisite to arbitration.<sup>105</sup> It is also beyond debate that failure to comply with Article 1121 deprives a NAFTA tribunal of jurisdiction. These have been the consistent conclusions of NAFTA tribunals and the consistent position of the NAFTA Parties.<sup>106</sup>

61. DIBC's Counter-Memorial offers evasive explanations of its inadequate waivers and of the claims DIBC and CTC are pursuing in the ongoing domestic litigations. The gravamen of this NAFTA arbitration and each of the domestic litigations are the same: DIBC alleges that it has an "exclusive franchise" on toll bridges across the Detroit River and argues that Canada has, through various measures, violated this right and reneged on promises made to DIBC. The measures include an alleged promise to build a direct link between Highway 401 and the Ambassador Bridge, approving a new bridge with a highway leading thereto but not the Ambassador Bridge, enacting the *IBTA*, delaying approval of the Ambassador Bridge New Span and enacting the *BSTA*, as well as various actions by Canada to give effect to these measures. Each proceeding involves overlapping facts, documents, witnesses, allegations and questions of law which put these measures at issue. That the domestic litigations in question are with respect to measures alleged to breach the NAFTA is the inevitable conclusion arising from a plain reading of DIBC and CTC's pleadings, vast portions of which are entirely duplicative.

62. In the following section, Canada will demonstrate that DIBC's interpretation of Article 1121 has no basis in the ordinary meaning of the text in its context in light of the object and purpose of the NAFTA. Further, Canada will demonstrate that DIBC did not file a valid waiver on the date the claim was submitted to NAFTA arbitration and that; in any event, DIBC has not acted consistently with the requirements of Article 1121. As such, this Tribunal is without jurisdiction over DIBC's claim.

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<sup>105</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 135.

<sup>106</sup> See Canada Memorial on Jurisdiction, ¶¶ 81-85 and sources cited therein.

**B. DIBC's Interpretation of NAFTA Article 1121(1)(b) and 2(b) is Contrary to its Ordinary Meaning and Object and Purpose**

**1. Compliance with Article 1121 is DIBC's Responsibility to Establish, Not that of Canada or the Tribunal**

63. As explained above and in Canada's Memorial, a NAFTA Party does not consent to arbitrate under Chapter Eleven until the claimant has submitted a valid waiver that conforms to the ordinary meaning and object and purpose of Article 1121 *and* refrains from initiating or continuing any domestic litigation proceedings with respect to measures alleged to breach the NAFTA, unless those proceedings fall within the limited exception allowed in Articles 1121(1)(b) and (2)(b). The decision of NAFTA tribunals, other international tribunals, and the positions of the other NAFTA Parties, all support Canada's view.<sup>107</sup>

64. In its Counter-Memorial, DIBC proffers a theory of Article 1121 that is unsupported by the provision's ordinary meaning and the object and purpose of the NAFTA. First, DIBC argues that Article 1121 only requires that a waiver be in writing and delivered with the submission of a claim to arbitration.<sup>108</sup> DIBC argues that a waiver under Article 1121 is not required to take a particular form or substance. This is incorrect. While Article 1121(3) says that "a consent and waiver *required by this Article* [1121] shall be in writing, shall be delivered to [Canada] and shall be included in the submission of a claim to arbitration" (emphasis added), 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."<sup>109</sup> If DIBC's interpretation were accepted, then any claimant could file a waiver that is completely at odds with the requirements of Article 1121(1)(b) and 2(b).

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<sup>107</sup> *Waste Management I*, Award, ¶ 31, RLA-4; *Commerce Group*, Award, ¶¶ 80-84, 115, RLA-6; See also Canada Memorial on Jurisdiction ¶ 84 and materials cited in n. 126.

<sup>108</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 136-139.

<sup>109</sup> *Commerce Group*, Award, ¶¶ 80-84, RLA-6.

65. Second, DIBC argues that under Article 1121 a claimant has no affirmative obligation to discontinue its domestic proceedings with respect to the measures alleged to breach the NAFTA.<sup>110</sup> This is also incorrect. The responsibility to materially comply with a waiver lies with the claimant. As the tribunal in *Commerce Group* stated, “logic tells us that it is up to the Claimants to make the waiver of their legal rights effective, not Respondent.”<sup>111</sup> Contrary to DIBC’s assertion,<sup>112</sup> the tribunal in *Waste Management I* also affirmed Canada’s position that a claimant is “obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”<sup>113</sup> It was precisely the claimant’s failure to do so that led the majority of the *Waste Management I* tribunal to conclude that it had no jurisdiction.

66. DIBC argues that if it were required to refrain from initiating or continuing parallel proceedings as of the date it submitted its claim to arbitration, it would be required to abandon its domestic proceedings before its NAFTA case “has been fully developed.”<sup>114</sup> This is simply not the case. Investors have *three years* since first acquiring knowledge of an alleged breach before a NAFTA arbitration needs to be commenced with respect to an impugned measure.<sup>115</sup> Investors are free to pursue domestic claims for damages for that entire period, which is efficient for both the investor and NAFTA Party because doing so will not impair the investor’s future ability to pursue arbitration, nor will it force the respondent government to deal with parallel proceedings.<sup>116</sup> It is true that

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<sup>110</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 149.

<sup>111</sup> *Commerce Group*, Award, ¶ 86, **RLA-6**.

<sup>112</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 149-153.

<sup>113</sup> *Waste Management I*, Award, ¶ 19, **RLA-4**.

<sup>114</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 150-151.

<sup>115</sup> NAFTA Articles 1116(2) and 1117(2).

<sup>116</sup> Campbell McLachlan Q.C., Laurence Shore & Matthew Weiniger, *Investment Treaty Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 107, **RLA-45** (referring to NAFTA Article 1121: “This route presents an advantage for both the investor and the host State, in that the investor may choose to seek to resolve his dispute in the local courts of the host State, without prejudice to subsequent resort to an investment tribunal should the investor still consider that the treaty standards have not been met. Once treaty arbitration has been invoked, the tribunal will be able to view the host State’s conduct in the round...but neither the tribunal nor the host State will, at that stage, have to contend with parallel proceedings.”).

domestic proceedings for damages cannot continue once the investor decides to choose NAFTA arbitration, but injunctive and declaratory relief can still be pursued against the respondent NAFTA Party in its own courts and still be fully consistent with Article 1121. The NAFTA Parties chose to adopt this procedure because it was a fair compromise to promote efficiency. That the procedure does not suit DIBC and CTC's vexatious litigation strategy is irrelevant for the purposes of interpreting the ordinary meaning and purpose of NAFTA Article 1121.

67. Third, DIBC misconstrues Canada's position to mean that the Tribunal must "police whether the Claimant's other domestic litigation claims are consistent with the NAFTA waiver"<sup>117</sup> and that the NAFTA Tribunal has authority to order the cessation of other litigation.<sup>118</sup> Based on its own misinterpretation of Canada's position, DIBC argues that Article 1121 does not authorize the Tribunal to police domestic lawsuits and as such, the Tribunal's authority relates only "to the matters before it."<sup>119</sup>

68. DIBC's argument is misguided and does not reflect Canada's position. Article 1121 does not require the Tribunal to "police" DIBC's multiple domestic lawsuits against Canada. Instead, what the Tribunal must do is "police" its own jurisdiction. Unless DIBC has actually done what is required by Article 1121, including having terminated domestic proceedings with respect to measures alleged to breach NAFTA, it is the NAFTA arbitration that must be terminated for lack of jurisdiction. This is precisely the "matter" before the Tribunal and clearly within its authority. This principle was confirmed by the Tribunal in *Waste Management I* and *Commerce Group*.<sup>120</sup>

69. DIBC relies on *Vanessa Ventures* to support their proposition, but that case does not help DIBC either.<sup>121</sup> In *Vanessa Ventures*, the claimant had withdrawn domestic

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<sup>117</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 147.

<sup>118</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 149.

<sup>119</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 143.

<sup>120</sup> *Waste Management I*, Award, ¶ 15, **RLA-4** ("[The Tribunal] lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one."); *Commerce Group*, Award, ¶ 97, **RLA-6** ("the issue of waiver is a question of jurisdiction.").

<sup>121</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 146; *Vanessa Ventures Ltd. v. The Bolivarian Republic of*

proceedings with respect to measures alleged to violate the Canada-Venezuela investment treaty. Venezuela raised the question of whether it made a difference under Venezuelan law that withdrawal had to be with or without prejudice to ensure the claimant could not pursue domestic claims in the future once the treaty arbitration was completed. The tribunal decided that it need not resolve that domestic law question in light of the definitive statement in a ruling by the Supreme Court of Venezuela that the claimant had “undoubtedly” waived its right to pursue domestic proceedings in favour of arbitration under the investment treaty.<sup>122</sup> This resolved the waiver question conclusively for the tribunal. *Vanessa Ventures* supports Canada's position that a claimant must terminate domestic damages proceedings before the respondent State's national courts if it wants to pursue treaty arbitration and that the waiver must be genuinely enforceable in domestic courts.<sup>123</sup>

70. Fourth, DIBC argues that it is the respondent State who should take the waiver delivered by the claimant to domestic courts for enforcement.<sup>124</sup> This is incorrect. Canada is under no obligation to do so. As the tribunal in *Commerce Group* stated, “the Tribunal has been provided with no reason to conclude that the formal and material requirements of the waiver provision should be divided between the Parties. In any event, logic tells us that it is up to the Claimants to make the waiver of their legal rights effective, not Respondent.”<sup>125</sup> Even if Canada were to choose such course of action, the waiver required by Article 1121 must be legally enforceable now and in perpetuity so that a claimant cannot later pursue domestic proceedings for damages with respect to measures

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*Venezuela* (ICSID Case No. ARB(AF)/04/6) Decision on Jurisdiction, August 22, 2008 (hereinafter “*Vanessa Ventures*, Jurisdictional Decision”), **CLA-17**.

<sup>122</sup> *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) Decision on Jurisdiction, August 22, 2008 (hereinafter “*Vanessa Ventures*, Jurisdictional Decision”) at 27, **CLA-17**.

<sup>123</sup> See *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) Award, January 16, 2013, ¶ 229, **RLA-46** (“Claimant had sought to litigate various aspects of the dispute before the Venezuelan courts, but eventually decided to waive its right to continue its proceedings before the Venezuelan courts in order to pursue the present arbitration. Such a waiver is a necessary precondition of access to arbitration under the Canada-Venezuela BIT, stipulated by Article XXI (3)(b).”).

<sup>124</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 152.

<sup>125</sup> *Commerce Group*, Award, ¶ 86, **RLA-6**.

alleged to breach NAFTA even after the NAFTA arbitration is over. This is consistent with the ordinary meaning of the provision, which requires that a claimant make a clear choice between pursuing its claims under NAFTA or in domestic court - it cannot do both.<sup>126</sup> What DIBC fails to recognize, however, is that a claimant cannot even commence NAFTA arbitration without also delivering a waiver that complies with the requirements of Article 1121 and refraining from pursuing parallel domestic proceedings. Unless these requirements are met, the question of future enforcement of a waiver in domestic courts is moot.

71. Fifth, DIBC says that “Canada is free to attempt to enforce Claimant’s Article 1121 waiver in the domestic cases themselves.”<sup>127</sup> This invitation is disingenuous: even without the defective language in both of DIBC’s waivers (discussed below), and even if the onus was on Canada to do this (it is not), it would be futile for Canada to even attempt to enforce DIBC’s waivers in the Washington Litigation and CTC Litigation given that DIBC expressly carved-out those proceedings from its waivers.<sup>128</sup>

72. Article 1121 requires more than simply providing a written document to the respondent NAFTA Party. The waiver must be consistent with the ordinary meaning of Article 1121 and its object and purpose and a claimant must act in accordance with the waiver by refraining from initiating or continuing any domestic proceedings other than those expressly permitted by Article 1121. Otherwise, the objective of that provision to provide legal certainty and avoid situations where respondent States are faced with multiple overlapping proceedings with respect to the measures cannot be achieved.

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<sup>126</sup> *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Canada’s Article 1128 Submission, December 17, 1999 (hereinafter “*Waste Management I*, Canada’s 1128 Submission”), ¶ 5, **RLA-9**.

<sup>127</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 172.

<sup>128</sup> While the Windsor Litigation is not explicitly carved-out of DIBC’s waivers, as discussed below, DIBC has refused to identify the Windsor measures at issue in this NAFTA arbitration. Thus, attempting to enforce the waiver in those proceedings would also be futile.

## **2. The Term “Proceedings With Respect to a Measure” Cannot Be Interpreted As Proposed By DIBC**

73. In its Memorial on Jurisdiction, Canada explained that the term “proceedings with respect to” a measure in Article 1121(1)(b) and 2(b) means a domestic proceeding that is in regards to a measure that might directly affect the disposition of the NAFTA arbitration, for example, if the domestic proceeding requires for its disposition making determinations of certain facts or of legal rights, or that might award compensation, in regards to or with reference to a measure alleged to breach NAFTA.<sup>129</sup>

74. In its Counter-Memorial, DIBC advocates a very narrow interpretation of proceedings “with respect to” that would require a waiver of claims only if the exact measure is specifically challenged and identified as the specific basis of its claim in domestic proceedings. DIBC argues that “for claims to overlap” they must be seeking relief for “the same government action.”<sup>130</sup>

75. DIBC’s interpretation is incorrect (and unhelpful to its case in any event). The ordinary meaning of the words “with respect to” is “as regards; with reference to,”<sup>131</sup> not “identical” or “same as.” The NAFTA Parties could have chosen more restrictive language such as “proceedings challenging the same measure of the disputing Party...” if that had been their intention. Instead, the NAFTA uses the more encompassing concept of proceedings, which are “with respect to” the measure alleged to breach the NAFTA. Article 1121 is focused on the *underlying actions* of the respondent Party at issue, not the cause of action and “not on the claims to which such a measure may give rise.”<sup>132</sup>

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<sup>129</sup> Canada Memorial on Jurisdiction, ¶ 95.

<sup>130</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 156.

<sup>131</sup> Oxford Dictionary- Online, definition of “with respect to”, **Exhibit R-82**. The term “with respect to” is, by its very nature, broad and inclusive. The equally authoritative French and Spanish texts of the NAFTA use similarly broad language. In French, “des procédures *se rapportant* à la mesure...” is used and means proceedings “relating to” or “in logical relation with.” See *Accord de libre-échange nord-américain, Loi portant mise en oeuvre de l’*, ch. 44, 1991-92-93, Statutes of Canada, **RLA-47**; Alain Rey, *Le Robert Micro Poche*, 2ed. (Montreal: Dictionnaires Le Robert, 1988), **Exhibit R-142**. The Spanish text uses “respecto a la medida...” which means proceedings “respecting” the measure. See *El Tratado de Libre Comercio en America del Norte, Executive Decree of December 14, 1993, Diario Oficial*, December 20, 1993, **RLA-48**.

<sup>132</sup> Campbell McLachlan, Q.C., Laurence Shore & Matthew Weiniger, *Investment Treaty Arbitration: Substantive Principles*, (Oxford: Oxford University Press, 2007) at 109, **RLA-45**. (emphasis added).

76. Moreover, DIBC's interpretation would erode the purpose of Article 1121 by allowing significant overlap between parallel proceedings. The *Consolidated Lumber* tribunal stated that "the words 'with respect to' are to be interpreted broadly" because of Article 1121's goal of preventing concurrent and overlapping proceedings.<sup>133</sup> A narrow construction of the term "with respect to" is inconsistent with the intention of the NAFTA Parties because, as the *Thunderbird* tribunal stated, the "specific purpose" of Article 1121 is "to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."<sup>134</sup> A proper interpretation of "with respect to" must safeguard the goal of Article 1121 to prevent a respondent State from expending considerable resources defending itself in multiple fora and prevent the "imminent risk that the Claimant may obtain the double benefit in its claim for damages."<sup>135</sup> As noted by the tribunal in *Waste Management I*, such situations are "precisely what NAFTA Article 1121 seeks to avoid."<sup>136</sup> In other words, the ordinary meaning and object and purpose of Article 1121 is to "preclude the pursuit of all other claims arising out of the act of the host State which is complained of, even if such claims are founded upon municipal law."<sup>137</sup>

77. In *Commerce Group*, the claimant attempted to characterize certain actions by El Salvador as separate and distinct measures. The tribunal had already decided that the Claimant's parallel proceedings with respect to the revocation of a mining permit violated the waiver provision of the CAFTA. The claimant, however, argued that the tribunal still had jurisdiction over an aspect of the CAFTA case dealing with a *de facto* mining ban policy which was not part of domestic proceedings. The tribunal disagreed with the

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<sup>133</sup> *Canfor Corporation v. United States of America and Terminal Forest Products Ltd v. United States of America* (UNCITRAL) Decision on Preliminary Question, June 6, 2006, ¶¶ 201, 237, 242, **RLA-12**.

<sup>134</sup> *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, January 26, 2006 (hereinafter "Thunderbird, Award"), ¶ 118, **RLA-5**.

<sup>135</sup> *Waste Management I*, Award, ¶ 27, **RLA-4**.

<sup>136</sup> *Waste Management I*, Award, ¶ 27, **RLA-4**.

<sup>137</sup> Campbell McLachlan Q.C., Laurence Shore & Matthew Weiniger, *Investment Treaty Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 129, **RLA-45** (emphasis added). See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 158, **RLA-49**.

claimant's characterizations and found that the permit revocation and the mining policy were both "part and parcel of their claim" and not "separate and distinct," meaning the domestic proceedings were with respect to the measure alleged to breach the CAFTA.<sup>138</sup>

78. Thus, interpreting Articles 1121(1)(b) and 2(b) in accordance with the *Vienna Convention of the Law of Treaties* and with regard to the findings of other tribunals, a determination as to whether domestic proceedings are "with respect to" a measure alleged to breach the NAFTA involves considering whether the measures in question play more than just an incidental or insignificant role in the both proceedings. 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 is "with respect to" the measure under Article 1121.

79. DIBC refers to *Waste Management, Feldman* and *Genin* to buttress its vague assertions that "cases may co-exist which do not challenge the same measures,"<sup>139</sup> "related measures could coexist in domestic cases and NAFTA arbitrations,"<sup>140</sup> and that "factual overlap alone [is] not enough to preclude jurisdiction."<sup>141</sup> But those cases are unhelpful to DIBC's arguments or are irrelevant.

80. DIBC relies on an extract from *Waste Management I*: "proceedings instituted in a national forum may exist *which do not relate* to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA." (emphasis added)<sup>142</sup> Canada agrees: domestic proceedings "*which do not relate*" to the measure alleged to breach NAFTA can proceed in parallel because they would not be "with respect to" that measure. However, this Tribunal has no jurisdiction

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<sup>138</sup> *Commerce Group*, Award, ¶¶ 111-112, **RLA-6**.

<sup>139</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 156.

<sup>140</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 157.

<sup>141</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 158.

<sup>142</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 156, citing *Waste Management I*, Award, ¶ 27, **RLA-4**.

for precisely this reason: DIBC and CTC's domestic proceedings *do relate* to the measures alleged to breach the NAFTA which is why they cannot coexist.<sup>143</sup>

81. DIBC also relies on *Feldman v. Mexico*,<sup>144</sup> but that case is also unhelpful to its cause. The reason why the *Feldman* tribunal "did not object to the investor's concurrent proceedings"<sup>145</sup> was because the Mexican domestic proceedings were for *declaratory relief* only, so there was no conflict with Article 1121.<sup>146</sup> *Feldman* serves to undermine DIBC's own position.

82. Finally, DIBC relies on the decision of *Genin* for the proposition that "factual overlap alone [is] not enough to preclude jurisdiction."<sup>147</sup> However the *Genin* decision is irrelevant for interpreting NAFTA Article 1121. In *Genin*, the tribunal was interpreting a "fork-in-the-road" provision in Article VI of the 1994 Estonia-United States BIT, which uses different language than NAFTA Article 1121 and is a legally distinct provision from the waiver provision used in the NAFTA.<sup>148</sup>

83. DIBC's narrow interpretation of "with respect to" under NAFTA Article 1121 has no basis in the ordinary meaning of those terms. As described below, DIBC's domestic proceedings are undoubtedly with respect to the measures alleged to breach the NAFTA.

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<sup>143</sup> *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Canada's Article 1128 Submission, December 17, 1999 (hereinafter "*Waste Management I*, Canada's 1128 Submission"), ¶ 5, **RLA-9**; *Waste Management I*, Award, ¶ 27, **RLA-4**.

<sup>144</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 157; *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, December 16, 2002 (hereinafter "*Feldman*, Award"), **RLA-14**.

<sup>145</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 157.

<sup>146</sup> *Feldman*, Award, ¶¶ 77-78, 85, **RLA-14**. The claimant in *Feldman* was challenging the validity of the tax assessment of the Mexican tax authorities and Mexico did not argue that it was obliged to discontinue the claim precisely because it was only seeking a declaration regarding its tax rebates.

<sup>147</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 158.

<sup>148</sup> "Fork-in-the-road" provisions like that in the 1994 Estonia-U.S. BIT are different from NAFTA Article 1121 because they automatically bar investors from pursuing investment treaty arbitration as soon as domestic remedies are pursued. In contrast, Article 1121 allows investors to pursue domestic litigation for three years before having to decide whether to pursue investor-state arbitration, but even at that point, domestic injunctive and declaratory proceedings can continue. See Campbell McLachlan Q.C., Laurence Shore & Matthew Weiniger, *Investment Treaty Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 107, **RLA-45**.

**3. “Not Involving the Payment of Damages” Includes Damages as an Alternative Means of Relief**

84. Articles 1121(1)(b) and 2(b) allow proceedings to continue in the domestic courts of the respondent NAFTA Party simultaneously with the NAFTA arbitration as long as the domestic proceedings are for injunctive, declaratory or other extraordinary relief and “not involving the payment of damages.”<sup>149</sup> As Canada explained in its Counter-Memorial, the ordinary meaning of the text precludes proceedings which include a request for monetary compensation, whether directly or indirectly.

85. In its Counter-Memorial, DIBC argues that Article 1121 allows it to seek damages in the domestic courts of the respondent NAFTA Party as long as the damages sought are “in the alternative” to other equitable relief or as long as the damages are not being sought for the “same” measures alleged to breach NAFTA.<sup>150</sup>

86. DIBC's interpretation does not find any support in the plain language of Article 1121, which explicitly states that “proceedings” for injunctive or declaratory relief in the respondent State must not “involv[e] the payment of damages.” That a request for damages is made in the alternative, or posited on some future event, or are not being sought for the “same” measures alleged to breach the NAFTA does not mean that the proceedings are “not involving the payment of damages” as articulated in Article 1121. DIBC's interpretation would create an exception under Article 1121 that does not exist on a good faith reading of the text.

**4. DIBC's Interpretation of “proceedings...before an administrative tribunal or court under the law of the disputing Party” is Wrong**

87. As Canada explained in its Memorial, “proceedings for injunctive, declaratory or other extraordinary relief” may co-exist with a NAFTA proceeding only when such

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<sup>149</sup> Canada Memorial on Jurisdiction, ¶ 99. See NAFTA Article 1134 (“A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.”); NAFTA Article 1135(1) (providing that a NAFTA tribunal may only award monetary damages or restitution of property).

<sup>150</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 209-211.

proceedings are within the jurisdiction of the respondent State.<sup>151</sup> This is consistent with the plain language of Article and its object and purpose.

88. In its Counter-Memorial, DIBC agrees that the reference to “disputing Party” refers to Canada.<sup>152</sup> However, DIBC argues that it may seek declaratory or injunctive relief before U.S. courts against Canada with respect to measures alleged to breach the NAFTA so long as they are brought “under Canadian law.”<sup>153</sup> DIBC’s position is illogical. Any injunctive or declaratory relief available in United States courts are under the laws of the United States, not Canada. Relief granted pursuant to U.S. law, even based on an alleged violation of Canadian law is not relief “under the law of” Canada as permitted by Article 1121(1)(b) and (2)(b).

89. DIBC also argues that domestic proceedings for injunctive or declaratory relief against Canada are permitted before U.S. courts to protect “rights which arise pursuant to Canadian law.”<sup>154</sup>

90. DIBC’s interpretation is not, however, supported by the plain language of Article 1121. The phrases “before an administrative tribunal or court” and “under the law of the disputing Party” are not disjunctive, but are part of the same sentence: “before an administrative tribunal or court under the law of the disputing Party.” The phrase “before an administrative tribunal or court” is modified by “under the law of the disputing Party,” meaning that claims for declaratory or injunctive relief are only permissible if brought “before an administrative tribunal or court” that owes its existence to or operates “under the law of” the respondent State.

91. The *Feldman* tribunal confirmed this interpretation, indicating that injunctive and declaratory relief was available only before the local courts of the disputing Party.<sup>155</sup> This

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<sup>151</sup> Canada Memorial on Jurisdiction, ¶ 100.

<sup>152</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 163 (“In this case, ‘under the law of the disputing Party’ means under Canadian law.”).

<sup>153</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 163.

<sup>154</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 207.

<sup>155</sup> *Feldman*, Award, ¶¶ 67, 73, **RLA-14**.

was also precisely the interpretation given by Mexico in the *Loewen* dispute in which Mexico indicated in its submission pursuant to NAFTA Article 1128 that while bringing a claim against the United States, a Canadian claimant “could not initiate or continue proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages before an administrative tribunal or court other than the administrative tribunals and domestic courts of the United States.”<sup>156</sup>

92. DIBC argues that the draft texts of NAFTA Chapter Eleven demonstrate “that there was debate over whether the waiver exception for claims seeking declaratory or injunctive relief should apply to claims brought under the law of the disputing Party, or claims brought in the domestic courts of the disputing Party.”<sup>157</sup> DIBC argues that the NAFTA Parties made a “conscious decision” to allow domestic proceedings for injunctive or declaratory relief against a respondent State in the courts of a jurisdiction other than the respondent State.<sup>158</sup> In other words, DIBC argues that, for example, the United States made a “conscious decision” to allow itself to be sued for injunctive and declaratory relief in Canadian or Mexican courts alleging breaches of U.S. law with respect to the measures at issue in a NAFTA arbitration.

93. DIBC misreads the NAFTA drafts.<sup>159</sup> The choice was not between either “injunctive or declaratory claims before an administrative tribunal or court of the disputing Party” or “injunctive or declaratory claims under the domestic law of the disputing Party”. The choice between referring to “administrative tribunal or court” and “under the domestic law” was a choice of how to describe the “proceedings” referred to in the clause; that is, either as “proceedings before an administrative tribunal or court of the disputing Party,” or “proceedings under the domestic law of the disputing Party.” Under neither option did the NAFTA Parties contemplate non-disputing Party proceedings or proceedings under non-disputing Party law. Moreover, the choice adopted

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<sup>156</sup> *Loewen Group Inc. et al. v. United States of America* (ICSID Case No. ARB(AF)/98/3) Article 1128 submission of Mexico, October 16, 2000, ¶ 7, **RLA-13**.

<sup>157</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 167.

<sup>158</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 171.

<sup>159</sup> INVEST1.904 (Sept. 4, 1992), **CLA-26**.

in the final text was to use both phrases in order to make clear that proceedings for declaratory or injunctive relief can only be brought “before an administrative tribunal or court under the law of the disputing Party.” In any event, it defies logic that the NAFTA Parties would subject themselves to injunctive, declaratory or other extraordinary relief in a foreign court without express language to that effect.

94. For all of the foregoing reasons, DIBC's interpretation is wrong. Proceedings for “injunctive, declaratory or other extraordinary relief” may co-exist with a NAFTA proceeding only when such proceedings are before the courts of the respondent NAFTA Party.

**C. DIBC and CTC Failed to Comply with the Conditions Precedent to Arbitration under NAFTA Article 1121**

95. DIBC submitted its claim to arbitration under the NAFTA on April 29, 2011. Pursuant to Article 1121, on that date DIBC was required to submit a valid waiver that conforms to the ordinary meaning and object and purpose of Article 1121. DIBC was also required to act consistently with that waiver by refraining from initiating and continuing all domestic litigation proceedings with respect to measures alleged to breach the NAFTA unless those proceedings fall within the limited exception allowed in Article 1121(1)(b) and 2(b).

96. DIBC did neither. The waiver DIBC filed with the submission of its claim deviates significantly from what is required by Article 1121 *and* DIBC and CTC initiated and continued domestic proceedings for damages against Canada after April 29, 2011 with respect to measures alleged to breach NAFTA. Despite Canada's multiple letters notifying DIBC that it has not complied with Article 1121 and that Canada does not consent to arbitrate,<sup>160</sup> Canada was and continues to be forced to defend itself at significant cost in multiple domestic proceedings.

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<sup>160</sup> Letter from Canada to DIBC dated June 6, 2011, **Exhibit R-22**; Letter from Canada to DIBC dated October 3, 2011, **Exhibit R-21**; Letter from Canada to DIBC dated December 28, 2011, **Exhibit R-25**; Letter from Canada to DIBC dated March 15, 2012, **Exhibit R-23**.

97. On January 15, 2013, DIBC amended its NAFTA claim and filed a second waiver pursuant to Article 1121. This Tribunal does not have jurisdiction over DIBC's amended claim because DIBC failed to fulfill the "conditions precedent" under Article 1121 as of April 29, 2011. Nonetheless, DIBC's amended claim is also outside the jurisdiction of the Tribunal because its Second NAFTA Waiver is inconsistent with Article 1121 and DIBC and CTC continued domestic proceedings against Canada with respect to measures alleged to breach the NAFTA.

98. As explained below, this Tribunal does not have jurisdiction to hear *any* of DIBC's NAFTA claims because of non-compliance with Article 1121. First, Canada will explain how DIBC's First and Second NAFTA Waivers contravene Article 1121 because they are inconsistent with the ordinary meaning and object and purpose of that provision. Second, Canada will explain how DIBC has failed to comply with Article 1121 by initiating and continuing domestic proceedings for damages after the date it submitted its claim to arbitration – namely, the Washington Litigation, the CTC Litigation, and the Windsor Litigation – which are all proceedings with respect to the measures that DIBC alleges breach the NAFTA.

### **1. DIBC's Waivers Contravene Article 1121**

99. A waiver filed pursuant to NAFTA Article 1121 must be consistent with the requirements set out in that provision. If it does not, the waiver is invalid and there is no consent to arbitration. Because jurisdiction is determined on the date DIBC submitted its claim to arbitration, it is DIBC's First NAFTA Waiver that is decisive. However, even if DIBC's Second NAFTA Waiver were considered, it is also inconsistent with the requirements of Article 1121.

100. DIBC's First NAFTA Waiver is inconsistent with Article 1121 for two reasons, each of which is fatal to the establishment of the Tribunal's jurisdiction.

101. First, DIBC expressly carved-out the Washington Litigation from its First NAFTA Waiver making it inapplicable to that domestic proceeding. DIBC thus granted itself a *carte blanche* to pursue the Washington Litigation with impunity, depriving

Canada of the ability to seek a dismissal if it were to attempt to do so. This contravenes Article 1121, which requires DIBC to file a waiver that covers “any proceeding.”

102. In its Counter-Memorial, DIBC argued that it was not required to waive its right to continue the Washington Litigation because that proceeding does not seek relief from Canada for the “same” measures that are at issue in the NAFTA arbitration.<sup>161</sup> This argument is inherently contradictory. If the Washington Litigation were truly not a proceeding with respect to the measures alleged to breach the NAFTA, then DIBC would have had no need to exclude it from its waiver. Nor would DIBC have gone to such great lengths to subsequently amend its Washington pleadings and drop its claim for damages to purportedly focus on Canada’s “actions in the United States”<sup>162</sup> and argue that Article 1121 allows it to seek injunctive and declaratory relief against Canada in U.S. courts.<sup>163</sup> DIBC had no *bona fide* reason to carve-out the Washington Litigation from its NAFTA waiver other than to ensure its continuance in parallel with the NAFTA arbitration. DIBC’s actions are exactly what Article 1121 is intended to prevent.

103. Second, DIBC’s First NAFTA Waiver is also inconsistent with Article 1121 because it only waives DIBC’s right to pursue certain specified measures in domestic proceedings, and thereby grants DIBC the ability to pursue claims that may be with respect to measures at issue in the NAFTA arbitration. As shown below, the measures that DIBC includes in its First NAFTA Waiver are *narrower* than the measures alleged to breach the NAFTA in its First NAFTA NOA:

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<sup>161</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 156. Article 1121 does not however use the term “same” but “with respect to.” Should this Tribunal determine that the meaning of “with respect to” is broader than DIBC’s interpretation, then DIBC’s stated rationale for carving-out the Washington Litigation from its First NAFTA Waiver is defunct.

<sup>162</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 162-171.

<sup>163</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 162-171.

<b>FIRST NAFTA NOA – MEASURES ADDRESSED</b> <sup>164</sup>	<b>FIRST NAFTA WAIVER – MEASURES ADDRESSED</b> <sup>165</sup>
“(a) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge”;	“to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Detroit River International Crossing (“DRIC”) Bridge;” and
“(b) to fail to provide comparable improvements in road access to the Ambassador Bridge, because of its ownership by a United States investor;” and	
“to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge.”	“to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned DRIC Bridge.”

104. DIBC’s First NAFTA Waiver does not cover Canada’s alleged failure “to provide comparable improvements in road access to the Ambassador Bridge, because of its ownership by a United States investor” and is thus on its face narrower than the measures it alleges breach the NAFTA.<sup>166</sup> DIBC’s First NAFTA Waiver is thus inconsistent with Article 1121, which required DIBC to waive its right to initiate or continue proceedings with respect to the measures alleged to breach the NAFTA.

105. DIBC’s Second NAFTA Waiver which accompanied its Amended NAFTA NOA aggravates the above defects. First, DIBC carved-out the Washington Litigation again, but in addition, also carved-out the CTC Litigation. This allows DIBC to continue those proceedings in parallel with the NAFTA claim and deprives Canada of the ability to seek dismissal even if it were to attempt to do so. The explicit carve-out of domestic proceedings from the scope of a NAFTA waiver is inconsistent with Article 1121.

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<sup>164</sup> First NAFTA NOA, ¶ 48.

<sup>165</sup> First NAFTA Waiver, April 28, 2011, **Exhibit C-140**.

<sup>166</sup> For example, DIBC’s omission ensures that the waiver would have no effect in a domestic court with respect to the Nine Point Plan and LGWEM Strategy.

106. Second, DIBC's Second NAFTA Waiver failed to include the following phrase from Article 1121(1)(b) and 2(b): "before an administrative tribunal or court under the law of the Disputing Party." Canada pointed out this omission in its Memorial on Jurisdiction, noting that DIBC was obviously aware of the phrase given that it did not fail to include it in its First NAFTA Waiver.<sup>167</sup> In its Counter-Memorial, DIBC argues that "the omission does not and was not intended to deviate from the requirements of Article 1121."<sup>168</sup> Whether or not DIBC "intended" to omit the language is irrelevant. By leaving it out, DIBC gives itself the right to pursue "injunctive, declaratory or other extraordinary relief" against Canada in the United States, which it has in fact been doing in the Washington Litigation. DIBC cannot give itself this right, as it contradicts Article 1121.

107. Finally, as with its First NAFTA Waiver, DIBC's Second NAFTA Waiver is inconsistent with Article 1121 in that DIBC only made the waiver applicable to certain measures at issue in the NAFTA arbitration. DIBC again impermissibly gives itself the right to pursue other measures in domestic proceedings with respect to the measures it alleges breach the NAFTA. Moreover, like the First NAFTA Waiver, the measures that DIBC lists in its Second NAFTA Waiver are *narrower* than the measures it alleges breach the NAFTA:

<b>AMENDED NAFTA NOA – MEASURES ADDRESSED</b> <sup>169</sup>	<b>SECOND NAFTA WAIVER – MEASURES ADDRESSED</b> <sup>170</sup>
“(1) to discriminate against DIBC, violating Claimant’s exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant’s franchise rights by precluding the construction of the New Span;	
(2) to prevent or delay DIBC’s ability to obtain Canadian approval to build the New Span;	“to block and delay the approval and construction of the Ambassador Bridge New Span,”

<sup>167</sup> Canada Memorial on Jurisdiction, ¶¶ 120-121.

<sup>168</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 140.

<sup>169</sup> Amended NAFTA NOA, ¶ 135.

<sup>170</sup> Second NAFTA Waiver, January 15, 2013, **Exhibit C-116**.

<p>(3) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian-owned NITC/DRIC Bridge, in breach of prior commitments and agreements to improve the connections to the Ambassador Bridge through the Ambassador Bridge Gateway Project;</p>	<p>“to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian NITC/DRIC Bridge;”</p>
<p>(4) to fail to provide comparable improvements in road access to the Ambassador Bridge as was previously provided to the Blue Water Bridge and is currently being provided to the nonexistent NITC/DRIC Bridge, because the Ambassador Bridge is owned by a United States investor; and</p>	
<p>(5) to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and other crossings not owned by a U.S. investor.”</p>	<p>“to take traffic measures with respect to Huron Church Road to divert traffic away from the Ambassador Bridge and toward the Detroit-Windsor Tunnel and the planned NITC/DRIC Bridge.”</p>

108. DIBC, again, expressly fails to waive its right to pursue claims against Canada in domestic proceedings with respect to “(4)”, which is Canada’s alleged failure “to provide comparable improvements in road access to the Ambassador Bridge as was previously provided to the Blue Water Bridge and is currently being provided to the nonexistent NITC/DRIC Bridge.” The Second NAFTA Waiver would also not cover DIBC’s allegations against the *BSTA*, which it alleges has unlawfully “accelerated” the construction of the DRIC Bridge.<sup>171</sup> DIBC’s Second NAFTA Waiver is on its face, narrower than the measures it alleges breach the NAFTA, in clear violation of Article 1121.<sup>172</sup>

109. While it is only DIBC’s First NAFTA Waiver that is decisive, the above analysis demonstrates that both DIBC’s First and Second NAFTA Waivers fail to meet the requirements set out in Article 1121.

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<sup>171</sup> Amended NAFTA NOA, ¶ 11.

<sup>172</sup> DIBC’s waivers are also unclear as to whether they are specifically enforceable vis-à-vis Ontario and Windsor, which it must be since DIBC alleges that measures undertaken by each violate NAFTA.

**2. DIBC and CTC's Continuation of the Washington Litigation Past April 29, 2011 Contravenes Article 1121 and Deprives the Tribunal of Jurisdiction**

110. DIBC's continuation of the Washington Litigation against Canada after it commenced NAFTA arbitration contravenes Article 1121 because it was both a proceeding with respect to the measures it alleges breach the NAFTA and was a proceeding for damages.

111. The table below highlights the relevant procedural history of the Washington Litigation and NAFTA arbitration showing the extent to which DIBC has pursued both lawsuits in tandem against Canada:<sup>173</sup>

WASHINGTON LITIGATION	NAFTA ARBITRATION
<b>March 22, 2010</b> - DIBC files its Washington Complaint against Canada. (Exhibit R-17)	
	<b>March 23, 2010</b> - DIBC files its Second Notice of Intent to Arbitrate under the NAFTA.
	<b>April 29, 2011</b> - DIBC initiates arbitration against Canada under the NAFTA by filing a Notice of Arbitration.
<b>June 6, 2011</b> - DIBC files its First Amended Complaint against Canada in the Washington Litigation. (Exhibit R-18)	
<b>November 29, 2011</b> - DIBC withdraws Washington First Amended Complaint against Canada without prejudice and reserves its right to file again. (Exhibit R-24)	
<b>November 9, 2012</b> - DIBC files the Washington Second Amended Complaint and a Motion to re-join Canada to the Washington Litigation. (Exhibit R-19)	

<sup>173</sup> This summary history does not enumerate all of the submissions that have been filed in the Washington Litigation, which is costing Canada millions of dollars in legal fees to defend. Instead of overwhelming the Tribunal with the full docket of litigation pleadings, Canada focuses on the most salient submissions thus far for the purposes of determining jurisdiction.

	<b>January 15, 2013</b> - DIBC amends its Notice of Arbitration against Canada under the NAFTA.
<b>May 29, 2013</b> - DIBC files its Third Amended Complaint against Canada in the Washington Litigation. (Exhibit C-141)	

112. As of April 29, 2011, when DIBC filed its Notice of Arbitration, it was required to withdraw its Washington complaint against Canada because it was (and continues to be) a proceeding with respect to the measures alleged to breach the NAFTA. DIBC failed to do so. Instead, DIBC continued the Washington Litigation by filing its First Amended Complaint on June 6, 2011, further elaborating its allegations against Canada.

**a) The Washington Litigation is a Proceeding with Respect to the Measures Alleged to Breach the NAFTA in DIBC's Notice of Arbitration**

113. The gravamen of the First NAFTA NOA and DIBC's Original and First Amended Complaint in the Washington Litigation was the same: Canada's decision to locate the DRIC Bridge, corresponding Parkway and customs plaza in proximity to the Ambassador Bridge. As explained above and in Canada's Memorial,<sup>174</sup> the measure which approved the location of the DRIC Bridge and the Parkway is one in the same: the DRIC EA.<sup>175</sup> DIBC's First NAFTA NOA was focused primarily on the DRIC EA, alleging that "Canada's focus in developing the Central Corridor crossing infrastructure was to develop a publicly owned bridge to take traffic from the Ambassador Bridge, drive down the value of the Ambassador Bridge, and facilitate a future acquisition of the Ambassador Bridge by Canada."<sup>176</sup> In DIBC's Original and First Amended Complaint in the Washington Litigation it also alleged that Canada "created a new opportunity to attempt to force the transfer of the Ambassador Bridge to ownership and control by Canada, this

<sup>174</sup> Canada Memorial on Jurisdiction, ¶¶ 28-48.

<sup>175</sup> DRIC EA Report, **Exhibit R-47**; CEAA Screening Report, **Exhibit C-92**.

<sup>176</sup> First NAFTA NOA, ¶ 35.

time by proposing to build a new bridge (the "DRIC bridge") between Detroit and Windsor, designed to take nearly all the traffic revenue from the Ambassador Bridge."<sup>177</sup>

114. The timing of DIBC's NAFTA arbitration and Washington Litigation is also telling. The DRIC EA was approved by Ontario and Canada in August and December 2009, respectively, after which CTC initiated a judicial review of the DRIC EA in the Federal Court of Canada on December 31, 2009.<sup>178</sup> DIBC and CTC then launched the Washington Complaint against Canada on March 22, 2010, and filed a notice of intent under the NAFTA on March 23, 2010. Clearly, the DRIC EA was the impetus for all three lawsuits.

115. DIBC argues that overlapping allegations in the Washington proceedings are to be construed as "context" and are there only to "corroborate Canada's discriminatory intent in the Washington Litigation."<sup>179</sup> This is not true. The Original Complaint and First Amended Complaint show that the allegations made and the relief requested by DIBC for Canada's decision on the location of the DRIC Bridge and Parkway overlap with the measures alleged to breach the NAFTA. The conclusion is obvious from a plain reading of the submissions, but the following table highlights some of that overlap:

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<sup>177</sup> Washington Complaint, ¶ 83, **Exhibit R-17**; Washington First Amended Complaint, ¶ 156, **Exhibit R-18**.

<sup>178</sup> EA JR (Can.), **Exhibit R-9**.

<sup>179</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 190, 192; DIBC Response to Canada's Brief Statement, ¶ 47.

FIRST NAFTA NOA	WASHINGTON COMPLAINT/1 <sup>ST</sup> AMENDED COMPLAINT
<b>Allegations with respect to the DRIC EA</b>	<b>Allegations with respect to the DRIC EA</b>
<p>“The location selected for the DRIC Bridge, in the area known as the Central Corridor, was intentionally chosen to divert traffic away from the Ambassador Bridge. The planned DRIC Bridge will have a direct connection to Highway 401 like the connection Canada promised but never built for the Ambassador Bridge. The new connection from Highway 401 to the DRIC Bridge, known as the Windsor-Essex Parkway, is designed to divert as much as 75% of the Ambassador Bridge’s commercial truck traffic and 39% of its passenger traffic, in order to ensure that the DRIC Bridge succeeds at the Ambassador Bridge’s expense.”<sup>180</sup></p> <p>“This arbitration arises from the decisions by Canada, the Province of Ontario, and the City of Windsor (a) to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned DRIC Bridge, (b) to fail to provide comparable improvements in road access to the Ambassador Bridge, because of its ownership by a United States investor.”<sup>181</sup></p>	<p>“[T]o ensure that the DRIC Bridge succeeds at the expense of the Ambassador Bridge, Canada and FHWA have manipulated regulatory and other processes to speed the construction of the DRIC Bridge, delay or prevent the construction of the Ambassador Bridge New Span, and impede the flow of traffic to the Ambassador Bridge. By the DRIC Proponents’ own estimate, the objective of the DRIC Bridge is to divert from the Ambassador Bridge to the DRIC Bridge up to 75% of the Ambassador Bridge’s truck traffic and up to 39% of its passenger traffic.”<sup>182</sup></p> <p>“Canada has taken a number of steps to undermine [DIBC/CTC’s] ability to compete with the proposed DRIC Bridge, including by insisting on placing the proposed DRIC Bridge in a location that would prevent Ambassador Bridge traffic from using any new road improvements to be constructed for the Canadian side of the DRIC Bridge ... [T]he planned site for the DRIC Bridge is less than two miles from the Ambassador Bridge, but – as Canada intended when it rejected X12 – the planned highway connection bypasses the Ambassador Bridge and instead steers traffic to the site of the proposed DRIC Bridge.”<sup>183</sup></p>

<sup>180</sup> First NAFTA NOA, ¶ 38.

<sup>181</sup> First NAFTA NOA, ¶ 48.

<sup>182</sup> Washington Complaint, ¶ 86, **Exhibit R-17**; See also Washington First Amended Complaint, ¶ 7, **Exhibit R-18**.

<sup>183</sup> Washington First Amended Complaint, ¶¶ 6, 176, **Exhibit R-18**; See also Washington Complaint, ¶ 153, **Exhibit R-17**; Washington First Amended Complaint, ¶ 218, **Exhibit R-18** (“The acts of Canada and FHWA to construct the DRIC Bridge across the Detroit River within two miles of the Ambassador Bridge, without legitimate need, for the purpose of destroying the economic value of DIBC’s and CTC’s rights, is a violation of DIBC’s and CTC’s rights under the U.S. and Canadian legislation constituting the Special Agreement and the Boundary Waters Treaty.”).

Relief Requested	Relief Requested
<p>“As a result of the measures taken by the Government of Canada described above, the Claimant respectfully requests an award...Directing Canada to pay damages in an amount to be proved at the hearing by which the Claimant presently estimates to be in excess of US\$3.5 billion.”<sup>184</sup></p>	<p>Based on these allegations,<sup>185</sup> DIBC “respectfully request[s] judgment against [Canada] for the following relief:</p> <p>(1) A declaratory judgement against...Canada under 28 U.S.C. 2201-2202 that the construction and operation of the planned DRIC Bridge across the Detroit River would violate the obligations of Canada and the United States to DIBC and CTC;...</p> <p>(8) An injunction against...Canada prohibiting...[it] from taking any steps to construct, prepare for construction of, or arrange for construction of the planned DRIC Bridge or any other bridge across the Detroit River between Canada and the United States;</p> <p>(9) Damages against Canada in an amount to be determined at trial.”<sup>186</sup></p>

116. Both DIBC’s First NAFTA NOA and the Washington Litigation were also with respect to the Nine Point Plan. At paragraphs 115-120 of the First Amended Complaint, DIBC argues that that it spent “hundreds of millions of dollars” in reliance on Canada’s alleged \$300 million commitment in 2002 to build a highway to the Ambassador Bridge.<sup>187</sup> DIBC explicitly relies on the 2002 MOU and the supposed “March 12, 2004 report of the Canadian government’s Business Transportation Task Force,” which, as described above, is the same defective and misrepresented document DIBC relies on in its Statement of Claim and Counter-Memorial,<sup>188</sup> and also relies on the Nine Point Plan

<sup>184</sup> First NAFTA NOA, ¶ 52.

<sup>185</sup> Washington Complaint, ¶¶ 147, 156, 160, 164, 167, 173, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 212, 220, 231, 235, 245.

<sup>186</sup> Washington Complaint at 45-47, **Exhibit R-17** First Amended Complaint, ¶¶ 67-68.

<sup>187</sup> See also Washington Complaint, ¶¶ 75-81; **Exhibit R-17**. Given DIBC’s allegations in its Counter-Memorial (¶¶ 46-48), this would also include the LGWEM Strategy.

<sup>188</sup> See ¶¶ 28 above; Business Transportation Task Force Situational Analysis (Mar. 12, 2004), **Exhibit C-34**.

for its allegation that Canada “reneged on its commitment to support the Ambassador Bridge Gateway Project.”<sup>189</sup> DIBC made the same allegations regarding the Nine Point Plan in its First NAFTA NOA.<sup>190</sup>

117. DIBC argues that its allegations against the Nine Point Plan in the Washington Litigation are merely “facts” that provide “background and context” to “corroborate Canada’s intent with respect to the measures that are at issue in the Washington Litigation.”<sup>191</sup> Allegations of discriminatory behavior are not, however, “facts” or “background.” The moment DIBC alleged in the Washington Litigation that Canada unlawfully “reneged” on the alleged \$300 million promise in the Nine Point Plan/LGWEM Strategy, the proceedings became “with respect to” those measures alleged by DIBC in its First NAFTA NOA to violate NAFTA. Canada denies that any such promise was ever made and denies that Canada reneged on anything. DIBC cannot expect that this so-called evidence of “discriminatory intent” would go unchallenged. Canada would have made the same arguments in the Washington Litigation as in this NAFTA arbitration to establish that there was never such a commitment and that Canada “reneged” on nothing. As such, these proceedings become “with respect to” those measures.

118. DIBC’s Counter-Memorial questions Canada’s reliance on the document requests filed against Canada in the Washington Litigation in July 2010 as evidence of what measures are truly at issue in the Washington Litigation.<sup>192</sup> As Canada noted in its Memorial,<sup>193</sup> the DRIC EA was central to those document requests, which were filed several months after DIBC initiated the Washington Litigation *and* filed its Second NAFTA NOI (March 22, 2010, the text of which was duplicated when DIBC filed its First NAFTA NOA on April 29, 2011). DIBC’s argument that it subsequently filed “far

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<sup>189</sup> Washington First Amended Complaint, ¶ 120, **Exhibit R-18**. See also Washington Complaint, ¶ 81, **Exhibit R-17**.

<sup>190</sup> First NAFTA NOA, ¶¶ 23-34.

<sup>191</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 192 (emphasis removed).

<sup>192</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 186-190.

<sup>193</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 144-146.

more limited” requests that did not include the DRIC Bridge or Parkway is untrue. All of DIBC’s reformulated requests targeted documents connected to the “DRIC Project,” which DIBC specifically defined as “the DRIC Bridge, the DRIC Parkway and any undertaking related to the planning or realization of the DRIC Bridge or DRIC Parkway.”<sup>194</sup>

119. In its Counter-Memorial DIBC wrongly assumes that the NAFTA and international law allows it to create jurisdiction at any time after commencing arbitration, and it totally ignores the consequence of having been in non-compliance with Article 1121 from the outset. This Tribunal need not look further than the First NAFTA NOA and the Washington Original Complaint and First Amended Complaint. The domestic proceedings were with respect to the measures alleged to breach the NAFTA and this Tribunal has no jurisdiction.

**b) Even if DIBC’s Amended NAFTA NOA Were Relevant to the Tribunal’s Jurisdiction, the Washington Litigation is Still a Proceeding With Respect to Measures Alleged to Breach the NAFTA**

120. On January 15, 2013, DIBC amended its claims against Canada in the NAFTA arbitration. The Tribunal does not have jurisdiction over these claims because DIBC failed to comply with Article 1121 as of April 29, 2011. But even if the Tribunal were to look into the Amended NAFTA NOA, it would find that the amended claim is itself outside of the jurisdiction of the Tribunal because DIBC was continuing the Washington Litigation against Canada as of January 15, 2013.

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<sup>194</sup> *Detroit Int’l Bridge Co. v. U.S. Dep’t of State*, Exhibit A to Plaintiff’s Motion for Discovery, Plaintiffs’ First Request for Production of Documents and First Interrogatory to All Defendants in Relation to Jurisdiction and Venue, No. 10-cv-476-RMC (D.D.C. July 20, 2010), **Exhibit C-143**. Furthermore, Request No. 7 requested “All documents created on or after January 1, 1979, concerning Canada’s intentions, attempts or strategies to acquire any commercial or propriety interest in the Ambassador Bridge, the proposed New Span, or any of Plaintiff’s rights or franchises, including but not limited to documents connecting such intentions, attempts or strategies with the (i) DRIC Project, (ii) the enactment or implementation of the International Bridges and Tunnels Act or the City of Windsor by-laws referenced in the Complaint, or (iii) any of the other acts alleged in the Complaint.” See also *DIBC v. U.S. Department of State et al.*, (D.D.C. File No. 13-CV-01876-RMC) Complaint, November 26, 2013, **Exhibit R-143**.

121. The “operative complaint” in the Washington Litigation at the time DIBC amended the submission of its claim to arbitrate was the Washington Second Amended Complaint. As Canada’s explained in its Memorial on Jurisdiction,<sup>195</sup> DIBC’s allegations in the Second Amended Complaint make the Washington Litigation a proceeding with respect to the measures alleged to breach the NAFTA. For example, the Second Amended Complaint continues and elaborates upon DIBC’s allegations against the Nine-Point-Plan and DRIC EA described above.<sup>196</sup> DIBC also makes new allegations in its amended claim against Canada with respect to the *IBTA*, the delay of approval of the New Span, and the *BSTA*. As the following tables show, each of these new allegations overlaps with the Washington Second Amended Complaint. For example, DIBC makes duplicative allegations in both proceedings with respect to the *IBTA*:

AMENDED NAFTA NOA - <i>IBTA</i>	2ND AMENDED COMPLAINT - <i>IBTA</i>
<p>“Canada has enacted the <i>IBTA</i> to give Canada the purported authority to interfere with the Ambassador Bridge’s expansion plans including the Ambassador Bridge New Span, to interfere with Claimant’s rights to operate the bridge under the Special Agreement, and to promote Canada’s long-term goal of limiting the value of Claimant’s rights in order to coerce DIBC and CTC to transfer their rights in the Ambassador Bridge only to Canada on Canada’s terms.”<sup>197</sup></p>	<p>“Canada has enacted the <i>IBTA</i> to interfere with the Ambassador Bridge’s expansion plans including the Ambassador Bridge New Span, to interfere with plaintiffs’ rights to operate the bridge under the Special Agreement, and to promote Canada’s long-term goal of limiting the value of plaintiffs’ rights in order to coerce plaintiffs to transfer their rights in the Ambassador Bridge only to Canada on Canada’s terms.”<sup>198</sup></p>

122. It also makes duplicative allegations with respect to the alleged delay of the New Span:

<sup>195</sup> Canada Memorial on Jurisdiction, ¶¶ 122-143.

<sup>196</sup> Washington Second Amended Complaint, ¶¶ 131-133, 180, 188-203, 239-249, **Exhibit R-19**. See also Canada Memorial on Jurisdiction, ¶¶ 129-132.

<sup>197</sup> Amended NAFTA NOA, ¶ 107.

<sup>198</sup> Washington Second Amended Complaint, ¶ 126, **Exhibit R-19**.

<b>AMENDED NAFTA NOA – DELAY TO THE NEW SPAN</b>	<b>2ND AMENDED COMPLAINT – DELAY TO THE NEW SPAN</b>
<p>“Canada has delayed and obstructed the construction of the New Span by, for example, delaying approval under the Canadian Environmental Assessment Act for the New Span. Claimant submitted an environmental impact statement to Transport Canada for the Ambassador Bridge New Span on December 4, 2007. Because the Ambassador Bridge New Span will be constructed directly alongside the existing span and will connect to the existing Ambassador Bridge plaza, any environmental impact will be insignificant or nonexistent. However, no decision has been received to this date, over five years later.”<sup>199</sup></p>	<p>“[Canada has] delayed and obstructed the construction of the New Span by delaying approval under the Canadian Environmental Assessment Act...Plaintiffs submitted an environmental impact statement to Transport Canada for the Ambassador Bridge New Span on December 4, 2007. Because the Ambassador Bridge New Span will be constructed directly alongside the existing span and will connect to the existing Ambassador Bridge plaza, any environmental impact will be insignificant or nonexistent. However, no decision has been received to this date, over four years later.”<sup>200</sup></p>

123. And makes duplicative allegations against the *BSTA*:

<b>AMENDED NAFTA NOA - <i>BSTA</i></b>	<b>2ND AMENDED COMPLAINT - <i>BSTA</i></b>
<p>“Canada has recently taken additional steps in its effort to discriminate against the New Span and in favor of the NITC/DRIC. In October 2012...legislation was proposed in the Canadian Parliament called the “Bridge to Strengthen Trade Act” to exempt the NITC/DRIC from a number of Canadian regulatory approval requirements, either by granting the NITC/DRIC automatic approval or by explicitly exempting the NITC/DRIC from the requirement. This legislation was passed in December 2012 ... The Bridge to Strengthen Trade Act does not exempt the Ambassador Bridge New Span from any requirements of Canadian law ... Thus, this recent legislation is additional evidence of the effort Canada is making to prevent DIBC and CTC from exercising their right to build the New Span and to ensure that the Canadian-owned NITC/DRIC Bridge is built before the U.S.-owned New Span can be built.”<sup>201</sup></p>	<p>“Canada has recently taken additional steps in its effort to discriminate against the New Span and in favor of the NITC/DRIC. In October 2012, legislation was proposed in the Canadian Parliament, called the “Bridge to Strengthen Trade Act,” that would exempt the NITC/DRIC from a number of Canadian regulatory approval requirements, either by granting the NITC/DIBC automatic approval or by explicitly exempting the NITC/DRIC from the requirement ... The proposed Bridge to Strengthen Trade Act does not exempt the Ambassador Bridge New Span from any requirements of Canadian law ... Thus, the recent proposed legislation is additional evidence of the effort Canada is making to prevent the plaintiffs from exercising their right to build the New Span, and to ensure that the NITC/DRIC is built before the New Span can be built.”<sup>202</sup></p>

<sup>199</sup> Amended NAFTA NOA, ¶¶ 97-98.

<sup>200</sup> Washington Second Amended Complaint, ¶¶ 146-147, **Exhibit R-19**.

<sup>201</sup> Amended NAFTA NOA, ¶¶ 109-111.

<sup>202</sup> Washington Second Amended Complaint, ¶¶ 246-249, **Exhibit R-19**. At paragraph 199 of its Counter-

124. Finally, DIBC requests relief in both the NAFTA arbitration and Washington Litigation for each of the above mentioned allegations:

AMENDED NAFTA NOA – RELIEF REQUESTED	2ND AMENDED COMPLAINT – RELIEF REQUESTED
<p>“As a result of the measures taken by the Government of Canada described above, the Claimant respectfully requests an award ... (b) Directing Canada to pay damages in an amount to be proved at the hearing.”<sup>203</sup></p>	<p>Based on these allegations,<sup>204</sup> DIBC “respectfully request[s] judgment against [Canada] as follows:</p> <p>(e) A declaratory judgement against [Canada] declaring that plaintiffs own a statutory and contractual franchise right to build the New Span, and that any conduct by any defendant that seeks to prevent plaintiffs from building the New Span is a violation of those rights, including in particular any conduct that seeks to accelerate the regulatory approvals of the NITC/DRIC and/or delay the regulatory approvals of the New Span;...</p> <p>(j) A declaratory judgment that [Canada’s] actions in supporting the construction of the NITC/DRIC, and in preventing plaintiffs from exercising their right to build the New Span, constitute a taking of plaintiffs’ private property rights without payment of just compensation, in violation of...international law.</p> <p>(l) Any such other and further relief as may be just and proper.”<sup>205</sup></p>

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Memorial, DIBC argues that it is not challenging the *BSTA* in the Washington Litigation because the statute is only mentioned under a heading titled “Canada’s and FHWA’s Proposed NITC/DRIC; Lack of Public need for NITC/DRIC.” This is not accurate. DIBC’s allegations against the *BSTA* are actually found under the heading “Canada’s Continued Effort to Discriminate Against the New Span and in Favor of the NITC/DRIC.” As the title indicates, DIBC alleges that the *BSTA* is a discriminatory measure, just as they do in the NAFTA arbitration.

<sup>203</sup> Amended NAFTA NOA, ¶ 139.

<sup>204</sup> Washington Second Amended Complaint, ¶¶ 273, 282, 294, 312, **Exhibit R-19**.

<sup>205</sup> Washington Second Amended Complaint at 90-92, **Exhibit R-19**.

125. DIBC argues that the Washington Litigation only “mentions” certain overlapping “facts” “in order to corroborate Canada’s discriminatory intent in the Washington Litigation.”<sup>206</sup> As shown in the above table, however, this is false. Even if DIBC were somehow correct, using measures at issue in the NAFTA arbitration to “corroborate Canada’s discriminatory intent in the Washington Litigation” is sufficient to make the Washington Litigation a proceeding with respect to the measures at issue in the NAFTA arbitration.

126. DIBC also argues that the Second Amended Complaint is nonetheless consistent with Article 1121 because that complaint does not “involve the payment of damages” and “seeks only declaratory and injunctive relief against Canada” “under Canadian law.”<sup>207</sup> As Canada explained in its Memorial,<sup>208</sup> however, DIBC sought a declaration in its Second Amended Complaint that Canada’s actions constitute a taking (i.e., expropriation) without compensation under international law, which necessarily begs the question of how such a declaration does not “involve the payment of damages.”

127. In any event, even if the Second Amended Complaint “seeks only declaratory and injunctive relief against Canada,” DIBC is not seeking that relief “under Canadian law.” Injunctive and declaratory relief available in United States’ courts, even if based on an alleged violation of Canadian law, is under the laws of the United States, not Canada. Contrary to DIBC’s assertion, its Second Amended Complaint explicitly states that declaratory relief is being sought against Canada pursuant to 28 U.S.C. §§ 2201-2202, which is a reference to the U.S. *Declaratory Judgment Act*.<sup>209</sup> DIBC is thus seeking relief against Canada under U.S. law, and not “under Canadian law.” DIBC’s efforts to evade its obligations under Article 1121 in this respect are without merit.

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<sup>206</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 190, 192.

<sup>207</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 163, 205-208.

<sup>208</sup> Canada Memorial on Jurisdiction, ¶¶ 148-150.

<sup>209</sup> See 28 U.S.C.A §§ 2201, 2202, **RLA-50**; Washington Second Amended Complaint, ¶¶ 283, 295, 296, **Exhibit R-19**. See also Washington Complaint at 45-46, **Exhibit R-17**.

128. For all of the foregoing reasons, the allegations made in the Second Amended Complaint make it a “proceeding with respect to” the measures alleged to breach NAFTA. DIBC has continued the Washington Litigation contrary to Article 1121 and this Tribunal has no jurisdiction over its amended claim.

**c) The Washington Litigation Third Amended Complaint is Irrelevant But Inconsistent with Article 1121 Nevertheless**

129. On May 29, 2013, DIBC amended its claims against Canada in the Washington Litigation for a third time. In its Counter-Memorial DIBC assumes that its Third Amended Complaint is the “operative complaint”<sup>210</sup> for the purposes of determining whether the Washington Litigation is a proceeding “with respect to” measures alleged to breach the NAFTA under Article 1121. The Third Amended Complaint is not the “operative complaint” as DIBC was required to comply with Article 1121 as of April 29, 2011. Nevertheless, the Third Amended Complaint does not rectify DIBC’s previous non-compliance with Article 1121 but only further demonstrates DIBC’s continued willingness to flout the conditions precedent under that provision.

130. The Third Amended Complaint shows that the Washington Litigation is a proceeding with respect to measures alleged to breach the NAFTA as understood by Article 1121 it still makes allegations with respect to the Nine Point Plan,<sup>211</sup> the DRIC EA,<sup>212</sup> the *IBTA*,<sup>213</sup> the alleged delay to the New Span EA,<sup>214</sup> and the *BSTA*.<sup>215</sup>

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<sup>210</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 178.

<sup>211</sup> Washington Third Amended Complaint, ¶¶ 134-136, **Exhibit C-141**; *DIBC et al. v. Canada et al.*, USDC, Docket: 1:10-CV-00476-RMC, Plaintiffs’ Memorandum of Points and Authorities in Opposition to the Motions to Dismiss and in Support of Plaintiffs’ Cross-motion for Partial Summary Judgment on Counts 1, 3, 6 and 7, 8 November 2013 (hereinafter “Washington Litigation Motion for Summary Judgment November 2013”) at 28-29, **Exhibit R-139**.

<sup>212</sup> Washington Third Amended Complaint, ¶¶ 191-206, **Exhibit C-141**.

<sup>213</sup> Washington Third Amended Complaint, ¶¶ 119-130, **Exhibit C-141**.

<sup>214</sup> Washington Third Amended Complaint, ¶¶ 149-151, **Exhibit C-141**; Washington Litigation Motion for Summary Judgment November 2013 at 24-25, **Exhibit R-139**.

<sup>215</sup> Washington Third Amended Complaint, ¶¶ 249-251, **Exhibit C-141**; Washington Litigation Motion for Summary Judgment November 2013 at 27-28, **Exhibit R-139**.

131. DIBC argues that the measures at issue in the Washington Third Amended Complaint are different than the measures at issue in the NAFTA arbitration because “the NAFTA arbitration challenges Canada’s measures that discriminate against Claimant *in Canada*, whereas the Washington Litigation challenges Canada’s unlawful actions *within the United States*.”<sup>216</sup> This is incorrect. The Third Amended Complaint explicitly states that it includes allegations against “Canada’s acts within Canada, in connection with the commercial activity in Canada of constructing and operating or preparing to construct and operate the NITC/DRIC.”<sup>217</sup> DIBC’s characterization of the Washington Litigation as applying only to “Canada’s actions within the United States” is therefore false.

132. Second, DIBC argues that the only measures at issue in the Washington Litigation are those that are listed at paragraph 43 of its Third Amended Complaint. This is also not true. For example, paragraph 44 of the Third Amended Complaint also lists a series of measures against Canada. The Third Amended Complaint also contains an additional approximate 373 paragraphs of allegations and seeks a declaration that “Canada may not discriminate in favor of the NITC/DRIC over the New Span, and may not accelerate the regulatory approvals for the NITC/DRIC and/or delay the regulatory approvals for the New Span.” In light of the foregoing, the measures at issue in the Third Amended Complaint are not limited to those listed in paragraph 43.<sup>218</sup>

133. Thus, even if the Third Amended Complaint were somehow the “operative complaint” for the purposes of Article 1121, which it is not, that pleading is evidence of

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<sup>216</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 177.

<sup>217</sup> Washington Third Amended Complaint, ¶ 44, **Exhibit C-141**. *DIBC et al. v. Canada et al.*, USDC, Docket: 1:10-CV-00476-RMC, Plaintiffs’ Memorandum of Points and Authorities in Opposition to the Motions to Dismiss and in Support of Plaintiffs’ Cross-motion for Partial Summary Judgment on Counts 1, 3, 6 and 7, 8 November 2013 (hereinafter “Washington Litigation Motion for Summary Judgment November 2013”) at 108-111, **Exhibit R-139**.

<sup>218</sup> Moreover, paragraph 43(d) refers to an October 19, 2005 meeting involving Canadian and U.S. officials regarding the Ambassador Bridge New Span. This meeting was one of many held during the DRIC EA’s Illustrative Alternatives phase to determine whether the twin Ambassador Bridge option X12 should be carried forward as a practical alternative. As the meeting notes explain, “In Canada, the second span of the Ambassador Bridge alternative [i.e., option X12] performs poorly due to impacts associated with the plaza and Huron Church Road.” Detroit River International Crossing Study Cooperating Agencies Meeting Notes, October 19, 2005, **Exhibit R-144**. DIBC thus specifically relies on Canada’s decision to eliminate option X12 from the DRIC EA (which was announced a few weeks after this meeting on November 14, 2005) as a basis for its Washington Third Amended Complaint.

nothing more than DIBC's continued willingness to ignore the conditions precedent under Article 1121.

### 3. The CTC Litigation is Inconsistent with Article 1121

134. The relevant procedural history of the NAFTA arbitration and CTC Litigation is highlighted in the table below and shows that CTC has continued both proceedings in tandem:

CTC LITIGATION	NAFTA ARBITRATION
	<b>April 29, 2011</b> - DIBC initiates arbitration against Canada under the NAFTA by filing a Notice of Arbitration.
<b>February 15, 2012</b> - DIBC files its Statement of Claim in the CTC Litigation. (Exhibit R-20)	
	<b>January 15, 2013</b> - DIBC amends its Notice of Arbitration against Canada under the NAFTA.
<b>February 19, 2013</b> - DIBC amends its claim in the CTC Litigation. (Exhibit C-119)	

135. As explained in Canada's Brief Statement and Memorial,<sup>219</sup> the CTC Litigation is a proceeding with respect to the measures alleged to breach the NAFTA as it seeks to impugn the Nine Point Plan,<sup>220</sup> the DRIC EA,<sup>221</sup> the *IBTA*<sup>222</sup> and the delay purportedly caused with respect to the New Span EA.<sup>223</sup> It is also a proceeding "involving the

<sup>219</sup> Canada Brief Statement on Jurisdiction, ¶¶ 73-75; Canada Memorial on Jurisdiction, ¶¶ 151-167.

<sup>220</sup> CTC Litigation Statement of Claim, ¶¶ 87-95, **Exhibit R-20**. The LGWEM Strategy is not explicitly named but as DIBC believes it was a "renaming" and "reformulation" of the Nine Point Plan (DIBC Counter-Memorial on Jurisdiction, ¶¶ 46-48), the proceedings are with respect to the LGWEM Strategy as well.

<sup>221</sup> CTC Litigation Statement of Claim, ¶¶ 99-113, **Exhibit R-20**.

<sup>222</sup> CTC Litigation Statement of Claim ¶¶ 1(g)(ii), **Exhibit R-20**.

<sup>223</sup> CTC Litigation Statement of Claim, ¶¶ 96-98, **Exhibit R-20**.

payment of damages.” For these two reasons DIBC contravened Article 1121 when it initiated and continued the lawsuit against Canada.

136. DIBC does not dispute that the CTC Litigation is a proceeding with respect to the measures that it alleges breach the NAFTA.<sup>224</sup> Nor does it even dispute that the CTC Litigation is a proceeding “involving the payment of damages.”<sup>225</sup> Instead, DIBC argues that it was allowed to initiate and continue the CTC Litigation under Article 1121 because its damages claim in that proceeding is not for the “same” measures at issue in the NAFTA arbitration.<sup>226</sup> In particular, DIBC states that the CTC Litigation “seeks damages only with respect to a potential, future expropriation that would be caused by the actual construction of the DRIC Bridge, and because that measure is not being challenged in this NAFTA arbitration, the CTC Litigation is consistent with Article 1121.”<sup>227</sup>

137. DIBC’s understanding of Article 1121 is wrong. Article 1121 bars “*any proceedings* with respect to” measures alleged to breach the NAFTA. The “proceedings” in question – the CTC Litigation – is a *proceeding* with respect to measures alleged to breach the NAFTA and is “involving the payment of damages.” The analysis need not proceed any further. DIBC misunderstands Article 1121 when it writes: “[A]n investor should [not] be required to waive its right to claim damages with respect to *different measures* that are not being challenged in the NAFTA arbitration.”<sup>228</sup> A claimant is required to waive *proceedings* with respect to measures, not the measures themselves. Because the CTC Litigation is a “*proceeding...involving the payment of damages,*” DIBC’s initiation and continuation of that proceeding against Canada contravenes Article 1121.

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<sup>224</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 209-214.

<sup>225</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 209-214.

<sup>226</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 214.

<sup>227</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 214.

<sup>228</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 214.

138. Moreover, DIBC's argument that the "actual construction" of the DRIC Bridge is a "measure" separate and distinct from the measures at issue in the NAFTA arbitration is untenable. For example, the approved location of the DRIC Bridge through the DRIC EA is not a measure that is separate and distinct from the actual construction of the DRIC Bridge for the purposes of NAFTA Article 1121. Both of DIBC's allegations have their roots in the same underlying complaint: that a new international crossing in proximity to the Ambassador Bridge violates DIBC's "exclusive franchise rights" and the NAFTA. Even DIBC acknowledges in the CTC Litigation that Canada, through the DRIC EA, "unlawfully commenced construction of a new, government-owned international crossing to be built less than two miles from the Ambassador Bridge."<sup>229</sup> DIBC also relies on the traffic projections of the DRIC EA to support its claim for damages.<sup>230</sup> DIBC cannot, therefore, legitimately argue that the "actual construction" of the DRIC Bridge is a measure "separate and distinct" from measures at issue in the NAFTA arbitration for the purposes of Article 1121.<sup>231</sup>

139. DIBC's argument that the CTC Litigation and NAFTA arbitration cannot overlap because it would be "premature" for DIBC to seek damages for the "actual construction" of the DRIC Bridge is also without merit. DIBC neglects that it has already sued Canada for damages in the Washington Litigation in March 2010 for "proceeding toward the construction of the DRIC Bridge."<sup>232</sup> Through its own pleadings DIBC therefore demonstrates its own understanding that such a claim is not "premature." Moreover, DIBC seeks "in excess of US\$3.5 billion" in damages against Canada in this NAFTA

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<sup>229</sup> CTC Litigation Statement of Claim, ¶ 99, **Exhibit R-20**; CTC Litigation Amended Statement of Claim, ¶ 105, **Exhibit C-119**.

<sup>230</sup> CTC Litigation Statement of Claim, ¶ 105, **Exhibit R-20**; CTC Litigation Amended Statement of Claim, ¶ 99, **Exhibit C-119**.

<sup>231</sup> Moreover, CTC does not only seek damages in the CTC Litigation for "a potential, future expropriation that would be caused by the actual construction of the DRIC Bridge." CTC also argues that it "must be compensated for the unlawful acts of the Canadian Government Bridge, which constitute nuisance, trespass to land (including interference with property rights), breach of contract and negligent misrepresentation. CTC Litigation Amended Statement of Claim, ¶ 113, **Exhibit C-119**.

<sup>232</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 213; Washington Complaint, ¶¶ 147-155, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 212-219, **Exhibit R-18**.

arbitration. It is difficult to imagine how this quantum would not overlap with DIBC's claim for *de facto* expropriation in the CTC Litigation.

140. By initiating and continuing the CTC Litigation, and by refusing to waive its right to continue the CTC Litigation in its Second NAFTA Waiver, DIBC has failed to meet the conditions precedent to arbitration under NAFTA Article 1121.

#### **4. DIBC Refuses to Confirm What Windsor Measures are Alleged to Breach the NAFTA**

141. The relevant procedural history of the Windsor Litigation and NAFTA arbitration is set out in the table below, which shows that CTC was pursuing both lawsuits against Canada in tandem:

WINDSOR LITIGATION	NAFTA ARBITRATION
<b>February 24, 2010</b> - CTC files a Statement of Claim in the Windsor Litigation. (Exhibit R-29)	
<b>June 22, 2010</b> - CTC files second Statement of Claim in the Windsor Litigation. (Exhibit R-30)	
<b>September 21, 2010</b> - CTC joined to Windsor by-law litigation initiated by other plaintiffs; Court stays CTC's February and June 2010 complaints pending outcome of by-law challenge. (Exhibit R-87)	
	<b>April 29, 2011</b> - DIBC initiates arbitration against Canada under the NAFTA by filing a Notice of Arbitration.
<b>September 6, 2011</b> - CTC's by-law challenge dismissed by Court. (Exhibit R-31)	
<b>August 13, 2012</b> - CTC abandons appeal, but February and June 2010 complaints still pending. (Exhibit R-33)	
<b>September 6, 2012</b> - CTC ordered to pay Windsor's legal costs. (Exhibit R-32)	

	<b>January 15, 2013</b> - DIBC amends its Notice of Arbitration against Canada under the NAFTA.
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142. In its NAFTA claim, DIBC alleges that the City of Windsor took measures “to discriminate against DIBC, violating Claimant’s exclusive franchise rights to operate a bridge between Detroit and Windsor, and also violating Claimant’s franchise rights by precluding the construction of the New Span.”<sup>233</sup>

143. In the Windsor Litigation, CTC alleges that the City of Windsor “engaged in unlawful and deliberate conduct for the purpose of delaying, obstructing, hindering and preventing CTC from engaging in its commercial activities to effectively operate and improve the Ambassador Bridge crossing.”<sup>234</sup> Specifically, CTC alleges that the following City of Windsor actions were unlawful and caused CTC damages:

- The Schwartz Report and Greenlink proposal;
- Purchase of property in the DRIC Bridge area;
- City Council Resolutions and submissions in the public consultation process opposing the construction of the New Span;
- Planning studies relating to the Olde Sandwich Towne;
- Installation of traffic lights and “unlimited driveway connections” along Huron Church Road; and
- By-laws and City Council resolutions to prevent the demolition of houses in Olde Sandwich Towne.<sup>235</sup>

144. In its Response to Canada’s Brief Statement on Jurisdiction and Admissibility, DIBC defended the continuation of the Windsor Litigation by arguing that, with the exception of Windsor’s “traffic measures” along Huron Church Road, none of the other

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<sup>233</sup> Amended NAFTA NOA, ¶ 135.

<sup>234</sup> *CTC v. Windsor* Statement of Claim, February 2010, ¶ 6, **Exhibit R-29**.

<sup>235</sup> See Canada Memorial on Jurisdiction, ¶ 176 and footnotes therein. See also *CTC v. Windsor* Statement of Claim, February 2010, **Exhibit R-29**.

“specific actions by Windsor...are at issue in this arbitration.”<sup>236</sup> In reliance on this statement, Canada accepted in its Memorial on Jurisdiction that DIBC had provided “written confirmation that Windsor’s measures relating to the DRIC Bridge and New Span are not part of the NAFTA arbitration.”<sup>237</sup> However, in its Counter-Memorial DIBC retracted in its previous statement and advanced a number of arguments to support CTC’s purported ability to pursue its allegations against the City of Windsor in both the Windsor Litigation and NAFTA arbitration simultaneously. None of DIBC’s arguments have any merit.

145. First, DIBC attempts to re-characterize the Windsor Litigation as challenging only municipal By-Laws enacted by the City of Windsor and not any other measures. This is false. CTC’s February 24, 2010 Statement of Claim in the Windsor Litigation, contains 93 paragraphs and 24 sections of allegations against the City of Windsor. Of those, only *nine* paragraphs and *two* sections relate specifically to the Windsor By-Laws.<sup>238</sup> The vast majority of CTC’s complaint focuses on a pattern of alleged discriminatory conduct by the City to favour the DRIC Bridge and prevent the Ambassador Bridge New Span. DIBC’s characterization of the Windsor Litigation as pertaining only to the City’s By-Laws is therefore inaccurate.<sup>239</sup>

146. Second, DIBC argues that it believed the Windsor Litigation had been “effectively terminated” and also appears to undertake to withdraw its proceedings.<sup>240</sup>

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<sup>236</sup> DIBC Response to Canada’s Brief Statement, ¶ 66.

<sup>237</sup> Canada Memorial on Jurisdiction, ¶ 178.

<sup>238</sup> *CTC v. Windsor* Statement of Claim, February 2010, ¶¶ 1, 65-69, 81-83, **Exhibit R-29**.

<sup>239</sup> In fact, DIBC originally identified the Schwartz Report as a specific measure alleged to breach NAFTA. See DIBC’s Second NAFTA NOI, ¶¶ 46-47 (“On January 21, 2005, the City of Windsor presented its report on border crossing issues to the public [i.e., the Schwartz Report]” with the goal of reducing the number of vehicles using the Ambassador Bridge in favour of the Windsor-Detroit Tunnel and, eventually, the DRIC Bridge). DIBC omitted this reference in its First NAFTA NOA in what was otherwise an identical passage. See First NAFTA NOA, ¶¶ 46-47. The Schwartz Report is also at issue in the Windsor Litigation – CTC alleges that it was part of Windsor’s “fixed intent to prevent the Replacement Span from ever coming to fruition” (*CTC v. Windsor* Statement of Claim, February 2010, ¶¶ 23-26, 86-87(a), **Exhibit R-29**.) DIBC’s latest explanation that the Schwartz Report and other measures impugned in CTC’s February 2010 complaint “may be relevant background” to the NAFTA arbitration is belied by its earlier submission which put the Schwartz Report at the foreground of its NAFTA claim. See Schwartz Report on Windsor Gateway, News Release, January 21, 2005, **Exhibit R-145**.

<sup>240</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 218.

DIBC cannot possibly have believed that the Windsor Litigation was somehow “effectively terminated” because the City of Windsor has been asking CTC to withdraw its proceedings since September 2012, most recently in July 2013, a mere one month before DIBC filed its Counter-Memorial.<sup>241</sup> As of the date of this Reply Memorial, DIBC has still not withdrawn the Windsor Litigation.

147. Third, DIBC argues that CTC's allegations against the City of Windsor in the Windsor Litigation “may be relevant background to this arbitration.” However, as Canada explained in its Memorial, the allegations of discrimination in the Windsor Litigation cannot be construed as “background” if DIBC advances the same allegations of discrimination in this NAFTA arbitration.

148. In its Counter-Memorial, DIBC simply refuses to identify which City of Windsor measures “discriminate against DIBC” and “preclud[e] the construction of the New Span.” If any of those measures include those at issue in the Windsor Litigation, then DIBC has failed to meet the conditions precedent to arbitration under Article 1121.

**V. DIBC HAS FAILED TO PROVE THAT ITS HIGHWAY 401-AMBASSADOR BRIDGE ROAD ACCESS CLAIM AND IBTA CLAIM ARE TIMELY**

**A. Summary of Canada's Position**

149. If the Tribunal decides that DIBC has complied with Article 1121, it nonetheless lacks jurisdiction *rationae temporis* over DIBC's Highway 401 and *IBTA* claims because of the three-year time limitation set out in NAFTA Articles 1116(2) and 1117(2).

150. DIBC's Counter-Memorial continues to rely on a theory of “continuing breach” to evade Articles 1116(2) and 1117(2). DIBC's interpretation is inconsistent with the ordinary meaning and object and purpose of those provisions, which refers to when the claimant *first* acquired actual or constructive *knowledge* of the alleged NAFTA breach

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<sup>241</sup> Letter from Christopher Williams to Mark A. Luz dated November 27, 2013, **Exhibit R-146**. Even if it were to withdraw those proceedings, now this would still not help its case under Article 1121, which required DIBC to act consistently with that provision as of the date it submitted its claim to arbitrate (April 29, 2011).

and loss and not on whether the *measure* is continuing or has ended. DIBC's theory was rejected in the recent NAFTA Chapter Eleven award *Apotex Inc. v. United States* and is inconsistent with the views of all three NAFTA Parties.

151. DIBC's Counter-Memorial also attempts to use principles from the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") to characterize the measures in a way that evades the NAFTA's three-year time limitations period.<sup>242</sup> DIBC describes Canada's actions regarding the Highway 401-Ambassador Bridge connection and the *IBTA* as "preparatory" or "composite" depending on which characterization it believes best assists it to avoid the requirements of Articles 1116(2) and 1117(2). However, DIBC's theories ignore or misconstrue uncontroverted evidence and none of these characterizations of the measures can displace the clear text of the NAFTA which must be applied as written and as it was intended to operate. DIBC has failed to establish that its Highway 401 or *IBTA* claims are timely. As such, this Tribunal is without jurisdiction over those claims.

152. The following section will first rebut DIBC's incorrect interpretation of Articles 1116(2) and 1117(2). In particular, Canada will demonstrate that a continuing measure does not toll the three-year time limitations period and that DIBC's arguments with respect to composite acts, knowledge of loss or damage, and the relevance of related domestic litigation are all misguided. Second, Canada will demonstrate that DIBC's characterization of the Highway 401 measures (i.e., Nine Point Plan/LGWEM Strategy and the DRIC EA) are not only contradictory and confused but are designed to mislead as to when DIBC first acquired knowledge of the alleged breach. The witness statement of Ms. Helena Borges, Associate Deputy Minister at Transport Canada, responds to various mischaracterizations in DIBC's Counter-Memorial and demonstrates, along with the totality of the other documentary evidence, that DIBC's Highway 401 claims are untimely. Third, Canada will demonstrate that DIBC's newest argument as to when it first acquired knowledge of the alleged NAFTA breach and damage relating to its *IBTA*

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<sup>242</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 243-260.

claim (October 18, 2010) is disingenuous and inconsistent with the evidence and its own prior positions.

## **B. DIBC Ignores the Ordinary Meaning and Object and Purpose of Articles 1116(2) and 1117(2)**

### **1. DIBC's "Continuing Measures" and "Composite Act" Theories Are Wrong**

153. Canada's Memorial explained that the plain language of Articles 1116(2) and 1117(2) bar a claimant from submitting a claim to arbitration if more than three years have passed from the "date on which" (i.e., a particular date) it or its enterprise "first acquired knowledge," either actual or constructive, of the alleged breach and that the investor or its enterprise "has incurred loss or damage."<sup>243</sup> Untimely claims are outside the tribunal's jurisdiction *rationae temporis*.<sup>244</sup> In its Counter-Memorial, DIBC provides a flawed interpretation of Articles 1116(2) and 1117(2) in an attempt to evade the fact that it filed untimely claims.

154. DIBC argues that wrongful measures that "have their origins before the time-bar" but continue past the three-year time limitations period can nevertheless be submitted for arbitration under NAFTA Chapter Eleven.<sup>245</sup> DIBC argues that that Article 1116(2) and Article 1117(2) do not "abrogate the continuing acts principle."<sup>246</sup>

155. However, interpreting Articles 1116(2) and 1117(2) in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties* makes it clear that they were drafted to ensure that, *regardless* of whether a measure is continuing or not, a NAFTA claim must be brought within three years of the claimant having *first acquired knowledge* of breach and loss. A NAFTA claim filed later is untimely, regardless of whether the impugned measure is still in place.

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<sup>243</sup> Canada Memorial on Jurisdiction, ¶¶ 186-215. Knowledge can be either actual or constructive. See NAFTA Articles 1116(2) and 1117(2).

<sup>244</sup> See *Apotex*, Jurisdictional Award, ¶ 337(b), **RLA-33**.

<sup>245</sup> See DIBC Counter-Memorial on Jurisdiction, ¶¶ 274, 295.

<sup>246</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 266.

156. Canada's Memorial on Jurisdiction explained that Article 1116(2) and 1117(2) deliberately use the term "first acquired knowledge" to place a marker on when the three-year limitations period for commencing arbitration must begin.<sup>247</sup> Canada explained that DIBC's interpretation defies the ordinary meaning of the text and defeats its purpose. What is critical for the analysis is the actual or constructive *knowledge* held by the claimant or its enterprise and when this knowledge was *first* acquired.<sup>248</sup>

157. DIBC relies on the ILC Articles to justify its continuing breach theory.<sup>249</sup> But as NAFTA tribunals have observed, the ILC Articles cannot displace the specific wording of the NAFTA.<sup>250</sup> Articles 1116 and 1117 constitute *lex specialis* and Article 55 (*Lex specialis*) of the ILC Articles states:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the internal responsibility of a State are governed by special rules of international law.<sup>251</sup>

158. Since filing its Memorial, Canada's position received additional support from the NAFTA tribunal's decision in *Apotex Inc. v. United States*, which DIBC's Counter-Memorial ignored. The *Apotex* tribunal reaffirmed that the NAFTA limitations period is a

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<sup>247</sup> Canada Memorial on Jurisdiction, ¶¶ 188-205.

<sup>248</sup> *Grand River Enterprises Six Nations Ltd. v. The United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, July 20, 2006 (hereinafter "*Grand River, Jurisdiction Decision*"), ¶¶ 54, 58-59, **RLA-15**. The *Grand River* tribunal characterized knowledge of breach and loss as "foremost a question of fact" (¶ 54) whereas constructive knowledge may be imputed to an investor if it can be shown that the investor would have known that fact had it exercised reasonable care or diligence.

<sup>249</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 247; 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), (hereinafter "ILC Articles" or "ILC Commentary") Article 14 at 59 and ILC Commentary at 60, **CLA-32**.

<sup>250</sup> *Archer Daniel Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States* (ICSID Case No. ARB(AF)04/05) Award, November 21, 2007 (hereinafter "*ADM, Award*") ¶¶ 118 ("The customary international law that the ILC Articles codify do not apply to matters which are specifically governed by *lex specialis* –i.e., Chapter Eleven of the NAFTA in the present case."), **RLA-51**; *Corn Products International Inc. v. United Mexican States* (ICSID Case No. ARB(AF)04/1) Decision on Responsibility, January 15, 2008, ¶ 76, **RLA-52**.

<sup>251</sup> ILC Articles, Article 55, at 140, **CLA-32**. This is apposite the general principle "that a special rule prevails over a general rule (*lex specialis derogate legi generali*), so that, for example, treaty rules between states as *lex specialis* would have priority as against general rules of customary international law between the same states." See Malcolm N. Shaw, *International Law*, 5<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 116, **RLA-53**.

“clear and rigid limitation defense, which is not subject to any suspension, prolongation or other qualification” and found that a continuing act or breach theories are not relevant.<sup>252</sup> The *Apotex* tribunal confirmed the views of other NAFTA tribunals which also concluded that a continuing course of conduct does not toll the NAFTA’s three-year time limitation period.<sup>253</sup> The *Apotex* tribunal’s award also reflects the consistent views of all three NAFTA Parties expressed in various fora over a number of years.<sup>254</sup>

159. In its Counter-Memorial, DIBC disputes the status of the concordant views of the NAFTA Parties on the interpretation of Article 1116(2) and 1117(2).<sup>255</sup> Under the misleading heading “Canada falsely alleges the NAFTA has been amended by a Subsequent Agreement,” DIBC denies that the common view of the NAFTA Parties on the interpretation of Article 1116(2) and 1117(2) has any weight under the *Vienna Convention on the Law of Treaties*.<sup>256</sup>

160. DIBC mischaracterizes Canada’s position. Canada never suggested that the NAFTA has been amended by a subsequent agreement. The issue is not one of an amendment to the NAFTA,<sup>257</sup> but rather how Articles 1116(2) and 1117(2) are to be

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<sup>252</sup> *Apotex*, Jurisdictional Award, ¶¶ 304,324-327, **RLA-33**. DIBC’s Counter-Memorial tries to distinguish important statements of the *Feldman* and *Grand River* tribunals concerning the character of the NAFTA limitations period by suggesting that *Feldman* and *Grand River* ought not to be applicable beyond the specific context of these decisions (¶ 303). But the *Apotex* decision specifically endorsed the view of those tribunals that the three-year time limitations period “is a ‘clear and rigid’ defence... ‘not subject to any suspension, prolongation or other qualification.’”) *Apotex*, Jurisdictional Award, ¶ 304, 327, **RLA-33**.

<sup>253</sup> See *Feldman*, Award, ¶ 63, **RLA-14** and *Grand River*, Jurisdiction Decision, ¶ 81, **RLA-15**.

<sup>254</sup> See *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, July 14, 2008 (hereinafter “*Merrill & Ring*, 1128 Submission of the United States”) ¶ 17, **RLA-17**; *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of Mexico, April 2, 2009 (hereinafter “*Merrill & Ring*, 1128 Submission of Mexico”), **RLA-18**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc., v. Government of Canada* (UNCITRAL), Submission of the United States of America, April 19, 2013, ¶ 12, **RLA-19**.

<sup>255</sup> The concordant views of the NAFTA Parties have featured most prominently in submissions under NAFTA Article 1128 (Participation by a Party), which provides: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”

<sup>256</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 309-311.

<sup>257</sup> Amendments to the NAFTA are to be undertaken in accordance with Article 2202: “(1) The Parties may agree on any modification of or addition to this Agreement. (2) When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.” See also VCLT Part IV (Amendment and Modification of Treaties), **RLA-10**.

*interpreted* in accordance with the customary international law rules of treaty interpretation set out in *Vienna Convention of the Law of Treaties* Article 31.<sup>258</sup> Article 31(1) sets out the primary rule of treaty interpretation and Article 31(2) describes what comprises the context of the terms of the treaty. Article 31(3) describes other elements which “*shall* be taken into account, together with the context” and includes “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (emphasis added).<sup>259</sup> The use of the word “shall” indicates the mandatory nature of this part of the general rule of treaty interpretation.<sup>260</sup> In other words, subsequent agreements and practice of the treaty parties regarding the interpretation of their obligations *must* be taken into consideration by the Tribunal.<sup>261</sup>

161. Thus, if all three NAFTA Parties have expressed their agreement on the interpretation of Article 1116(2) and 1117(2), this is a “subsequent agreement” for the purposes of *Vienna Convention of the Law of Treaties* Article 31(3)(a) which “*shall* be taken into account” when interpreting the treaty.<sup>262</sup> All three NAFTA Parties agree that a continuing measure does not toll the limitations period under Article 1116(2) and 1117(2).

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<sup>258</sup> The governing law of the NAFTA is the NAFTA itself and “applicable rules of international law.” See NAFTA Article 1131(1). *Merrill & Ring Forestry L. P. v. Government of Canada* (UNCITRAL) Award, March 31, 2010 (hereinafter “*Merrill & Ring, Award*”), ¶ 183, **RLA-54**. See VCLT, Article 31, **RLA-10**.

<sup>259</sup> VCLT Article 31(3)(b) also dictates that “any subsequent practice between the parties in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account when interpreting the treaty. See VCLT, Article 31, **RLA-10**.

<sup>260</sup> This stands in contrast to optional nature of VCLT Article 32 (Supplementary Means of Interpretation). See VCLT, Article 32, **RLA-10**.

<sup>261</sup> Interpretations by the NAFTA Free Trade Commission go further because they are specifically binding on a Chapter Eleven Tribunal. See NAFTA Article 1131(2).

<sup>262</sup> See *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, January 28, 2008, ¶¶ 181-189, **RLA-55**. The existence of such an “agreement” turns less on its form than on the fact that the parties intended their understanding to constitute an agreed basis for interpretation. Such an agreement need not be formal. See, e.g., Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 217, **RLA-56** (“It is not a question of whether that provision [article 31(3)(a) of the Vienna Convention, which addresses the meaning of “agreement”] adds to the assessment that any given instrument was intended to be a binding treaty, but whether the parties to a treaty have, subsequent to its conclusion, reached a firm agreement on what one of its provisions means.”); Sir Robert Jennings QC & Sir Arthur Watts QC, *Oppenheim’s International Law*, 9<sup>th</sup> ed. (Harlow: Longman Group UK Limited, 1992) at 1268, § 630 (Parties can “agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure.”), **RLA-57**.

162. DIBC relies on several arbitral awards in its Counter-Memorial to support its reliance on the continuing act theory.

163. First, DIBC points to *UPS v. Canada* in support of its position.<sup>263</sup> As Canada's Memorial explained, the *UPS* decision on the question of continuing breach was incorrect and should not be followed by this Tribunal.<sup>264</sup> Every other NAFTA tribunal, including the most recent *Apotex v. United States*, has taken a different view, as have the NAFTA Parties themselves. Interpreted in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties*, there is no reason for this Tribunal to come to a different conclusion.

164. Finally, DIBC relies on the *Feldman* and *Pac Rim* decisions in support of its continuing breach arguments.<sup>265</sup> However, neither case is relevant. In the *Feldman* decision, the time bar issues considered by the tribunal did not address the "first acquired" language under Article 1116(2) in connection with a continuing course of conduct. Rather, the tribunal considered whether state action short of "formal and authorized recognition" of a claim could "either bring about interruption of the running of limitation or estop the respondent State from presenting a regular limitation defense."<sup>266</sup> Similarly, the *Pac Rim* tribunal only engaged in a discussion of continuing acts in the context of abuse of process<sup>267</sup> and not in its *rationae temporis* analysis.<sup>268</sup> A correct reading of *Pac Rim* demonstrates that the relevant issue for time bar under the NAFTA is when claimant *first* acquired knowledge of the alleged breach and damage and not whether a measure is a continuing act. Neither *Feldman* nor *Pac Rim* is of any assistance to DIBC.

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<sup>263</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 252.

<sup>264</sup> See Canada Memorial on Jurisdiction, ¶¶ 210-212.

<sup>265</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 251 (citing *Feldman*, Award, ¶¶ 187-188), 255 (citing *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on Respondent's Jurisdictional Objections, June 1, 2012 (hereinafter "*Pac Rim Cayman*, Jurisdictional Decision"), ¶ 2.104, **CLA-30**).

<sup>266</sup> *Feldman*, Award, ¶ 63, **RLA-14**.

<sup>267</sup> *Pac Rim Cayman*, Jurisdictional Decision, ¶¶ 2.91-2.92, **CLA-30**.

<sup>268</sup> *Pac Rim Cayman*, Jurisdictional Decision, ¶¶ 3.35-3.38, **CLA-30**.

165. DIBC's Counter-Memorial also attempts to use the notion of "composite acts" to avoid the NAFTA limitations period by characterizing the measures relating to its Highway 401 claim (Nine Point Plan, LGWEM Strategy and DRIC EA) and the *IBTA* as composite acts so as to avoid having its claim found untimely.<sup>269</sup>

166. DIBC's legal characterizations are inapposite to the facts of this dispute. As described more fully below, the alleged breach of the \$300 million "promise" in the Nine Point Plan is not "composite" because it was "reneged" in the LGWEM Strategy on March 11, 2004. The elimination of option X12 from the DRIC EA on November 14, 2005 was described by DIBC the very next day as having "effected delay and damage" to the Ambassador Bridge.<sup>270</sup> DIBC itself has already identified October 3, 2007 as a specific date on which Canada's alleged commitment regarding a Highway 401-Ambassador Bridge connection was breached.<sup>271</sup> None of these fit DIBC's "composite" label. Finally, DIBC's attempt to bootstrap the *IBTA* on to legislation which was enacted almost six years later (*BSTA*) and call it a "composite" act is also inappropriate. In light of the NAFTA's clear requirement that a claimant is required to bring its claim within three years of *first acquiring* actual or constructive knowledge of the breach of the NAFTA and that loss or damage was incurred, DIBC's label simply does not fit the facts which gave rise to this dispute. DIBC is unable to evade the time limitations period in this manner.

## **2. Knowledge of the Extent of Loss or Damage is Not Required for the Limitations Period to Commence**

167. In its Counter-Memorial, DIBC argues that under Article 1116(2) and 1117(2) an investor must have actually been harmed and have specific knowledge of that harm for

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<sup>269</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 257-263. ILC Article 15 defines a composite act as a "series of acts or omissions defined in the aggregate as wrongful." An act may also be a "completed act" "at the moment when the act is performed, even if its effects continue." ILC Articles, Article 14(1) at 59, **CLA-32**. The ILC Commentary notes that the prolongation of the effects of a completed act does not mean that the breach is a continuing one. ILC Articles, Article 14(1) at 60, **CLA-32**.

<sup>270</sup> Letter from Dan Stamper (DIBC/CTC) to Roger Ward (MTO) dated November 15, 2005, **Exhibit R-35**; Letter from Dan Stamper (DIBC/CTC) to Mohammed Alghurabi (MDOT) dated November 15, 2005, **Exhibit R-36**.

<sup>271</sup> NAFTA Statement of Claim, ¶ 190.

the limitations period to run.”<sup>272</sup> This is incorrect. Concrete knowledge of the actual amount of loss or damage is not a pre-requisite to the running of the limitation period under 1116(2) or 1117(2). Nor can a claimant sit on its hands while it incurs additional losses. Both NAFTA tribunals in *Mondev* and *Grand River* found that “damage or injury may be incurred even though the amount or extent may not become known until some future time.” The tribunal in *Apotex* concurred with this determination,<sup>273</sup> as have all three NAFTA Parties.<sup>274</sup>

### **3. Litigation with Respect to Measures Alleged to Breach NAFTA Do Not Extend the Limitations Period**

168. DIBC takes the position in its Counter-Memorial that ongoing litigation can toll the NAFTA limitations period. DIBC argues that both the application brought by Canada seeking a declaration that the *IBTA* was not barred by the Settlement Agreement and the judicial review sought by DIBC/CTC of the Ministerial Order demonstrate that DIBC could only have learned of any damages as of the date of the Ministerial Order “at the earliest.”<sup>275</sup> DIBC goes on to argue that “because the Ministerial Order was (and is) subject to litigation, it is far from clear that the application of the *IBTA* to Claimant is legally certain enough to commence the litigation period.”<sup>276</sup>

169. DIBC’s position is wrong. The text of Articles 1116(2) and 1117(2) makes no allowance for the limitations period to be tolled by ongoing litigation with respect to the impugned measure. Doing so would defeat the purpose of the provisions, which is to provide a clearly defined period within which a claim to arbitration must be filed. After a review of relevant NAFTA awards, the *Apotex* tribunal concluded as follows:

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<sup>272</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 239.

<sup>273</sup> *Apotex*, Jurisdictional Award, ¶ 303, **RLA-33**.

<sup>274</sup> See *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, July 14, 2008 (hereinafter “*Merrill & Ring*, 1128 Submission of the United States”) ¶ 17, **RLA-17**; *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of Mexico, April 2, 2009 (hereinafter “*Merrill & Ring*, 1128 Submission of Mexico”), **RLA-18**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc., v. Government of Canada* (UNCITRAL), Submission of the United States of America, April 19, 2013, ¶ 12, **RLA-19**.

<sup>275</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 293.

<sup>276</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 306.

The position, therefore, is that any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to court action. Any conclusion otherwise would provide a very easy means to evade the clear rule in NAFTA Article 1116(2) in most cases (i.e. by filing any court action, however hopeless).<sup>277</sup>

170. Similarly, NAFTA tribunals have found that the limitations period is not tolled by the pending outcome of subsequent litigation that stands to quantify the extent of loss for the investor.<sup>278</sup> DIBC's argument cannot stand as it would lead to the absurd result that by disagreeing with a measure and challenging it in domestic proceedings, even if frivolous, a claimant could evade a limitations period. As such, none of the ongoing litigation referenced by DIBC serves to toll the limitation period in NAFTA Articles 1116(2) and 1117(2).

**C. The Evidence Shows that DIBC First Acquired Actual or Constructive Knowledge of the Alleged Breach and Loss Arising from its Highway 401 Claim before May 1, 2008**

**1. DIBC's Position on the Date It "First Acquired Knowledge" Has Changed Multiple Times**

171. DIBC has taken conflicting positions in this arbitration with regard to the timeliness of its claim relating to a direct highway connection between Highway 401 and the Ambassador Bridge. In its Second NAFTA NOI and First NAFTA NOA, DIBC alleged as follows:

Canada has failed to observe the clear commitments that it made with respect to extending Highway 401 to the Ambassador Bridge. On November 12, 2008, Canada admitted in writing that rather than being a temporary delay, this failure reflected a decision by Canada to renege on its commitments with respect to improving the management of traffic to the Ambassador Bridge.<sup>279</sup>

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<sup>277</sup> *Apotex*, Jurisdictional Award, ¶¶ 328, 331, **RLA-33**.

<sup>278</sup> *Mondev*, Award, ¶ 87, **RLA-20**. *Mondev* cited with approval in *Grand River*, Jurisdiction Decision, ¶ 78, **RLA-15**; see also *Apotex*, Jurisdictional Award, ¶¶ 328, 331, **RLA-33**.

<sup>279</sup> Second NAFTA NOI, ¶ 34; First NAFTA NOA, ¶ 34 (emphasis added). In Canada's submissions, when referring to the date on which DIBC/CTC knew or should have known that they incurred loss or damage for the purpose of Articles 1116(2) and 1117(2), Canada does not concede that either DIBC or CTC incurred any compensable loss or damage under NAFTA Chapter Eleven.

172. The alleged November 12, 2008 “admission” to which DIBC was referring was the DRIC EA, which was released for public comment on that day.<sup>280</sup> As described above, the DRIC EA selected the location for the new DRIC Bridge, Parkway and customs plaza.

173. In DIBC's Statement of Claim, DIBC reproduced the same text and allegation but removed the November 12, 2008 reference and moved back the alleged date of Canada's “renegeing” on previous commitments to October 3, 2007, when Minister Cannon wrote to DIBC to confirm Canada's position regarding the Nine Point Plan/LGWEM Strategy and to confirm that Canada was committed to the DRIC EA's plan for a new highway to a new bridge without a direct connection to the Ambassador Bridge.<sup>281</sup> DIBC's Response to Canada's Brief Statement maintained October 3, 2007 as its date of first acquired knowledge but argued that the claim was timely nevertheless because it was a “continuing breach.”<sup>282</sup>

174. In its Counter-Memorial, DIBC again reversed course stating that May 1, 2008 is the earliest possible date of the NAFTA breach and damage because that was when the exact route of the Parkway was publically announced.<sup>283</sup> DIBC says it met NAFTA's three-year time limitation because it filed its First NAFTA NOA on April 29, 2011, i.e. within three years (less two days) of the May 1, 2008 Parkway announcement. But DIBC's Counter-Memorial still does not fully concede the May 1, 2008 date and pushes the relevant date for triggering the limitations period even further into the future than what it originally alleged in its First NAFTA NOA.<sup>284</sup>

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<sup>280</sup> “Ontario Government Notice Draft Environmental Assessment Report Available for Review”, November 12, 2008, **Exhibit R-147**; Listing of Canadian Reports, Detroit River International Crossing / New International Trade Crossing, Partnership Border Study, **Exhibit R-148**. DIBC does not specifically identify what occurred on November 12, 2008, but the public release of the DRIC EA is the only event it could be referring to.

<sup>281</sup> NAFTA Statement of Claim, ¶ 190. See Letter from the Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC (Oct. 3, 2007), **Exhibit C-110**.

<sup>282</sup> DIBC Response to Canada's Brief Statement on Jurisdiction, ¶ 23.

<sup>283</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 227, 230.

<sup>284</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 270-271.

175. DIBC's vacillations as to when it did or should have first acquired knowledge of the alleged NAFTA breach and loss speak to the conflict between DIBC's arguments, the proper interpretation of Articles 1116(2) and 1117(2) and the evidence.

## 2. All the Relevant Events Relating to DIBC's Highway 401 Claims Happened Before May 1, 2008

### a) Nine Point Plan/LGWEM Strategy

176. DIBC's allegation that Canada reneged on a commitment to spend \$300 million on a direct highway connection to the Ambassador Bridge in the Nine Point Plan is central to its NAFTA claim.<sup>285</sup> DIBC alleges that it relied on this promise when it decided to spend "hundreds of millions" on the Gateway Project in Detroit.<sup>286</sup> DIBC alleges that it has *already* lost toll revenue to the Blue Water Bridge because of Canada's refusal to build a highway to the Ambassador Bridge.<sup>287</sup>

177. Canada denies that there ever was such a commitment and DIBC has provided no evidence to make out even a *prima facie* case. DIBC also conflates the Nine Point Plan and LGWEM Strategy with the DRIC EA process. This is a mischaracterization. These measures are separate and distinct. The Nine Point Plan and LGWEM Strategy was focused on short and medium-term traffic improvement projects with a defined \$300 million budget.<sup>288</sup> In contrast, the DRIC EA was focused on addressing the long-term transportation needs of the Windsor-Detroit border by evaluating the need for a new

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<sup>285</sup> First NAFTA NOA, ¶¶ 26-35; Amended NAFTA NOA, ¶ 113; NAFTA Statement of Claim, ¶ 102, 190. DIBC also relies on this allegation in its Washington Complaint. See Washington Complaint, ¶ 8, 79-81, **Exhibit R-17**; Washington First Amended Complaint, ¶ 193, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 229, 240-243, **Exhibit R-19**.

<sup>286</sup> Washington Complaint, ¶¶ 8, 79-81, **Exhibit R-17**; Washington First Amended Complaint, ¶ 193, **Exhibit R-18**; Washington Second Amended Complaint, ¶¶ 132-133, 229, 240-243, **Exhibit R-19**; First NAFTA NOA, ¶¶ 33-35; Amended NAFTA NOA, ¶¶ 70, 83-84; NAFTA Statement of Claim, ¶¶ 95, 158, 190.

<sup>287</sup> NAFTA Statement of Claim, ¶ 172.

<sup>288</sup> Windsor Gateway Short and Medium Term Improvements," Memorandum of C-29 Understanding between The Government of Ontario and The Government of the Province of Ontario (Sept. 25, 2002), **Exhibit C-29**; News Release, "Canada and Ontario Announce Next Steps at Windsor Gateway," May 27, 2003 ("Nine Point Plan"), **Exhibit C-32**; "A New Solution for the Windsor Gateway Announced By All Three Levels of Government," News Release, March 11, 2004 ("LGWEM Strategy"), **Exhibit R-34**.

crossing, customs plaza and highway connection between Highway 401 in Ontario and the interstate highways in Michigan.<sup>289</sup>

178. But in any event, even if Canada had promised \$300 million towards an Ambassador Bridge highway connection in the Nine Point Plan, by March 2004 DIBC knew that it would not be receiving the money. DIBC has no response to this except to say the LGWEM Strategy was a “renaming” or “reformulation” of the Nine Point Plan.<sup>290</sup> This is simply incorrect.<sup>291</sup> DIBC knew, or should have known, of the NAFTA alleged breach and loss relating to Canada's promise to spend \$300 million on a highway to the Ambassador Bridge as of March 11, 2004. As such, any claim based on a breach of this alleged promise is time barred pursuant to Articles 116(2) and 1117(2).

#### **b) DRIC Environmental Assessment**

179. In its Counter-Memorial, DIBC argues that it that could not have known before May 1, 2008, the day the exact route of the Parkway was publically announced, that Canada would not build a direct highway connection between Highway 401 and the Ambassador Bridge.<sup>292</sup>

180. This is untenable. Canada's Memorial presented voluminous evidence to show that DIBC knew or should have known that as of November 15, 2005, there would be no highway built between Highway 401 and the Ambassador Bridge. This evidence came in the form of correspondence and statements by DIBC's own officials,<sup>293</sup> public

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<sup>289</sup> DRIC EA Report, Executive Summary at (i), **Exhibit R-47**.

<sup>290</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 46, 282.

<sup>291</sup> See ¶ 31 above; 2004 MOU at 2 of 6, **Exhibit R-8** (“This new approach replaces the Nine Point Windsor Gateway Action Plan”).

<sup>292</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 296, 270.

<sup>293</sup> Letter from Dan Stamper (DIBC/CTC) to Roger Ward (MTO) dated November 15, 2005, **Exhibit R-35**; Letter from Dan Stamper (DIBC/CTC) to Mohammed Alghurabi (MDOT) dated November 15, 2005, **Exhibit R-36**; 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, 1<sup>st</sup> Sess., 39<sup>th</sup> Parliament, Tuesday, May 30, 2006 at 3, **Exhibit R-108**; Proceedings of the Standing Senate Committee on Transport and Communications, Issue 6 – Evidence – November 28, 2006 at 6 of 12, **Exhibit R-37**; Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon, Q.C. (Transport Canada) dated April 26, 2007, **Exhibit R-119**; “Ambassador Bridge Owners Forging

information sessions regarding the DRIC EA<sup>294</sup> and correspondence and statements by Canadian officials.<sup>295</sup>

181. After November 2005, Canada was clear as to what Highway 401 access options remained under consideration. For example, the November 2005 *Generation and Assessment of Illustrative Alternatives* report shows a map of the Highway 401 route connections still under consideration and *none* of them went to the Ambassador Bridge.<sup>296</sup> Every one of the DRIC EA public information open houses in 2006 and 2007 discussed and showed maps of, specific routes and options to connect Highway 401 to a new bridge in one of three locations in southwest Windsor; *none* of those options included a highway connection to the Ambassador Bridge.<sup>297</sup>

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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**. See also “Bridge would chip in on Hwy,” Windsor Star, September 13, 2007, **Exhibit R-149**.

<sup>294</sup> See “Welcome to the Second Public Information Open House for the Detroit River International Crossing Environmental Assessment,” November 29, 30 and December 1, 2005 at 27-28, 36, **Exhibit R-53**; DRIC Video Presentation, Second Public Information Open House (November/December 2005) **Exhibit R-53(a)**; DRIC EA Report, § 3.2 Table 3.3 at 3-11, **Exhibit R-47**; Third Public Information Open House, Display Board March 28 and 30, 2006, **Exhibit R-116**; Third Public Information House, DRIC-Why not other alternatives, March 28, 2006, **Exhibit R-117**; Fourth Public Information Open House Display Boards Handouts, Dec 6, 2006, **Exhibit R-118**. See also DRIC EA Public Information Open House #5 Handouts, **Exhibit R-150**; 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**.

<sup>295</sup> Letter from Len Kozachuk to Skip McMahon (DIBC/CTC) dated January 27, 2006, **Exhibit R-112** (“[I]n consideration of the high community impacts of an expanded Canadian bridge plaza and the expansion of Huron Church Road north of E.C. Row Expressway, and the potential for disruption to border traffic during construction of the plaza and freeway, the Partnership considered that, on an end-to-end basis, the disadvantages of this alternative outweighed the advantages.”); Letter from Roger Ward (MTO) to Dan Stamper (DIBC/CTC) dated January 31, 2006, **Exhibit R-113** (“As you are aware, the DRIC EA was established in order to address the entire border crossing system, including the connection to the provincial freeway system. *The Area of Continued analysis, which we announced in November 2005, is the area in which the Project Team intends to develop specific alternatives for river crossings, plazas and access road to Highway 401.*”); 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**.

<sup>296</sup> *Generation and Assessment of Illustrative Alternatives* (November 2005), Exhibit 3.19 “Recommended Area of Continued Study, Canadian Side” at 121, **Exhibit R-52**.

<sup>297</sup> See 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**

182. Even DIBC's own New Span environmental assessment confirmed that there would be no direct connection between Highway 401 and the Ambassador Bridge. In April 2006, DIBC explicitly confirmed that its New Span proposal did not contemplate the construction of a "ring road" through Sandwich Towne or the conversion of Huron Church Road into a dedicated highway to the Ambassador Bridge from Highway 401.<sup>298</sup> Both of those specific road access options had been considered and rejected in the DRIC EA in November 2005 because of their negative impacts on Windsor neighborhoods.<sup>299</sup> When DIBC formally filed its New Span EA in December 2007, it did not include any improved highway connection from Highway 401 and assumed Huron Church Road would remain as it existed.<sup>300</sup> Had DIBC been expecting a direct highway connection to the Ambassador Bridge, its proposal for the New Span would have included that key assumption.

183. On May 24, 2007, in response to DIBC's allegation in the media regarding the "promised" \$300 million highway, the Ontario Ministry of Transportation said "it has no plans to provide a direct connection to the Ambassador [Bridge]" and that that "the section between the [EC Row] expressway and the Ambassador Bridge will remain much as it is today but under the city's control."<sup>301</sup>

184. DIBC's Counter-Memorial ignores all of this evidence because it contradicts DIBC's argument that it was uncertain as to what Canada's plans were regarding a

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**R-115**; Third Public Information Open House Display Board March 28 and 30, 2006, **Exhibit R-116**; Third Public Information Open House, DRIC-Why not other alternatives, March 28, 2006, **Exhibit R-117**; Fourth Public Information Open House Display Board Handouts, December 6, 2006, **Exhibit R-118** (slide entitled "Practical Alternatives" showing access road from Highway 401); Fifth Public Information Open House Display Board Handouts, August 14 and 15, 2007, **Exhibit R-150**.

<sup>298</sup> "Bridge Forges Ahead with Twin Span," Windsor Star, April 27, 2006, **Exhibit R-153** (quoting DIBC official as saying "The [Ambassador] bridge's 'ring road' is no longer under consideration" and that Huron Church Road has sufficient capacity.").

<sup>299</sup> DRIC EA Report at 6-34, 6-37, **Exhibit R-47**; *Generation and Assessment of Illustrative Alternatives* (November 2005), Exhibit 3.19 "Recommended Area of Continued Study, Canadian Side" at 121, **Exhibit R-52**.

<sup>300</sup> New Span EA, **Exhibit C-89**.

<sup>301</sup> Peter Kenter, "Gateway bridge to spur new highway building," *Daily Commercial News*, May 24, 2007, **Exhibit R-154**.

Highway 401-Ambassador Bridge connection until May 1, 2008.<sup>302</sup> Instead, DIBC's Counter-Memorial suggests that DIBC officials were oblivious to events between March 2004 and May 1, 2008. The witness statement of Associate Deputy Minister of Transport Canada Helena Borges confirms that DIBC was told numerous times at meetings and in correspondence between April and October 2007 that Canada would not support the construction of a Highway 401-Ambassador Bridge connection.

185. In her witness statement, Ms. Borges testifies about various meetings she and other Canadian government officials, including the Minister of Transport, Infrastructure and Communities Lawrence Cannon, had with DIBC regarding the Ambassador Bridge-Highway 401 issue in April, July and October 2007.<sup>303</sup> At those meetings and in related correspondence, DIBC repeatedly alleged that Canada had made a commitment to build a direct Highway 401-Ambassador Bridge connection, that Canada in fact had a legal obligation to do so and that it would be discriminatory to construct a highway to the DRIC Bridge but not the Ambassador Bridge. DIBC went so far as to threaten legal action against Canada if a highway connection to the Ambassador Bridge was not built.<sup>304</sup>

186. Ms. Borges testifies that Canada's position was made clear to DIBC: Canada never made a commitment in 2002 or at any other time to build a Highway 401-Ambassador Bridge connection and that it would not do so through the DRIC EA.<sup>305</sup> Ms. Borges testifies that she explained to DIBC's officials during their July 4, 2007 meeting that all feasible road access options between Highway 401 and the Ambassador Bridge had been examined as part of the DRIC EA but it was decided in November 2005 that the community and environmental impacts of building a direct Highway 401-Ambassador Bridge connection were too serious to consider any further.<sup>306</sup>

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<sup>302</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 16, 227.

<sup>303</sup> Witness Statement of Helena Borges (Transport Canada) dated December 6, 2013 ("Borges Statement"), ¶¶ 8-16.

<sup>304</sup> Borges Statement, ¶¶ 6-7, 11.

<sup>305</sup> Borges Statement, ¶¶ 9-10, 14, 16.

<sup>306</sup> Borges Statement, ¶¶ 9-10. As described above, DIBC must have already known this given the

187. Despite Canada's clear position on this issue, DIBC persisted with its demands and threats of legal action, including arbitration under the NAFTA.<sup>307</sup> DIBC wrote directly to Canadian Prime Minister Stephen Harper on August 9, 2007 alleging Canada failed to spend \$300 million to build a highway to the Ambassador Bridge.<sup>308</sup> Despite Minister Cannon's clear position on the subject in his October 3, 2007 letter,<sup>309</sup> DIBC made the same allegations again during a meeting with Minister Cannon and other government officials on October 25, 2007, but Canada's position with respect to building a highway to the Ambassador Bridge remained unchanged.<sup>310</sup> DIBC persisted in its demands, alleging again on November 6, 2007 that Canada had the legal obligation to build a highway to the Ambassador Bridge.<sup>311</sup> On November 26, 2007, Canada and the United States signed a memorandum of understanding confirming the dedication of both countries to the DRIC EA in support of a new bridge and highway connections and on November 27, 2007, Minister Cannon reiterated Canada's commitment to a "new highway that will link the 401 to the new crossing."<sup>312</sup> As Ms. Borges testifies, thereafter

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voluminous material made publically available post-November 14, 2005.

<sup>307</sup> Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon Q.C. (Transport Canada) dated April 26, 2007, **Exhibit R-119**; Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon Q.C. (Transport Canada) dated July 9, 2007, **Exhibit R-38**; Letter from Jacques Pigeon Q.C. (Transport Canada) to Patrick Moran (DIBC/CTC) dated July 30, 2007, **Exhibit R-39**; Letter from Patrick Moran (DIBC/CTC) to Jacques Pigeon Q.C. (Transport Canada) dated August 24, 2007, **Exhibit R-111**.

<sup>308</sup> Letter from Dan Stamper to Prime Minister Stephen Harper dated August 9, 2007, **Exhibit R-155**.

<sup>309</sup> Letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC, October 3, 2007, **Exhibit C-110**.

<sup>310</sup> Borges Statement, ¶¶ 15-16. See DIBC Presentation to The Honourable Lawrence Cannon, October 25, 2007, at 11, 76, **Exhibit R-156**, ("Canada and Ontario committed \$300 million to connect Highway 401 to the Ambassador Bridge"; "we have a valid legal agreement with the Government of Canada" (emphasis in original); "it is up to Canada to...live up to their commitment and legal agreements...and fix the road").

<sup>311</sup> Letter from Manuel J. Moroun to Hon. Lawrence Cannon dated November 6, 2007, **Exhibit R-157**. ("To fulfill the cooperation required under the [Settlement] Agreements, the road from the Ambassador Bridge to the 401 must be fixed [...] We have agreements that require Canada and DIBC to cooperate to retain the Ambassador Bridge as the premier crossing...Canada has an obligation to connect the 401 to the Bridge...").

<sup>312</sup> 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, **Exhibit R-158**; Transport Canada News Release No. H221/07, dated November 26, 2007, **Exhibit R-159**. 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, dated November 27, 2007, **Exhibit R-160**.

Canada had nothing further to say to DIBC regarding the construction of a highway connection from Highway 401 to the Ambassador Bridge.<sup>313</sup>

188. In light of the evidence presented above, DIBC cannot credibly claim 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.

189. DIBC's attempts to push the date it first acquired knowledge of the alleged NAFTA breach and damage past May 1, 2008 are also not credible. DIBC suggests that various post-May 2008 activities related to the Parkway (e.g., permitting, tendering, expropriation, demolition and construction) demonstrate that it could have only learned of the breach and damage "long after" the operative time bar date of April 29, 2008.<sup>314</sup> But no post-May 2008 Parkway activities are at all relevant to the Ambassador Bridge because DIBC knew that the Parkway would not be going to the Ambassador Bridge as of November 2005. DIBC first acquired all pertinent knowledge regarding the construction of a highway to a different location long before these subsequent acts occurred.

### **3. DIBC's "Preparatory" and "Composite" Act Characterizations of the Nine Point Plan and DRIC EA Do Not Accord With the Evidence**

190. DIBC suggests that the elimination of option X12 from the DRIC EA was merely a preparatory act and that Canada's unlawful conduct only occurred much later when the exact route of the Parkway was announced on May 1, 2008.<sup>315</sup> With respect to the application of its composite act theory, DIBC advances a similar argument and alleges that "the final act which consummated the composite act" could not have occurred before the Parkway announcement.<sup>316</sup> In light of the evidence described above, DIBC's "legal"

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<sup>313</sup> Borges Statement, ¶ 20. See 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**.

<sup>314</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 271.

<sup>315</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 227, 285.

<sup>316</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 230.

characterizations of Canada's actions as "preparatory" or "composite" do not withstand scrutiny. May 1, 2008 is not the date on which DIBC first acquired knowledge of any alleged NAFTA breach and resulting damage.

191. DIBC says in its Counter-Memorial (in contrast to what it said in its Statement of Claim<sup>317</sup>) that "the earliest possible date Canada could be said to have adopted a formal measure with respect to the Roads Claim is when it announced its commitment to the [Parkway], which did not happen until May 1, 2008."<sup>318</sup> DIBC says that prior to that date, "no measure had been adopted, meaning there could be no breach."<sup>319</sup>

192. DIBC's reasoning is flawed. First, it ignores the replacement of the Nine Point Plan with the LGWEM Strategy in March 2004, which definitively ended any possibility that the \$300 million DIBC alleges was earmarked for a Highway 401-Ambassador Bridge connection would be spent in that manner. This was not a "preparatory" act or part of a "composite" act, it was complete: DIBC alleges a \$300 million promise was made to it in the Nine Point Plan, but that alleged "promise" was "renege" March 11, 2004. All the money was earmarked by April 2005.<sup>320</sup> DIBC presents no evidence that would support a different interpretation.

193. Second, it ignores the November 14, 2005 decision to eliminate the twin Ambassador Bridge option X12 from the DRIC EA the relevant date for the purposes of Articles 1116(2) and 1117(2). Much of DIBC's Statement of Claim and Counter-Memorial is dedicated to attacking this decision and Canada's motivations for doing so.<sup>321</sup> For example, DIBC alleges "the decision to reject location X12 was designed

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<sup>317</sup> NAFTA Statement of Claim, ¶ 190.

<sup>318</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 227.

<sup>319</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 227.

<sup>320</sup> "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," News Release No. GC004/05, April 21, 2005, **Exhibit R-90**; "Canada and Ontario Announce Major Steps to Improve the Windsor-Detroit Gateway," Ontario News Release, April 21, 2005, **Exhibit R-91**.

<sup>321</sup> NAFTA Statement of Claim ¶¶ 110-133; DIBC Counter-Memorial on Jurisdiction, ¶¶ 84-102. DIBC's pleadings in the Washington Litigation are also largely dedicated to the elimination of X12 in November 2005. See e.g., Washington Third Amended Complaint ¶¶ 191-206, **Exhibit C-141**. All of DIBC's allegations were made and dismissed as "without any merit" by the Federal Court of Canada. See EA JR (Can.), ¶¶ 1-3, **Exhibit R-9**; EA JR (Can.) Appeal, **Exhibit R-15**.

solely to block the Ambassador Bridge New Span.”<sup>322</sup> It also alleges the decision was intended to ensure a highway connection to the Ambassador Bridge would not be built,<sup>323</sup> that “Canada chose its assumptions regarding the impacts of X12 location to manufacture a pretext for insisting that the other (United States) members of the DRIC Partnership accepted its rejection of the X12 location”<sup>324</sup> and that Canada “unlawfully” eliminated “the New Span location” from the DRIC EA in November 2005.<sup>325</sup> All of this evidence points to DIBC having knowledge of an alleged breach in November 2005.

194. DIBC tries to argue that the November 14, 2005 elimination of option X12 was merely “preparatory,”<sup>326</sup> but has already alleged that this decision was “unlawful” and even DIBC’s own President believed otherwise when he wrote the next day that the decision had “effected delay and damage” to the Ambassador Bridge and was by DIBC’s own characterization, a complete act.<sup>327</sup> DIBC does not explain how the November 14, 2005 “decision” was any less of a “formal measure” than Minister Cannon’s October 1, 2007 letter “decision to renege”<sup>328</sup> or the May 1, 2008 press release which announced something that DIBC already knew, namely, the Parkway would be connected to the DRIC Bridge but not the Ambassador Bridge. All the evidence presented by Canada, including the witness statement of Helena Borges, proves that DIBC’s “preparatory” characterization of the elimination of option X12 is designed to avoid the consequences of the NAFTA time bar.

195. DIBC’s Counter-Memorial also seeks to get around Article 1116(2) and 1117(2) by alleging that Canada’s actions relating to the Highway 401-Ambassador Bridge

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<sup>322</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 102. See also NAFTA Statement of Claim, ¶ 133.

<sup>323</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 98-99; NAFTA Statement of Claim, ¶ 125, 127, 133.

<sup>324</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 99.

<sup>325</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 83 (See heading: “Canada Unlawfully Eliminated the New Span Location from Consideration in the NITC/DRIC Partnership Process.”).

<sup>326</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 283, 285.

<sup>327</sup> Letter from Dan Stamper (DIBC/CTC) to Roger Ward (MTO) dated November 15, 2005, **Exhibit R-35**; Letter from Dan Stamper (DIBC/CTC) to Mohammed Alghurabi (MDOT) dated November 15, 2005, **Exhibit R-36**.

<sup>328</sup> NAFTA Statement of Claim, ¶ 190, citing Letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC (Oct. 3, 2007), **Exhibit C-110**.

connection were a “composite act” which consummated, at the earliest, with the announcement of the Parkway.

196. Again, all of the evidence establishes that it became “finally known” to DIBC that Canada would not build a Highway 401-Ambassador Bridge connection before May 1, 2008. DIBC itself has alleged that Canada made it “finally known” on October 3, 2007 that a “decision by Canada to renege on its commitments” to build a Highway 401-Ambassador Bridge connection had been made.<sup>329</sup> This “decision” merely confirmed that Canada had never committed to building a Highway 401-Ambassador Bridge connection in the first place. In other words, the announcement of the exact route of the Parkway on May 1, 2008 is irrelevant because there had not been a possibility that it would have included a connection to the Ambassador Bridge since November 2005. DIBC’s “composite act” theory is redundant in light of uncontroverted evidence.

#### **D. DIBC’s New Arguments Regarding the *IBTA* Do Not Render its Claim Timely**

##### **1. DIBC’s Position As to the Date it “First Acquired Knowledge” of the NAFTA Alleged Breach and Loss Has Changed Multiple Times**

197. In contrast to its original position,<sup>330</sup> DIBC now argues that it did not incur the loss or damage required by NAFTA Articles 1116(2) and 1117(2) when the *IBTA* came into force on February 1, 2007.<sup>331</sup> However, DIBC does not proffer an alternative date and instead adopts multiple positions intended to render its claim timely.

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<sup>329</sup> NAFTA Statement of Claim, ¶ 190 (emphasis added), citing Letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC (Oct. 3, 2007), **Exhibit C-110**. DIBC has repeated this allegation in its most recent submission in the Washington Litigation filed after DIBC submitted its Counter-Memorial in this arbitration. See *DIBC et al. v. Canada et al.*, (D.D.C. File No. 10-CV-00476-RMC), Plaintiffs’ Memorandum of Points and Authorities in Opposition to the Motions to Dismiss and in Support of Plaintiffs’ Cross-motion for Partial Summary Judgment on Counts 1, 3, 6 and 7, 8 November 2013 (hereinafter “Washington Litigation Motion for Summary Judgment November 2013”) at 28-29, **Exhibit R-139**.

<sup>330</sup> First NAFTA NOI, **Exhibit R-44**; DIBC’s Response to Canada’s Brief Statement, ¶ 24.

<sup>331</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 288-289.

198. For example, DIBC argues that it incurred loss on February 18, 2009 when the *IBTA Regulations* were promulgated,<sup>332</sup> but then backtracks and says that this loss did not trigger the NAFTA time limitations period because “it was not a loss that Claimant has ever raised in this NAFTA arbitration.”<sup>333</sup> DIBC then concedes that loss or damage occurred on November 18, 2009 when Canada brought an application in the Ontario Superior Court of Justice to secure a declaration that the Ambassador Bridge was not exempt from the *IBTA* by virtue of the Settlement Agreements,<sup>334</sup> but backtracks again to say that this event did not trigger the three-year limitation period because the proceedings are still pending.<sup>335</sup> DIBC appears to settle on October 18, 2010 as the date it first acquired knowledge of loss because that was when Canada issued a Ministerial Order to refrain from further work on the New Span until approval under the *IBTA* was received.<sup>336</sup> Yet DIBC then pushes that date even further into the future by saying the *IBTA* did not become discriminatory until the *BSTA* was passed on December 14, 2012.<sup>337</sup> However, even this 2012 date is, in DIBC's view, insufficient to trigger the NAFTA time limitations period because DIBC alleges that the *IBTA* is a continuing act which causes new damage every day it remains in place.<sup>338</sup>

199. DIBC's changing position as to when it did acquire or should have first acquired knowledge of the alleged NAFTA breach and loss relating to the *IBTA* speaks to the conflict between DIBC's arguments, the proper interpretation of Articles 1116(2) and 1117(2) and the evidence.

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<sup>332</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 233, 290 (“Alternatively, loss or damage did not occur until passage of the *IBTA Regulations*, in [February 2009]”). This was the same position DIBC took in its Response to Canada's Brief Statement on Jurisdiction. See DIBC Response to Canada's Brief Statement on Jurisdiction, ¶ 26.

<sup>333</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 290.

<sup>334</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 233 (“Loss or damage did not occur pursuant to the *IBTA* until 2009 at the earliest, when Canada sued Claimant trying to apply the *IBTA* to the Ambassador Bridge/New Span. Until that time, the *IBTA* had not been applied to Claimant in any concrete way, so loss or damage could not have occurred.”)

<sup>335</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 291. See *Canada v. Canadian Transit Company*, Notice of Application, Superior Court of Ontario No. 09-46882, November 18, 2009, **Exhibit C-95**.

<sup>336</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 292.

<sup>337</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 288, n. 288, ¶ 299.

<sup>338</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 297.

## **2. The Evidence and DIBC's Own Pleadings Confirm that the *IBTA* Claim is Untimely**

200. In its Counter-Memorial, DIBC advances various flawed arguments and fails to establish that its *IBTA* claim is timely.<sup>339</sup> First, DIBC takes the position for the first time in its Counter-Memorial that it was not until the Ministerial Order of October 18, 2010, at the earliest, that it first acquired knowledge of both NAFTA breach and damage arising from the *IBTA*.<sup>340</sup>

201. This argument is untenable. On January 25, 2010, *10 months before* the Ministerial Order was issued, DIBC filed a notice of intent to arbitrate under the NAFTA alleging that the *IBTA* breached the NAFTA and caused it damages of “not less than US\$1.5 billion.”<sup>341</sup> DIBC chose not to pursue this claim in its First NAFTA NOA but opted to do so in its Amended NAFTA NOA. Moreover, on March 22, 2010, DIBC and CTC sued Canada in United States federal court in Washington D.C. for damages caused by the *IBTA*:

Canada has violated DIBC's and CTC's rights...by enacting and seeking to apply the *IBTA* so as to limit rights that DIBC and CTC enjoy by the terms of the Special Agreement, including (1) the right to set and collect tolls on the Ambassador Bridge, (2) the right to transfer their property or change their corporate ownership, and (3) the right to perform necessary and appropriate maintenance on the Ambassador Bridge. Plaintiffs are entitled to damages...<sup>342</sup>

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<sup>339</sup> While the point is not decisive in light of the evidence, it should be noted that DIBC wrongly assumes that the relevant date to measure the timeliness of its *IBTA* claim is the date of its First NAFTA NOA (April 29, 2011). See DIBC Counter-Memorial on Jurisdiction, ¶ 297. But the *IBTA* only became part of this arbitration when DIBC filed its Amended NAFTA NOA on January 15, 2013, as DIBC itself concedes. See DIBC Counter-Memorial on Jurisdiction, ¶ 197. A claimant cannot avail itself of an earlier limitations period for an otherwise untimely measure not included in its original claim – this would constitute an amendment “in a manner that...falls outside the jurisdiction of the arbitral tribunal.” See UNCITRAL Rules Article 22. It was for this reason Canada's Memorial on Jurisdiction specifically noted that *even if* a later date were used (e.g., the February 2009 *IBTA Regulations*) this “would still not make DIBC's *IBTA* claim timely under Articles 1116(2) and 1117(2).” See Canada Memorial on Jurisdiction, ¶ 250, n. 345. Thus, the relevant date to assess whether DIBC's *IBTA* claim is timely is *January 15, 2010* (i.e., three years prior to filing its Amended NAFTA NOA.)

<sup>340</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 293.

<sup>341</sup> First NAFTA NOI ¶ 44, **Exhibit R-44**.

<sup>342</sup> Washington Complaint, ¶¶ 162-163 **Exhibit R-17**.

202. DIBC's claims for damages with respect to the *IBTA* under the NAFTA and the Washington Litigation months before the October 10, 2010 Minister order prove this newly-concocted allegation is not credible.

203. Indeed, DIBC has long alleged that the enactment of the *IBTA* was a breach of the NAFTA because of its alleged abrogation of pre-existing treaty/statutory/contractual rights under the Special Agreement/*Ambassador Bridge Treaty*, CTC Act and Settlement Agreements to charge tolls, freely transfer ownership and to build the New Span.<sup>343</sup> Mr. Matthew Moroun (CenTra Inc., owner of the Ambassador Bridge) himself alleged that the *IBTA*'s requirement to seek government approval before selling the Ambassador Bridge damaged its value.<sup>344</sup> DIBC has alleged that the enactment of the *IBTA* impairs its ownership rights on the U.S. side of the Ambassador Bridge.<sup>345</sup> DIBC also alleges that the *IBTA* was specifically "enacted" with the intention of preventing its New Span as well as taking away its pre-existing rights.<sup>346</sup> DIBC argues that the *IBTA*'s application to the Ambassador Bridge violated the Settlement Agreements between DIBC and Canada and limits the value of the Ambassador Bridge.<sup>347</sup> All of these allegations are sufficient to trigger the NAFTA three-year time limitation because knowledge of general loss or damage is sufficient for the purposes of Articles 1116(2) and 1117(2).<sup>348</sup>

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<sup>343</sup> Canada Memorial on Jurisdiction, ¶¶ 246-270. See also Canada Brief Statement on Jurisdiction, ¶¶ 103-105. See DIBC Response to Canada's Brief Statement on Jurisdiction, ¶ 24. See also NAFTA Statement of Claim, ¶¶ 180, 213; First NAFTA NOI, ¶ 38, **Exhibit R-44**.

<sup>344</sup> House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1<sup>st</sup> Sess., 39<sup>th</sup> Parliament, Tuesday, May 30, 2006 at 6, **Exhibit R-108** ("[*IBTA*] would also require the transport minister's or the government's approval to sell the bridge to the highest bidder in an auction sale, thus hurting the value of the bridge and my family's investment in it since 1979. It has serious financial ramifications to the point of almost disenfranchisement.").

<sup>345</sup> NAFTA Statement of Claim, ¶ 178 ("The *IBTA*, if applicable, would have extraterritorial effects in the United States by interfering with DIBC's commercial ownership and operation of the U.S. portion of the [*Ambassador*] bridge.").

<sup>346</sup> Amended NAFTA NOA, ¶ 107; NAFTA Statement of Claim, ¶ 180. See also Washington Complaint, ¶¶ 123-133, **Exhibit R-17**; Washington First Amended Complaint, ¶¶ 103-114, **Exhibit R-18**; Washington Second Amended Complaint, ¶ 126, **Exhibit R-19**.

<sup>347</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 106, 115.

<sup>348</sup> See *Grand River*, Jurisdiction Decision, ¶ 77, **RLA-15**. *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, October 11, 2002, ¶ 87, **RLA-20**.

204. Second, contrary to its previous pleadings in this arbitration and in domestic proceedings, DIBC says in its Counter-Memorial that “when it was enacted in 2007, the *IBTA* did not require Claimant to do anything and did not cause any immediate harm to Claimant.”<sup>349</sup> DIBC goes on to say that “in 2007, Claimant had not yet received the environmental approvals needed for its New Span, and hence was not yet in a position to build its New Span, and therefore was not yet in a position” to seek *IBTA* approval.<sup>350</sup> DIBC concludes by saying that since it took the position the *IBTA* did not apply to the Ambassador Bridge, it did not need to comply with the *IBTA* and still does not need to do so until a court orders it to do so, which in turn tolls the NAFTA time limitation for filing a claim.<sup>351</sup>

205. DIBC's arguments ignore reality. The fact that DIBC held the view that the *IBTA* did not apply to the Ambassador Bridge does not change the irrefutable fact that it did and that DIBC was clearly told that it did. DIBC knew that the *IBTA* would apply to it and for this reason opposed the legislation when it was being debated by the Parliament of Canada in 2006.<sup>352</sup> DIBC cannot toll the NAFTA's time limitations period by unilaterally declaring itself unbound by a lawfully enacted statute.

206. After the *IBTA* became law, Canada explicitly informed DIBC during meetings and in writing in 2007 that the *IBTA* applied to the Ambassador Bridge.<sup>353</sup> As described in Canada's Memorial,<sup>354</sup> when CTC's Executive Director revealed to the media in August 2007 that the construction on the approach ramps for the Ambassador Bridge

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<sup>349</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 289.

<sup>350</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 289.

<sup>351</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 289.

<sup>352</sup> House of Commons Standing Committee on Transport, Infrastructure and Communities, No. 5, 1<sup>st</sup> Sess., 39th Parliament, Tuesday, May 30, 2006, at 6, **Exhibit R-108**; Letter from Dan Stamper to Senator Lise Bacon, Re: Bill C-3 International Bridges and Tunnels Act dated November 3, 2006, **Exhibit R-120**.

<sup>353</sup> Borges Statement, ¶ 10, n. 4; See also Letter from Jacques Pigeon, Q.C. (Transport Canada) to Patrick Moran (DIBC/CTC) dated July 30, 2007, **Exhibit R-39**. DIBC responded to this letter by stating that it disagreed with Canada. See Letter from Patrick Moran to Jacques Pigeon dated August 24, 2007, **Exhibit R-111**. DIBC acknowledges that it was opposed to the applicability of the *IBTA* to the Ambassador Bridge and made that position known before it was enacted. DIBC Counter-Memorial on Jurisdiction, ¶¶ 106-107.

<sup>354</sup> Canada Memorial on Jurisdiction, ¶¶ 259-264.

New Span had commenced,<sup>355</sup> Canada wrote to DIBC on October 30, 2007 to remind it that such construction required *IBTA* approval.<sup>356</sup> CTC has characterized this letter as an enforcement of the *IBTA* against the Ambassador Bridge.<sup>357</sup> Canada told DIBC again on November 23, 2007 that *IBTA* approval was required for its New Span.<sup>358</sup> DIBC only admitted to having already undertaken construction on its New Span on March 22, 2010 in its Washington Litigation Complaint.<sup>359</sup> It was this admission which gave rise to the Ministerial Order of 2010.<sup>360</sup>

207. Despite all of the above evidence, DIBC still maintains that “in 2007, the *IBTA* did not require the Claimant to do anything.”<sup>361</sup> This is clearly not true and is belied by the evidence described above which proves DIBC’s *IBTA* claim is time-barred under Articles 1116(2) and 1117(2).

208. Finally, DIBC’s Counter-Memorial argues that the *IBTA*, the October 2010 Ministerial Order and the *BSTA* are all components of a composite act that was only consummated with the passage of the *BSTA* in 2012.<sup>362</sup> This argument is illogical. As explained above, DIBC’s own allegations and pleadings stress that the *passage* of the *IBTA* breached its rights and caused it damage, which started the NAFTA limitations period.<sup>363</sup> DIBC’s attempt to bootstrap the *IBTA* on to the *BSTA* and call it a “composite

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<sup>355</sup> Dave Battagello, “Bridge to Nowhere- Construction has begun on Ambassador’s twin span, despite lack of gov’t approvals”, *Windsor Star* (August 24, 2007), **Exhibit R-124**.

<sup>356</sup> Letter from Brian E. Hicks to Dan Stamper dated October 30, 2007, **Exhibit R-122**. DIBC responded the same day but did not reveal that it was constructing the approach ramps for the New Span. See Email from Dan Stamper to Paul Fitzgerald, dated October 30, 2007 **Exhibit R-125**.

<sup>357</sup> *Canadian Transit Company v. Minister of Transport*, Notice of Application (FCC), November 18, 2010, ¶¶ 10-11, **Exhibit R-46**.

<sup>358</sup> Letter from Paul Fitzgerald to Dan Stamper, dated November 23, 2007, **Exhibit R-123**.

<sup>359</sup> See Washington Complaint, ¶¶ 72, 96, **Exhibit R-17**. DIBC confirmed this admission in its Statement of Claim. See NAFTA Statement of Claim, ¶ 157. DIBC omitted to mention in its Counter-Memorial that it “already constructed the ramps that would connect the New Span to the existing plazas on the U.S. and Canadian sides.” See DIBC Counter-Memorial ¶ 82.

<sup>360</sup> See Canada Memorial on Jurisdiction, ¶ 264 and exhibits cited therein.

<sup>361</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 289.

<sup>362</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 298.

<sup>363</sup> First NAFTA NOI, ¶¶ 38, 42, **Exhibit R-44**. DIBC Response to Canada’s Brief Statement on Jurisdiction, ¶ 24 (“[t]he essence of the *IBTA*-related claim is that by delaying DIBC’s ongoing effort to

act” is meritless. The *BSTA* did not even exist until almost *six years* after the *IBTA* was enacted. By the time the *BSTA* was enacted, almost *three years* had elapsed since DIBC alleged in its First NAFTA NOI that it had suffered “in excess of U.S. \$1.5 billion” in damages arising out of the *IBTA*. DIBC’s “composite act” theory is a thinly veiled attempt to cover up the untimeliness of its claim.

**VI. WHETHER A *BOUNDARY WATERS TREATY* “SPECIAL AGREEMENT” EXISTS AS AN INTERNATIONAL TREATY AND HAS BEEN VIOLATED BY CANADA GOES TO THE TRIBUNAL’S JURISDICTION**

209. Canada argued in its Memorial on Jurisdiction that it is outside this Tribunal’s jurisdiction to determine the existence and violation of an international treaty other than the NAFTA.<sup>364</sup> Canada also submitted evidence which undermined DIBC’s entire premise that a *Boundary Waters Treaty* “special agreement” relating to the Ambassador Bridge exists as an international treaty and binding in international law (the so-called *Ambassador Bridge Treaty*).<sup>365</sup>

210. DIBC’s Counter-Memorial had no credible response to either submission. Despite its previous allegations that Canada is “depriving,”<sup>366</sup> “abrogating,”<sup>367</sup> and “breaching”<sup>368</sup> its rights under the alleged *Boundary Waters Treaty* Article XIII “special agreement”/international treaty, including its “right” to build the New Span and an exemption from the *IBTA*,<sup>369</sup> DIBC’s Counter-Memorial now passes this off as mere “background” or “potentially relevant information.”<sup>370</sup> Yet DIBC *still* continues to assert,

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construct its New Span, Canada is depriving DIBC of toll and concession revenues it would otherwise earn through the operation of the New Span.”); DIBC argued (¶ 24) that the *IBTA* interferes with its rights and infringes its exclusive franchise. DIBC has also argued that *IBTA* was enacted to “interfere” with its New Span plans and to interfere with Claimant’s right to operate the bridge. NAFTA Statement of Claim, ¶ 180.

<sup>364</sup> Canada Memorial on Jurisdiction, ¶¶ 287-292.

<sup>365</sup> Canada Memorial on Jurisdiction, ¶¶ 276-286.

<sup>366</sup> First NAFTA NOI, ¶ 33, **Exhibit R-44**.

<sup>367</sup> First NAFTA NOI, ¶¶ 36-37, **Exhibit R-44**; NAFTA Statement of Claim, ¶ 175. See also Washington Second Amended Complaint, ¶ 118, **Exhibit R-19**.

<sup>368</sup> DIBC Response to Canada’s Brief Statement of Jurisdiction, ¶ 29.

<sup>369</sup> See e.g., First NAFTA NOI, ¶¶ 26, 33-37, **Exhibit R-44**; Amended NAFTA NOA, ¶¶ 36, 42, 102-107; NAFTA Statement of Claim, ¶¶ 33-39, 42, 48-49, 64, 174-175, 180.

<sup>370</sup> DIBC Counter-Memorial on Jurisdiction, ¶ 314.

without legal authority or evidence, that Canada's legislation governing the Ambassador Bridge was "passed in Canada pursuant to the Boundary Waters Treaty" even though there is no mention of the *Boundary Waters Treaty* or any other international legal instrument in that legislation.<sup>371</sup>

211. First, DIBC's assertion in its Counter-Memorial that the issue relating to the alleged "special agreement" under the *Boundary Waters Treaty* is a merits question is wrong at law. International judicial bodies do not have jurisdiction to hear a dispute where the rights and obligations of a non-consenting third-party State would also have to be adjudicated.<sup>372</sup> An international tribunal cannot invoke the rights or obligations of an absent third-party State without its consent, nor can it have jurisdiction over a legal issue if the third-party State's legal rights or obligations would be the subject of adjudication. As the International Court of Justice established in the *Monetary Gold* case, a tribunal cannot have jurisdiction over a subject matter if a third-party's "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."<sup>373</sup>

212. There are only two parties to the *Boundary Waters Treaty*: Canada and the United States. DIBC and CTC have no rights thereunder.<sup>374</sup> Special agreements arising out of Article XIII speak to rights and obligations of each treaty party vis-à-vis the other with respect to the use, obstruction or diversion of boundary waters and speak to the

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<sup>371</sup> DIBC Counter-Memorial on Jurisdiction, ¶¶ 314, 321. See *An Act to Incorporate the Canadian Transit Company Act*, 11-12 George V., Chap. 57, May 3, 1921, as am. ("CTC Act"), **Exhibits C-6, C-7, C-11**. The United States legislation governing the Ambassador Bridge also contains no reference to the *Boundary Waters Treaty* or any other international legal instrument. See *American Transit Company Act*, 66<sup>th</sup> Congress, Sess III Chs. 166-168, March 4, 1921, as am. ("ATC Act"), **Exhibits C-5, C-9, C-10**.

<sup>372</sup> *Monetary Gold Removed From Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) Judgment, I.C.J. Reports 1954, June 15, 1954 at 32, **RLA-58** (hereinafter "*Monetary Gold*, Judgment"). See also *Case Concerning East Timor* (Portugal v. Australia) Judgment, I.C.J. Reports 1995, June 30, 1995 at 105, **RLA-59**.

<sup>373</sup> *Monetary Gold*, Judgment at 32, **RLA-58**.

<sup>374</sup> As noted in Canada's Memorial, DIBC has no standing *rationae personae* to allege a violation thereof either under international law or domestic law in Canada or the United States. See Canada Memorial on Jurisdiction, ¶ 292, n. 409.

jurisdiction of the International Joint Commission (“IJC”).<sup>375</sup> Declaring the existence of a special agreement as an international treaty would affect the rights and obligations of the United States, an absent third party from this dispute. As Canada’s Memorial argued, whether a *Boundary Waters Treaty* Article XIII “special agreement” exists, what are the international rights and obligations derived therefrom, whether the “treaty” has been amended or breached by either Canada or the United States are all questions that necessarily require a determination of the provisions of the *Boundary Waters Treaty* (which is within the jurisdiction of the IJC) and invokes the rights and obligations of the United States. This NAFTA Chapter Eleven Tribunal has no jurisdiction to make such an inquiry and determination.

213. Second, DIBC has misread the findings and reasoning of the *Grand River*, *Methanex* and *Bayview* cases, which DIBC’S Counter-Memorial attempts to distinguish from the issue before this Tribunal.<sup>376</sup> It is unnecessary to describe the flaws in DIBC’s explanation of those cases in light of the singular difference with this case that renders DIBC’s arguments redundant: in *Bayview*, *Methanex* and *Grand River*, there was no dispute as to whether the treaty in question (*U.S.-Mexico Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, *General Agreement on Tariffs and Trade* and *Jay Treaty*, respectively) actually existed. In the current dispute, Canada denies the very existence of the international treaty that DIBC has invoked. Whether the United States agrees or not, and whether the United States believes Canada has violated that treaty, is solely for the United States to assert, not DIBC.

## VII. CONCLUSION

214. For the foregoing reasons and those in Canada’s Memorial on Jurisdiction, Canada respectfully requests that this Tribunal dismiss the Claimant’s claims in their entirety and with prejudice on the grounds of lack of jurisdiction and/or admissibility and,

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<sup>375</sup> See *Treaty Between the United Kingdom and the United States of America Concerning Boundary Waters and Questions Arising Along the Boundary Between Canada and the USA*, U.S. Treaty Series, No. 548, ratification exchanged May 5, 1910, proclaimed May 13, 1910, Articles II, III and IV of the BWTS, **Exhibit R-16**.

<sup>376</sup> *Grand River*, Award, ¶ 71, **RLA-22**; *Methanex*, Award, Part II, Chapter B at 2, ¶ 4-6, **RLA-23**; *Bayview*, Award, ¶ 122, **RLA-24**.

in accordance with Article 42 of the UNCITRAL Arbitration Rules, order the Claimant to pay all of costs arising from this arbitration, including Canada's legal costs and disbursements.

Respectfully submitted on behalf of  
the Government of Canada  
this 6<sup>TH</sup> day of December, 2013



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