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

Between

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant,

and

THE GOVERNMENT OF CANADA,

Respondent.

PCA Case No. 2012-25

DIBC'S RESPONSE TO CANADA'S BRIEF STATEMENT ON JURISDICTION AND ADMISSIBILITY

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PRELIMINARY STATEMENT

1. Claimant Detroit International Bridge Company ("Claimant" or "DIBC") hereby responds to Respondent Canada's brief statement of its arguments concerning jurisdiction and admissibility.

2. The parties' brief statements are being submitted to help the Tribunal set the schedule for the jurisdictional phase of this arbitration. When the parties and the Tribunal discussed the organization of these proceedings, Canada proposed a year-long jurisdictional phase that included jurisdictional discovery. In contrast, DIBC did not believe that any jurisdictional discovery was necessary, and proposed a two-month schedule for jurisdictional arguments. The parties agreed to submit brief statements to the Tribunal concerning Canada's jurisdictional arguments to inform the Tribunal's scheduling decision.

3. In this submission, DIBC is only presenting a brief response to the arguments raised by Canada in order to allow the Tribunal to make a decision on what procedure is best for resolving the jurisdictional issues. Like Canada, DIBC also reserves its rights to supplement its arguments in its anticipated memorial on both jurisdiction and admissibility.

4. Each of the three jurisdictional arguments raised in Canada's brief statement is without merit. Rather than face the substance of DIBC's claim, Canada is attempting to delay these proceedings with unnecessary discovery and a protracted briefing schedule.

5. First, DIBC's claim is timely. DIBC seeks to recover damages that are being caused *right now*, that DIBC suffered in the three years before it made its claim for arbitration, and that DIBC will continue to suffer in the future absent any change in Canada's conduct. The damages DIBC seeks to recover are those that flow from Canada's ongoing discriminatory and inequitable conduct, including in particular: (a) Canada's failure to develop the highway connections to DIBC's American-owned Ambassador Bridge, even while it has devoted

substantial resources to improving the highway connections to Canadian-owned bridges, including a proposed Canadian bridge that *is not even built yet* (and may never be built); and (b) Canada's efforts to prevent DIBC from building its proposed new span to the Ambassador Bridge ("New Span"), including through the promotion of a new, Canadian-owned bridge (the "NITC/DRIC") that is proposed to be built right next to DIBC's Ambassador Bridge. A party's continuing course of conduct that violates a legal obligation constitutes a *continuing breach* of that obligation, and renews the applicable limitation period on an ongoing basis. Here, Canada is engaged in a continuing course of conduct that violates NAFTA. NAFTA limits DIBC's claim to the damages it suffered within three years of making its claim for arbitration; because DIBC is not seeking damages prior to that time, DIBC's claims are consistent with NAFTA and are not time-barred.

6. Second, DIBC is not bringing its claim under the Boundary Waters Treaty. As a result, Canada's argument that this Tribunal does not have jurisdiction to decide such claims is irrelevant.

7. Third, DIBC has fully complied with the waiver requirements of NAFTA Article 1121. Because Canada is violating DIBC's rights through its conduct on both sides of the U.S.-Canada border, and because this Tribunal does not have the ability to grant injunctive relief against Canada, DIBC and its subsidiary The Canadian Transit Company ("CTC") have been forced to defend their rights in several fora. However, DIBC has taken great care to ensure that the claim advanced in this arbitration is consistent with the waiver required by NAFTA. DIBC's federal court action in Washington, D.C. seeks only declaratory and injunctive relief, and the only actions of the Canadian Government it challenges are those taken in the United States. CTC's provincial court action in Toronto seeks declaratory and injunctive relief under Canadian

law (which is expressly permitted under NAFTA Article 1121); it also seeks damages in the alternative, but that damages claim is based *solely* on the scenario in which Canada *actually constructs and completes* the NITC/DRIC, which is a measure that has not yet occurred and is not the basis for DIBC's NAFTA claims. The Toronto suit does not seek any damages for the ongoing discriminatory and inequitable acts that have taken place to date, for which DIBC is seeking compensation in this proceeding. Similarly, CTC's past Canadian lawsuit against the government of Windsor sought declaratory and injunctive relief under Canadian law, and damages based on city zoning by-laws that are not at issue in this arbitration.

8. With regard to the schedule for the jurisdictional phase of this arbitration, Canada has not shown any need for jurisdictional discovery. It has admitted that it already has the jurisdictional evidence it needs, and further has not shown – and cannot show – that any additional discovery it could obtain from DIBC would be material to its jurisdictional arguments. Accordingly, the Tribunal should deny Canada's request for jurisdictional discovery, and should set a schedule that provides for full briefing on, and a prompt resolution of, the jurisdictional issues raised by Canada.

9. In the alternative, if the Tribunal grants Canada's request for jurisdictional discovery, that discovery should be limited to the two issues specifically identified in Canada's brief statement and the corollary issues identified by DIBC in this submission (which we do not believe are necessary to resolve the jurisdictional dispute, but which we would request to ensure that any jurisdictional discovery is not one-sided). DIBC believes that one round of narrow discovery on those issues can be completed in approximately two months, at which point the parties can move forward with memorials on jurisdiction and admissibility.

RELEVANT PROCEDURAL HISTORY

10. In November and December 2012, when the Tribunal asked the parties to discuss the organization of these arbitration proceedings, Canada proposed a year-long schedule for jurisdictional proceedings that included jurisdictional discovery.[1] DIBC, on the other hand, did not believe that jurisdictional discovery was necessary, and proposed a two-month schedule for the jurisdiction phase.[2]

11. When the Tribunal and the parties conferred in mid-December 2012, the Tribunal directed the parties to submit brief statements concerning jurisdiction and admissibility issues, to allow the Tribunal to gauge the appropriate scope of discovery (if any), and to determine the schedule for jurisdictional proceedings. The Tribunal agreed to hold a meeting on March 20, 2013 to discuss the further organization of the proceedings.[3]

ARGUMENT

I. CANADA HAS NOT SHOWN ANY NEED FOR JURISDICTIONAL DISCOVERY.

12. Tellingly, Canada dedicates only two pages of its 41-page submission to the discovery it claims it needs to support its challenges to jurisdiction and admissibility.[4]

13. The parties' brief statements on jurisdiction and admissibility are being provided to help the Tribunal determine the appropriate scope of discovery for the jurisdictional phase of this matter. Yet Canada identifies only two issues where it claims it needs discovery: (1) the date when DIBC first acquired knowledge of Canada's breaches of NAFTA related to highway

[1] Letter from M. Luz to Tribunal at 2 (Dec. 12, 2012), Exhibit C-113.

[2] Email from J. Schiller to Tribunal (Dec. 12, 2012), Exhibit C-114.

[3] *See* Procedural Order No. 1 at ¶ 14 (Dec. 20, 2012).

[4] Government of Canada Brief Statement on Jurisdiction and Admissibility at ¶¶ 106-110.

connections to the Ambassador Bridge and the application of the International Bridges and Tunnels Act ("IBTA") to the Ambassador Bridge, and (2) the date when DIBC first acquired knowledge of its related damages.[5] Canada has not identified *any* categories of documents or other evidence that it would need to litigate its arguments concerning waiver under NAFTA Article 1121 or the Boundary Waters Treaty. Thus, the Tribunal should not grant any discovery relating to Canada's waiver argument or its jurisdictional argument relating to the Boundary Waters Treaty.

14. Further, no jurisdictional discovery is warranted with respect to the two limited issues Canada identifies, for two reasons.

15. First, Canada admits that it *already has* the documents it needs. Canada asserts that it has "exercised due diligence and obtained public documents and correspondence from DIBC and CTC which demonstrate that they first acquired, or should have first acquired, knowledge of the alleged breach and damage with respect to the Highway 401 Road Access claims and the IBTA more than three years prior to filing the First NAFTA NOA."[6] Canada contends that those documents "will demonstrate DIBC's 'objective' knowledge" of Canada's breaches and DIBC's damages.[7]

16. Assuming for the sake of argument that Canada has accurately described the documents in its possession, Canada has not shown how *additional* DIBC and CTC documents would materially affect Canada's ability to litigate its argument that certain aspects of DIBC's claim are time-barred.

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[5] *Id.* at ¶ 108.

[6] *Id.*

[7] *Id.* at ¶ 109.

17. Second, as explained further below, DIBC's arbitration claim arises out of Canada's continuing violation of NAFTA. In other words, Canada's present course of conduct – including its ongoing failure to improve Canadian highway connections to the Ambassador Bridge and its position that the IBTA applies to the Ambassador Bridge – is an *ongoing* violation of NAFTA that is harming DIBC each day it continues. DIBC is only seeking damages associated with Canada's breaches of NAFTA within the three years prior to the start of this arbitration (which breaches are ongoing during this arbitration, and continuing into the future).

18. In short, Canada already has the jurisdictional evidence it claims it needs. Moreover, Canada has not shown – and cannot show – that any additional evidence it could obtain in discovery from DIBC could be material to its jurisdictional arguments. There is no reason to delay this case and burden the parties with unnecessary discovery. Accordingly, the Tribunal should set a schedule that begins with Canada's memorial on jurisdiction and admissibility, and provides for the prompt decision of the jurisdictional issues in this case.

19. In the alternative, if the Tribunal sees fit to grant Canada's request for jurisdictional discovery, any such discovery by Canada should be limited to the two issues specifically identified in Canada's submission: (1) the date when DIBC first acquired knowledge of Canada's breaches of NAFTA related to highway connections to the Ambassador Bridge and the application of the IBTA to the Ambassador Bridge, and (2) the date when DIBC first acquired knowledge of its related damages.[8] In addition, if the Tribunal decides to permit discovery on jurisdictional issues, DIBC should be permitted to take discovery of Canada related to the corollary issues of: (1) the extent to which Canada has documents showing that DIBC began suffering harm, or suffered increased harm, as a result of Canada's discriminatory and

[8] *Id.* at ¶ 108.

inequitable treatment within the three years before DIBC made its claim for arbitration, and (2) the extent to which Canada has made decisions within the three years before DIBC made its claim for arbitration (such as decisions to refuse to consider proposals to connect the Windsor-Essex Parkway to the Ambassador Bridge) that have caused DIBC to suffer harm. DIBC believes that one round of narrow discovery on these issues can be completed in approximately two months, at which point the parties can move forward with memorials on jurisdiction and admissibility.[9]

II. DIBC'S ARBITRATION CLAIM IS TIMELY.

20. Under Article 1116(2), "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach [of NAFTA] and knowledge that the investor has incurred loss or damage."[10] Article 1117(2) establishes a similar limitation for claims on behalf of an investor's enterprise.[11]

21. However, a party's continuing course of conduct that violates a legal obligation constitutes a continuing breach of that obligation, and renews the applicable time limitation period on an ongoing basis. In other words, a continuing course of conduct that violates NAFTA is a new violation each day it continues. As a result, a party's wrongful course of conduct that begins prior to the three-year time limit, but continues after that date, is not barred by Articles

[9] Canada has also requested confirmation that DIBC is preserving evidence relevant to this dispute. DIBC has provided Canada with such confirmation, and has requested similar confirmation from Canada. Letter from J. Schiller to M. Luz (Mar. 15, 2013), Exhibit C-115.

[10] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 1116(2), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

[11] *Id.* at Art. 1117(2).

1116(2) or 1117(2).[12] In such a case, the three-year time limit does not bar the case from proceeding, but merely limits the claimant's damages to the losses and damages it suffered in the three years before it made its claim.[13]

22. As explained below, the crux of DIBC's arbitration claim is that Canada is engaged in a continuing course of conduct – including its ongoing failure to improve Canadian highway connections to the Ambassador Bridge – that violates NAFTA.[14] Further, DIBC is only claiming damages from three years prior to its Notice of Arbitration. Accordingly, DIBC's claim is timely and is not barred by NAFTA Articles 1116(2) or 1117(2).[15]

23. Canada's ongoing refusal to honor its past commitments to improve the highway connections to the Ambassador Bridge is a continuing breach of its NAFTA obligations.[16] Each day Canada persists in this course of conduct, DIBC suffers new injury. Among other injuries, it continues to be deprived of traffic and traffic growth – and the associated toll and concession revenues – that would flow to the Ambassador Bridge if Canada fulfilled its commitments: some portion of the traffic that currently travels over competing bridges and tunnels would travel over the Ambassador Bridge if Canada were not discriminating against the American-owned

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[12] *See, e.g., United Parcel Service of Am., Inc. v. Government of Canada*, Award on the Merits (May 24, 2007), Exhibit CLA-13 at ¶ 28.

[13] *See, e.g., id.* at ¶ 30.

[14] Canada has only objected to the timeliness of DIBC's claim as it relates to highway access to the Ambassador Bridge and the application of the IBTA to the Ambassador Bridge. Thus, even if these claims were time-barred – and they are not – the remainder of DIBC's case should be allowed to proceed.

[15] In addition, Canada has been on notice of DIBC's arbitration claim since at least January 25, 2010, when DIBC served its first notice of intent to arbitrate.

[16] DIBC Statement of Claim at ¶¶ 91-102, 190-204.

Ambassador Bridge by developing the highway connections to Canadian-controlled crossings, while refusing to develop the highway connections to the American-owned Ambassador Bridge (in breach of prior commitments to do so).

24. Similarly, Canada's ongoing assertion that the IBTA applies to the Ambassador Bridge is a continuing NAFTA violation.[17] The application of the IBTA to the Ambassador Bridge infringes on the exclusive franchise granted to DIBC and CTC and interferes with DIBC's rights to build the New Span. As a result, each day Canada continues in this course of conduct, DIBC suffers new injury. For example, DIBC must incur further expenses to defend its franchise and assert its rights to build the New Span. Further, Canada's assertion that the IBTA applies to DIBC's New Span will in the *future* (unless enjoined by a Canadian court) require DIBC to seek an IBTA approval, which will further delay DIBC's ability to build the New Span and cause DIBC to suffer further damages. The essence of the IBTA-related claim is that by delaying DIBC's *ongoing effort* to construct its New Span, Canada is depriving DIBC of toll and concession revenues it would otherwise earn through the operation of the New Span.

25. Because Canada's wrongful course of conduct has continued into the three-year NAFTA time limit, and because DIBC is only seeking damages starting three years prior to making its claim, DIBC's claim is timely under Articles 1116(2) and 1117(2).

26. Further, DIBC could not reasonably have first acquired knowledge of all of Canada's NAFTA breaches prior to the three-year time limit. For example, Canada's position that the IBTA applies to the Ambassador Bridge was not made clear until 2009, when Canada adopted regulations listing the Ambassador Bridge as subject to the IBTA.[18] DIBC served its

[17] *Id.* at ¶¶ 173-181.

[18] International Bridges and Tunnels Act Regulations, P.C. 2009-117, Exhibit C-112.

first Notice of Arbitration on April 29, 2011, less than three years later. Thus, even if Canada's course of conduct was not an ongoing violation of NAFTA, Canada's time-bar argument would still fail.

III. DIBC IS NOT BRINGING ITS CLAIM UNDER THE BOUNDARY WATERS TREATY.

27. Canada's argument that the Tribunal lacks jurisdiction because DIBC's claim is being brought under the Boundary Waters Treaty, and therefore must be resolved by the International Joint Commission, is meritless.

28. DIBC's exclusive franchise to build, operate, maintain, and collect tolls on an international bridge across the Detroit River arises out of the 1921 CTC Act, the 1921 DIBC Act, and subsequent Canadian and U.S. legislation. These legislative acts represented a "special agreement" under the Boundary Waters Treaty. Nevertheless, DIBC's franchise rights are specifically bestowed by those statutes, which are independently enforceable and which do not depend on the Boundary Waters Treaty.[19]

29. The 1921 CTC Act, the 1921 DIBC Act, and subsequent Canadian and U.S. legislation constituted "concurrent and reciprocal" legislation by the Canadian Parliament and the United States Congress, and accordingly, constitute a "special agreement" within the meaning of the Boundary Waters Treaty.[20] As a result, the reciprocal agreement between Canada and the United States to grant franchise rights to DIBC and CTC constitutes a binding international agreement under international law, which has been incorporated into domestic Canadian law and U.S. law through legislation in each country. It is this agreement and these

[19] DIBC Statement of Claim at ¶¶ 34, 36.

[20] Convention Concerning the Boundary Waters Between the United States and Canada, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448, Art. XIII, Exhibit C-4.

statutory rights that Canada is breaching; accordingly, DIBC is not asserting any claim that Canada has breached the Boundary Waters Treaty.

30. Canada's reference to the International Joint Commission ("IJC") is also spurious. The Boundary Waters Treaty established the IJC to resolve disputes over certain specific matters set forth in the Treaty.[21] For example, the IJC has jurisdiction over: "obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the [boundary] line, affecting the natural level or flow of boundary waters on the other side of the line," that are not authorized by a special agreement;[22] and "the construction or maintenance . . . of any remedial or protective works or any dams or other obstruction in the waters flowing from boundary waters," not authorized by a special agreement, "the effect of which is to raise the natural level of waters on the other side of the boundary."[23] The IJC may also examine disputes between the parties to the Treaty, but its reports on such matters "shall not be regarded as decisions of the questions or matters so submitted on either the facts or the law, and shall in no way have the character of an arbitral award," unless the United States and Canada both refer the matter to the IJC.[24]

31. DIBC's claim does not involve a dispute between the governments of the United States and Canada. As a result, the dispute resolution process set out in the Boundary Waters Treaty does not apply here.[25]

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[21] *Id.* at Art. VIII.

[22] *Id.* at Art. III.

[23] *Id.* at Art. IV.

[24] *Id.* at Art. IX – X.

[25] *Id.*

32. Further, nothing in the Boundary Waters Treaty suggests that the IJC has any jurisdiction, much less *exclusive* jurisdiction, over an ongoing breach of the rights conferred by a "special agreement."

33. As a result, there is no reason to believe that any aspect of DIBC's claim – including its claim for damages based on Canada's wrongful interference with the exclusive franchise granted to DIBC through the 1921 CTC Act, the 1921 DIBC Act, and subsequent Canadian and U.S. legislation, which constitutes a violation of NAFTA – is precluded or otherwise barred by the Boundary Waters Treaty.

IV. DIBC HAS COMPLIED WITH NAFTA ARTICLE 1121.

34. DIBC has submitted an adequate waiver pursuant to NAFTA Article 1121, and has fully complied with the terms of that waiver. Canada's arguments to the contrary are without merit, for the reasons explained below.

35. Article 1121 requires claimants to waive their rights to certain legal claims which could overlap with a Chapter 11 arbitration. Specifically, it provides that the claimant must waive any proceedings with respect to the *same measure* – defined as any law, regulation, procedure, requirement, or practice – that is the subject of arbitration, *except* for proceedings seeking only injunctive, declaratory, or other extraordinary non-monetary relief before an administrative tribunal or court under the law of the disputing NAFTA party.[26]

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[26] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 201(1), 1121(1)(b), 1121(2)(b), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12. Article 1121(1)(b) provides that:

> A disputing investor may submit a claim under Article 1116 to arbitration only if:
> . . .
>
> (b) the investor, and where the claim for loss or damage to an interest in an enterprise of another Party that is a juridicial person that the investor owns or

36. By requiring a claimant to waive any other claims for monetary damages arising out of the specific measure or measures submitted to arbitration, this provision eliminates any possibility that a claimant will obtain a double recovery. Although a claimant may pursue damages in a Chapter 11 arbitration and still seek injunctive or declaratory relief concerning the same measure or measures from a court under the law of the disputing NAFTA party, a Chapter 11 Tribunal cannot order injunctive or declaratory relief,[27] and the claimant must waive any non-arbitration damages claims concerning the measure submitted to arbitration.[28]

37. As explained below, DIBC's waiver fully complies with Article 1121. Because Canada is violating DIBC's rights on both sides of the U.S.-Canada border, and because this Tribunal does not have the ability to grant injunctive relief against Canada, DIBC has been forced to pursue its claims in several fora. However, DIBC has organized its lawsuits and this arbitration such that each proceeding addresses different measures undertaken by Canada. The only instances where more than one proceeding bears on the same measures are where DIBC is seeking damages in this arbitration and declaratory relief in a court under the law of Canada – an overlap expressly permitted by Article 1121.

> controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal our court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

[27] *Id.* at Art. 1135(1).

[28] *Id.* at Art. 201(1), 1121(1)(b), 1121(2)(b).

A. The Relevant Waiver

38. The relevant waiver for the purpose of assessing DIBC's compliance with Article 1121 is the waiver DIBC executed in connection with its January 15, 2013 Amended Notice of Arbitration.[29]

39. DIBC also executed an earlier waiver in 2011, in connection with its initial Notice of Arbitration. However, DIBC amended the scope of its arbitration claim in its Amended Notice of Arbitration, and DIBC's current arbitration claim going forward corresponds to the later Amended Notice of Arbitration. Further, this arbitration did not materially proceed in the time between that notice and DIBC's Amended Notice of Arbitration.

40. For the sake of clarity and brevity, the discussion below focuses on Canada's waiver arguments with respect to DIBC's January 15, 2013 waiver, and does not repeat the similar analysis that applies to DIBC's earlier waiver. DIBC will address both waivers in its memorial on jurisdiction and admissibility.

B. The Washington Litigation Involves Different Measures Than This Arbitration And Does Not Seek Damages.

41. On March 22, 2010, DIBC and CTC filed a complaint in the United States District Court for the District of Columbia against the United States, several U.S. government agencies and officers, and Canada (the "Washington Litigation"). In November 2012 – approximately two months before DIBC filed its waiver with its Amended Notice of Arbitration – DIBC and CTC moved to amend their complaint in the Washington Litigation. That complaint, dated November 9, 2012, was formally docketed on February 11, 2013.[30]

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[29] DIBC Waiver (Jan. 15, 2013), Exhibit C-116.

[30] *Detroit Int'l Bridge Co. v. U.S. Dep't of State*, No. 10-cv-476-RMC, Second Amended Complaint (Feb. 11, 2013), Exhibit C-117.

42. DIBC and CTC are *not* seeking monetary damages in the Washington Litigation. Rather, DIBC and CTC are seeking declaratory and injunctive relief against several entities, including Canada.[31]

43. Further, DIBC and CTC's claims against Canada in the Washington Litigation are limited to claims arising out of Canada's acts *in the United States*. Such acts include, for example, Canada's efforts to convince the U.S. Federal Highway Administration ("FHWA") to reject the New Span as a possible alternative for a new bridge connecting Detroit and Windsor, despite FWHA's internal selection of the New Span as a top choice.[32] Similarly, Canada has pressured the U.S. Coast Guard to withhold a navigational permit for the New Span.[33]

44. In contrast, DIBC's claim in this arbitration arises out of Canada's acts *in Canada*, such as, for example, Canada's ongoing failure to improve highway connections to the American-owned Ambassador Bridge even as it has improved highway connections to Canadian-controlled bridges, its construction of the Windsor-Essex Parkway, and its ongoing assertion that the IBTA requires DIBC to obtain a special permit to build the New Span to the Ambassador Bridge.[34]

45. Because DIBC is challenging different measures in this arbitration and in the Washington Litigation, Article 1121 does not require DIBC to waive its rights with respect to the

[31] *See id.* at pp. 90-92.

[32] *Id.* at ¶¶ 188-212.

[33] *Id.* at ¶¶ 156-165.

[34] *See, e.g.*, DIBC Statement of Claim at ¶ 215.

Washington Litigation in order to bring this arbitration.[35]

46. Although some of DIBC's rights are implicated in both cases – for example, the exclusivity of DIBC's franchise – those rights are being impacted by *different measures* in each case. Nothing in Article 1121 prohibits DIBC from bringing separate suits in different fora to defend its rights against different adverse measures.

47. In order for DIBC to adequately explain its case to the court in the Washington Litigation and to the Tribunal in this arbitration, DIBC necessarily had to discuss Canada's conduct on both sides of the U.S.-Canada border in its respective pleadings. For example, it would have been both confusing and potentially misleading if DIBC had simply omitted from its Statement of Claim any mention of Canada's actions in the U.S., or the United States' actions with respect to the New Span and the NITC/DRIC. However, DIBC's effort to provide the Tribunal and the Washington Litigation court with *context* for its respective claims does not mean that the claims it is pursuing in each forum overlap. Rather, as stated above, DIBC's claim in this arbitration arises out of Canada's measures in Canada, and DIBC's claims in the Washington Litigation arise out of Canada's measures in the United States.

48. In light of the purpose behind Article 1121, it is noteworthy that the Washington Litigation does not create any risk of a double recovery, as DIBC is *only* seeking injunctive and declaratory relief in that case.

49. Indeed, DIBC is maintaining the Washington Litigation against Canada precisely because this Tribunal is not empowered to grant an injunction against Canada's actions in the

[35] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 1121(1)(b), 1121(2)(b), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

United States (or anywhere). Conversely, DIBC is pursuing this Chapter 11 arbitration because this is the most appropriate forum to seek damages for Canada's actions *in Canada*.

50. For all of these reasons, DIBC was not required to waive its rights to bring or continue the Washington Litigation in order to satisfy Article 1121.

51. In addition, DIBC's statement in its waiver that it was not waiving its claims for declaratory and injunctive relief in the Washington Litigation does not pose any jurisdictional problem under Article 1121.[36] That statement was merely for the avoidance of doubt: as explained above, DIBC was *not required* to waive those claims.

C. The *CTC v. Canada* Litigation Involves Different Measures Than This Arbitration And Seeks Declaratory Relief In Canadian Court.

52. On February 15, 2012, CTC brought a lawsuit in the Ontario Superior Court of Justice against Canada ("*CTC v. Canada* Litigation").[37] CTC amended its claims on February 19, 2013.[38]

53. CTC's claims in the *CTC v. Canada* Litigation are divided into two parts. First, CTC is seeking declaratory relief concerning its rights and the status of its franchise.[39] Second, in the alternative and *only* in the event that the NITC/DRIC is *completed*, CTC is seeking damages from Canada for the expropriation of its rights.[40]

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[36] DIBC Waiver (Jan. 15, 2013), Exhibit C-116.

[37] *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Statement of Claim (Feb. 15, 2012), Exhibit C-118.

[38] *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Amended Statement of Claim (Feb. 19, 2013), Exhibit C-119.

[39] *See id.* at ¶ 1(a)-(g).

[40] *See id.* at ¶ 1(h) ("The plaintiff, The Canadian Transit Company ('CTC') seeks the following relief: . . . (h) In the alternative, and in the event of the construction of a proposed new

54. Article 1121 does not require DIBC to waive its claims for declaratory relief in the *CTC v. Canada* Litigation, because those claims are being brought in a court under the law of Canada.[41]

55. Article 1121 also permits DIBC's claims for monetary damages in the *CTC v. Canada* Litigation, because they involve different measures than this arbitration.[42] In this case, DIBC is seeking damages for Canada's ongoing failure to connect the Ambassador Bridge to the Canadian highway system and for Canada's efforts *to prevent DIBC from building the New Span*, which efforts include Canada's *promotion* of the NITC/DRIC in an effort to delay DIBC's right to build the New Span. DIBC is *not* bringing an expropriation claim under NAFTA.[43] In contrast, CTC's alternative damages claim in the *CTC v. Canada* Litigation is limited to the damages that would result from the eventual *completion* of the NITC/DRIC and the concomitant expropriation of CTC's franchise rights that would occur if and when the NITC/DRIC is ultimately constructed.[44]

56. As in the Washington Litigation, the *CTC v. Canada* Litigation does not create any risk of a double recovery. DIBC's damages claim in this arbitration and CTC's damages

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international border crossing in the vicinity of the Ambassador Bridge . . . (ii) compensation from the Canadian Government . . . .").

[41] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 1121(1)(b), 1121(2)(b), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

[42] *Id.*

[43] *See, e.g.*, DIBC Statement of Claim at ¶ 215.

[44] *Canadian Transit Co. v. Attorney General of Canada*, No. CV-12-446428, Amended Statement of Claim at ¶¶ 1(h), 111.A-113 (Feb. 19, 2013), Exhibit C-119.

claim in the *CTC v. Canada* Litigation would remedy entirely different injuries arising from different breaches.

57. In addition, CTC's claims for declaratory relief in the *CTC v. Canada* Litigation are expressly permitted under Article 1121. Indeed, DIBC and CTC *must* seek that relief outside of the NAFTA arbitration process, as the Tribunal is not empowered to grant declaratory or injunctive relief.

58. For all of these reasons, DIBC was not required to waive its rights to bring or continue the *CTC v. Canada* Litigation in order to satisfy Article 1121.

59. In addition, DIBC's statement in its waiver that it was not waiving its claims in the *CTC v. Canada* Litigation does not pose any jurisdictional problem under Article 1121.[45] That statement was merely for the avoidance of doubt: as explained above, DIBC was *not required* to waive those claims.

D. The Windsor Litigation Involved Different Measures Than This Arbitration And Sought Declaratory Relief In Canadian Court.

60. On February 24, 2010 and June 21, 2010, CTC initiated two lawsuits in the Canadian courts against the City of Windsor, the Mayor of Windsor, and members of the Windsor City Council (collectively, the "Windsor Litigation").[46]

61. CTC challenged nine city by-laws, which it argued were unlawful, invalid, and enacted in bad faith and for an unlawful purpose. CTC also sought related monetary damages.[47]

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[45] DIBC Waiver (Jan. 15, 2013), Exhibit C-116.

[46] *Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim (June 21, 2010), Exhibit C-121.

62. The by-laws challenged by CTC related to zoning and historic preservation.[48] Taken together, they had the effect of limiting CTC's ability to demolish certain properties owned by CTC.

63. Several of the claims asserted by CTC in the Windsor Litigation were for declaratory relief alone. Article 1121 expressly permits those claims, as they were brought in a court under the law of the disputing NAFTA party.[49]

64. To the extent CTC sought damages in the Windsor Litigation, it did not seek damages arising out of any of the measures at issue in this arbitration. As a result, CTC was not required to waive those claims under Article 1121.[50]

65. Canada's argument that CTC pursued claims in the Windsor Litigation based on Windsor's installation of traffic lights and driveway connections along Huron Church Road is mistaken. Windsor's installation of traffic lights and driveway connections is mentioned as context in one paragraph of one of CTC's statements of claim.[51] It was not the basis of CTC's claim in the Windsor Litigation.

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[47] *See Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim at ¶ 1 (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim at ¶ 1 (June 21, 2010), Exhibit C-121.

[48] *See Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim at ¶¶ 81, 87, 90 (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim at ¶¶ 25, 36-37 (June 21, 2010), Exhibit C-121.

[49] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 1121(1)(b), 1121(2)(b), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

[50] *Id.*

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

66. Canada's argument that the Windsor Litigation creates a jurisdictional defect because it included claims involving the New Span is also baseless. In the Windsor Litigation, CTC argued that Windsor had undertaken certain discrete actions to delay or block the construction of the New Span.[52] None of those specific actions by Windsor are mentioned in the Statement of Claim for this arbitration, and none of them are at issue in this arbitration.[53]

67. For the purposes of Article 1121, a "measure" is a "law, regulation, procedure, requirement, or practice."[54] Nothing in NAFTA bars DIBC and CTC from suing in the Canadian courts to challenge one set of laws, regulations, or practices that would have the effect of delaying or blocking the construction of the New Span, while bringing an arbitration against a *different* set of laws, regulations, or practices that would have the same or a similar effect.

68. In addition, the Windsor Litigation was a dead issue by the time DIBC filed its Amended Notice of Arbitration and related waiver in early 2013. The Ontario Superior Court ruled against CTC in the Windsor Litigation in late 2011, and CTC abandoned its appeal on August 13, 2012.[55]

69. As in the *CTC v. Canada* Litigation, the Windsor Litigation did not create any risk of double recovery – both because it addressed different measures than the ones at issue in this arbitration, and because it has been conclusively resolved against CTC. And as in the *CTC*

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[52] *See Canadian Transit Co. v. City of Windsor*, No. CV-10-395654, Statement of Claim at ¶¶ 86-91 (Feb. 24, 2010), Exhibit C-120; *Canadian Transit Co. v. City of Windsor*, No. CV-10-405347, Statement of Claim at ¶¶ 5-7(June 21, 2010), Exhibit C-121.

[53] *See, e.g.*, DIBC Statement of Claim at ¶ 215.

[54] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 201(1), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

[55] *Payne v. City of Windsor*, Notice of Abandonment of Appeal (Aug. 13, 2012), Exhibit C-122.

v. Canada Litigation, CTC's claims for declaratory relief in the Windsor Litigation are expressly permitted under Article 1121.[56]

70. For all of these reasons, DIBC was not required to waive its rights to bring or continue the Windsor Litigation in order to satisfy Article 1121.

CONCLUSION

71. As explained above, Canada's jurisdictional arguments are baseless. DIBC's claim is timely and is not barred by the Boundary Waters Treaty. Further, DIBC has fully complied with the waiver requirements of Article 1121.

72. Canada has not shown any need for jurisdictional discovery. It has admitted that it already has the evidence it needs, and further has not shown – and cannot show – that any additional discovery it could obtain from DIBC would be material to its jurisdictional arguments. Thus, the Tribunal should set a schedule for the jurisdictional phase of this case that begins with Canada's memorial on jurisdiction and admissibility, and provides for the prompt resolution of the jurisdictional issues raised by Canada.

73. In the alternative, if the Tribunal sees fit to allow some jurisdictional discovery, that discovery should be limited to the two issues specifically identified in Canada's brief statement and the corollary issues identified above by DIBC. DIBC believes that one round of narrow discovery on these issues can be completed in approximately two months, at which point the parties can move forward with memorials on jurisdiction and admissibility.

[56] North American Free Trade Agreement, U.S.-Can.-Mex., Ch. 11, Art. 1121(1)(b), 1121(2)(b), Dec. 17, 1992, 32 I.L.M. 605-649 (1993), Exhibit CLA-12.

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Respectfully submitted,

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