

**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.

AMENDED NOTICE OF ARBITRATION

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I

DEMAND FOR ARBITRATION

1. Pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) and Articles 1116(1), 1117(1), and 1120(1)(b) of the North American Free Trade Agreement (“NAFTA”), claimant Detroit International Bridge Company (“DIBC” or “Claimant”), on its own behalf and on behalf of its enterprise The Canadian Transit Company (“CTC”), hereby demands and commences arbitration against respondent the Government of Canada (“Canada”).

2. This proceeding arises from a dispute between Claimant and Canada arising from Claimant’s ongoing investment in the Ambassador Bridge, a privately owned international toll bridge that connects Detroit, Michigan and Windsor, Ontario. Since the Ambassador Bridge opened for service on November 11, 1929, Claimant has owned the bridge, including the associated toll-collection rights, in its entirety.¹ Claimant directly owns the relevant rights with respect to the U.S. side of the bridge, and Claimant’s wholly owned subsidiary CTC owns the relevant rights with respect to the Canadian side of the bridge.

3. The Ambassador Bridge includes a bridge span, customs and toll plazas, approach roads, duty-free shops, and other associated facilities on both sides of the border. The Ambassador Bridge is the busiest crossing between the United States and Canada, facilitating more than 27% of annual trade between the two countries.

¹ As explained below in the description of the parties, Claimant is the successor in interest to the entities that received the statutory rights to construct and own the Ambassador Bridge. For the sake of simplicity, this Request for Arbitration refers to the Claimant and its predecessors-in-interest collectively as “Claimant” or “DIBC.”

4. The Ambassador Bridge was designed, constructed, maintained, and operated entirely with the private funds of DIBC and its subsidiary CTC. In return for constructing and agreeing to own and operate the Ambassador Bridge, DIBC and CTC were granted a perpetual right to maintain the Bridge and collect tolls from vehicles using the bridge. The bridge first opened for traffic in 1929, and from that time to the present day, DIBC has invested hundreds of millions of dollars in operating, maintaining, and improving the Ambassador Bridge in reliance on these rights.

5. As part of a plan to operate and maintain the bridge in a more cost-effective manner, and to improve the efficiency with which traffic is processed through the customs plaza, DIBC has undertaken to build a new span to the Ambassador Bridge (“New Span”). The New Span will be built right next to the existing Ambassador Bridge, and will connect to the same approaches and customs plazas as the existing bridge. It will consist of six lanes (three in each direction), as opposed to the four lanes (two in each direction) on the existing bridge. This expanded number of lanes is not needed because of any increase in traffic capacity, but instead is designed to allow different kinds of traffic to be channeled more easily into different lanes in the customs plaza (most importantly, commercial trucking versus other kinds of traffic), thereby allowing far more efficient processing of the traffic through customs. In addition, the New Span will allow for far easier and less expensive maintenance to be performed on both the existing bridge and the New Span. Finally, while any reasonable traffic projections show that there is likely no need for additional crossing capacity for several decades (if ever), it will be possible (after relatively minor modifications) for DIBC and CTC to operate both the New Span and the existing Ambassador Bridge, so as to provide a total of 10 lanes of crossing capacity, in the unlikely event that such capacity is needed at some point in the future.

6. For many years, however, Canada has been hostile to the fact that an American-owned company owns the perpetual and exclusive right to own and operate the Ambassador Bridge. As a result of that hostility, Canada has: (a) prevented DIBC and CTC from building their New Span; (b) announced a commitment to construct a heavily-subsidized, competing bridge that will be Canadian-owned and located within approximately 3.2 kilometers (roughly 2 miles) of the existing Ambassador Bridge; and (c) improved the highway connections to both the Canadian-owned Blue Water Bridge that competes with the Ambassador Bridge, and to the newly proposed, but still *non-existent*, Canadian-owned bridge that Canada intends to build right next to the Ambassador Bridge—all while refusing to improve the highway connections to the American-owned Ambassador Bridge.

7. The proposed Canadian-owned bridge has been variously called the “Detroit River International Crossing” (“DRIC”) or the “New International Trade Crossing” (“NITC”) (referred to herein as the “Canadian NITC/DRIC Bridge” or the “NITC/DRIC”). By discriminating against the American-owned Ambassador Bridge and the proposed New Span and in favor of the Canadian-owned NITC/DRIC and the Canadian-owned Blue Water Bridge, Canada has failed to accord DIBC and CTC the “national treatment” required by NAFTA Article 1102, and has also failed to provide the minimum standard of fair and equitable treatment required by NAFTA Article 1105.

8. Canada’s discriminatory conduct directly infringes on DIBC’s exclusive franchise rights. This discrimination is intended to prevent the U.S. owners of the Ambassador Bridge from building the New Span, with the apparent long-term goal of forcing those U.S. owners to sell the Ambassador Bridge for less than its fair market value.

9. Given the level of traffic reasonably projected for the Detroit-Windsor crossing, there is not enough traffic at the crossing to support both the NITC/DRIC and the Ambassador Bridge's New Span. Thus, when the NITC/DRIC is built, the viability of the Ambassador Bridge will be jeopardized (which would give rise to a separate and additional claim for damages and expropriation, which is not currently part of this NAFTA claim). In addition, the construction of the NITC/DRIC will make it economically infeasible for Claimants to construct their New Span. Canada's discrimination against the U.S. owners of the Ambassador Bridge includes this deliberate effort to prevent the U.S. owners of the Ambassador Bridge from maintaining and improving the long-term viability of that bridge through the construction of the New Span.

10. By contrast, in the early 1990s, Canada willingly approved the construction of a new span to the Blue Water Bridge, the Canadian half of which is owned by the Canadian Government (Transport Canada), and the U.S. half of which is owned by the Michigan Department of Transportation. The Blue Water Bridge, which crosses the St. Clair River between Port Huron, Michigan and Sarnia, Ontario, is the closest bridge to the Ambassador Bridge and directly competes with the Ambassador Bridge for large commercial truck traffic. The Blue Water Bridge was built 10 years *later* than the Ambassador Bridge (i.e., it opened in 1938 versus the Ambassador Bridge's opening in 1929). Thus, by approving the construction of a new span to the Blue Water Bridge (which was completed in 1998) while thwarting Claimant's ability to build a New Span to the Ambassador Bridge, Canada has discriminated against Claimant as an American-owned business and has failed to afford Claimant a minimum standard of fair and equitable treatment, and therefore has violated NAFTA.

11. Canada has discriminated against DIBC and CTC by delaying their ability to obtain regulatory approvals for the New Span in both the United States and Canada, even while accelerating the approvals granted to the Canadian NITC/DRIC. In legislation that was passed in December 2012, Canada arbitrarily provided that the Canadian-owned NITC/DRIC is exempt from essentially all of the regulatory requirements applicable to other bridges, thereby ensuring that it is given preferential treatment as compared with Claimant's competing New Span.

12. In addition, Canada has taken deliberate steps to divert traffic from the Ambassador Bridge to the Canadian NITC/DRIC, all without any legitimate or nondiscriminatory justification. Canada has arbitrarily and discriminatorily reneged on its prior commitments to improve the highway connections to the Ambassador Bridge, choosing instead to improve the highway connections to the non-existent NITC/DRIC. In 2002, Canada signed a Memorandum of Understanding with the Government of Ontario in which they jointly committed to a five-year, C\$300 million investment in the highway connections to the Ambassador Bridge (as well as other border crossings). Canada has reneged on that commitment. Instead, it has designed and commenced construction on a new highway (the "Windsor-Essex Parkway") that will replace the old road to within approximately 3.4 kilometers (2.1 miles) of the foot of the Ambassador Bridge. But after being built to within just 2 miles short of the American-owned Ambassador Bridge, the new highway was diverted west to connect only to the proposed site of the new (but non-existent) Canadian NITC/DRIC.

13. Canada has taken these inequitable and discriminatory steps, designed to undermine and eliminate the profitability of DIBC's investment in the Ambassador Bridge, in whole or in part because: (a) Canada or its political subdivisions will have a proprietary interest in the Canadian NITC/DRIC Bridge, unlike the Ambassador Bridge; (b) the Canadian

NITC/DRIC Bridge, unlike the Ambassador Bridge, will not be wholly owned by United States investors; and (c) Canada is intentionally seeking to drive down the value of the Ambassador Bridge to facilitate a purchase of either the entire bridge or the Canadian half of the bridge.

14. In so doing, Canada has breached its obligations under NAFTA, including its obligations (a) to treat DIBC and its investment in a manner no less favorable than the treatment afforded to Canadian and third-country investors, and (b) to treat DIBC and its investment in a manner consistent with international law, including fair and equitable treatment and full protection and security. Over the past several years, Canada has repeatedly breached both of these obligations, and those breaches have caused DIBC to suffer damages and will cause it ongoing damage in the future.

15. For these reasons, as further set forth below, DIBC seeks a determination that Canada has breached its obligations under NAFTA and an award of past and future damages and other appropriate relief. Because Claimant is attempting to prevent the construction of the NITC/DRIC through declaratory and injunctive relief in domestic court actions, this Notice does not seek compensation based on the damages Claimant will suffer when the NITC/DRIC is actually constructed. The construction of the NITC/DRIC is a future event not properly included in this arbitration. Instead, Claimant seeks damages for the losses (including future losses) suffered as a result of the discriminatory and inequitable actions that Canada has undertaken prior to this Demand (and any during these proceedings) that have diminished Claimant's past and future toll revenues due to the failure to improve the highway connections to the Ambassador Bridge and due to the delay and obstruction of Claimant's ability to construct the New Span to the Ambassador Bridge.

II

THE PARTIES AND THE INVESTMENT

16. Claimant DIBC is a United States company incorporated under the laws of the State of Michigan. DIBC's principal place of business is at 12225 Stephens Road, Warren, Michigan 48089, United States of America.

17. Claimant DIBC is a privately held company that is owned, through another company, by citizens of the United States of America.

18. The following are the agents, counsel, and advocates for Claimant for purposes of this arbitration proceeding:

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19. The addresses of Claimant's counsel of record should be deemed to be Claimant's address for purposes of this proceeding, and all communications shall be served on Claimant through counsel.

20. DIBC owns and controls the stock of CTC, a Canadian company established by a Special Act of Parliament. CTC's principal place of business is at 4285 Industrial Drive, Windsor, Ontario, N9C 3R9, Canada.

21. DIBC and CTC, respectively, own the United States and Canadian sides of the Ambassador Bridge. They operate the Ambassador Bridge in cooperation with each other pursuant to a joint operation agreement.

22. Claimant DIBC is the successor in interest to the American Transit Company ("ATC") and another company also known as Detroit International Bridge Company ("Old DIBC"). ATC and CTC were the original grantees, in 1921, of the rights to build and operate a toll bridge across the Detroit River, together with the associated toll-collection and other rights. Pursuant to statutory authorization, ATC transferred all of its rights and assets to Old DIBC in 1927. This Amended Notice refers to claimant DIBC, and where applicable, its predecessors in interest ATC and Old DIBC, collectively as "DIBC."

23. Canada is a sovereign state and a state party to NAFTA.

24. Under Article 1137(2) of NAFTA, delivery of notices and documents to the Government of Canada should be made to the following address:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
Canada

25. Under Article 105 of NAFTA, Canada is responsible for the actions of its subnational governments, including provincial and municipal governments. The claim asserted herein involves the actions of the federal government of Canada, the government of the Province of Ontario, the municipal government of the City of Windsor, Ontario, and numerous governmental agencies of each of them. Canada is responsible for the actions of those entities.

III

THE AGREEMENT TO ARBITRATE

26. The text of the agreement to refer this dispute to arbitration is set forth in NAFTA. In Chapter Eleven of NAFTA, Canada made an offer to submit to arbitration claims for breaches of its substantive obligations under that chapter. Claimant DIBC has accepted Canada's offer, forming the agreement between the parties to arbitrate this dispute.

27. NAFTA Article 1122(1) provides that "each [state] Party [to NAFTA] consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Further, NAFTA Article 1122(2) states that "the consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of . . . Article II of the New York Convention for an agreement in writing."

28. Article 1120(1) of NAFTA states that:

Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: . . . (c) the UNCITRAL Arbitration Rules.

29. The parties have attempted, without success, to settle the dispute through consultation and negotiation.

30. Each of the requirements for arbitration under NAFTA is satisfied here:

- NAFTA became effective in 1994 and remains in force between the United States and Canada.
- More than six months have elapsed since the events giving rise to the claim.
- On March 23, 2010, Claimant DIBC served Canada with a Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement (the "Notice of Intent") specifying the name and address of the claimant; the

provisions of NAFTA that have been breached; the issues and factual basis of the claims set forth in this Notice of Arbitration; and the relief sought and the approximate amount of damages claimed. More than ninety days have elapsed since the service of the Notice of Intent.

- Claimant DIBC is an enterprise organized under the laws of the State of Michigan in the United States of America, and is therefore an investor of the United States under Article 1139 of NAFTA.
- DIBC and CTC have provided the requisite consent to arbitration and waiver in the form contemplated by Article 1121. The consent and waiver are attached as Annex A.
- None of the exceptions to arbitration under Annex 1120.1, Article 1138, or Annex 1138.2 of NAFTA are applicable to DIBC's claims against Canada.

IV

RELATIONSHIP OUT OF WHICH THE DISPUTE ARISES

31. This dispute arises out of Canada's breaches of NAFTA. DIBC's investment in the Ambassador Bridge was made pursuant to the reciprocal legislation described below.

V

NATURE OF CLAIM AND STATEMENT OF FACTS

A. DIBC's Exclusive Franchise to Build, Operate, Maintain, and Collect Tolls on a Bridge Across the Detroit River

32. In 1909, the United States and the United Kingdom of Great Britain and Ireland, which at the time was responsible for Canada's foreign affairs, signed and ratified a treaty regulating, among other things, the construction of bridges and other impediments to navigation across the waters separating the United States and Canada. Treaty Relating to Boundary between the United States and Canada, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448 (the "Boundary

Waters Treaty”). The Boundary Waters Treaty prohibits the construction of new bridges over the boundary waters between the United States and Canada, other than as specified in the treaty.

33. In 1921, the Canadian Parliament and the U.S. Congress adopted a special agreement in the manner contemplated by the Boundary Waters Treaty. They did so by passing reciprocal legislation granting to CTC and DIBC, respectively, a right to construct, operate, and collect tolls on an international bridge between Detroit, Michigan and Sandwich (now part of Windsor), Ontario, among other rights. Act of Mar. 4, 1921, 66th Cong., ch. 167, 41 Stat. 1439 (“1921 DIBC Act,” and, with subsequent U.S. legislation (the 1925 DIBC Amendment and 1926 DIBC Amendment cited below), the “U.S. Act”); Act of May 3, 1921, 11-12 Geo. V Ch. 57 (Can.) (“1921 CTC Act,” and, with subsequent Canadian legislation (the 1927 CTC Amendment cited below), the “Canadian Act”) (collectively, the “Special Agreement”).

34. From 1922 to 1927, both the U.S. and Canada amended the Acts to expand and clarify the rights of DIBC and CTC. *See* Act of June 28, 1922, 12-13 Geo. V. ch. 56 (Can.) (“1922 CTC Amendment”); Act of April 17, 1924 68th Cong., ch. 125 43 Stat. 103 (“1924 DIBC Amendment”); Act of Mar. 3, 1925, 69th Cong. 448, 43 Stat. 1128 (“1925 DIBC Amendment”); Act of May 13, 1926, 69th Cong. ch. 292, 44 Stat. 535 (“1926 DIBC Amendment”); Act of Mar. 31, 1927, 17 Geo. V. ch. 81 (Can.) (“1927 CTC Amendment”).

35. The special agreement formed by the U.S. Act and Canadian Act (the “Special Agreement”) constitutes a binding international agreement. This international agreement constitutes a treaty under international law. The agreement has been incorporated into U.S. and Canadian domestic law by virtue of the U.S. Act and the Canadian Act.

36. The Special Agreement granted DIBC and CTC a perpetual and exclusive franchise right to build, operate, maintain, and collect tolls on a bridge across the Detroit River, subject to conditions specified in the Special Agreement.

37. Under Canadian law, it is well settled that a franchise is exclusive by nature. Unless stated otherwise in the enacting legislation, a toll bridge franchise grants the franchisee an exclusive right to operate its facilities and collect tolls or fares and to be free of contiguous or injurious competition as long as the bridge remains useful. Because the Canadian Act does not state that CTC's franchise is nonexclusive, the Canadian Act granted CTC an exclusive franchise as a matter of law.

B. DIBC's Construction, Operation, and Maintenance of the Ambassador Bridge

38. In reliance on the perpetual rights granted by the Special Agreement, and having obtained all approvals required by the U.S. Act and the Canadian Act, DIBC and CTC (which DIBC acquired in 1927) raised money by selling bonds, acquired the necessary land, and constructed the Ambassador Bridge and its accompanying facilities.

39. The Ambassador Bridge opened for traffic on November 11, 1929.

40. Over the years, DIBC has invested hundreds of millions of dollars into building, maintaining, operating, and upgrading the Ambassador Bridge, in reliance on the exclusive statutory and contractual franchise rights that the United States and Canada granted to DIBC and CTC under the Special Agreement.

41. The tangible value of the physical bridge facility (including the bridge span and associated buildings and plazas) is only a small part of the value of Claimant's rights under the Special Agreement. The principal value in Claimant's rights under the Special Agreement comes from the right to earn revenues from the Bridge such as collecting tolls from vehicles.

C. DIBC’s Planned New Span to the Ambassador Bridge

42. The reciprocal legislation constituting the Special Agreement granted DIBC and CTC the right to “construct, maintain, and operate” a bridge and approaches thereto across the Detroit River. *See* 1921 DIBC Act, § 1; 1921 CTC Act, § 8(a). The Special Agreement’s provision of a perpetual and exclusive right to construct and maintain a bridge across the Detroit River necessarily includes the right to build a replacement or additional span as needed or appropriate. Both the United States State Department and Congress have recognized Claimant’s right to build its New Span. For over a decade, DIBC and CTC have been seeking the regulatory approvals needed to build the New Span to the Ambassador Bridge. As shown below, Canada has committed itself to blocking this effort based on discriminatory and inequitable motives, in violation of NAFTA.

D. Canada’s Longstanding, Pre-NAFTA Hostility Towards Private American Ownership of the Ambassador Bridge

43. As shown below, there has been a long history of Canadian hostility to U.S. ownership of the Ambassador Bridge. In particular, from the 1970s through to the early 1990s (ending shortly before the execution and implementation of NAFTA), Canada took a series of actions showing extreme hostility to the fact that a private, American-owned company had a perpetual and exclusive right to operate a bridge between the United States and Canada. As explained below, these hostile actions were resolved only after years of litigation that ended with two settlement agreements executed in 1990 and 1992, shortly before Canada, the U.S., and Mexico entered into NAFTA. As also shown below, this historic animosity to American ownership of the Ambassador Bridge has now resurfaced as the principal motivating factor behind the Canadian NITC/DRIC Bridge, and in opposition to the Ambassador Bridge’s New Span.

44. Canada's first concerted efforts to interfere with Claimant's Ambassador Bridge franchise rights took place beginning in 1973, immediately after Central Cartage Co., a company owned by the current owners of DIBC, advised Canada by letter that it was interested in acquiring ownership of DIBC.

45. Canada subsequently undertook a number of efforts to interfere with Claimant's rights. Canada issued a policy statement (the "Sharp Policy") stating that the Canadian government "would expect" any "change in the status of the CTC," or any mortgaging of the Canadian portion of the bridge, to meet certain conditions, including, among others: (a) a reduction of tolls; (b) a requirement that the Canadian portion of the bridge would be conveyed without cost to Canadian or Ontario governmental authorities within 25 years after acquisition; and (c) immediate conveyance, without cost, of land not required for the operation of the bridge to a body designated by the Canadian government. Canada later revised that policy and purported to require that the Canadian portion of the Ambassador Bridge be conveyed without cost to Canadian or Ontario governmental authorities immediately upon any change in status of CTC, such as an acquisition of control of its parent company DIBC, subject to a 25-year lease-back (the "Amended Sharp Policy").

46. In addition, Canada enacted Part I of the Foreign Investment Review Act ("FIRA"), which demanded that acquisition of control of a Canadian business or establishment could proceed only if the Government of Canada had determined that such acquisition were of "significant benefit to Canada." DIBC is not a Canadian corporation, but its wholly owned subsidiary CTC is a Canadian corporation. FIRA was a protectionist enactment designed to discourage foreign ownership by adopting discriminatory policies and to place Canadians in control of foreign investments on Canadian soil.

47. The Sharp Policy, the Amended Sharp Policy, and FIRA were directly contrary to Claimant's rights under the Special Agreement formed by the U.S. Act and the Canadian Act. The Sharp Policy, the Amended Sharp Policy, and the application of FIRA to CTC were all intended to defeat the acquisition of ownership and control of DIBC by Central Cartage, even though Canada, Central Cartage, or anyone else could have acquired control of DIBC simply by purchasing a sufficient number of shares of stock publicly traded on the over-the-counter market.

48. In 1979, Central Cartage acquired a controlling interest in the stock of DIBC by a combination of market purchases and a purchase from an unrelated American investor. To comply with the requirements that Canada had purported to impose under FIRA, Central Cartage's acquisition of DIBC had been structured so that DIBC would transfer ownership of CTC to an unrelated third-party Canadian owner.

49. The Government of Canada nonetheless immediately brought suit in Canada seeking to block this transaction, claiming that Central Cartage's acquisition of DIBC, which owned CTC prior to giving effect to the planned transfer of CTC to an unrelated investor, violated FIRA by not being "of significant benefit" to Canada. Canada obtained a preliminary injunction from the Federal Court of Canada that made it impossible to carry out the transaction within Canada but disclaimed any extraterritorial effect that would block the underlying acquisition of DIBC in the United States.

50. The acquisition of DIBC by Central Cartage thus proceeded in accordance with Central Cartage's filings with the SEC, but the Canadian injunction prevented DIBC from transferring its stock in CTC to the unrelated third-party Canadian investor as contemplated by Central Cartage's plan for acquiring DIBC. As a result, DIBC became wholly owned by Central Cartage, and CTC remained wholly owned by DIBC.

51. In 1980, Central Cartage and DIBC sued Canada and a number of Canadian officials in a United States district court, asserting that Canada's attempts to enforce FIRA against them constituted an expropriation, breach of contract, and other violations of law. Litigation raged for more than a decade.

E. On The Eve Of Entering Into NAFTA, And To Resolve Litigation, Canada Executed The 1990 And 1992 Settlement Agreements With DIBC And CTC, Recognizing Private American Ownership Of The Ambassador Bridge

52. In 1990, shortly before Canada's entry into NAFTA, which would prohibit discrimination by Canada against U.S. investors, Canada, Central Cartage, DIBC, and CTC entered into a settlement agreement concerning the FIRA litigation. The 1990 settlement agreement provided that both the Canadian and U.S. litigation would be dismissed with prejudice. It also stated that "Canada and DIBC have the mutual desire to make the DIBC facilities at Windsor a model facility border crossing between Canada and the United States."

53. By a subsequent 1992 facilities agreement that was contemplated by the 1990 settlement agreement, CTC and Canada agreed to cooperate with regard to customs facilities and other construction projects in connection with the Ambassador Bridge for at least five years. The 1992 facilities agreement again recited that "Canada and CTC each desire to make the CTC facilities at Windsor, Ontario a model border crossing facility between Canada and the United States."

54. The 1990 settlement agreement and the 1992 facilities agreement ushered in a period of cooperation between Canada and DIBC with respect to the Ambassador Bridge. This period coincided with Canada's entry into NAFTA, and likely reflected its effort to avoid discriminating against U.S.-owned businesses, as is prohibited by NAFTA.

F. During A Period Of Relative Cooperation, Canada Committed To Improve The Highway Connections To The Ambassador Bridge And DIBC Made Substantial Investments In Reliance On That Commitment

55. The Ambassador Bridge predated modern limited access highways. By the 1990s, both the United States and Canada recognized that additional road construction was needed to provide a direct freeway connection from the Bridge to major highways in the United States and Canada. There followed a series of enactments and commitments that were referred to on both sides of the border as the “Ambassador Bridge Gateway Project.”

56. In 1995, the United States Congress designated the Ambassador Bridge as part of the national highway system. Commencing in 1998, Congress authorized and appropriated more than \$230 million for the U.S. part of the Ambassador Bridge Gateway Project, which was a highway expansion to connect the Ambassador Bridge directly to the Interstate Highway and State Highway Systems in Michigan. In 2003, the legislative history supporting one of these appropriations specifically referred to Congress’s desire to “protect plans identified by the Ambassador Bridge, including a second span of the Ambassador Bridge.” Based on these appropriations as well as hundreds of millions of dollars invested by DIBC, the U.S. side of the Ambassador Bridge now has direct highway connections to I-75 and I-96, two of the three main interstates, and an indirect connection to the third main interstate, I-94.

57. Canada and its provincial and local governments have periodically expressed support for the Ambassador Bridge Gateway Project. Starting in 1999, Canada made a number of commitments (including contractual commitments) towards improving infrastructure to establish an end-to-end solution to and from the highway systems in each country to and from the Ambassador Bridge in support of the Ambassador Bridge Gateway Project.

58. In September 2002, after the U.S. federal government had begun appropriating funds for the Ambassador Bridge Gateway Project, the Canadian Government and the

Government of Ontario signed a Memorandum of Understanding (the “2002 MoU”) in which they “jointly commit[ted]” to a five-year, C\$300 million “investment in the Windsor Gateway.” This Memorandum of Understanding established a Canada-Ontario Joint Management Committee to recommend specific targets for the investment funds, which were designated for “improvements to the existing border crossings and their approaches,” including the Ambassador Bridge. Part I of the 2002 MoU, entitled “Canada’s and Ontario’s Commitment,” stated that:

Canada and Ontario shall continue to work with the City of Windsor on immediate improvements to assist in the management of traffic on the Highway 3/Huron Church Road Corridor [*i.e.*, the road to the Ambassador Bridge]. This includes, but is not limited to the eight hundred and eighty thousand dollars (\$880K) Investment announced on July 11, 2002 by Canada and Ontario.

59. The Canada-Ontario Joint Management Committee issued an Action Plan in November 2002. The Committee there proposed specific investments in “core infrastructure [that] would improve access to the existing crossings at the Ambassador Bridge and the Detroit-Windsor Truck Ferry” and recommended that the two governments “[w]ork with CTC/Ambassador Bridge . . . to pursue the development of a dedicated truck route from Ojibway Parkway at EC Row Expressway to the Ambassador Bridge.” The Committee also stated that “[t]he governments of Canada and Ontario would provide technical assistance and support to CTC in their pursuit of the proposed investments” and that “CTC would be encouraged to expand its Industrial Drive commercial vehicle customs plaza to accommodate primary and, possibly, secondary inspection.” This initiative, the Committee concluded, “would provide a secure, efficient truck route to the border crossing” that “would accommodate both the needs of industries that rely on cross-border trade, as well as the local tourist and business operations within the City of Windsor and surrounding areas.” The truck ferry improvements have been completed and the improved ferry service became operational in September 2010.

60. By May 2003, Transport Canada (the Canadian federal transportation ministry) secured funding for transportation infrastructure projects including the expansion of the EC Row Expressway (the Ambassador Bridge access road in Canada), improvements to Huron Church Road, and the extension of Highway 401, a major limited-access trunk road in Ontario, through Windsor, to facilitate separate car and truck access to the Ambassador Bridge. This was communicated by the Canadian Transportation Minister to the U.S. Secretary of Transportation during a meeting in Washington, D.C.

61. Later the same month, Canada and Ontario publicly announced the adoption of a nine-point “Windsor Gateway Action Plan” (“2003 Canada-Ontario Action Plan”) based in substantial part on the recommendations of the Canada-Ontario Joint Management Committee. A May 27, 2003 news release, issued jointly by Infrastructure Canada and Transport Canada, announced that Canada and Ontario had agreed:

- to “[w]ork together with the City of Windsor and Town of LaSalle on improvements to Highway 3/Huron Church Road,” the road to the Ambassador Bridge;
- to “[w]ork together with . . . the Canadian Transit Company (Ambassador Bridge) . . . in their efforts to build connections to the border crossing, concurrent with the Bi-National Planning Process”; and
- to “work together with partner agencies to accelerate the Bi-National Planning Process, and work with all proponents of new border crossing capacity, including the Canadian Transit Company (Ambassador Bridge) . . . in the context of this process.”

62. Canada appended to its press release a map showing the proposed truck-only road to the Ambassador Bridge that was incorporated into the 2003 Canada-Ontario Action Plan. The

map showed that, as contemplated by the 2003 Canada-Ontario Action Plan, Highway 401 in Canada would be connected to the foot of the Ambassador Bridge.

63. In reliance on Canada's promise of improved road connections to support the continued use and expansion of the Ambassador Bridge, Claimant has invested hundreds of millions of dollars into improvements to the Ambassador Bridge designed to take advantage of the Ambassador Bridge Gateway Project, including improvements to water, sewer, power generation, and lighting systems; expanded customs inspection facilities; and road connections on the Ambassador Bridge property. Significant additional sums have been spent on land acquisition and design costs associated with the New Span contemplated by the Ambassador Bridge Gateway Project.

G. Canada's Renewed Hostility To Private American Ownership Of The Ambassador Bridge: Using The Proposed Canadian NITC/DRIC To Prevent Or Delay The New Span

64. After a period of relative cooperation reflected by the 1990 and 1992 agreements referenced above, and the 2002 Memorandum of Understanding regarding the Ambassador Bridge Gateway Project, Canada began to take a series of actions that reflected a renewed effort to deprive Claimant of its rights. Specifically, contradicting its statements in the 1990 and 1992 agreements to make the Ambassador Bridge a "model border crossing," Canada has instead: (a) announced a commitment to the construction of an unnecessary, economically unjustifiable, and heavily-subsidized Canadian-owned bridge located *right next to* the Ambassador Bridge, which would divert approximately 75% of the commercial traffic from the Ambassador Bridge; (b) used this pre-commitment to the Canadian NITC/DRIC Bridge to block and delay DIBC's efforts to exercise its franchise right to build the New Span to the Ambassador Bridge; and (c) reneged on its commitment to improve the highway connections to the Ambassador Bridge, choosing instead to use its highway improvement funds to improve the connections to the

location of the non-existent Canadian NITC/DRIC Bridge, while deliberately and irrationally diverting those improved highways away from the location of the Ambassador Bridge.

65. As explained below, these discriminatory and inequitable actions are reflected in a series of events that have recently culminated in: (a) Canada's execution on June 15, 2012 of a "Crossing Agreement" with the Governor of Michigan, the Michigan Department of Transportation ("MDOT"), and the Michigan Strategic Fund ("MSF"), which purports to commit Canada to the financing and construction of the Canadian NITC/DRIC Bridge (subject to U.S. regulatory approvals that DIBC is challenging); (b) Canada's passage of legislation in December 2012 that exempts the Canadian-owned NITC/DRIC Bridge from all of the regulations applicable to the American-owned New Span; and (c) Canada's construction of the Windsor-Essex Parkway (which was recently renamed the Rt. Hon. Herb Gray Parkway), in a manner that irrationally and discriminatorily avoids connecting to the Ambassador Bridge. These measures, as well as related measures that have occurred over the past several years, have all violated NAFTA's "national treatment" and "fair and equitable" treatment requirements, and have resulted in continuing and increasing injury to DIBC and CTC.

66. These and related discriminatory and wrongful measures, and the background and context for those measures, are summarized below.

(1) *The NITC/DRIC Partnership*

67. In December 2000, Transport Canada, the U.S. Federal Highway Administration ("FHWA"), MDOT, and the Ontario Ministry of Transportation formed a working group called the Ontario-Michigan Border Transportation Partnership. This partnership was formed to study transportation needs in the area. While ostensibly formed simply to evaluate potential ways to improve border transportation needs, as explained below, this partnership eventually adopted a commitment to the construction of the economically unjustifiable Canadian NITC/DRIC Bridge,

and to blocking the construction of the Ambassador Bridge New Span. For that reason, it is referred to here as the “DRIC Partnership” (or the “NITC/DRIC Partnership”).

68. Initially, the construction of the Ambassador Bridge New Span and the completion of the Canadian portion of the Ambassador Bridge Gateway Project had been on the DRIC Partnership’s agenda as a way to improve traffic flow and commerce in the Detroit-Windsor area.

69. More recently, however, Canada realized that the DRIC study project created a new opportunity to attempt to force the transfer of the Ambassador Bridge to ownership and control by Canada, this time by proposing to build a new, Canadian-owned bridge between Detroit and Windsor, planned and sited so as to take nearly all the traffic revenue from the Ambassador Bridge. Building the Canadian NITC/DRIC Bridge would also make the construction of the New Span economically unviable.

(2) *Canada’s Opposition to the New Span for the Ambassador Bridge*

70. During the course of its consideration of a possible new bridge between Detroit and Windsor, the DRIC Partnership ostensibly considered many possible locations and solutions to that proposal, including (in theory) using the New Span of the Ambassador Bridge to provide the increased capacity or infrastructure that the DRIC Partnership ostensibly sought. As shown below, however, Canada ensured that the DRIC Partnership could never adopt the New Span as its solution, but instead insisted that an entirely new, Canadian-owned bridge be built right next to the Ambassador Bridge.

71. Initially, after 2000, the DRIC Partnership identified fifteen potential crossing sites across the Detroit River for the location of a possible new bridge. These were designated X1 through X15, with “X” standing for “crossing.”

72. At the outset of its consideration of alternatives, the DRIC Partnership professed to be open to various ownership structures. The FHWA noted in its Draft Environmental Impact Statement analyzing the different alternatives that it had received four alternatives proposed by private companies, and it included among them the X12 location proposed by DIBC, which would have been a twin or new span for the existing Ambassador Bridge (i.e., the New Span).

73. Internal documents that were later discovered by DIBC and CTC through public information requests show that Canada concluded that it would ultimately not allow DIBC and CTC to own any new crossing, whether or not it was a twin of the existing Ambassador Bridge. In a series of internal emails drafted by Andrew Shea, a Policy Advisor for Transport Canada, Mr. Shea described Canada's position, as endorsed by the Ontario Ministry of Transportation, as follows: "regardless of where the new crossing is located, there will, implicitly, be public control of that crossing. Therefore this would not preclude a twinned Ambassador Bridge from [being] chosen under the [DRIC Partnership process], except that the Ambassador Bridge wouldn't control it"

74. By contrast, FHWA ranked X12, the New Span of the Ambassador Bridge proposed by DIBC, very high among the various alternatives under consideration. Indeed, X12 was recognized as having one of the lowest environmental impacts on the United States side of the border of all proposed sites, and a far lower U.S. environmental impact than the site eventually chosen by Canada for the Canadian-owned NITC/DRIC Bridge.

75. Canada realized that even if the new crossing were to be publicly owned, selection of a site at the location of the Ambassador Bridge (i.e., X12) would necessarily result in the new crossing sharing a highway connection with the Ambassador Bridge. Moreover, any environmental or other regulatory approvals obtained by the DRIC Partnership for a new bridge

at the X12 site would equally support an application for approval of DIBC and CTC's privately-owned option at the same site. For these reasons, the consideration and potential approval of the X12 crossing location would have been a direct threat to Canada's long-term goal of acquiring control of Claimant's franchise to operate the bridge crossing between Detroit and Windsor.

76. For these reasons, the Canadian government resolved to reject site X12 as an alternative as soon as practicable, though it recognized that it did not have any justification for rejecting that site within the stated criteria governing the NITC/DRIC project. In an email reporting on a DRIC Partnership Working Group Meeting held September 28, 2005, Tim Morin, a Transport Canada project engineer, observed that "X12 ranks high on the US side and not so high on Canadian side," but recognized that "in order to maintain the integrity of the environmental assessment X12 will most likely have to remain based on the technical data at the moment" Reporting on a DRIC Steering Committee meeting held in October 2005, a Transport Canada official, Sean O'Dell, recounted that Canada had "argued strongly that the twinning option was not acceptable," while acknowledging FHWA's arguments that "eliminating this option could not be done on the basis of the strict [environmental] analysis" and that the DRIC Partnership "would be better off to delay a likely court challenge from the twinning proponents by keeping [X12] on the short list and strengthening the case for dropping it through further analysis"

77. Canada's own technical consultants and the Ministry of Transportation of Ontario ("MTO") took the position that X12 should be given further consideration. As recounted by Mr. O'Dell in an October 2005 email, "[b]oth MTO and our consultants were strongly of the opinion that X12 could not be ruled out at this point on the basis of the technical criteria used in the assessment of the alternatives." This conclusion was compelled by the fact that none of the

objections raised by Canada to X12 formed “part of the terms of reference of the accepted criteria for this phase of the assessment,” and left Canada “as the sole partner arguing that [X12] should be dropped now.” Yet later that month, Mr. O’Dell sent an email to FHWA objecting to the publication of a FHWA study on the NITC/DRIC because Canada did “not agree that X12 should proceed.”

78. In response to the position taken by MTO and its own consultants that X12 could not be eliminated based on technical criteria, Canada pressured its consultants in a discussion held on October 28, 2005 to “‘carefully review’ all of the material, in light of all of the concerns that have been raised, so that they can be confident in making a recommendation.” A supplemental report prepared the next week altered key findings about the impact of the X12 crossing—including increasing the projected number of homes to be displaced by the project, purporting to find new deficiencies with respect to impacts on the natural environment and regional mobility, and increasing the projected price tag of the crossing by C\$200,000,000. These findings were all based on a predetermined judgment that X12 had to be eliminated no matter what a fair analysis might show.

79. In particular, Canada falsely assumed that X12 would require a new 120-acre plaza on the Canadian side, and used the community impacts *under that (false) assumption* as the basis for rejecting X12 as an alternative. A New Span or other facility owned by DIBC did not require any additional plaza construction on the Canadian side because it could use the existing Ambassador Bridge plaza, to which the Ambassador Bridge New Span was designed to connect. Canada’s analysis was based on the undisclosed assumption that any New Span of the Ambassador Bridge would be publicly owned. It also made the undisclosed (and false)

assumption that no accommodation to share the existing plaza could be reached between a proposed publicly owned twin at location X12 and the existing Ambassador Bridge.

80. Moreover, Canada's proposed 120-acre plaza would be more than six times the size of the current plaza on the Canadian side of the Ambassador Bridge, which currently has significant excess capacity. Even the Canadian Border Services Agency, which would be responsible for customs operations at the plaza, had indicated that no more than 40 acres would be needed. As noted above, the community impacts projected by Canada for the hypothetical new plaza at the X12 site stemmed largely from Canada's deliberately inflated, false assumptions as to the appropriate size of the X12 plaza.

81. In rejecting the X12 site as a practical alternative for a new crossing, Canada also argued that building a highway connection to the new crossing would cause "unacceptable negative environmental impacts on Windsor." Any landing site would require additional highway infrastructure, however, and the preferred alternative crossing ultimately chosen by NITC/DRIC proponents itself requires the construction of a new highway. The proposed route of that new highway passes within a mile of the Ambassador Bridge plaza, and for most of its length, it follows the same route that would be followed by an improved highway connection to the Ambassador Bridge. That new highway to the Canadian-owned NITC/DRIC Bridge also imposes numerous community and environmental impacts, including (according to Canada) the displacement of approximately 370 homes, changes to cohesion and character in some neighborhood communities, the displacement of over fifty businesses, the displacement of a church, a school, and other cultural institutions, the displacement of wildlife, and potential mortality to species at risk.

82. Even before Canada received its manipulated “analysis” of the impacts of X12, Canada was stating in its internal briefing papers relating to the selection of the “practical alternatives” for the NITC/DRIC Project that X12 had been eliminated and that “the study team is confident that the decision is consistent with the process identified in the [Terms of Reference], and that there is adequate data to support such a decision”—precisely the opposite of what Canada’s study team had just advised. Canada’s decision to reject X12 had already been made before a purported justification to do so was found.

83. For these reasons and others, it is clear that Canada chose its assumptions regarding the impacts of the X12 location to manufacture a pretext for insisting that the other (United States) members of the DRIC Partnership accept its rejection of the X12 location.

84. Canada and its U.S. partners subsequently announced that X12 would not be included among the practical alternatives that would undergo further evaluation. This decision to reject location X12 was designed to block the Ambassador Bridge New Span, and to provide a pretextual justification for constructing the improved highway connections—which had been promised to the Ambassador Bridge as Canada’s half of the Ambassador Bridge Gateway Project—in a manner that would funnel traffic solely to the Canadian-owned NITC/DRIC Bridge, and *away from* the U.S.-owned Ambassador Bridge.

(3) *Canadian Advocacy and Funding for the Canadian NITC/DRIC Bridge*

85. Canada has gone to extraordinary lengths to advocate for the Canadian-owned NITC/DRIC Bridge—and against the New Span. For example, the Canadian government has committed \$550 million to fund the State of Michigan’s share of the construction costs of the NITC/DRIC, over and above the amounts Canada plans to spend. This has been used by the proponents of the Canadian NITC/DRIC to argue that it will be a “free” bridge for the people of Michigan. In fact, however, it reflects an intent by Canada to maintain full control over the

NITC/DRIC Bridge, and to provide enormous subsidies to that Canadian bridge so that it will have an unfair competitive advantage over the U.S.-owned Ambassador Bridge.

(4) *Canadian Agreement with the Michigan Governor to Build the Canadian-owned NITC/DRIC Bridge*

86. In June 2012, Canada’s actions culminated in an agreement with the Michigan Governor, MDOT, and the MSF to “design, construct, finance, operate and maintain” the NITC/DRIC (the “Crossing Agreement”).

87. The execution of the Crossing Agreement was a major step towards the construction of the Canadian-owned NITC/DRIC Bridge. It establishes a framework for the NITC/DRIC project and addresses issues including toll collection, financial responsibilities, and governance.

88. Under the terms of the Crossing Agreement, if the NITC/DRIC is constructed, it will be operated for the foreseeable future by a Canadian-controlled authority. Under the status quo, Canada will also collect all tolls from the NITC/DRIC.

(5) *Lack of Public Need for the Canadian-owned NITC/DRIC Bridge*

89. Each of the reasons cited by Canada and FHWA for pursuing the NITC/DRIC and refusing to support the Ambassador Bridge New Span is merely a pretext and lacks any reasonable or rational basis.

90. Canada and FHWA have contended that the NITC/DRIC will serve traffic needs. Traffic levels in the Southeast Michigan and Southwest Ontario transportation corridor, however, are not sufficient to support an additional bridge in the Detroit-Windsor area, an area known as the “Central Corridor.” For that reason, after the NITC/DRIC is built, at least one of the two bridges—the Ambassador Bridge or the NITC/DRIC—is destined for economic failure. It is even more the case that when the NITC/DRIC is built, it will be economically irrational for

DIBC to build the New Span. However, and despite the fact that Congress and the State Department have confirmed that DIBC has the right to expand or twin the Ambassador Bridge by adding the New Span, the traffic projections relied on by the DRIC Partnership fail to take into account the increased traffic capacity that the New Span will provide.

91. Canada has also suggested that the NITC/DRIC is necessary and that any expansion of the Ambassador Bridge is inappropriate because of the Ambassador Bridge's alleged impacts on the surrounding community, based on the assumption that the construction of the Ambassador Bridge New Span would require an expanded bridge plaza in Windsor. However, as Canada knows or should know, there is no need for an expanded Ambassador Bridge plaza, and Claimant's plans to connect the New Span to the existing plaza do not require an expansion of the plaza.

92. Canada also has claimed that the twinning of the Ambassador Bridge is inappropriate because of the absence of a direct highway connection from the Ambassador Bridge to Highway 401 in Canada. However, as explained below, the reason there is no highway connection to the Ambassador Bridge is *because Canadian officials diverted the C\$300 million that had been allocated to building such a connection to other uses*. As a result, the improvement to the access route to the Ambassador Bridge, which was designed to complement the Ambassador Bridge Gateway Project on the U.S. side, never occurred. And, as noted above, the impacts of a highway connection to the Ambassador Bridge are similar to those of the proposed highway connection to the NITC/DRIC, most of which follow the same route as would a highway connection to the Ambassador Bridge.

93. Canada, FHWA, and the other NITC/DRIC proponents have also cited "redundancy" as a reason for building the new NITC/DRIC, meaning that having two bridges

(the NITC/DRIC and the Ambassador Bridge) would avoid traffic interruption in the event that a natural or manmade disaster or other incident shut down one of the bridges. FHWA has variously described the need for “redundancy” as related to ensuring “fiscal security” and “physical security,” but has stated that both refer to the risk to transportation that would result from the disruption of a crossing. However, once the decision was made to site the proposed NITC/DRIC in the near vicinity of the Ambassador Bridge, any “redundancy” justification ceased to apply. Building a new bridge in close proximity to the existing Ambassador Bridge in the Central Corridor would not provide materially greater redundancy in the system than would the Ambassador Bridge New Span, because a problem such as a natural disaster or terrorist attack at one bridge would almost certainly affect the other.

94. Canada, FHWA, and the other proponents of the NITC/DRIC have often cited governance concerns as a reason for rejecting private ownership of any new crossing. According to FHWA, public ownership of the bridge, preferably through a public-private partnership with a long-term concession agreement to a private entity, is justified by the public policy goals of minimizing the use of public taxpayer funds while providing a safe and secure crossing.

95. Unlike the proposed NITC/DRIC, the Ambassador Bridge New Span would not use any public funds and thus would be a superior means of meeting the goal of minimizing the use of public taxpayer funds.

96. Moreover, NITC/DRIC proponents have not disputed that DIBC, CTC, and their predecessors have provided travelers a safe and secure crossing for nearly 82 years. In addition, DIBC has obtained assessments of the Ambassador Bridge applying the National Bridge Inspection Standards, and the bridge has consistently been judged to be far safer than many

publicly owned crossings. Any safety and security concerns regarding a privately owned bridge can be addressed by reasonable safety and security regulations.

(6) *Delays in Canadian Ministerial Approvals for the New Span*

97. Canada has delayed and obstructed the construction of the New Span by, for example, delaying approval under the Canadian Environmental Assessment Act for the New Span.

98. 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.

99. By way of contrast, the agencies constructing the NITC/DRIC submitted their Ontario Environmental Assessment Report in December 2008 and received a Notice of Approval from the Ontario Minister of the Environment in August 2009, just nine months later, despite serious concerns about the impact of the NITC/DRIC on the surrounding community, wetlands, and species-at-risk in Canada. The Federal Screening Report under the Canadian Environmental Assessment Act for the Canadian NITC/DRIC and plaza was released in July 2009 and approved just four months later in December 2009.

100. Similarly, as noted above, Canada approved the twin span of the Blue Water Bridge in the early 1990s, without the delays and obstruction that have prevented approval of the Ambassador Bridge New Span. The Canadian half of the Blue Water Bridge is Canadian-owned, and the Blue Water Bridge competes with the American-owned Ambassador Bridge. The discriminatory treatment of the new span of the Blue Water Bridge and the proposed Ambassador Bridge New Span is a violation of NAFTA's requirements of "national treatment"

and “fair and equitable” treatment, and is causing damages to Claimants to this day. Those damages include the loss of toll revenue attributable to traffic that uses the Blue Water Bridge rather than the Ambassador Bridge due to the Blue Water Bridge’s having received approval to construct its twin span over 15 years ago, and having received the benefit of improvements to its highway connection—both of which have been denied to the Ambassador Bridge for discriminatory and inequitable reasons.

(7) *The IBTA And The “Bridge to Strengthen Trade Act”*

101. Canada has also taken steps to discriminate in favor of its proposed Canadian-owned NITC/DRIC Bridge and against the U.S.-owned New Span through legislative enactments that were driven by the desire to promote the NITC/DRIC and to oppose the New Span.

102. In 2007, Canada enacted the International Bridges and Tunnels Act, S.C. 2007, ch. 1 (the “IBTA”). The IBTA states that its provisions should “prevail” in the event of “any inconsistency or conflict” between the IBTA and other statutes, including the 1921 CTC Act, which forms part of the Special Agreement. *See* IBTA § 4 & Schedule item 34.

103. The United States Congress has not consented to abrogation of any part of the Special Agreement, and has never enacted any legislation that is either concurrent or reciprocal to the IBTA. Thus, the IBTA is not part of any special agreement that can authorize the construction of a bridge in a manner that is consistent with the Boundary Waters Treaty.

104. Canada has taken the position that the IBTA applies to the Ambassador Bridge. In 2009, Canada adopted the International Bridges and Tunnels Regulations, P.C. 2009-117, which listed the Ambassador Bridge in a schedule of bridges and tunnels subject to the IBTA.

105. In November 2009, Canada filed an application in Ontario Superior Court seeking a declaration that the 1990 agreement settling the FIRA litigation and the subsequent 1992 facilities agreement did not bar the application of the IBTA to the Ambassador Bridge.

106. Among other things, the IBTA, like the Sharp Policy and Amended Sharp Policy adopted in the 1970s, purports to give the Canadian government authority to set tolls on privately owned international bridges. The IBTA establishes new requirements for approval for alterations of existing bridges, even if proposals were submitted to departments and agencies before the passage of the IBTA. If alteration occurs without such approval, the owner may be ordered to “remove and destroy the bridge” or to forfeit ownership to Canada. The IBTA, like the former FIRA, also purports to limit the change of ownership over international bridges, requiring government approval to purchase, operate, or acquire control of an entity that owns and operates an international bridge. In each of these respects, 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 bridge, which necessarily operates in conjunction with CTC’s Canadian portion of the bridge.

107. Canada has enacted the IBTA to give Canada the purported authority to interfere with the Ambassador Bridge’s expansion plans including the Ambassador Bridge New Span, to interfere with 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.

108. An October 2005 Transport Canada briefing paper discussing the NITC/DRIC admitted that a principal purpose of the IBTA was to thwart the proposed Ambassador Bridge

New Span. That briefing paper, regarding proposed legislation containing an earlier version of the IBTA, stated that an “extremely urgent consideration, given the anticipated reaction of the private sector proponents for a new crossing (Ambassador Bridge and DRTP [another proposed private bridge at the time]), is the need to get [the bill] passed as soon as possible. [Transport Canada] urgently needs the legal authority to turn down these or any other proposals if attempts are made to have them reconsidered.”

109. 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, as part of an omnibus budget bill called the Jobs and Growth Act, 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. It provides that the Canadian-owned NITC/DRIC is no longer subject to the Fisheries Act, the Navigable Waters Protection Act, the Species at Risk Act, section 6 of the IBTA, the Port Authorities Operations Regulations, the Canadian Environmental Assessment Act, 2012, and any additional requirement under any Canadian federal act to obtain a permit, license, approval, or other authorization in relation to the construction of the NITC/DRIC or any related work from which the Governor in Council decides to exempt the NITC/DRIC.

110. The Bridge to Strengthen Trade Act does not exempt the Ambassador Bridge New Span from any requirements of Canadian law. Rather, as described in the *Windsor Star* and *Detroit Free Press*, Canadian officials have explained that this legislation is intended to “insulate the DRIC (Detroit River International Crossing) from any future lawsuit on the Canadian side by

exempting the DRIC from any laws under which it would have to get permits and permissions and things like that.”

111. 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.

112. DIBC has undertaken to build its New Span as soon as it receives all regulatory approvals, and has been injured and impaired in this effort by the inequitable Canadian actions that discriminate against the U.S. ownership of the Ambassador Bridge.

H. Canada Has Reneged On Its Commitments To Improve Infrastructure At The Windsor Side Of The Ambassador Bridge

(1) Canada's Decision to Renege

113. As part of its effort to discriminate in favor of the Canadian-owned NITC/DRIC Bridge and against the U.S.-owned Ambassador Bridge and its proposed New Span, Canada has reneged on its commitments to improve the highway connections to the Ambassador Bridge—in particular by refusing to extend Highway 401 to the Ambassador Bridge. Canada has admitted in writing that rather than being a temporary delay, this failure reflects a decision by Canada to renege on its commitments to improve the management of traffic to the Ambassador Bridge.

114. The primary reason Canada has reneged on its commitments to improve the connection of Highway 401 to the Ambassador Bridge is the desire of the Canadian federal government and the Province of Ontario to build and favor the Canadian NITC/DRIC, rather than a bridge owned by a U.S. investor. Canada's intent 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. As early as 2004, Andrew

Shea, Policy Advisor for Transport Canada, wrote in internal correspondence that “regardless of where the new crossing is located, there will, implicitly, be public control of that crossing.”

115. The Canadian NITC/DRIC Bridge is meant to take commercial and passenger traffic from the Ambassador Bridge and decrease the value of the Ambassador Bridge by diverting its toll revenues and, in addition, is meant to prevent the New Span. On the Canadian side, the bridge will be less than two miles from the Ambassador Bridge; on the U.S. side, the two bridges will be even closer, and the two bridge plazas will nearly abut one another. The new bridge will avail itself of the very same highways in both nations. The Final Environmental Impact Statement submitted by the proponents of the Canadian NITC/DRIC Bridge estimated that, when completed, up to 39% of passenger traffic and 75% of commercial traffic would be diverted from the Ambassador Bridge to the Canadian NITC/DRIC Bridge. These projections similarly demonstrate the sharply diminished economics of the New Span with which Canada is threatening Claimant.

116. Unlike the Ambassador Bridge, which is wholly owned by DIBC, a privately owned U.S. company, at least half of the new Canadian NITC/DRIC Bridge would be owned by Canada or its political subdivisions, with the other half belonging either to a Canadian-controlled entity or to public agencies in the United States.

117. Internal correspondence of Canadian officials confirms that Canada’s objective is to use the Canadian NITC/DRIC Bridge – or the threat of the Canadian NITC/DRIC Bridge competing with the Ambassador Bridge – to drive down the value of Claimants’ investment and facilitate a future acquisition, either through a purchase of the bridge or an attempted expropriation of the Canadian half of the bridge. In a 2004 email discussing the governance model for both the NITC/DRIC and the Ambassador Bridge crossings, Ghislain Blanchard, a

senior Transport Canada official, described his preference for an “integrated approach” to governance, in which Canada would own an interest in both crossings. Mr. Blanchard noted that once “the new crossing is operational and capture[s] a substantial share of the market of the existing operators” Canada “might be in a much stronger position to negotiate a reasonable price [for the Ambassador Bridge].” He then went on to conclude that the prospect of undermining the value of the Ambassador Bridge franchise “suggest[s] a two-phase strategy, with the first phase being focused on getting a new crossing in place as soon as possible. In the second phase, the option of putting in place a more integrated approach could be examined.”

118. The proposed location of the new Canadian NITC/DRIC Bridge ultimately demonstrates its discriminatory and inequitable intent. The new bridge is designed for a location only approximately 2 kilometers from the foot of the Ambassador Bridge on the Canadian side (and even closer on the U.S. side). The proposal to build a publicly owned bridge so close in proximity to the current Ambassador Bridge, as well as to the New Span to the Ambassador Bridge, shows the deliberate and discriminatory attempt to eliminate U.S. ownership of the major crossing at this location between the U.S. and Canada.

(2) *The Windsor-Essex Parkway*

119. The location selected for the Canadian NITC/DRIC Bridge, in the area known as the Central Corridor, was intentionally chosen to divert traffic away from the Ambassador Bridge. The planned Canadian NITC/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 Canadian NITC/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, to ensure that the Canadian NITC/DRIC Bridge succeeds at the Ambassador Bridge's expense.

120. Approximately nine kilometers of the planned twelve kilometers of the Windsor-Essex Parkway will follow the exact same route that would have been used for a direct connection to the Ambassador Bridge. The Windsor-Essex Parkway would only need to be extended another approximately three kilometers to reach the plaza of the Ambassador Bridge.

121. Like the first nine kilometers, these last three kilometers to the Ambassador Bridge would be sited along the Highway 3/Huron Church Road corridor, which is already heavily traveled by cars and trucks bound for the Ambassador Bridge. The City of Windsor has designated Huron Church Road as a high-capacity vehicular corridor, recognizing its importance as a gateway to Canada because it is the access road to the Ambassador Bridge, and has adopted design guidelines for the road similar to international crossings in other U.S.-Canada border cities. But instead of continuing the Windsor-Essex Parkway down its expected path along the corridor to the Ambassador Bridge, Canada is planning to divert the new Parkway to the Canadian NITC/DRIC Bridge site, causing adverse impacts on the local environment. ,.

122. In an effort to justify its decision to refuse to build a direct highway connection to the Ambassador Bridge, as it had previously promised to do, and instead build a highway connection to its competing publicly owned crossing, Canada alleged that the Ambassador Bridge connection would disrupt the Sandwich community in Windsor, Ontario. While the route to the Ambassador Bridge was already a heavily trafficked vehicular corridor, the Windsor-Essex Parkway now under construction will impact both the Ojibway Prairie Complex, Canada's largest remaining tall grass prairie complex, and eight at-risk species. In addition, the construction of the Windsor-Essex Parkway and related toll-plaza for the Canadian NITC/DRIC Bridge will displace approximately 360 homes, 50 businesses, a church, a school, and other cultural institutions.

123. Canada's claims of alleged community disruption as a reason for the planned site of the Windsor-Essex Parkway are thus clearly a pretext to attempt to justify discrimination against the Ambassador Bridge and in favor of the Canadian NITC/DRIC Bridge, for the purposes of diverting toll revenues away from Claimant's investment and toward Canada's own competing project and of driving down the value of claimant's investment.

124. Over the past three years and continuing today, Canada has undertaken to build a new highway that discriminates against the U.S. ownership of the Ambassador Bridge and its proposed New Span. These discriminatory and inequitable acts will continue until the highway is completed, and are causing ongoing and continuing injuries to Claimant.

(3) *Interference with Traffic on Huron Church Road*

125. In 1990, ownership of the Detroit Windsor Tunnel, a two-lane vehicle crossing in the Central Corridor, reverted to The City of Windsor, Ontario ("Windsor") following the expiration of a sixty-year lease agreement between Windsor and the Detroit & Canada Tunnel Corporation and the determination by the Canadian Courts of the issue. Since 1990, Windsor has held a direct financial interest in the toll franchise associated with the Detroit-Windsor Tunnel.

126. Windsor has worked with the Canadian federal and Ontario provincial governments to promote the Canadian NITC/DRIC Bridge and the Detroit Windsor Tunnel and take traffic away from the Ambassador Bridge. Windsor has accomplished this by implementing measures that unfairly and unreasonably impeded traffic along the primary access route to the Ambassador Bridge on the Canadian side, Huron Church Road.

127. Huron Church Road is designated by the City of Windsor as a high capacity vehicular corridor and, as the access road to the Ambassador Bridge, plays an important role as a gateway to Canada. Huron Church Road was constructed as and intended to be a limited access

route to the Ambassador Bridge. Windsor intentionally destroyed this limited access route by granting ongoing unlimited curb cuts and driveway connections to Huron Church Road.

128. In addition, Windsor has installed and continues to operate seventeen unnecessary traffic lights along Huron Church Road to further discourage traffic from using the Ambassador Bridge.

129. The reason that Windsor has taken and is continuing to take these steps to discourage traffic from using the Ambassador Bridge is to encourage the use of its own competing toll crossing, the Detroit-Windsor Tunnel, for the time being, and ultimately to encourage use of Canada's planned Canadian NITC/DRIC Bridge. Through its ownership interest in these alternative crossings, Canada will derive a financial benefit from tolls collected from cars and trucks crossing its competing crossings. Further, by diverting traffic away from the Ambassador Bridge, Canada seeks to unfairly gain leverage over claimant and drive down the value of claimant's investment in the Ambassador Bridge, either to facilitate a purchase of the bridge or in advance of an attempt to expropriate the Canadian half of the bridge.

I. Injury to Claimant

130. As explained above, Canada has discriminated and continues to discriminate against DIBC, a U.S. investor, in favor of Canada's own investment in the planned Canadian NITC/DRIC Bridge as well as in the existing Blue Water Bridge.

131. Canada has also failed, and is failing, to accord DIBC and its investment fair and equitable treatment, by violating DIBC's exclusive franchise to operate the Ambassador Bridge, and its right to modernize and protect its franchise by building the New Span.

132. Canada's actions have diverted traffic and traffic growth away from the Ambassador Bridge. As a result, Claimant has been deprived of toll and concession revenues.

133. Canada's actions have also delayed DIBC's construction of the New Span to the Ambassador Bridge. By delaying DIBC's construction of the New Span, Canada has set back the opening of the New Span and deprived DIBC of toll and concession revenues it would have otherwise earned through operation of the New Span.

134. Canada's actions have also forced DIBC to incur additional expenses to exercise its statutory and contractual right to build the New Span. Those expenses have included, but are not limited to, costs associated with litigation, public relations, and communications.

VI

POINTS AT ISSUE

135. This arbitration arises from measures taken by the Government of Canada, the Province of Ontario, and the City of Windsor: (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; (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; (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 non-existent NITC/DRIC Bridge, because the Ambassador Bridge is owned by a United States investor; and (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.

136. The points raised by this arbitration are: (a) whether those measures are inconsistent with Canada's obligations under Chapter 11 of NAFTA, including national treatment under Article 1102, most-favored-nation treatment under Article 1103, and the minimum standard of treatment under Article 1105; and (b) if so, what is the appropriate amount of damages.

137. Articles 1102, 1103 and 1105 of NAFTA provide as follows:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

138. DIBC reserves the right to bring additional and further claims under Chapter 11 of NAFTA, either by amendment of its claims in this arbitration or by commencement of a new arbitration.

VII

RELIEF REQUESTED

139. As a result of the measures taken by the Government of Canada described above, the Claimant respectfully requests an award:

- (a) Finding that Canada has breached its obligations under NAFTA;

- (b) Directing Canada to pay damages in an amount to be proved at the hearing;
- (c) Directing Canada to pay interest to the claimant on the sums awarded;
- (d) Directing Canada to pay the claimant's costs associated with this proceeding, including professional fees and disbursements;
- (e) Directing Canada to pay all amounts awarded to the claimant in U.S. dollars in the United States, without any deduction, withholding, or setoff for taxes or expenses, and to pay claimant's taxes on all sums awarded; and
- (f) Ordering such other and further relief as the Tribunal deems appropriate in the circumstances.

Dated: January 15, 2013

Respectfully submitted,

/s Jonathan D. Schiller
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Counsel for Claimant

**ANNEX A
WAIVER AND CONSENT**

Pursuant to Articles 1121.1 and 1121.2 of the North American Free Trade Agreement ("NAFTA"), Detroit International Bridge Company and The Canadian Transit Company each hereby consent to arbitration in accordance with the procedures set out in NAFTA, and waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged in the foregoing Notice of Arbitration to be a breach referred to in Article 1116 or Article 1117, namely the decisions by Canada, the Province of Ontario, and the City of Windsor to locate the Windsor-Essex Parkway so as to bypass the Ambassador Bridge and steer traffic to the planned Canadian NITC/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 NITC/DRIC Bridge, and to block and delay the approval and construction of the Ambassador Bridge New Span. Consistent with NAFTA's waiver requirements, the only exception from this waiver is for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of (a) the claims included in the action titled *Detroit International Bridge Company et al. v. United States Coast Guard et al* in the United States District Court for the District of Columbia (including all claims contained in the Second Amended Complaint plaintiffs are currently seeking to file in that action), which seeks only declaratory and injunctive relief, or (b) the claims contained in *CTC v. Attorney General of Canada*, Court File No. CV-12-446428, pending in the Ontario Superior Court of Justice (Toronto).

DETROIT INTERNATIONAL BRIDGE COMPANY

By:
Name:
Title:
Date:


PATRICK A. MORAN
EVP & CORP. COUNSEL
1-15-13

THE CANADIAN TRANSIT COMPANY

By:
Name:
Title:
Date:


JAN STAMPOR
PRESIDENT
1/15/13