

**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.

STATEMENT OF CLAIM

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TABLE OF CONTENTS

I	INTRODUCTION AND OVERVIEW	1
II	THE PARTIES AND THE INVESTMENT.....	7
III	THE AGREEMENT TO ARBITRATE	9
IV	RELATIONSHIP OUT OF WHICH THE DISPUTE ARISES	10
V	NATURE OF CLAIM AND STATEMENT OF FACTS	10
A.	DIBC’s Exclusive Franchise to Build, Operate, Maintain, and Collect Tolls on a Bridge Across the Detroit River	10
(1)	Enactment Of U.S. And Canadian Legislation Constituting A Special Agreement Under Article XIII Of The 1909 Boundary Waters Treaty	10
(2)	Claimant’s Franchise And Contract To Build, Operate, And Maintain The Ambassador Bridge Between The United States And Canada In Exchange For Perpetual Rights Under The Special Agreement.....	13
(3)	Claimant’s Property Rights In The Ambassador Bridge And The Associated Franchises.....	15
(4)	The Exclusivity Of Claimant’s Franchise.....	16
B.	DIBC’s Construction, Operation, and Maintenance of the Ambassador Bridge.....	17
C.	DIBC’s Planned New Span to the Ambassador Bridge.....	18
D.	Canada’s Longstanding, Pre-NAFTA Hostility Towards Private American Ownership of the Ambassador Bridge	21
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.....	25
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	26

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.....	30
(1)	The NITC/DRIC Partnership	32
(2)	Canada’s Opposition to the New Span for the Ambassador Bridge	33
(3)	Canadian Advocacy and Funding for the Canadian NITC/DRIC Bridge	42
(4)	Canadian Agreement with the Michigan Governor to Build the Canadian-owned NITC/DRIC Bridge	43
(5)	Lack of Public Need for the Canadian-owned NITC/DRIC Bridge	44
(i)	Alleged Traffic Needs For A Second Bridge.	44
(ii)	Alleged Community Impacts of Ambassador Bridge Improvements On the Canadian Side of the River.	51
(iii)	Alleged Need For Redundancy.....	52
(iv)	Alleged Need For Public Governance	54
(6)	Delays in Canadian Ministerial Approvals for the New Span.....	55
(7)	The IBTA And The “Bridge to Strengthen Trade Act”.....	57
H.	Canadian Has Coupled Its Attacks On Claimant’s Rights With Attempts To Purchase the Ambassador Bridge.....	61
I.	Canada Has Reneged On Its Commitments To Improve Infrastructure At The Windsor Side Of The Ambassador Bridge.....	62
(1)	Canada’s Decision to Renege	62
(2)	The Windsor-Essex Parkway	64
(3)	Interference with Traffic on Huron Church Road.....	67
J.	Injury to Claimant.....	68
VI	POINTS AT ISSUE	69
VII	RELIEF REQUESTED.....	71

I

INTRODUCTION AND OVERVIEW

1. Pursuant to Article 20 of the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) (CLA-3) and Articles 1116(1) and 1117(1) of the North American Free Trade Agreement (“NAFTA”) (attached as CLA-12), claimant Detroit International Bridge Company (“DIBC” or “Claimant”), on its own behalf and on behalf of its enterprise The Canadian Transit Company (“CTC”), hereby submits its Statement of Claim against the Government of Canada (“Canada”).¹

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.² 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 DIBC submitted Legal Authorities CLA-1 – CLA-11 and Exhibits C-1 – C-3 with its Amended Notice of Arbitration and, therefore, herein begins the numbering of Legal Authorities with CLA-12 and Exhibits with C-4.

² 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 Statement of Claim 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 (the “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 ("MDOT"). 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 Statement of Claim 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 DIBC's claims; 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.
- 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

(1) Enactment Of U.S. And Canadian Legislation Constituting A Special Agreement Under Article XIII Of The 1909 Boundary Waters Treaty

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. Convention Concerning the

Boundary Waters Between the United States and Canada, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448 (the “Boundary Waters Treaty”) (attached as Exhibit C-4).

33. 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. One of the ways the treaty authorizes the construction of new bridges is pursuant to a “special agreement” authorizing construction of bridges and other uses, obstructions, or diversions of the boundary waters between the United State and Canada. Boundary Waters Treaty, Art. III. The Boundary Waters Treaty further specifies that “concurrent or reciprocal” legislation by the United States Congress and the Canadian Parliament would constitute such a “special agreement.” *Id.* Art. XIII.

34. 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 1924, 1925, and 1926 DIBC Amendments cited below), the “U.S. Act”) (attached as Exhibit C-5); Act of May 3, 1921, 11-12 Geo. V Ch. 57 (Can.) (“1921 CTC Act,” and, with subsequent Canadian legislation (the 1921 and 1927 CTC Amendments cited below), the “Canadian Act”) (attached as Exhibit C-6) (collectively, the “Special Agreement”).

35. The effectiveness of the U.S. Act was expressly conditioned on the passage of reciprocal legislation by Canada, and the effectiveness of the Canadian Act was expressly conditioned on the passage of reciprocal legislation by the U.S. Congress.

36. From 1922 to 1927, both the U.S. and Canada amended the Acts to expand and clarify Claimant's rights. *See* Act of June 28, 1922, 12-13 Geo. V. ch. 56 (Can.) ("1922 CTC Amendment") (attached as Exhibit C-7); Act of Apr. 17, 1924 68th Cong., ch. 125 43 Stat. 103 ("1924 DIBC Amendment") (attached as Exhibit C-8); Act of Mar. 3, 1925, 69th Cong. 448, 43 Stat. 1128 ("1925 DIBC Amendment") (attached as Exhibit C-9); Act. Of May 13, 1926, 69th Cong. ch. 292, 44 Stat. 535 ("1926 DIBC Amendment") (attached as Exhibit C-10); Act of Mar. 31, 1927, 17 Geo. V. ch. 81 (Can.) ("1927 CTC Amendment") (attached as Exhibit C-11).

37. In an April 1927 letter, the U.S. Department of State advised DIBC that the U.S. Act and Canadian Act constituted "a special agreement of the kind defined by Article 13 of the Boundary Waters Treaty of 1909 between the United States and Great Britain, authorizing construction of the bridge . . . and that in view of such special agreement, under Article 3 of the Treaty the matter of the construction of the bridge will not require the approval of the International Joint Commission." Letter from Joseph C. Grew, Under Secretary of State, to Messrs. Cook, Nathan, and Lehman (Apr. 6, 1927) (attached as Exhibit C-12).

38. In a July 1927 letter to CTC's Canadian attorneys, the Department of External Affairs in Canada similarly advised that no approval of the International Joint Commission was required under the Boundary Waters Treaty. *See* Letter from O.D. Melton, Dep't of External Affairs, Canada, to Messrs. McGiverin, Haydon, and Ebbs (Aug. 17, 1927) (attached as Exhibit C-13).

39. As an agreement between nations, consented to in the manner specified in the previously ratified Boundary Waters Treaty, 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.

40. The original 1921 CTC Act stated that CTC had “the powers, rights and privileges of a railway company” and that it “may purchase, lease or otherwise acquire and hold lands for the bridge, tracks, terminal yards, accommodation works and facilities” as well as “expropriate and take an easement in, over, under or through any lands without the necessity of acquiring a title in fee simple thereto.” 1921 CTC Act. The later amendments to that Act provided that CTC had the power “to construct, maintain and operate a railway and general traffic bridge across the Detroit River [that] may be exercised by the Company in the construction, maintenance and operation of a bridge for both railway traffic and general traffic purposes” and that CTC was subject to “the provisions of The Railway Act, 1919.” 1922 CTC Amendment; 1927 CTC Amendment.

41. In addition, the Bridge Act of 1906, under which the Ambassador Bridge was built, states that “any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route” Bridge Act of 1906 § 2 (attached as Exhibit C-14).

(2) Claimant’s Franchise And Contract To Build, Operate, And Maintain The Ambassador Bridge Between The United States And Canada In Exchange For Perpetual Rights Under The Special Agreement

42. To induce Claimant to undertake the risk and expense of constructing and operating the bridge, the United States and Canada passed the legislation constituting the Special Agreement. The legislation granted Claimant perpetual and exclusive right of franchise to build, operate, maintain, and collect tolls on a bridge across the Detroit River, subject to the conditions specified in the Special Agreement.

43. Claimant's rights under the U.S. Act and the Canadian Act were conditioned on the commencement and completion of construction of the bridge by certain deadlines. *See* 1921 DIBC Act § 2; 1921 CTC Act § 17. These deadlines were subsequently extended. 1924 DIBC Amendment § 1; 1925 DIBC Amendment § 1; 1926 DIBC Amendment § 1; 1927 CTC Amendment § 2.

44. At the time of the Special Agreement, building a bridge span long enough to cross the river between Detroit and Windsor was an extraordinary technical feat, and it was uncertain whether it could even be accomplished. For a time after its construction, the Ambassador Bridge was the longest suspension bridge in the world. Both Canada and the United States recognized that a bridge crossing between Detroit and what is now Windsor would help the economy of the region, and that inducing a private party to undertake the expense and risk of building such a bridge would be for the benefit of the public in both countries. The Canadian Act expressly declared “[t]he works and undertaking of [CTC] . . . to be for the general advantage of Canada.” 1921 CTC Act § 2.

45. In reliance on the perpetual rights granted to it and to its wholly owned subsidiary CTC by the Special Agreement, and having obtained all approvals required by the U.S. Act and the Canadian Act, DIBC raised money by selling bonds, acquired the necessary land, and constructed the Ambassador Bridge and its accompanying facilities.

46. DIBC and CTC would not have undertaken to build the Ambassador Bridge if they had believed that their franchise rights were not exclusive, *i.e.*, that other entities would be permitted to build bridges in the vicinity of the Ambassador Bridge.

47. The Ambassador Bridge first opened for traffic on November 11, 1929. As the Michigan Supreme Court explained in 1930, the Ambassador Bridge and its approaches formed

“a union of highways of Michigan and Ontario and convert[ed] them into one uninterrupted public road.” *Detroit International Bridge Co. v. Am. Seed Co.*, 249 Mich. 289, 295 (Mich. 1930) (attached as Exhibit C-15).

48. The Special Agreement, and each of the U.S. Act and the Canadian Act that make up the Special Agreement, constituted both a statutory right and a contractual offer to Claimant. The construction and opening of the Ambassador Bridge constituted acceptance of that contractual offer through performance. This offer and acceptance formed a binding contract among all four of the United States, Canada, DIBC, and CTC, in addition to the statutory franchise right.

49. As a result of the Special Agreement and Claimant’s acceptance of the offer contained therein, Claimant acquired certain statutory, contractual, treaty, and property rights, including the perpetual right to own, operate, maintain, and charge tolls on the Ambassador Bridge, subject only to the requirements set forth in the Special Agreement and the other legislation made applicable by the Special Agreement.

(3) *Claimant’s Property Rights In The Ambassador Bridge And The Associated Franchises*

50. Claimant, through DIBC and CTC, has a property interest in the joint franchise established by the Special Agreement formed by the U.S. Act and the Canadian Act.

51. DIBC has a property interest in the franchise granted by the U.S. Act, which specifically conferred rights and benefits upon ATC by name, DIBC’s predecessor in interest, and specifically authorized ATC to transfer those rights to a successor.

52. CTC has a property interest in the franchise granted to CTC by the Canadian Act, which chartered CTC and specifically conferred rights and benefits upon CTC by name.

(4) The Exclusivity Of Claimant's Franchise

53. 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 exclude competition as long as the bridge remains useful. See *Aubert-Gallion v. Roy*, 1892 CarswellQue 14 (Can. 1982) (attached as Exhibit C-82); *Whistler Cable Television Ltd. v. Ipec Canada Ltd.*, 1992 CarswellBC 377, 22 (B.C.S.C. 1992) (attached as Exhibit C-83); *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, 1955 CarswellNat 275, 97 (S.C. 1955) (attached as Exhibit C-84); *Owen Sound Transportation Co. v. Tackaberry*, [1936] O.J. No. 29 (C.A.) (attached as Exhibit C-106); *Hammerton v. Earl of Dysart*, 1 A.C. 57 (H.L. 1916) (attached as Exhibit C-107); see also John Burke, *Jowitt's Dictionary of English Law*, 3d ed. (London: Sweet & Maxwell, 2010) s.v. "franchise" (attached as Exhibit 108).

54. 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.

55. Exclusivity of a toll bridge franchise is breached under Canadian law if a competing bridge diverts traffic from the franchisee. Thus, any new bridge must be placed at sufficient distance from the franchisee's bridge to avoid a diversion of traffic that would be injurious to the franchise. This principle of law recognizes that a franchisee has not only rights but also duties, including the duty to maintain the bridge, and that building another bridge in the immediate vicinity would leave the franchisee saddled with its duties, but deprive it of rights granted in consideration of those duties.

56. The exclusivity of CTC's franchise under the Canadian Act necessarily requires that DIBC's franchise under the U.S. Act, and Claimant's common franchise under the Special

Agreement, must also be exclusive, both as a matter of law and as a matter of practicality, for several reasons.

57. First, as a matter of law, the U.S. Act states that it is meant to operate in tandem with the Canadian Act, which grants exclusivity as discussed. Article XIII of the Boundary Waters Treaty also establishes that the two acts operate together as a Special Agreement.

58. Second, also as a matter of law, DIBC accepted its franchise under the U.S. Act in reliance on the reciprocal franchise of CTC, its wholly owned subsidiary, under the Canadian Act. Thus, DIBC has a contractual right to the maintenance of CTC's exclusivity.

59. Finally, a bridge that only goes to the middle of the Detroit River and stops there is not a functioning crossing. Any bridge on the Detroit River that competes with the Ambassador Bridge must necessarily land on both the U.S. and Canadian sides of the river. Thus, any injurious competition with DIBC's franchise necessarily constitutes injurious competition with CTC's franchise and vice versa. For this reason, CTC's legal right to exclusivity on the Canadian side of the river must also grant exclusivity on the U.S. side of the river.

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

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

61. 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.

62. 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

63. For over a decade, the owners of the Ambassador Bridge have been trying to build a “twin” span (“New Span”) to the bridge. The reason for this effort is not due to increased traffic levels—to the contrary, traffic levels have been *declining* for the past decade. Rather, the desire for the New Span is based on the need to provide a slightly wider crossing (six lanes of the New Span instead of four lanes on the existing span) that will allow for more efficient funneling of traffic into the specialized lanes on the Customs Plaza for different kinds of traffic (*e.g.*, commercial trucks versus passenger cars). In addition, the New Span will upgrade and modernize the infrastructure of the 83-year old bridge. This will also increase the efficiency of the regular maintenance work that occasionally has to be performed: once the New Span is built, it will be much easier to perform such maintenance work without losing any capacity and without any costly or disruptive delays.

64. 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.

65. This right to build the New Span has been explicitly acknowledged.

66. First, the United States Congress has never granted an entity other than DIBC any statutory or contractual franchise rights to build an international bridge between Detroit and Windsor.

67. Second, in 1972, when Congress enacted the International Bridge Act (“IBA”), 33 U.S.C. §§ 535-535i, it recognized that the new legislation “should not be construed to adversely affect the rights of those operating bridges previously authorized by Congress to repair, replace or enlarge existing bridges.” H.R. Rep. No. 92-1303 (Aug. 3, 1972) at 3-4 (attached as Exhibit C-16).

68. Third, in explaining its 2003 legislation appropriating funds for the Ambassador Bridge Gateway Project, Congress stated that the funds were intended in part to “protect plans identified by the Ambassador Bridge, including a second span of the Ambassador Bridge.” H.R. Rep. No. 107-722 (Oct. 7, 2002) at 110 (attached as Exhibit C-17). Thus, the United States Congress confirmed that any new bridge crossing between Detroit and Windsor should be at the location of the Ambassador Bridge, which the United States had previously selected as the preferred location for any bridge crossing between Detroit and Windsor.

69. Fourth, in an August 3, 2005 letter, the State Department acknowledged that “the replacement or expansion of existing bridges authorized by Congress prior to passage of the 1972 International Bridge Act did not require a Presidential permit” and that because “DIBC is only seeking to expand (or twin) the operation of the bridge . . . DIBC does not require a Presidential permit.” Letter from Len Kusniz, Office of Canadian Affairs, U.S. Dep’t of State, to David Coburn, Steptoe & Johnson LLP (Aug. 3, 2005) (attached as Exhibit C-18). In other words, because the New Span was already authorized by a preexisting Act of Congress, DIBC’s existing franchise includes the right to build the Ambassador Bridge New Span without seeking a Presidential permit from the State Department.

70. In addition to this authorization inherent in Claimant’s franchise under the Special Agreement, the Ambassador Bridge Gateway Project, as authorized by Congress, was

specifically designed to facilitate Claimant's plans to construct a New Span of the Ambassador Bridge. Both a Memorandum of Understanding between DIBC and MDOT, signed in 1996, and the Ambassador Bridge Gateway Project Agreement between DIBC and MDOT dated April 23, 2004 explicitly acknowledge that one of the goals of the project was to "[a]ccommodate a potential future second span of the [Ambassador] BRIDGE" Ambassador Bridge Gateway Project Memorandum of Understanding (July 26, 1996) (attached as Exhibit C-19); Ambassador Bridge Gateway Project Agreement (Apr. 23, 2004) (attached as Exhibit C-20). Later briefing papers prepared by FHWA in 2006 confirmed that the Ambassador Bridge Gateway Project was "designed to accommodate the second span, if built." "Briefing Issues: Ambassador Bridge/Gateway Project in Detroit, Michigan," FHWA (2006) (attached as Exhibit C-21). About this same time, James Steele, an FHWA official with responsibility for the DRIC Project, advised the DRIC Project steering committee that "the approvals for connecting a second span [of the Ambassador Bridge] to the freeway system were already granted through the Gateway Project." DRIC Steering Committee Meeting Notes (May 3, 2006) at 4 (attached as Exhibit C-22).

71. As contemplated by the Ambassador Bridge Gateway Project, the approach ramps to the Ambassador Bridge on both the U.S. side and the Canadian side of the river were designed to accommodate a connection to the New Span.

72. Claimant has spent over \$500 million of its own funds to acquire the land for the New Span and on other expenditures related to the New Span and the Ambassador Bridge Gateway Project. CTC already owns all the land between the ramp and the Detroit River on the Canadian side. The ramps that would be used for the New Span connect directly to the

Ambassador Bridge's existing toll and customs plazas on both the U.S. side and Canadian side. The existing plazas have ample capacity to handle the expected traffic from the New Span.

73. 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

74. 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 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.

75. The Common Stock of DIBC, a Michigan corporation, was publicly traded on the over-the-counter market beginning in 1939 after DIBC underwent a bankruptcy reorganization. From 1939 to 1973, Canada made no attempts to interfere with purchases or sales of DIBC stock.

76. 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. Letter from Edwin A. Goodman, Good & Goodman, to K.W. MacLellan, Department of External Affairs, Ontario (Oct. 17, 1973) (attached as Exhibit C-23).

77. In response to Central Cartage's letter, Canada issued a document titled Statement by the Secretary of State for External Affairs, the Honourable Mitchell Sharp, on the Government's Policy on International Bridges with Particular Reference to the Ambassador Bridge (Oct. 15, 1973) (attached as Exhibit C-24). This policy statement (the "Sharp Policy") stated 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 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. *Id.*

78. In 1974, 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." *Foreign Investment Review Act*, 21-22 Elizabeth II, ch. 46 (Dec. 12, 1973) (attached as Exhibit C-25). 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.

79. In 1977, Canada revised the Sharp Policy to make it even more draconian. The revised policy, titled *Policy on International Bridges* (the "Amended Sharp Policy"), 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. *Policy on International Bridges*, Appx. II (1977) (attached as Exhibit C-26).

80. FIRA, the Sharp Policy, and the Amended Sharp Policy were directly contrary to Claimant's rights under the Special Agreement formed by the U.S. Act and the Canadian Act.

81. Among other things, the Canadian Act granted CTC the right to unite with any Canadian, Michigan, or other U.S. company in building, working, managing, maintaining, and using the bridge and its terminals and approaches; to convey or lease to such company all or part of its interest in the bridge; and to mortgage, pledge, or hypothecate all its assets, alone or in conjunction with such other company. 1921 CTC Act § 14; 1922 CTC Amendment § 4. The assets of CTC referenced in the Canadian Act include CTC's rights in the bridge and all other rights and franchises granted to CTC under the Canadian Act.

82. Similarly, the U.S. Act granted DIBC the right to sell, assign, transfer, or mortgage all its assets. *See* 1926 DIBC Amendment § 3. The assets of DIBC referenced in the U.S. Act include DIBC's rights in the bridge and all other rights and franchises granted to DIBC under the U.S. Act.

83. 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. Only 0.8% of DIBC stock was owned by Canadians in 1979, following 50

years of the opportunity for anyone, including the Canadian government, to purchase the publicly traded shares.

84. 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. Central Cartage proposed a “going-private” transaction, whereby it would pay the minority shareholders for their shares and return the publicly-traded DIBC to being a privately held company, as it had been prior to its bankruptcy in the 1930s. This transaction received approval from the United States Securities and Exchange Commission (“SEC”) and the requisite vote of the shareholders. 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.

85. 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.

86. 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.

87. In 1980, Central Cartage and DIBC sued Canada and a number of Canadian officials in 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

88. 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. "Agreement in Principle", Canada and DIBC (Nov. 29, 1990) (attached as Exhibit C-27). 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." *Id.*

89. 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. "Agreement," Canada and CTC (Jan. 31, 1992) (attached as Exhibit C-28). 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." *Id.*

90. 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

91. 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.”

92. 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.” Exhibit C-17 (H.R. Rep. No. 107-722). 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.

93. 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.

94. For example, in January 1999, the government of the Province of Ontario and several Canadian municipalities, including the Cities of Windsor and Sarnia, took a position in support of the projects submitted by the Michigan Department of Transportation to the United States government under the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107. These projects included the Ambassador Bridge Gateway Project. *See* Letters from Canadian Municipalities and Municipal Organizations to James Steele, FHWA (Jan. 1999) (attached as Exhibit C-59).

95. 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.” “Windsor Gateway Short and Medium Term Improvements,” Memorandum of Understanding between The Government of Ontario and The Government of the Province of Ontario (Sept. 25, 2002) (attached as Exhibit C-29). 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.

Id. at 2.

96. The Canada-Ontario Joint Management Committee issued an Action Plan in November 2002. News Release, “Canada and Ontario Welcome Windsor Gateway Action Plan Recommendations” (Dec. 20, 2002) (attached as Exhibit C-30). 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.” *Id.* 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.” *Id.* The truck ferry improvements have been completed and the improved ferry service became operational in September 2010.

97. 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. *See* Email, Subject: “UNTD-0003: Report Minister Collenette’s visit” (May 2, 2003) (attached as Exhibit C-31).

98. 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. *See* “Canada and Ontario Announce Next Steps at Windsor Gateway,” Infrastructure Canada (May 27, 2003) (attached as Exhibit C-32). 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.”

Id.

99. 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. Map, “Windsor Gateway Action Plan” (attached as Exhibit C-33). 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.

100. A March 12, 2004 report of the Canadian government's Business Transportation Task Force summarized the Canada-Ontario plan as including "a new truck-only parkway linking Highway 401 with the EC Row Expressway, the expansion of the EC Row Expressway and improvements to Highway 3 / Huron Church Road." "Business Transportation Task Force Situational Analysis" (Mar. 12, 2004) at 2 (attached as Exhibit C-34).

101. The purpose of this proposal was to improve highway connections to the Ambassador Bridge on the Canadian side and create an end-to-end solution linking the U.S. Interstate Highway System to major Canadian highways across the Ambassador Bridge.

102. In reliance on Canada's promise of improved road connections to support the continued use and expansion of the Ambassador Bridge, Claimant has invested hundreds of millions of dollars into improvements to the Ambassador Bridge designed to take advantage of the Ambassador Bridge Gateway Project, including improvements to water, sewer, power generation, and lighting systems; expanded customs inspection facilities; and road connections on the Ambassador Bridge property. 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

103. 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.

104. 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.

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

(1) The NITC/DRIC Partnership

106. In February 2001, 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. “Ontario-Michigan Border Transportation Partnership Framework” (approved Feb. 7, 2001) (attached as Exhibit C-35). 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”).

107. 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. *See* Exhibit C-35 (Partnership Framework) at 2.

108. 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.

109. The members of the DRIC Partnership entered into a number of contractual agreements to further their purpose, including by agreeing to the Ontario-Michigan Border Transportation Partnership Framework on February 7, 2001, and by adopting the Canada-United

States-Ontario-Michigan Border Transportation Partnership Charter on February 2, 2005 (attached as Exhibit C-36). In 2007, the departments of the United States and Canada that oversee the DRIC Partnership members entered into the Memorandum of Cooperation Between the Department of Transportation of the United States of America and the Department of Transport of Canada on the Development of Additional Border Capacity at the Detroit-Windsor Gateway (2007) (attached as Exhibit C-37).

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

110. 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.

111. 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." "Area of Focus Based on Weighted Performance Analysis," Figure S-5 to DRIC Final Environmental Impact Statement (showing location of X1 through X15) (attached as Exhibit C-38).

112. At the outset of its consideration of alternatives, the DRIC Partnership professed to be open to various ownership structures. In an official position statement regarding the ownership of a new crossing issued in August 2005, the DRIC Partnership stated that the additional border crossing would be "subject to appropriate public oversight in both countries," and the alternative governance models included, but were "not limited to: Government

ownership . . . ; a concession agreement in which the private sector designs, builds, finances, and operates the facilities under a long-term lease arrangement with the governments; [and] other options that may be appropriate and developed by the partners.” “Statement of the Border Transportation Partnership on Governance of the New/Expanded Detroit River International Crossing” (Aug. 30, 2005) (attached as Exhibit C-39). FHWA, at least initially, recognized the benefits of private ownership, as the minutes of a May 2006 DRIC Partnership Steering Committee meeting describe James Steele of FHWA asking “why spend government money if the private sector is willing to spend money to solve the problem?” Exhibit C-22 (DRIC Steering Committee Meeting Notes).

113. 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). *Draft Environmental Impact Statement and Draft Section 4(f) Evaluation: The Detroit River International Crossing Study*, U.S. Dep’t of Transportation, FHWA, and MDOT (Feb. 2007) at 2-1, 2-5 (excerpt attached as Exhibit C-40), *available at* http://www.partnershipborderstudy.com/reports_us.asp#deis.

114. However, Canada acted in the United States to persuade U.S. agencies to block DIBC’s right to build the New Span solely to advance Canadian commercial interests and on the basis of Canada’s longstanding hostility to the existence of a privately owned bridge between Detroit and Windsor.

115. 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" Email from Andrew Shea, "Windsor-Detroit Crossing Governance Principles" (Dec. 13, 2004 at 10:25 AM) at 2 (attached as Exhibit C-42).

116. Mr. Shea also wrote that Canada's position "implicitly precludes the Ambassador Bridge from owning/operating a new or expanded international crossing. . . . What the principle means, is that regardless of where the new crossing is located, the incumbent owner will not be controlling the crossing." *Id.*

117. Mr. Shea, describing his communications with the Ontario Ministry of Transportation, also described "a desire for public ownership of the crossing" as one of the Ministry's "key points." Email from Andrew Shea to Sean O'Dell and Helena Borges (June 29, 2005) at 11:12 AM) (attached as Exhibit C-43).

118. 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. *See* "Evaluation of Studied Alternatives and Determination of Practical Alternatives," FHWA, Appendix C to *DRIC Final Environmental Impact Statement* (attached as Exhibit C-44) ("One alternative, the twinning of the Ambassador Bridge (X-12), ranked very high on the U.S. side due to its minimal

direct environmental impacts”); “Detroit River International Crossing Study Talking Points” (attached as Exhibit C-45); Email from James Steele, “Briefing on Bi-National Partnership – Selection of Practical Alternatives” (Nov. 4, 2005) (attached as Exhibit C-46).

119. 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.

120. 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” Email from Tim Morin to Sean O’Dell (Oct. 3, 2005) at 2 (attached as Exhibit C-47). 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” Email from Sean O’Dell, “DRIC Steering Committee Debrief – October 6, 2005” (Oct. 6, 2005) at 1-2 (attached as Exhibit C-48).

121. 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.” Email from Sean O’Dell to Helena Borges and Kristine Burr (Oct. 26, 2005 at 8:39 PM) (attached as Exhibit C-49). 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.” *Id.* Yet, 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.” Email from Sean O’Dell to Susan Mortel and Jim Steele (Oct. 24, 2005 at 1:09 PM) (attached as Exhibit C-50).

122. 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.” Email from Kaarina Stiff to Helena Borges and Sean O’Dell (Oct. 28, 2005) (attached as Exhibit C-51). 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. *Compare* “DRIC Selected Slides,” MDOT (Oct. 2005) at 8 (attached as Exhibit C-52) (showing showing 160 residences displaced, low impact on natural environment, high benefits to Regional Mobility and a total cost of C\$1.3 billion) *with* “Analysis Results—Crossing X12 Ambassador Bridge” (Nov. 2005) (attached as Exhibit C-53) (showing 426 homes displaced; emphasizing risks to the natural environment; stating with respect to Mobility that X12 did not provide a new river crossing with new connections to the freeway systems; and estimating a total cost of CDN\$1.5 billion). *See also* Exhibit C-46 (Steele Nov. 4, 2005 email). These findings were all based on a predetermined judgment that X12 had to be eliminated no matter what a fair analysis might show.

123. 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. *See* Exhibit C-46 (Steele Nov. 4, 2005 email). 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.

124. 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. *See* Email from James Kirschensteiner to Mohammed S. Alghurabi (May 23, 2007) (attached as Exhibit C-54). 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.

125. 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. Exhibit C-46 (Steele Nov. 4, 2005 email). 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 360 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. *See* Chapter 10, "Environmental Effects and Mitigation of the Recommended Plan," DRIC Ontario Environmental Assessment Report (Dec. 2008) at 10-8 (attached as Exhibit C-55).

126. 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. “Selection of Practical Alternatives for the Detroit River International Crossing Project” at 4 (attached as Exhibit C-56). Canada’s decision to reject X12 had already been made before a purported justification to do so was found.

127. 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.

128. Canada simultaneously engaged in discussions with FHWA to influence FHWA’s analysis of location X12. In a document titled the “Evaluation of Studied Alternatives and Determination of Practical Alternatives,” signed on November 10, 2005 but not made public until years later, as an appendix to the Draft Environmental Impact Statement issued by FHWA in February 2008, FHWA confirmed that “the twinning of the Ambassador Bridge (X12), [was] ranked high on the U.S. side due to its minimal direct environmental impacts and its high regional mobility ranking” but noted that “the Canadian Partners have stated their intent not to continue the study of their portion of this alternative.” Exhibit C-44 (“Evaluation of Studied Alternatives and Determination of Practical Alternatives,” FHWA). After endorsing the Canadian evaluation of X12, and noting again “that the Canadian partners have firmly stated their objections to alternative X12 and their unwillingness to consider this alternative further,” FHWA concluded that X12 would not be considered a practical alternative for further study on the U.S. side. *Id.*

129. FHWA relied entirely on the Canadian “analysis” to make a decision under NEPA to eliminate site X12, rather than performing its own analysis. FHWA further confirmed that the sole reason why X12, the twin of the Ambassador Bridge, was rejected during the U.S. review process was Canadian opposition. *See* Transcript of Deposition of James Steele (Jan. 13, 2011) at 74: 15 – 75:11 (attached as Exhibit C-57). Recognizing that it had no reasons of its own sufficient to reject location X12, FHWA noted to MDOT on February 4, 2008, in the context of commenting on the draft Environmental Impact Statement for the DRIC, that “[i]t would be helpful if we had something in the record from Canada saying officially that they hated this alternative and it was a ‘dealbreaker.’” Chart of FHWA Comments on the DRIC Draft Environmental Impact Statement at DRIC117828 (attached as Exhibit C-58).

130. Similarly, FHWA official James Kirschensteiner explained in an email to a Coast Guard official that the “twinning” proposal was rejected due to Canada’s opposition: “When we did the analysis of the impacts, traffic, etc., the twinned Ambassador came out close to the top in the ranking on the US side, but very poor on the Canadian side. . . . [T]he conclusion was that even though the alternative was reasonable in the US, we could not move forward with it since it was not a reasonable alternative in Canada (we can’t build have [sic] a bridge).” Email from James Kirschensteiner to Robert W. Bloom (Nov. 15, 2005) (attached as Exhibit C-60).

131. In rejecting the X12 alternative to accommodate Canada’s wishes, FHWA closed its eyes to Canada’s incorrect assumption, in conducting its “analysis,” that any new bridge had to be publicly owned and would not make use of the Ambassador Bridge’s existing facilities. Canada’s assumption was contrary to FHWA’s and the DRIC Partnership’s official neutrality as to ownership and governance issues.

132. In 2008, having been pressured by Canada to reject the X12 solution that would twin the Ambassador Bridge, and having dropped several other sites at the request of the Governor of Michigan, the members of the DRIC Partnership were left only with locations in downtown Detroit in close proximity to—but not directly twinning—the Ambassador Bridge. At the site ultimately selected (location X10B), the new customs and toll plaza for the NITC/DRIC on the U.S. side is planned nearly to abut the existing plaza for the Ambassador Bridge and to use the existing highway connections that were built for the Ambassador Bridge Gateway Project. On the Canadian side, the planned site for the NITC/DRIC is less than two miles from the Ambassador Bridge, but—as Canada intended when it rejected X12—the planned highway connection bypasses the Ambassador Bridge and instead steers traffic to the site of the proposed NITC/DRIC.

133. In short, the 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

134. 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. *See* Letters Related to Canada’s \$550 Million Commitment (attached as Exhibit C-61). 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. *See, e.g.*, “\$1B Windsor-Detroit Bridge Deal Struck,” *CBC News* (June 15, 2012) (attached as Exhibit C-62). 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.

135. During the NITC/DRIC planning process, FHWA recognized that the proposed bridge would require ongoing subsidies:

There is a large understated “pink elephant” in this room that should be driving every element of the decision making: Namely, the fact that *real tolls will not raise sufficient funds to build the project* and therefore some kind of public subsidy from both countries will be necessary.

Email from Prabhat Diksit, “Public Oversight Meeting and PWC Draft Final Report” (Jan. 31, 2007) (attached as Exhibit C-63).

136. Although FHWA anticipated that the Canadian NITC/DRIC would be subsidized by “both countries,” the NITC/DRIC as it is now proposed would be funded – and subsidized – only by Canada. Those subsidies would be another means by which Canada would retain full control over the bridge and maintain its unfair advantage over the Ambassador Bridge.

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

137. 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”). Crossing Agreement (June 15, 2012) (attached as Exhibit C-64).

138. 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.

139. 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

140. 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.

(i) Alleged Traffic Needs For A Second Bridge.

141. 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.” *Compare Detroit River International Crossing Study: Travel Demand Forecasts*, IBI Group (Sept. 2005) at 129 (excerpt attached as Exhibit C-65), *available at* <http://www.partnershipborderstudy.com/pdf/TTRexisting&future2005-09-15.pdf> (reflecting incorrect traffic predictions on which Canada and FHWA based need for NITC/DRIC) *with* “Ontario Border Crossings with Michigan & New York,” Public Border Operators Ass’n (2011-2012) (attached as Exhibit C-66); “BTOA Traffic Numbers,” Bridge and Tunnel Operators Ass’n (2004-2006) (attached as Exhibit C-67); *Ambassador Bridge Traffic and Revenue Study Final Report*, Halcrow Grp. Ltd. (June 2009) at 86-87 (excerpt attached as Exhibit C-68); Memorandum from Van. E. Conway, Conway MacKenzie, Inc. to Dan Stamper, DIBC (May 12, 2011) at 4 (attached as Exhibit C-69); Addendum to *Ambassador Bridge Traffic and Revenue Study Final Report*, Halcrow Grp. Ltd. (May 2010) at 7 (attached as Exhibit C-70); *Final Report: Cargo Inspection Facility Master Plan*, General Services Administration (July 2007) at 3-4 – 3-5, Figure 3-3 (excerpt attached as Exhibit C-71); Presentation, “DRIC/NITC,” State Senator John

Pappageorge at 4-14 (attached as Exhibit C-72). 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. *See* Memorandum, “Financial and Economic Analysis of the New International Trade Crossing,” O’Keefe & Associates (Sept. 10, 2012) at 2, 4, 5 (attached as Exhibit C-73). 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.

142. State Department officials internally acknowledged that the construction of the NITC/DRIC would undermine the viability of the New Span, in communications from the American Consulate in Toronto to Secretary Clinton, saying in December 2006 that “The financial feasibility of constructing a new separate bridge will be undermined if Ambassador Bridge owners construct a new six-lane twin span; particularly if, as now seems likely, the existing four-lane bridge span can be refurbished and kept in operation for many years to come,” Communication from American Consulate, Toronto, to U.S. Secretary of State, “Border Crossing Update: Detroit River” (Dec. 2006) (attached as Exhibit C-41) and in April 2007 that “The intense political machinations of the Windsor border crossing chess game continue. The race is on to see whether the DIBC can complete its twin span before the bi-national DRIC project is ready,” Communication from American Consulate, Toronto, to U.S. Secretary of State, “Update on Detroit River Bridge(s)” (Apr. 2007) (attached as Exhibit C-74).

143. A large portion of the traffic across the Detroit River consists of trucks transporting automobile parts between factories in Ontario and Michigan. Over many years, as the American auto industry has continued to decline, so has traffic across the Ambassador Bridge and other crossings. Traffic has been adversely affected by the loss of manufacturing in the American Midwest to low-cost foreign manufacturers, the loss of U.S. market share of American

automobile manufacturers and hence their suppliers, the general downturn in the auto industry, and the loss of the formerly significant numbers of Americans traveling to Caesar's Windsor Casino to gamble before the explosion of casinos operating in Michigan and Ohio. *See* Initial Comments on Detroit River Crossing Draft Environmental Impact Statement, DIBC and CTC at 8-17 (attached as Exhibit C-75); Memorandum from Ian E. Bennett to Minister of Finance, Canada, "Update on Border Infrastructure Issues" (2006) at 2 (attached as Exhibit C-76).

144. At its height in 1999, traffic crossing the existing Central Corridor crossings (the Ambassador Bridge and the Detroit-Windsor Tunnel) reached a maximum of approximately 22 million vehicle crossings per year (12.3 million vehicles at the Ambassador Bridge and 9.5 million vehicles at the Detroit-Windsor Tunnel). Exhibit C-68 (Halcrow Grp. June 2009 Report) at 14-15. In 2010, the traffic volume was less than half that: only about 10.7 million vehicle crossings per year (7.2 million vehicles at the Ambassador Bridge and 3.5 million vehicles at the Detroit-Windsor Tunnel). Exhibit C-69 (Conway Memorandum) at 22. Canada, FHWA, and the other NITC/DRIC Proponents have not articulated any rational reasons to expect that this trend would reverse or traffic would increase.

145. Nonetheless, Canada, FHWA, and the other NITC/DRIC Proponents publicly took the position in the Planning/Needs Feasibility Study ("P/NF Study") issued in January 2004 that the NITC/DRIC was needed to serve increased traffic needs, based on a projection that crossings would rapidly increase, rising to around 27.4 million vehicle crossings by 2010, as measured by projected daily vehicle crossings. *Planning/Need Feasibility Study*, NITC/DRIC Partnership (Jan. 2004) at 43 (excerpt attached as Exhibit C-77) (chart estimating roughly 75,000 daily vehicle volume for the Ambassador Bridge by 2010). To attempt to justify this conclusion, the NITC/DRIC Proponents in the P/NF Study adopted a conclusion from a report that had been

prepared outside the public consultation process and that drew a straight line extrapolating upward from a brief, small increase in traffic around the time of the study. The prediction ignored what was otherwise a general downward trend in traffic patterns. The P/NF prediction offers no economic or other reasons to expect that such an increase would occur.

146. In contrast to their public statements relying on the P/NF prediction, internal communications indicate that both FHWA and Canada recognized that there was no necessity for another crossing. In an internal FHWA briefing paper from June 2006, FHWA recognized that the Ambassador Bridge New Span was likely to “preclude the need for another publicly controlled crossing for 30 years,” even if the inflated traffic projections set forth in the P/NF Study proved accurate. Briefing, “Subject: New Crossing at Detroit/Windsor – Role of the US Government to Advance the Building of Additional Capacity Between the US and Canada,” FHWA (June 15, 2006) at 4 (attached as Exhibit C-78). Internal MDOT documents obtained by Claimant also show that the NITC/DRIC proponents *knew* their traffic estimates were deeply flawed, but relied on them anyway to make a case for the NITC/DRIC. According to the minutes of a 2008 meeting, “[MDOT consultant] Corradino has *had to pump up the modeling numbers* to make a worst case scenario, because *the traffics [sic] numbers just aren’t there otherwise.*” Minutes, MDOT Air Quality Community Enhancements Meeting (Dec. 12, 2008) at 5 (attached as Exhibit C-79) (emphasis added).

147. Even if the NITC/DRIC were built, FHWA projected that the best alternatives would only result in 3% fewer Vehicle Hours of Travel for border crossings in the Central Corridor. Exhibit C-40 (Excerpt from DRIC DEIS) at 2-6. A confidential memorandum regarding border infrastructure, drafted in March 2004 for the Canadian Minister of Finance, acknowledged the decrease in traffic across the Ambassador Bridge and attributed it, in part, to a

decrease in American visitors to Windsor following the opening of new casinos in Michigan and to long-haul truck traffic traveling across alternative routes. Exhibit C-76 (Bennett 2006 Memorandum) at 2.

148. Canada and FHWA further acknowledged that observed border delays at the Ambassador Bridge were the result of the shortage of customs staff supplied by the U.S. and Canadian governments rather than any shortage of capacity of the bridge and associated facilities. Exhibit C-76 (Bennett 2006 Memorandum) at 2. Even the 2004 P/NF prediction acknowledged that “one of the key challenges facing border processing agencies, particularly on the U.S. side of the border, is having sufficient staffing available.” Exhibit C-77 (2004 P/NF Study) at 31. An undated draft of an FHWA report titled “The Northern Border” was even more explicit: “one of the most critical issues the crossing is facing is the lack of staffing.” “The Northern Border,” FHWA, at 1 (attached as Exhibit C-80). The same report noted that the present level of staffing at the border was less than half what was actually needed. *Id.* at 2. According to the 2004 confidential memorandum for the Canadian Minister of Finance, “most delays at the [U.S.-Canadian] border are not caused by inadequate infrastructure.” Exhibit C-76 (Bennett 2006 Memorandum) at 2. The memo noted a 2003 study that found delays “were mainly the result of inadequate customs’ staffing levels, particularly on the US-side.” *Id.* An independent review and assessment prepared by Dr. John C. Taylor for the Ontario Ministry of Transportation’s consultant in July 2004 confirmed that “existing border backups and delays are a function of inadequate border processing infrastructure and staffing, and not a result of bridge roadbed capacity problems.” *Bi-National Study of the Southeastern Michigan-Southwestern Ontario Border Crossings*, Dr. John C. Taylor (July 14, 2004) at ii (attached as Exhibit C-81).

149. The traffic projections in the P/NF report, on which Canada and FHWA publicly relied despite their private doubts, have turned out to be completely wrong. The traffic data in the intervening seven years since the P/NF report shows a decline in traffic in accordance with the general trend, not the sharp increase predicted by the P/NF report. In 2010, only about 7.2 million trucks, buses, and passenger vehicles crossed the Ambassador Bridge, not the 14.7 million that the P/NF report predicted. Exhibit C-69 (Conway Memorandum) at 22.

150. The economic changes in the automobile and other manufacturing industries and the loss of cross-border traffic to casinos in Windsor continue to have a major adverse effect on bridge traffic today. Canada's and FHWA's projection of increased traffic based on the P/NF report, however, assumes these changes never occurred.

151. Moreover, even if traffic levels do recover, Claimant has demonstrated through its investments at the Ambassador Bridge that technological improvements can produce substantial reductions in customs processing times, thereby increasing capacity without additional bridge infrastructure. Claimant has recently constructed state-of-the-art customs preclearance facilities in Canada, where trucks headed toward the Ambassador Bridge can transmit their customs paperwork electronically to U.S. customs inspectors hours before the trucks even arrive at the bridge. As a result of this advance, the average number of trucks diverted to secondary inspection decreased from approximately 800 per day in 2008, prior to the opening of the preclearance facility, to fewer than twenty four per day in 2011. Claimant plans to construct similar facilities in the United States for trucks planning to cross the Ambassador Bridge into Canada. These improvements, paid for by Claimant's funds, have greatly improved the speed of customs clearance across the border and have served as a model that customs border officials

have made a future requirement for all international crossings between the United States and Canada.

152. David Jacobson, the U.S. Ambassador to Canada, acknowledged in a speech delivered in Ottawa on Tuesday, March 9, 2010, that border crossings between the United States and Canada are faster than they were before the terrorist attacks of September 11, 2001, despite greatly heightened security requirements, because of technological improvements. Susan Delacourt, “Canada-U.S. Border Crossing Faster Than Before 9/11: Ambassador,” *The Toronto Star* (Mar. 9, 2010) (attached as Exhibit C-109). In 2012, the average travel time for vehicles crossing into Canada on the Ambassador Bridge at the peak traffic hour during the afternoon was less than ten minutes. *Travel Time Analysis Study*, prepared for DIBC by American Consulting Engineers of Florida, LLC (Sept. 2012) at 5-3 (attached as Exhibit C-103).

153. Even if additional bridge capacity were needed, it could be served more cheaply and efficiently—and consistently with Claimant’s legal rights—by twinning the Ambassador Bridge with the goal of keeping both spans open after renovations on the original span. The FEIS for the NITC/DRIC, prepared by FHWA based on FHWA’s inflated traffic projections, concluded that ten lanes of roadway will be required to handle the traffic anticipated in 2035. *Final Environmental Impact Statement and Draft Section 4(f) Evaluation: The Detroit River International Crossing Study*, U.S. Dep’t of Transportation, FHWA, and MDOT (Dec. 2008) at 1-13 (excerpt attached as Exhibit C-85), *available at* http://www.partnershipborderstudy.com/reports_us.asp#feis. There are four lanes in the current span of the Ambassador Bridge, six lanes proposed for the New Span of the Ambassador Bridge, two lanes at the Detroit-Windsor Tunnel, the equivalent of two lanes in the form of the two Canadian Pacific rail tunnels under the Detroit River, the equivalent of two additional lanes in

the form of a proposed double-stacked Canadian Pacific rail tunnel under the Detroit River, and the equivalent of one lane in the form of the Detroit-Windsor Truck Ferry. Together, these existing and anticipated crossings will provide more than ample capacity across (or under) the Detroit River. These crossings are in addition to the six lanes of the twinned Blue Water Bridge between Port Huron, Michigan and Sarnia, Ontario, the equivalent of two lanes in the form of the Canadian National double-stacked rail tunnel in Port Huron, Michigan, the equivalent of two lanes in the form of the ferries operating between Port Huron, Michigan and Sarnia, Ontario, and the equivalent of one lane in the form of a ferry between Algonac, Michigan and Ontario.

154. As explained above, Congress and the State Department have already confirmed that DIBC has the right to expand or twin the Ambassador Bridge by adding the New Span, which DIBC is actively trying to do. Despite this, FHWA's traffic projections fail to take into account the increased traffic capacity that the New Span will provide.

(ii) Alleged Community Impacts of Ambassador Bridge Improvements On the Canadian Side of the River.

155. 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 an Ambassador Bridge New Span would require an expanded bridge plaza in Windsor.

156. 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. As discussed, the requirement for an expanded plaza on the Canadian side, analyzed by Canada in rejecting twinning of the Ambassador Bridge as part of the DRIC Project, assumed that the new crossing would be publicly owned, that the existing facilities owned by Claimant would not be

available for the new crossing, and that the newly constructed plaza would be much larger than required.

157. As noted, Claimant has already constructed the ramps that would connect the New Span to the existing plazas on the U.S. and Canadian sides. All the land between the connection ramps and the river on the Canadian side is already owned by CTC, so no additional land acquisition on the Canadian side would be required to complete the New Span and connect it to the existing plazas.

158. 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.

(iii) Alleged Need For Redundancy.

159. 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. Exhibit C-57 (Steele Deposition Transcript) at 113-114.

160. 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 a second Ambassador Bridge span, because a problem such as a natural disaster or terrorist attack at one bridge would almost certainly affect the other. In 2005, the U.S. Department of State sent a letter to FHWA advising them “that the proximity of any new crossing to the existing crossings may mean that a problem at any one crossing may affect all the centrally-located crossings.” Letter from Terry Breese, U.S. Dep’t of State, to Terry Kirschensteiner (Nov. 4, 2005) (attached as Exhibit C-86).

161. Moreover, in addition to the Ambassador Bridge, several other border crossings are already in operation between eastern Michigan and southwestern Ontario. In the Central Corridor alone, international traffic has at least two alternatives to the Ambassador Bridge. The Detroit-Windsor Tunnel, operated by the cities of Detroit and Windsor, has been in operation since 1930, providing a second road connection for cars and trucks less than three miles from the Ambassador Bridge. The Detroit-Windsor Truck Ferry, operating since 1990, provides another alternative for trucks just two miles from the Ambassador Bridge.

162. Other crossings are available a short distance from the Central Corridor. The Blue Water Bridge, which connects Port Huron, Michigan and Sarnia, Ontario across the St. Clair River about 60 miles north of the Ambassador Bridge, provides a third road connection for cars and trucks. Traffic from Chicago to Toronto travels almost exactly the same distance

whether it uses the Ambassador Bridge or the Blue Water Bridge. The publicly owned Blue Water Bridge has been open since 1938 and was twinned in 1997 with public funds from Canada and the U.S. to increase its traffic capacity, without any objection by Canada or FHWA that twinning would not contribute to redundancy.

163. Twenty miles south of the Blue Water Bridge, the St. Clair River ferries provide connections for cars and trucks between Marine City, Michigan and Sombra, Ontario, and between Algonac, Michigan and Walpole Island, Ontario. Moreover, there are two railway connections in the area: the Canadian Pacific Railroad has a tunnel between Detroit and Windsor, built in 1910 and located a mile from the Ambassador Bridge, which is currently being modified to allow double-stacked railcars; and the Canada National Rail Tunnel provides a railway connection between Port Huron and Sarnia. Each of these crossings would provide an additional means of transportation between the United States and Canada in the greater Detroit-Windsor area in the event that traffic is ever interrupted at the existing Ambassador Bridge span, the proposed Ambassador Bridge New Span, or both.

(iv) Alleged Need For Public Governance

164. 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.

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

166. Moreover, Respondent has not disputed that DIBC and CTC, and their predecessors, have provided travelers a safe and secure crossing for nearly 82 years. Since 2008, expenditures by Claimant on security and safety have averaged approximately \$700,000 annually. In addition, DIBC has obtained assessments of the Ambassador Bridge applying the National Bridge Inspection Standards, *see* Letter from John Kulicki, Modjeski & Masters, to Dan Reaume, Bridge Superintendent, DIBC (Nov. 19, 2012) (attached as Exhibit C-111), and the bridge has consistently been judged to be far safer than many publicly owned crossings. Border security at the Ambassador Bridge is also state of the art and constantly improving. In 2002, President George W. Bush and Prime Minister Jean Chretien lauded steps taken by DIBC, CTC, and customs authorities to tighten border security through the Free and Secure Trade initiative and expanded use of photo identification. News Release “Remarks by the President and Prime Minister Chretien on U.S.-Canada Smart Borders” (Sept. 9, 2002) (attached as Exhibit C-87).

167. Any safety and security concerns of the Respondent regarding a privately owned bridge can be addressed by reasonable safety and security regulations. In fact, over 85% of the country’s critical infrastructure, as determined by the Department of Homeland Security, is owned by the private sector. *National Strategy for Homeland Security*, Office of Homeland Security (July 2002) at viii (excerpt attached as Exhibit C-88), *available at* http://web.archive.org/web/20120112224223/http://www.dhs.gov/xlibrary/assets/nat_strat_hls.pdf.

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

168. Under the Canadian Act, the rights of CTC are subject to (a) the Railway Act, 1919, except to the extent inconsistent with the 1921 CTC Act and the 1922 CTC Amendment; and (b) the Navigable Waters’ Protection Act. *See* 1921 CTC Act §§ 8, 20; 1922 CTC Amendment 6.

169. Nonetheless, 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.

170. Claimant submitted an environmental impact statement to Transport Canada for the Ambassador Bridge New Span on December 4, 2007 and an updated environmental impact statement in April 2011. *See Cover Page, Ambassador Bridge Enhancement Project Environmental Impact Statement* (Apr. 2011) (excerpt attached as Exhibit C-89). 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.

171. 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. *DRIC Environmental Assessment Report, DRIC Study* (Dec. 2008) at title page (excerpt attached as Exhibit C-90), *available at* <http://www.partnershipborderstudy.com/pdf/12-5-09/Appendix%20J%20-%20Provincial%20EA.pdf>; “Environmental Assessment Act Section 9 Notice of Approval to Proceed with the Undertaking,” Ministry of Transportation (Aug. 21, 2009) (attached as Exhibit C-91). 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. *Canadian Environmental Assessment Act Screening Report, DRIC Study*

(Nov. 2009) (attached as Exhibit C-92); News Release, “Detroit River International Crossing Project Receives Environmental Approval” (Dec. 3, 2009) (attached as Exhibit C-93).

172. 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”

173. 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.

174. In 2007, Canada enacted the International Bridges and Tunnels Act, S.C. 2007, ch. 1 (the “IBTA”) (attached as Exhibit C-94). 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.

175. 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.

176. 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 (attached as Exhibit C-112), which listed the Ambassador Bridge in a schedule of bridges and tunnels subject to the IBTA.

177. 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. Notice of Application, *Canada v. Canadian Transit Co., Superior Ct. of Ontario*, No. 09-46882 (Nov. 18, 2009) (attached as Exhibit C-95).

178. 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.

179. In effect, by enacting the IBTA and seeking to apply it to the Ambassador Bridge, Canada is attempting to resurrect FIRA, the Sharp Policy, and the Amended Sharp Policy, contrary to settlement of the FIRA litigation of 1990.

180. 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.

181. 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. Briefing Paper, "Windsor Gateway," FHWA (Oct. 26, 2005) (attached as Exhibit C-96). 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." *Id.* at 3.

182. 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. Jobs and Growth Act, 2012, S.C. 2012, c. 31, art. 179 (Can.) (Exhibit C-1). This act exempts the planned Canadian-owned NITC/DRIC Bridge (but not the U.S. owned Ambassador Bridge New Span, a mere two miles away) from environmental and safety regulations such as the Canadian Environmental Assessment Act, the Canadian Port Authority Environmental Assessment Regulations, and the Statutory Instruments Act, as well as numerous other statutes and regulations. *Id.* at § 4-6. The Act further provides that after the NITC/DRIC is constructed, all relevant construction permits and authorizations shall be “deemed to have been issued.” *Id.* at § 3, 6.

183. A Canadian Member of Parliament, Jeff Watson (Essex), stated that the purpose of the legislation was to “insulate” the NITC/DRIC “from any future lawsuit on the Canadian side” from DIBC, CTC, or their American owners the Moroun family. “Canada Fires Back at Moroun,” *The Windsor Star* (Oct. 18, 2012) (Exhibit C-2).

184. 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.

185. Terence Corcoran, the editor of the *Canadian Financial Post*, explained the motivation behind Canada’s continued discrimination against the New Span in favor of the NITC/DRIC: “[Prime Minister] Harper is the heavy-handed statist trying to cripple a private entrepreneur. What Mr. Harper is really doing is using government power to do what Canadian governments have wanted to do for at least five decades: thwart the private ownership – and if

possible take control – of the Ambassador Bridge.” Terence Corcoran, “Plans for New Detroit-Windsor Bridge Put Billions At Risk As Border Traffic Stalls,” *National Post* (Jun. 29, 2012) (attached as Exhibit C-97). Responding to a statement by Prime Minister Harper that it is “ludicrous” that the Ambassador Bridge is privately owned, Mr. Corcoran wrote: “If there’s anything ludicrous taking place here, it’s the great public-policy con job around the need for a brand new bridge that in the end will require U.S. and Canadian government spending of \$4 billion – all to build a bridge for which there is no market.” *Id.* He concludes: “The Harper plan puts Canadian and U.S. taxpayers at risk. And all for – what? To expand the role of government at the expense of private industry.” *Id.*

186. 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. Canadian Has Coupled Its Attacks On Claimant’s Rights With Attempts To Purchase the Ambassador Bridge.

187. Canada’s hostility towards private American ownership of the Ambassador Bridge (and the franchise rights to build the New Span) are further shown by its recent attempts to purchase the Ambassador Bridge from DIBC.

188. Starting in 2009, Canada has attempted to purchase the Ambassador Bridge, but has been unwilling to meet DIBC’s price. Tom Greenwood, “Canada Sought Ambassador Bridge But Price Too High,” *The Detroit News* (Feb. 10, 2010) (attached as Exhibit C-98); “Canada Offered To Buy Ambassador Bridge Last Summer, Says Ex-Michigan Gov.,” *The Canadian Press* (Feb. 10, 2010) (attached as Exhibit C-99); “Transport Canada Offers To Buy Ambassador Bridge,” *The Associated Press* (Feb. 9, 2010) (attached as Exhibit C-100); John

Iverson and Dave Battagello, “Ottawa Mulls Buying Windsor-Detroit Ambassador Bridge,” *Canwest News Service* (Feb. 8, 2010) (attached as Exhibit C-101).

189. These attempts are consistent with Canada’s strategy – which dates from at least 2004 – of using the NITC/DRIC project to put Canada in “a much stronger position to negotiate a reasonable price” for the Ambassador Bridge. Email from Ghislain Blanchard, “RE: Windsor Governance” (Oct. 13, 2004 at 5:25 PM) (attached as Exhibit C-102).

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

(1) Canada’s Decision to Renege

190. As part of its effort to discriminate in favor of the Canadian-owned NITC/DRIC Bridge and against the U.S.-owned Ambassador Bridge and its proposed New Span, Canada has reneged on its commitments to improve the highway connections to the Ambassador Bridge—in particular by refusing to extend Highway 401 to the Ambassador Bridge. Canada has admitted in writing that rather than being a temporary delay, this failure reflects a decision by Canada to renege on its commitments to improve the management of traffic to the Ambassador Bridge. *See* Letter from The Honourable Lawrence Cannon, P.C., M.P., to Dan Stamper, President, CTC (Oct. 3, 2007) at 1-2 (attached as Exhibit C-110).

191. 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.”

Email from Andrew Shea, “Windsor-Detroit Crossing Governance Principles” (Dec. 13, 2004 at 10:25 AM) (attached as Exhibit C-104).

192. 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.

193. 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. *See* Exhibit C-85 (DRIC FEIS) at 3-57 – 3-61. These projections similarly demonstrate the sharply diminished economics of the New Span with which Canada is threatening Claimant.

194. 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. Presidential Permit Application for the New International Trade Crossing (June 18, 2012) at 1 (excerpt attached as Exhibit C-105), *available at* <http://www.state.gov/p/wha/rt/permit/canada/application/index.htm>.

195. 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. Exhibit C-102 (Blanchard Oct. 13, 2004 email). 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].” *Id.* 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.” *Id.*

196. 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*

197. 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. *See* Exhibit C-85 (DRIC FEIS) at 3-57 – 3-61.

198. Canada deliberately designed the Windsor-Essex Parkway to *avoid* improving the connection between the Ambassador Bridge and Highway 401. Initially, Canada adopted a circuitous design that was wholly impractical, and that had as its sole justification the desire to avoid connecting with the road that leads up to the Ambassador Bridge, because Canada was committed to undermining the viability of the American-owned Ambassador Bridge.

199. After it became infeasible for Canada to embark on its original design of the Windsor-Essex Parkway, it adopted a modified design that expanded and improved the roads connecting Highway 401 along a route that led to both the Ambassador Bridge and the proposed site of the NITC/DRIC. However, Canada *deliberately stopped improving the connections just two kilometers short of the Ambassador Bridge*, choosing instead to develop and improve its roads in a way that veered off the route to the Ambassador Bridge, towards the proposed site of the NITC/DRIC. 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 diverted the new Parkway to the Canadian NITC/DRIC Bridge site, causing adverse impacts on the local environment.

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

201. Moreover, as noted above, Canada has used the fact that the final 2 kilometers of the Windsor-Essex Parkway run to an unauthorized bridge rather than to the New Span as a reason to refuse to authorize the New Span.

202. 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.

203. 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.

204. 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

205. 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.

206. 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.

207. 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.

208. 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.

209. 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.

J. Injury to Claimant

210. 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.

211. 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.

212. 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.

213. 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.

214. 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

215. 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.

216. 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.

217. 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).

218. 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

219. 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 31, 2013

Respectfully submitted,

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