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PUBLIC-PRIVATE PARTNERSHIPS FOR PROMOTION OF CROSS-BORDER TRADE AND TRANSPORTATION

By: *David Lick & Roger E. Hamlin*

I. INTRODUCTION

Although a simple concept at its core, implementing public-private partnerships (“P3s”) can be complex legally, financially, and organizationally. While expertise, power, and financial capabilities on each side complement one another, the cultural differences between public participants and private participants are great.¹ Now, more than ever, cross-border trade between Canada and the United States and between Mexico and the United States is imperative for North America to compete in the global marketplace.² Use of public-private partnerships holds out great promise for promoting the creation of the infrastructure and facilities needed to promote cross-border trade.³ Yet this approach adds a new layer of complexity due to the interfacing of differing business cultures and public approaches.⁴ This is really the first time in history that Canada and the United States are jointly pursuing the implementation of public-private partnerships for this purpose.⁵ This endeavor will require a rich blend of innovative thinking and diligence. Some old approaches to promoting trade may need to be set aside.

Some recent experiences suggest that the great possibility of public-private partnerships can be realized for the benefit of both countries, albeit with many lessons learned along the way. The broad purpose of this paper is to organize knowledge about this subject so as to offer guidance, promotion,

¹ See generally ROGER E. HAMLIN & THOMAS S. LYONS, *ECONOMY WITHOUT WALLS: MANAGING LOCAL DEVELOPMENT IN A RESTRUCTURING WORLD 3* (1996) (stating the goals sought by public and private participants).

² See generally N. AM. COMPETITIVENESS COUNCIL, *ENHANCING COMPETITIVENESS IN CANADA, MEXICO, AND THE UNITED STATES 12* (2007), available at http://coa.counciloftheamericas.org/files/editor/image/grp_10_4.pdf (stating that encouraging cross-border trade through the North American Free Trade Agreement is essential to protecting the citizens of Mexico, Canada, and the United States).

³ See generally MICHAEL KERGIN & BIRGIT MATTHIESEN, *CAN. INT’L COUNCIL, BORDER ISSUES REPORT: A NEW BRIDGE FOR OLD ALLIES 8-9* (2008), available at <http://www.open.canada.org/wp-content/uploads/2011/05/A-New-Bridge-for-Old-Allies-Michael-Kergin-Birgit-Matthiesen.pdf> (stating that public-private partnerships are a useful means of improving infrastructure, specifically for cross-border facilities).

⁴ See, e.g., *id.* at 8 (stating that the future of the Detroit River International Crossing may be subject to various cultural differences between Canada and the United States).

⁵ Press Release, Fact Sheet: Security and Prosperity Partnership, U.S. Dep’t of Homeland Sec. (June 27, 2005), available at http://www.dhs.gov/xnews/releases/press_release_0695.shtm.

and prudence to all who might benefit from the use of public-private partnerships for the promotion of United States-Canadian and United States-Mexican cross-border trade through infrastructure and facility development.

A. Public-Private Partnerships: The General Concept

The concept of public-private partnership is a simple one with a long history.⁶ It has been used in nearly every realm of community activity, from business promotion⁷ to health care to public service privatization⁸ to infrastructure development.⁹

At its core, the concept simply means public entities and private entities working together for mutual benefit.¹⁰ The mutual benefit on the public side is defining and achieving public goals.¹¹ On the private side, rewards may include public relations, financial, and ego benefits. A desire to find win-win situations is the most important motivator of public-private partnerships, and, therefore, a zero-sum-game mentality is one of the greatest enemies of public-private partnership success.¹² Perhaps the two most important aspects of successful public-private partnerships are: (1) the sharing of complementary powers and expertise and (2) the sharing of risks and rewards.¹³

In essence the public sector must define the goals of the community and look for ways in which partnering with one or more private entities might promote those goals.¹⁴ Often this means creating inducements for private

⁶ See THOMAS S. LYONS & ROGER E. HAMLIN, CREATING AN ECONOMIC DEVELOPMENT ACTION PLAN 42-43 (2001) (stating the history of public-private partnerships).

⁷ See generally HAMLIN & LYONS, *supra* note 1, at 69-70 (stating that public-private partnerships are used to assist in business development) (1996).

⁸ See generally Roger E. Hamlin & Bogdana Neamtu, *Policy Tools for Urban Redevelopment: Public-Private Partnerships*, 15 TRANSYLVANIAN REV. ADMIN. SCI. 107, 107-120 (2005) (stating ways in which public-private partnerships could be used to revitalize urban areas).

⁹ See, e.g., WILLIAM REINHARDT, THE ROLE OF PRIVATE INVESTMENT IN MEETING U.S. TRANSPORTATION INFRASTRUCTURE NEEDS (2011) (stating the various uses of public-private partnerships in the United States for transportation infrastructure).

¹⁰ RESEARCH & POLICY COMM., COMM. FOR ECON. DEV., PUBLIC-PRIVATE PARTNERSHIP AN OPPORTUNITY FOR URBAN COMMUNITIES 2 (1982).

¹¹ See *id.* at 2-3 (stating that the policy dimension of public-private partnerships are based on civic foundations).

¹² See *id.* at 2 (stating that the purpose of public-private partnerships is to facilitate public goals with private resources by allowing private entities to simultaneously promote their goals).

¹³ See LYONS & HAMLIN, *supra* note 6, at 16, 20 (stating that risk and reward sharing is imperative to development, and that efficient public-private partnerships require the allocation of skills and resources).

¹⁴ See RESEARCH & POLICY COMM., *supra* note 10, at 2 (stating that the public sector must define community goals, and utilize the private sector in ways that will result in an effective public-private partnership that mutually benefits both parties).

entities to behave in ways that promote the public interest while achieving their own ends.¹⁵ P3s are often seen as the carrot side of a government's "carrot and stick role." Inducements are not always financial and do not necessarily have to cost the general public anything.¹⁶ But on the financial side, the best inducement is the promise of a revenue stream. A revenue stream enables the private entity to either benefit over time, or to capitalize and sell to others in the present. This facilitates a way of raising revenues for the project.¹⁷ Ultimately, the revenue stream is the source for paying back both private debt and equity capitalists for providing financing.¹⁸

All activities carry some risk.¹⁹ At the same time, investors, developers, and private business operators are always looking for opportunities. These private entrepreneurs are naturally attracted to activities where the potential revenue stream, or rate of return on investment, is sufficient for the amount of perceived risk.²⁰ Therefore, capital will flow to activities where the perceived reward-to-risk ratio is best. Since: (a) the flow of capital around the entire globe is very fast and liquid;²¹ (b) substantial capital is currently available world-wide, but is often pinned down by a risk averse global posture;²² (c) many excellent and important projects, programs, and business ventures are in need of capital;²³ and (d) implementing these projects is critical to in-

¹⁵ See Julia Paschal Davis, *Public-Private Partnerships*, 44 PROCUREMENT L. 9, 9-10 (2008) (stating that public-private partnerships are used to achieve public goals while allowing private entities to profit).

¹⁶ See Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937, 953 (2009) (stating that there are a wide range of private sector inducements).

¹⁷ See CAN. COUNCIL FOR PUB.-PRIVATE P'SHIPS, BUILDING A BETTER TOMORROW THROUGH PUBLIC-PRIVATE PARTNERSHIPS 10 (2004), available at <http://www.pppcouncil.ca/pdf/ontgov.pdf> (stating that revenue is essential to attract the private sector).

¹⁸ See e.g., Davis, *supra* note 15, at 10 (stating that legislatures have allowed debt to be paid from future revenue).

¹⁹ See e.g., CORRIGAN ET AL., URBAN LAND INST., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIPS 13 (2005), available at http://www.uli.org/ResearchAndPublications/Reports/~media/Documents/ResearchAndPublications/Reports/TenPrinciples/TP_Partnerships.ashx (stating the various risks associated public-private partnerships).

²⁰ *Id.* at 14.

²¹ See e.g., WORLD BANK, MULTIPOLARITY: THE NEW GLOBAL ECONOMY 133 (2011), available at http://siteresources.worldbank.org/INTGDH/Resources/GDH_CompleteReport2011.pdf (stating that the United States has a liquid and at times rapid flow of capital).

²² See generally EMILIA ISTRATE & ROBERT PUENTES, MOVING FORWARD ON PUBLIC-PRIVATE PARTNERSHIPS: U.S. AND INTERNATIONAL EXPERIENCE WITH PPP UNITS 1 (2011) (stating that the enthusiasm to invest has declined due to less resources and political unwillingness to search for other resources).

²³ See e.g., GREAT LAKES COMMISSION, FEDERAL SUPPORT NEEDED TO ADDRESS WASTEWATER INFRASTRUCTURE DEFICIT IN THE GREAT LAKES-ST. LAWRENCE REGION (2010), available at <http://www.glc.org/announce/10/pdf/CitiesInvest-20100212-Final.pdf> (stating that

fusing new life into a sluggish North American economy,²⁴ successful implementation of public-private partnerships is more important now than ever before. Public-private partnerships provide an innovative way of engaging multiple stakeholders in the creation of new wealth while also achieving public goals.

The origination of a public-private partnership can result from the government identifying a need and selecting a public-private partnership as a methodology of design, construction, finance, and operation of that facility or parts thereof.²⁵ The financing of public-private partnerships is a means for governmental agencies to capture the value of non-liquid assets.²⁶ Other public-private partnerships originate from the private sector via proposals to governmental agencies for the provision of services or the construction of public facilities or structures. Once these proposals are received, most governmental agencies require that it be subjected to some degree of public scrutiny. If and when these proposals are approved, they must also be subject to a competitive process where other potential concessionaires have the opportunity to make a proposal.²⁷

B. Purpose and Organization of this Paper

This paper attempts to add to the growing and maturing knowledge base about the effective use of public-private partnerships. While application of the public-private partnership concept can be very broad, this paper looks at a one fairly limited but important slice of that broad scope, public-private partnerships for infrastructure development. Even more specifically, we want to examine infrastructure for Canadian-United States cross-border trade. The theory and practical knowledge concerning public-private partnerships has been maturing for thirty or forty years, while the use of public-private partnerships for infrastructure has only gained intensity in the last fifteen.²⁸

the Great Lakes and St. Lawrence River ecosystems are important and federal governments must take action to reduce the infrastructure deficits).

²⁴ See ISTRATE & PUENTES, *supra* note 22, at 1 (stating that leaders have continued to push for infrastructure investment during the Great Recession).

²⁵ *Types of Public-Private Partnerships*, THE NAT'L COUNCIL FOR PUB.-PRIVATE P'SHIPS, <http://www.ncppp.org/howpart/ppptypes.shtml> (last visited Mar. 7, 2012).

²⁶ UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, *GUIDEBOOK ON PROMOTING GOOD GOVERNANCE IN PUBLIC-PRIVATE PARTNERSHIPS* 84 (2008) [hereinafter *GUIDEBOOK ON PROMOTING GOOD GOVERNANCE*], available at <http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>.

²⁷ John T. Hodges & Georgina Dellacha, *Unsolicited Infrastructure Proposals* 38 (Public-Private Infrastructure Advisory Facility, Working Paper No. 1, 2007), available at <http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/WP1-Unsolicited%20Infra%20Proposals%20-%20JHodges%20GDellacha.pdf>.

²⁸ See generally LYONS & HAMLIN, *supra* note 6, at 43 (stating various definitions of pub-

Much of the broad knowledge base has relevance to the narrow but important subject of this paper. This paper attempts to add to that knowledge and bring it up to date by discussing current cases, examples, and critiques specific to infrastructure and facilities related to cross-board trade and transportation.

I. PUBLIC-PRIVATE PARTNERSHIPS FOR INFRASTRUCTURE DEVELOPMENT

The National Council of State Legislatures P3 Toolkit provides a definition of public-private partnerships for infrastructure development. It says:

A public-private partnership is a contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed.²⁹

Some key points from the definition have to do with ownership and motivation. While using public-private partnerships for industrial development or central business district renovation usually results in private ownership of the project, using public-private partnership for infrastructure development usually results in public ownership of the facility.³⁰ But the private participant's reward for the risk taken can be structured in a variety of ways.

In comparison to other types of public-private partnership endeavors, infrastructure-focused P3s are often about larger and more expensive projects.³¹ When cross-border trade is involved, the focus expands into multi-billion dollar highway projects, bridges, rail facilities, and border terminal

lic-private partnerships from the 1980s); *see also* Darrin Grimsey & Mervyn K. Lewis, *Evaluating the Risks of Public-Private Partnerships for Infrastructure Projects*, 20 INT'L J. PROJECT MGMT. 107, 107 (2002) (stating that since the 1990s the government has begun to look to the private sector to accomplish public infrastructure goals).

²⁹ U.S. DEP'T OF TRANSP., REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS 10 (2004), available at <http://www.fhwa.dot.gov/reports/pppdec2004/pppdec2004.pdf>.

³⁰ *See* GUIDEBOOK ON PROMOTING GOOD GOVERNANCE *supra* note 26 (stating the various public-private partnership structures which allow the government to retain ownership of the facility).

³¹ *See* Eduardo Engel et al., *The Economics of Infrastructure Finance: Public-Private Partnerships versus Public Provision*, 15 EUR. INVESTMENT BANK PAPERS 41 (2010) (stating that the use of public-private partnerships for infrastructure require larger initial investments).

facilities.³² In fact, some suggest that only very large infrastructure projects can easily attract private capital.³³ Often these infrastructure projects have a wide regional impact and the users of a bridge or highway may come from or serve a multi-state area.³⁴

The economics of infrastructure projects are clearly different from many other types of businesses. Infrastructure tends to experience large economies of scale and economies of contiguity.³⁵ Economies of scale result as one-time fixed costs, such as building a water treatment plant, and are efficiently spread over a large number of customers, up to capacity.³⁶ Economies of contiguity are efficiencies that result from overcoming the cost of the friction of space; costs associated with distance.³⁷ A water line, for example, is expensive to build and maintain, creating a large fixed cost per linear foot. Linear fixed costs may also be a high percentage of total costs. A water enterprise will experience economies of contiguity because increased customers along the already-built, linear route, increases revenues relative to those linear fixed costs.³⁸ When economies of contiguity are high, competition between multiple supplies may be difficult because the cost of building multiple lines down the same street would be exorbitant and would dilute the economies of contiguity.³⁹

³² See e.g., Merrill Douglas, *Ties That Bind: Sewing up U.S.-Canada Trade*, INBOUND LOGISTICS (July 2010), <http://www.inboundlogistics.com/cms/article/ties-that-bind-sewing-up-u.s.-canada-trade/> (stating various cross-border projects that have been implemented).

³³ See E. R. YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS: PRINCIPLES OF POLICY AND FINANCE 2 (2007) (explaining “[i]nfrastructure requires a high initial investment on which only a very long term return can be expected”). See generally Darrin Grimsey & Mervyn K. Lewis, *Evaluating the Risks of Public-Private Partnerships for Infrastructure Projects*, 20 INT’L J. PROJECT MGMT. 107 (2002), available at http://www.usp.br/procam/govagua/Documentos/Biblioteca/water%20management/WM_GRIMSEY_Evaluating.pdf (evaluating the risks and financial structure of P3s).

³⁴ See U.S. DEP’T TRANSP., FED. HIGHWAY ADMIN., OUR NATION’S HIGHWAYS 2011 13, 17 (2011), available at <http://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/onh2011.pdf> (showing the national impact of bridges and highways).

³⁵ ENVTL. & NATURAL RES. POLICY & TRAINING PROJECT, COST AND PRICE STRUCTURES 1 (1999), available at <http://epat.wisc.edu/energy/env-serv/format/cost.html> (explaining infrastructure for water and sewer have large economies of scale and contiguity).

³⁶ See generally N. AMIR & Y. KLEINER, NAT’L RESEARCH COUNCIL CAN., CONSIDERING ECONOMIES OF SCALE AND ADJACENT INFRASTRUCTURE WORKS IN WATER MAIN RENEWAL PLANNING, NRCC – 52639 (2009), available at <http://www.nrc-cnrc.gc.ca/obj/irc/doc/pubs/nrcc52639.pdf> (explaining economies of scale in water main renewal planning).

³⁷ Cf. GEORGE MACESICH, SUCCESSOR STATES & COOPERATION THEORY 146 (1994) (explaining that geographic contiguity enhanced by a transportation system enhances economic integration).

³⁸ See ENVTL. & NATURAL RES. POLICY & TRAINING PROJECT, *supra* note 35 (providing that “the marginal cost of adding connections to individual houses or to standposts in neighborhoods is relatively low” once the fixed capital is installed).

³⁹ Cf. David N. Ammons & Debra J. Hill, *The Viability of Public-Private Competition as a*

The broad impact that these projects have on the public and their economies of scale and contiguity mean that such projects exhibit high levels of externalities.⁴⁰ In the parlance of the public choice, infrastructure projects are close to the public-good end on the public-to-private scale.⁴¹ This makes structuring a deal more difficult and more critical. It places the “public interest” front and center.

Public-private partnerships can assist governments in managing their assets so that efficient progress can be made and capital can be amassed by monetizing assets.⁴² Public-private partnerships can also be very helpful in sustaining growth across and within each border to help further economic development to serve import and export activities. P3s are interconnected with exports for trade crossing and infrastructure on both sides of any border.

States are beginning to recognize that having public-private partnership guidelines encourages public-private equity participation, creativity, and competition. For example, the Texas legislature has adopted such guidelines.⁴³ But most importantly, private entities are meeting this public interest. In fact, the Michigan Economic Development Corporation (“MEDC”) CEO Michael Finney has stated “MEDC has switched its focus from business tax incentives – all of which have been ended under Snyder– to creating public-private partnerships to give Michigan businesses the resources they need.”⁴⁴ Moreover, MEDC has developed a statewide transportation, distribution, and logistics strategy. This strategy was developed in conjunction with the Mich-

Long-Term Service Delivery Strategy, 19 PUB. PRODUCTIVITY & MGM'T REV. 12, 15 (1995) (explaining inversely that opening up a municipal waste collection market to competition eliminates the economies of contiguity).

⁴⁰ See Jonathan P. West, Book Review, 95 AM. POL. SCI. REV. 219, 220 (2001), available at <http://www.jstor.org/stable/pdfplus/3117659.pdf> (stating that gains in cost efficiency from public-private partnerships may be offset by externalities and increased costs to society); cf. generally, Stephen King & Rohan Pitchford, *Private or Public? A Taxonomy of Optimal Ownership and Management Regimes* (Asia Pac. Sch. of Econ. and Gov't, Working Paper No. 01-5, 2001), available at http://www.crawford.anu.edu.au/degrees/idec/working_papers/IDEC01-5.pdf (discussing the positive and negative externalities of government and private ownership models).

⁴¹ See, e.g., Santanu Chatterjee, *Should the Private Sector Provide Public Capital?* 11 MACROECONOMIC DYNAMICS 318, 319 (2007), available at http://www.terry.uga.edu/~schatt/Papers/chatterjee_MD07.pdf (stating that infrastructure projects are predominantly treated as a public-good).

⁴² See OR. DEP'T OF TRANSP. ET AL., *THE POWER OF PUBLIC-PRIVATE PARTNERSHIPS* (2006), available at <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf?ga=t> (describing the advantages of public-private partnerships, such as project acceleration and cost-effective design and construction).

⁴³ Public and Private Facilities and Infrastructure Act, TEX. GOV. CODE ANN. § 2267.02 (2011).

⁴⁴ Christopher Behnan, *CEO: Public-Private Partnerships Give Michigan Businesses Needed Resources*, LIVINGSTONDAILY.COM (Mar. 13, 2012), <http://pqasb.pqarchiver.com/livingstondaily/access/2608831721.html?FMT=CITE&date=Mar+13%2C+2012>.

igan Department of Transportation and the Michigan Department of Agriculture and Rural Development who transformed Michigan into a gateway for the Midwest and as a center for global freight, logistics, and supply chain that will drive significant job creation and investment over the next decade. MEDC has recognized the need to develop a partnership with Ohio as well as specific Canada provinces such as Ontario and destinations like Montreal and Halifax.⁴⁵

II. PUBLIC-PRIVATE PARTNERSHIPS FOR CROSS-BORDER INFRASTRUCTURE DEVELOPMENT

Cross-border, public-private partnerships noticeably began emerging about ten years ago.⁴⁶ Prior to that, primarily the North American Free Trade Agreement (“NAFTA”) encouraged cross-border trade with Canada and Mexico.⁴⁷ Border security issues became a priority after September 11.⁴⁸ Now that the economy is in a recession it behooves many U.S. and Canadian businesses and agriculturalists to focus on exports.⁴⁹ Cross-border trade requires additional infrastructure and upgrades to existing infrastructure.⁵⁰ But

⁴⁵ See MICHIGAN ECONOMIC DEVELOPMENT CORPORATION, www.michiganadvantage.org (last visited Mar. 13, 2012).

⁴⁶ See *Global Guide to Public-Private Partnerships (PPP)*, ALLEN & OVERY (last updated Mar. 23, 2010), <http://www.allenoverly.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&prefLangID=410&itemID=55199&langID=410> (acknowledging that “as recently as 10 years ago, [PPP’s were] considered a step too far even for some European partners countries”).

⁴⁷ See FOREIGN AFFAIRS & INT’L TRADE CAN., *THE NAFTA AT FIVE YEARS: A PARTNERSHIP AT WORK: THE NAFTA’S IMPACT: TRADE RESULTS (1999)*, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/nafta5_section04.aspx?lang=en&view=d (stating that in since NAFTA was implemented, trade between U.S. and Canada rose 80% and trade between United States and Mexico doubled).

⁴⁸ See generally Kathryn Bryk Friedman, *The Border After 9/11 — Security Trumps All*, POL. OPTIONS, Feb. 2010, available at <http://www.irpp.org/po/archive/feb10/friedman.pdf> (stating that after September 11, 2001, border security trumps U.S. trade with Canada).

⁴⁹ See, e.g., Jeremy A. Leonard, *Issues in Brief: Beyond the Border: Reconciling Security Concerns and Smoother Canada-U.S. Trade Flows*, MAPI (Feb. 7, 2012), available at <http://mapi.net:20001/MediaCenter/news/Lists/Posts/Post.aspx?ID=366> (stating that the Regulatory Cooperation Council is working on harmonizing regulatory standards in order to ease exports in “agriculture, food, transportation, health, and consumer products”).

⁵⁰ See Stephen Blank et al., *Staying Alive: North American Competitiveness and the Challenge of Asia* 12, 13 (Lubin Sch. of Bus., Ctr. for Applied Research, Working Paper No. 223, 2006) [hereinafter Blank, *Staying Alive*], available at http://digitalcommons.pace.edu/lubin-faculty_workingpapers/55 (arguing that inadequate North American infrastructure limits cross-border growth in those regions); see also Stephen Blank et al., *Freight Transportation Infrastructure Policies in Canada, Mexico and the U.S.: An Overview and Analysis* 12, 13 (N. American Transp. Research Competitiveness Council, Working Paper No. 5, 2008), available at <http://natrc.org/Research%20Council%20Working%20Paper%205%20March>

the desire and need for cross-border trade exists and it exists at a time when public capital at the state and national levels is diminished.

However, private capital from financial houses, investment firms, pension plans, and equity funds is available. And those sources have shown an interest in investing in infrastructure.⁵¹ The desire of private equity to invest in infrastructure is driven by what such investors generally perceive as a long-term, stable, and fair rate of return from a financially sound investment.⁵² Public-private partnerships are a means of coupling private equity with government institutions to build infrastructure and, in many instances, promote economic development.⁵³ Cross-border trade and public-private partnerships as a methodology to increase trade, is for the benefit of the economy and increases the number of jobs on both sides of the border.⁵⁴

III. PUBLIC-PRIVATE PARTNERSHIPS: CROSS-BORDER ACTIVITY OF THE UNITED STATES, CANADA, AND MEXICO

It is very significant that the State of Michigan has recently determined that it has the statutory authority to enter into a Crossing Agreement to construct a new bridge (the New International Trade Crossing) from Detroit, Michigan to Windsor, Ontario. The Crossing Agreement, executed on June 15, 2012 and lasting 100 years,⁵⁵ did not depend upon passage by the legislative body of the State of Michigan, of any special legislation, nor passage of

%202008.pdf (noting that North American infrastructure has not kept pace with the volume of goods flowing across its internal borders, the economy and there is a growing infrastructure deficit).

⁵¹ See Morag Torrance, *The Rise of a Global Infrastructure Market Through Relational Investing: Unraveling the Web of Financial Flows Into Urban Geographies* 16, 17 (Sch. of Geography, Oxford Univ. Ctr. for the Env't Working Paper Grp., Paper No. 06-17, 2006), available at <http://www.geog.ox.ac.uk/research/transformations/wpapers/wpg06-17.pdf> (explaining that interest in investing in infrastructure is growing among institutional investors, particularly among pension plans and insurance companies).

⁵² See *id.* at 18 (arguing that institutional investors favor certain infrastructure assets because they have stable and long term cash flows as well as attractive returns on a risk adjusted basis).

⁵³ See, e.g., MICHAEL LIKOSKY ET AL., SOC. SCI. RESEARCH COUNCIL, *RETHINKING 21ST – CENTURY GOVERNMENT: PUBLIC-PRIVATE PARTNERSHIPS AND THE NATIONAL INFRASTRUCTURE BANK 4* (2011), available at http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B2c5fcc9-6b9e-e011-bd4e-001cc477ec84%7D.pdf (arguing that public-private partnerships allow the government to match projects with private sources of funding, decreasing the public debt burden and growing the economy).

⁵⁴ See *id.* (arguing that public-private partnerships grow our economy); see also Blank, *Staying Alive*, *supra* note 50, at i (arguing that focusing on cross-border trade and public-private partnerships could help bridge the infrastructure gap and lead to greater continental prosperity).

⁵⁵ *Crossing Agreement*, http://www.michigan.gov/documents/snyder/Agreement_389442_7.pdf (Crossing Agreement between Canada and the State of Michigan).

a public-private partnership act. The agreement was entered into by her Majesty the Queen in right of Canada, as represented by the Canadian Minister of Transport, by the Crossing Authority (a bi-national entity established by Canada pursuant to and subject to the laws of both Canada and Michigan), by the Michigan Department of Transportation, and by Michigan Strategic Fund.⁵⁶

The Crossing Agreement provides:

“...a framework for a Crossing Authority established by Canada to design, construct, finance, operate and maintain a new international crossing between Canada and Michigan, under the oversight of a jointly established International Authority with three members appointed by Canada and the crossing authority and three members appointed by the Michigan Parties...”⁵⁷

The Crossing Authority Agreement between Canada and Michigan is one of the largest cross-border agreements involving a public-private partnership arrangement. In essence, the Crossing Authority with international authority of approval and oversight will enter into a public-private partnership for the design, construction, finance, operation, and maintenance of the international crossing through its lifecycle. The Canadian side of the bridge will collect tolls and these funds will subsidize bridge costs.⁵⁸ Once bridge costs are covered, excess tolls collected will equally pay out to Michigan and Canada.⁵⁹ The Crossing Authority will be responsible to third parties for its actions of administration, operation, maintenance, and improvement of the international crossings.⁶⁰ Additionally, the contract states that all iron and steel used on the Canadian side of the crossing will be produced in either the United States or Canada.⁶¹

It is unique that the agreement contains specific provisions that shall not be included in the public-private agreement. For example, the public cannot be deprived of the use and benefit of the international crossing except as necessary to implement tolls, any prohibition against a public or private party to the agreement requires a proposal to be submitted and approved by the other parties, and that Michigan, any of its political subdivisions, MDOT, MSF or

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at art. V, § II.

⁵⁹ See, e.g., *One Billion Dollar Windsor-Detroit Bridge Deal Struck*, CBC NEWS (June 15, 2012, 5:14 AM), <http://www.cbc.ca/news/canada/windsor/story/2012/06/14/wdr-prime-minister-bridge-windsor-detroit.html>.

⁶⁰ *Crossing Agreement*, *supra* note 55, at art. IX, § 2.

⁶¹ *Id.* at art. IX, § 5(b).

an agency or authority of Michigan, are obligated to use Michigan state funds to make any payment to the concessionaire or any third party.⁶²

The New International Trade Crossing (“NITC”) will cost approximately \$3.6 billion dollars and, according to Governor Snyder of Michigan, would create as many as 10,000 jobs.⁶³ As part of the collaboration, Canada has offered to advance \$550 million dollars for “Michigan's portion of the project cost and be responsible for any operating short fall not covered by tolls.”⁶⁴ This is highly beneficial to Michigan because Governor Snyder was able to negotiate with the U.S. Federal Highway Administration that the \$550 million contribution from Canada would count towards Michigan's federal match that is four times the money raised.⁶⁵ Therefore, Michigan would receive \$2.2 billion dollars from the Federal Highway Administration to use on any federal project throughout Michigan.⁶⁶ However, the new bridge would compete with the privately owned Ambassador Bridge whose owner is vehemently opposing the new bridge.⁶⁷ This P3 project is very large, has significant impacts on cross border trade and jobs and consequently is being watched by many people, business, politicians, and entities throughout the United States.

At the present time, Windsor, Canada is going forward with the Windsor-Essex Parkway in Ontario extending Highway 401 to the United States border.⁶⁸ On August 24, 2011 the Daily Commercial News and Construction Record reported that “construction has begun on the \$1.4 billion dollar Windsor Essex Parkway that will ease traffic congestion along the vital trade corridor to Detroit.”⁶⁹ Canada's Minister of Transportation, Kathleen Wynne,

⁶² *Id.* at Schedule B, § 3(c).

⁶³ Tom Greenwood, *Detroit Council Backs Public Bridge Project*, BUILDTHEDRICNOW.COM (July 8, 2011), <http://buildthedricnow.com/2011/07/08/detroit-council-backs-public-bridge-project/>; see also J. Vincent Burr, *New International Trade Crossing-Bridge Deal Coming*, MICHIGANSTANDARD.COM (June 2, 2012), <http://www.michiganstandard.com/356/new-international-trade-crossing-bridge-deal-coming/>.

⁶⁴ Monica Davey, *New Detroit-to-Canada Bridge to be Unveiled*, N.Y. TIMES, June 15, 2012, at A20.

⁶⁵ See, e.g., COLBY W. SPENCER ET AL., BUILDING A NEW BRIDGE IN DETROIT: A STUDY EVALUATING THE OPTIONS 2, 6-7, 13 (2011).

⁶⁶ *Id.*

⁶⁷ See Mike Turner, *Matthew Moroun Speaks out Against a New Bridge: Leave Crossings to the Private Sector, Son of Ambassador Bridge Owner Urges*, CORP! MAGAZINE (Sept. 8, 2011), <http://www.corpmagazine.com/DesktopModules/EngagePublish/printerfriendly.aspx?itemId=7131&PortalId=0&TabId=%2054> (discussing the Moroun family's disapproval of new bridge crossing between Canada and the United States).

⁶⁸ See generally WINDSOR-ESSEX PARKWAY, FACTS AT A GLANCE—WINDSOR-ESSEX PARKWAY PUBLIC INFORMATION OPEN HOUSE #5 1-3 (2012) (describing the Windsor-Essex Parkway project and how it will benefit the environment and community).

⁶⁹ Kelly Lapointe, *Construction Begins on Windsor-Essex Parkway in Ontario Extending Highway 401 to the U.S. Border*, DAILY COM. NEWS & CONSTRUCTION REC., Aug. 24, 2011,

has stated "today is an exciting moment of the Windsor Essex Community. Construction of the Windsor Essex Parkway will strengthen the local economy and when completed the Parkway will provide an efficient gateway to Canada's busiest trade corridor."⁷⁰ The Parkway construction is slated to bring more than 12,000 jobs, with the majority in the Windsor Essex region.⁷¹

But before these major P3 endeavors, the United States, Canada, and Mexico showed significant interest in cross-border public-private partnerships. For example, in October 2000, a Memorandum of Cooperation was executed between the U.S. Department of Transportation and Transport Canada.⁷² The memorandum stated, in part, that the United States and Transport Canada intended to enhance collaboration and cooperation. Additionally, the United States/Mexico Joint Working Committee on Transportation Planning⁷³ undertook a study regarding the use of Public-Private Partnerships for Arizona-Mexico Border Infrastructure Projects.⁷⁴ The purpose of the project was to evaluate and determine the feasibility using public-private partnerships to finance Arizona-Mexico border region infrastructure projects.⁷⁵ The study team identified SR189/Mariposa Road connecting Mariposa port of entry with I-19 in Nogales, Arizona with potential to generate sufficient revenue so as to be a self-funding public-private partnership.⁷⁶ The United States-Mexico Border Transportation Planning Reports states that toll facilities and other revenue sources, at or near border crossings, would be conducive to public-private partnerships.⁷⁷

And today, not just Michigan and Texas, but California,⁷⁸ New York,⁷⁹ and Washington⁸⁰ are also pursuing public-private partnership initiatives,

<http://www.dcnonl.com/article/id46358>.

⁷⁰ Press Release, Gov't of Canada & Gov't of Ontario, Construction Set to Begin on Windsor-Essex Parkway: Critical gateway project is creating jobs and providing new opportunities in the region (Aug. 18, 2011) (on file with author), available at http://www.infrastructureontario.ca/uploadedFiles/NR%20-%20Windsor-Essex%20Parkway%20Groundbreaking%20_Aug%2018_2011.pdf.

⁷¹ *Id.*

⁷² *Memorandum of Cooperation*, TRANSP. BORDER WORKING GRP., http://www.thetbwg.org/about-memorandum_e.htm (last visited July 27, 2012).

⁷³ *U.S./Mexico Joint Working Committee On Transportation Planning*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., http://www.borderplanning.fhwa.dot.gov/adot_PPPrpt/execSumm.asp (last visited Mar. 10, 2010).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Public-Private Partnerships (PPP)*, CAL. DEPT. OF TRANSP., http://www.dot.ca.gov/hq/innovfinance/Public-Private%20Partnerships/PPP_main.html (last visited July 27, 2012).

⁷⁹ See Charles J. Fuschillo, *Senate Transportation Committee Passes Innovative Infra-*

greater private sector involvement, and/or innovative finance at border crossings. For example, California is in the process of exploring and implementing several interesting border and toll related projects.⁸¹ This includes public-private partnerships at new Otay Mesa East port of entry, involving a toll road, cross border conveyer belts for moving aggregate, and potential cross border air terminal passenger facility.⁸²

IV. LEGISLATION, AGENCIES, AND ORGANIZATIONS PROMOTING PRIVATE-PUBLIC PARTNERSHIPS

On Friday, July 6, 2012 President Barak Obama signed the House Transportation and Infrastructure Bill (HR4348).⁸³ Ultimately this Act will encourage the Secretary of Transportation to develop standard public-private partnership transaction model contracts for the most popular types of public-private partnerships for the development, financing, construction, and operation of transportation facilities.⁸⁴ Additionally, the Secretary should also encourage states, public transportation agencies, and other public officials to use the model contract as a base template when developing their own public-private partnership agreements for the development, financing, construction, and operation of transportation facilities. Moreover, the Secretary's model will ultimately (1) better coordinate public and private sector/provide a public transportation services; (2) promote more effective utilization of private sector expertise; (3) promote transparency and public understanding of public-private partnerships affecting public transportation; and (4) promote better coordination between public and private sector providers of public transportation access.⁸⁵

structure Development Act, N.Y. STATE SENATE (June 5, 2012), <http://www.nysenate.gov/print/151746>.

⁸⁰ See *Washington Selects AeroVironment to Light up Nation's First Electric Highway*, WASH. STATE DEP'T OF TRANSP., (July 13, 2012) http://www.wsdot.wa.gov/News/2011/07/13_ElectricHighways.htm.

⁸¹ U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., PUBLIC-PRIVATE PARTNERSHIPS POTENTIAL FOR ARIZONA-MEXICO BORDER INFRASTRUCTURE PROJECTS at 14-15 (Sept. 30, 2009), available at http://www.borderplanning.fhwa.dot.gov/adot_PPPrpt/toc.asp.

⁸² ECON. RESEARCH BUREAU, SAN DIEGO REGIONAL CHAMBER OF COMMERCE, ECONOMIC IMPACT STUDY: OTAY MESA EAST PORT OF ENTRY at 1 (May 2008), available at <http://www.sdchamber-members.org/edoc/policy/OtayMesaEIS.pdf>.

⁸³ Surface Transportation Extension Act of 2012, Part II, Pub. L. No. 112-141 (2012); see also Matt Compton, *President Obama Signs the Transportation and Student Loan Bill*, THE WHITE HOUSE BLOG (June 6, 2012, 6:29 PM), <http://www.whitehouse.gov/blog/2012/07/06/president-obama-signs-transportation-and-student-loan-bill-0>.

⁸⁴ See generally Surface Transportation Extension Act of 2012, Part II, § 1534(d)(2).

⁸⁵ Surface Transportation Extension Act of 2012, Part II, § 5315(b).

Most recently, the Cross Border Trade Endorsement Act of 2012 was introduced and calls for alternative financing arrangement for certain services and construction and maintenance of infrastructure at land border ports of entry.⁸⁶ The Act relates to customs and border protection.⁸⁷ It permits proposals submitted by any person to enter into a cost sharing or reimbursement agreement with the administration to facilitate construction or maintenance of a facility or other infrastructure at land border ports of entry.⁸⁸

Applications of P3 are not limited merely to those previously mentioned in this article. Airports are one of the hottest new market places. As a result of critical needs and budget short falls, public-private partnerships and airport privatization are being explored internationally.⁸⁹ On May 3, 2011, the U.S. Commerce Department announced a \$1.3 billion signing in commercial U.S. airspace companies with Canadian firms.⁹⁰ Curt Coltice opines: "With over \$13 billion in bilateral aerospace trade in 2009, the aerospace sector is truly crucial to the economic feature of both the United States and Canada. [Furthermore, t]he continued expansion of commercial partnerships are vital to cross border trade and support many jobs across the United States and Canada."⁹¹

Public-private partnerships have been used in Canada for transport, education, health care, corrections, law enforcement facilities, and leisure.⁹² Federal and provincial governments have developed agencies and regulations that encourage the use of public-private partnerships.⁹³ In 2009, PPP Canada Inc. was created to manage and invest the federal government's \$1.25 billion dollar public-private partnership fund in an infrastructure program designed to use a range of financing arrangements, advise the federal government on the execution of public-private partnerships projects, and access public-

⁸⁶ Cross Border Trade Endorsement Act of 2012, S. 3279, 112th Cong. (2nd Sess. 2012); Cross Border Trade Endorsement Act of 2012, H.R. 5964, 112th Cong. (2nd Sess. 2012).

⁸⁷ H.R. 5964.

⁸⁸ H.R. 5964, § 4.

⁸⁹ See, e.g., Mary Scott Nabers, *Airports Nationwide Becoming Hot Marketplace*, GOVERNMENT CONTRACTING PIPELINE, (Apr. 25, 2012), http://www.spartnerships.com/resources/2012-jump/pipeline_jump_042512.html#1.

⁹⁰ Press Release, U.S. Commerce Department Official Announces \$1.3 Billion in Commercial Signings for U.S. Aerospace Companies with Canadian Firms (May 3, 2011), *available at* http://trade.gov/cs/press_release/pr_kumarmay3.pdf.

⁹¹ *Id.*

⁹² See THE CAN. COUNCIL FOR PUB.-PRIVATE P'SHIPS, FROM THE GROUND UP: CANADIAN OPINION TO PUBLIC-PRIVATE PARTNERSHIPS 2 (2011) [hereinafter CANADIAN OPINION], *available at* http://www.pppcouncil.ca/pdf/ppp_survey_2011.pdf.

⁹³ See *National Survey Reports Canadians Support Public-Private Partnerships*, THE CAN. COUNCIL FOR PUB.-PRIVATE P'SHIPS, <http://www.pppcouncil.ca/resources/news/319-national-survey-reports-canadians-support-public-private-partnerships.html> (last visited Mar. 10, 2012).

private-partnership options for major projects seeking funding from federal infrastructure programs.⁹⁴

The provincial infrastructure regulatory framework for Ontario provides that Infrastructure Ontario (“IO”) is the agency responsible for the delivery of public infrastructure improvements.⁹⁵ Public-private partnership financing is known as Alternative Financing and Procurement.⁹⁶ If a proposed project has a projected value anywhere between \$50 million and \$300 million Canadian dollars, IO is mandated to set project criteria, bring together public and private sector organizations, and conduct a procurement process to select a private sector consortia for certain projects.⁹⁷ The projects include public hospitals, courthouses, roads, bridges, border crossings, water systems, and public buildings.⁹⁸

The Canadian procurement process for public-private partnership transactions related to infrastructure and facilities can be summarized as an RFP process. The United States P3 infrastructure process is similar to the Canadian process.⁹⁹ Oftentimes in the United States, the process will begin with the governmental authority issuing an RFI or “Request for Declaration of Interest.”¹⁰⁰ During the period of time between that stage and the request for qualification stage, teams will usually be assembled.¹⁰¹ Then the RFQ process follows. However, this typical United States public-private partnership process is not mandatory. There is no federal statute encompassing public-private partnerships or dictating the procedure.

The Michigan Department of Transportation (“MDOT”), through its P3 Lite has developed many processes, procedures, and knowledge. MDOT has reported that the P3 Lite projects it has undertaken have reduced construction schedules while producing high quality work.¹⁰² MDOT also noted the sec-

⁹⁴ See *PPP Canada*, PPP CAN., <http://www.p3canada.ca/home.php> (last visited Mar. 10, 2012).

⁹⁵ See *Building a Better Tomorrow*, INFRASTRUCTURE ONTARIO, <http://www.infrastructureontario.ca/> (last visited Mar. 10, 2012).

⁹⁶ See *Alternative Financing and Procurement*, INFRASTRUCTURE ONT., <http://infrastructureontario.org/en/projects/afp.asp> (last visited Mar. 10, 2012).

⁹⁷ *How Infrastructure Ontario Supports Infrastructure Development*, INFRASTRUCTURE ONT., <http://infrastructureontario.org/en/about/develop.asp> (last visited Mar. 10, 2012).

⁹⁸ See *Current Projects*, INFRASTRUCTURE ONT., <http://infrastructureontario.org/en/projects/index.asp> (last visited Mar. 10, 2012).

⁹⁹ See REINHARDT, *supra* note 9.

⁹⁹ See *Request for Information*, http://www.google.com/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=1&ved=0CGEQFjAA&url=http%3A%2Fwww.neinadvocates.com%2Fregional%2Fwp-content%2Fuploads%2F2011%2F02%2FRFI_Lafayette-Center_900-North.docx&ei=uacVUNnaM630QH4mYDABg&usq=AFQjCNFmrU44b19xh8yUXnlfKuSz8RMTrA (providing an actual example of an RFI).

¹⁰¹ See REINHARDT, *supra* note 9, at 13.

¹⁰² See *Cross-Border Public-Private Partnerships*, DOME, <http://dome.mazine.com/canadamichigan/canada071711> (last visited Mar. 10, 2012).

ondary benefit of creating jobs. Some of the costs associated with private financing were offset through innovations, use of present materials to reduce cost escalation in the future, and expected savings from maintenance costs using present and later project reconstruction.¹⁰³ MDOT has also gone through a review and assessment of its public-private partnership-like projects to develop improvements, innovations, and chance procedures where needed.¹⁰⁴ MDOT recognizes that public-private partnership projects will include a transfer of additional responsibilities after construction is completed for a specific period of time.¹⁰⁵ The agency, however, retains ownership of the facility.¹⁰⁶

On January 16, 2012, Mexico enacted the Ley de Asociaciones Público Privadas (Law on Public-Private Partnerships or “PPP Law”).¹⁰⁷ The new PPP Law sets out to regulate the formation of partnerships between the public and private sectors in an effort to provide services and build infrastructure to improve social welfare and increase investment levels in Mexico.¹⁰⁸ Additionally, it creates an outline for public-private partnerships to facilitate cooperation between the Mexican government and the private sector in the construction of infrastructure.¹⁰⁹

In October 2009, Julia Doherty, the Senior Director of Non-Tariff Measures in World Trade Organization and Multi-Lateral Affairs, reported on the key aspects of cross-border collaboration.¹¹⁰ These key aspects include a high level of commitment, public-private partnerships/sector focus, guidance from established principals, coordination of trade policy, standards and regulatory officials, a flexible approach with a process-driven component, transparency and information sharing, capacity building, and mutually beneficial goals and outcomes.¹¹¹

The United Nations Trade Facilitation Network reported in June 2005 that public-private partnerships “bring together stakeholders in trade and transportation to design and implement procedures that improve the efficiency of

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Bram Hanono, *Mexico Continues to Entice Private Investment in Infrastructure with a New Public-Private Partnership Act*, LATINO LAW BLOG (Apr. 10, 2012, 10:45 AM), <http://www.latinolawblog.com/2012/04/articles/crossborder-insolvency/mexico-continues-to-entice-private-investment-in-infrastructure-with-a-new-publicprivate-partnership-act/>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ JULIE DOHERTY, STRENGTHENING COMPLIANCE IN THE TBT FIELD THROUGH CROSS-BORDER COLLABORATION: EXAMPLES FROM THE U.S. EXPERIENCE (2009), available at <http://www.oecd.org/dataoecd/55/2/43864202.pdf>.

¹¹¹ *Id.*

public and private management of the international supply chain.”¹¹² Additionally, a “demand for greater efficiency...is driving both [public and private entities] to heighten cooperation to achieve their respective goals.”¹¹³ Collaboration is needed among public and private individuals to identify critical trade and transport impediments as well as identify the definition of alternative ways to achieve similar objections at lower costs.¹¹⁴ Public-private partnerships provide a form where stakeholders can develop strategies to remove barriers to efficient trade.¹¹⁵ The importance of partnerships is to identify issues affecting costs and efficiency of a country's international trade, develop measures to reduce the cost and improve efficiency of international trade, assist in the implementation of those measures, monitor the impact of measures using detailed indicators, provide a national focal point for the collection and dissemination of information on best practices and international trade, and participate in international efforts to improve trade facilitation and transport facilities.¹¹⁶

Private stakeholders consist of financial institutions, transportation providers, intermediaries, drivers and operators, brokers and forwarders, and freight terminals.¹¹⁷ The public sector representatives include border security officials, customs and health authorities, revenue collectors, enforcement agencies and any government agency with a stake in a product being transported.¹¹⁸ They opined that the combined resources of public and private sectors can provide adequate transportation infrastructure and efficient information and communication technology infrastructure, can export promotion programs and systems for certifying norms and standards, and create efficient and fair legal and regulatory structures.¹¹⁹

They also recommended establishing public-private partnership clusters.¹²⁰ A cluster core adds value as a trans-service production line with all businesses and government participants acting as providers of added value to

¹¹² THE UNITED NATIONS TRADE FACILITATION NETWORK, PUBLIC-PRIVATE PARTNERSHIPS IN TRADE AND TRANSPORT FACILITATION 1 (2005), available at <http://www.gfptt.org/uploadedFiles/4957ad2b-9a3a-42c7-82a2-c8d83c96b669.pdf>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1-2.

¹¹⁷ *Id.* at 2.

¹¹⁸ THE UNITED NATIONS TRADE FACILITATION NETWORK, PUBLIC-PRIVATE PARTNERSHIPS IN TRADE AND TRANSPORT FACILITATION 2 (2005), available at <http://www.gfptt.org/uploadedFiles/4957ad2b-9a3a-42c7-82a2-c8d83c96b669.pdf>.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 3.

the end product.¹²¹ The cluster corridor provides or shares information through a network.¹²²

Many organizations in the United States and Canada support the use of public-private partnerships. For instance, in the United States, the following associations have been known to support public-private partnerships: the American Road and Transportation Builders Association (“ARTBA”);¹²³ the National Council for Public-private Partnerships (“NCP3”);¹²⁴ and the National Conference of State Legislatures (“NCSL”).¹²⁵ And in Canada, the Canadian Council for Public-private Partnerships was formed in 1993.¹²⁶

Local and state organizations have also formed at border crossings.¹²⁷ The State of Washington has its Cascade Gateway Expanded Cross Border Project.¹²⁸ To date the public-private activity has been dialogue and collaboration regarding congestion relief.¹²⁹ They have opened channels of communication between shippers, carriers, brokers, and agencies.¹³⁰ The effort has proven to be invaluable for the speedy resolution of issues relating to the rapidly changing operation requirements of the electronic cargo information, e-manifest, new lanes for expedited clearance programs, parking, and entry-filing arrangements.¹³¹

Perhaps the most pervasive and all-encompassing group is the Transportation Border Working Group (“TBWG”) founded in January 2001.¹³² The working group's members are mostly from the Federal Highway Administration (“FHWA”), each state’s department of transportation, Transport Canada,

¹²¹ Id.

¹²² Id.

¹²³ AM. ROAD & TRANSP. BUILDERS ASS’N, <http://www.artba.org/> (last visited Mar. 13, 2012).

¹²⁴ NAT’L COUNCIL FOR PUB.-PRIVATE P’SHPIS, <http://www.ncppp.org/> (last visited Mar. 13, 2012).

¹²⁵ NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/> (last visited Mar. 13, 2012).

¹²⁶ CAN. COUNCIL FOR PUB. PRIVATE P’SHPIS, <http://www.pppcouncil.ca/> (last updated Mar. 13, 2012).

¹²⁷ See, e.g., *Border Crossing/Canadian Issues*, MAINEDOT, <http://www.state.me.us/mdot/freight/border-crossing.php> (last visited Mar. 10, 2012) (describing the efforts that various agencies are taking to increase border security and efficiency); see also Robert W. Poole Jr., *Crossroads For the Highway Trust Fund*, PUBLIC WORKS FINANCING, Sept. 2011, at 14 (describing the plan of President Obama and Canadian Prime Minister Harper to create “bi-national port of entry committees” at ten border crossings).

¹²⁸ *Cascade Gateway Expanded Cross-Border ATIS*, WASH. STATE DEP’T OF TRANSP., 1, <http://resources.wcog.org/border/tbcrPPPAddendum.pdf> (last visited Mar. 10, 2012).

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² *About Us*, TBWG, http://www.thetbwg.org/about_e.htm (last visited Feb. 25, 2012).

and the provincial departments of transportation.¹³³ There are 119 ports of entry into the United States and 120 Canadian land ports of entry.¹³⁴ TBWG states that its mission is to “facilitate the safe, secure, efficient and environmentally responsible movement of people and goods across the Canadian-United States Border.”¹³⁵ To materialize its mission, TBWG “brings together multiple transportation and border agencies and other organizations to coordinate transportation planning, policy implementation and the development of technology to enhance border infrastructure and operations.”¹³⁶ TBWG “fosters on-going communication, information sharing and the exchange of best practices to improve the transportation and the safety and security systems” connecting the United States and Canada.¹³⁷

In approximately the last thirteen years, many associations, working groups, and focus groups have formed to study and enhance cross-border trade and transportation collaboration.¹³⁸ Other associations and groups, recognizing the importance of the United States-Canadian border and the trade between the two countries, have consequently realigned their focus toward cross-border trade, transportation, and the need for collaboration.¹³⁹

V. P3 LESSONS AND ELEMENTS

When a public-private partnership is negotiated with a balancing of experts on both sides and without undue time-pressure constraints, it can be very successful. A public partner must be strong, stable, with authority and political will to enter into a long-term public-private partnership contract. In essence, the government mental entity must have a person who is a champion of the concept end project. Once the decision is made to pursue a public-private partnership the governmental entity must do an honest assessment of its ability to undertake a public-private partnership either with in-house engineers, lawyers, accountants, and financial analysts or make the decision to obtain that expertise from outside consultants.¹⁴⁰ The governmental agency

¹³³ *Id.*; see also *TBWG Directory*, TBWG, http://www.thetbwg.org/about-directory_e.htm (last visited Feb. 25, 2012).

¹³⁴ *Id.*

¹³⁵ TBWG, http://www.thetbwg.org/index_e.htm (last visited Feb. 25, 2012).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See HUGH CONROY, BORDER POLICY RESEARCH INSTITUTE, *ADVANCING U.S. - CANADA BORDER TRANSPORTATION PLANNING AND PROGRAMMING 1* (2011) (“Since NAFTA, the United States and Canada have initiated programs to address cross-border transportation and anticipated increases in North American trade and travel.”).

¹³⁹ See *id.* (explaining that the Coordinated Infrastructure Program began to focus its attention on border transportation investment between the United States and Canada).

¹⁴⁰ See ECONOMIST INTELLIGENCE UNIT LTD., *EVALUATING THE ENVIRONMENT FOR PUBLIC-PRIVATE PARTNERSHIPS IN LATIN AMERICA AND THE CARIBBEAN: THE 2010 INFRASCOPE* (2nd

also must be aware that it has to have the necessary personnel in place to monitor the project once it is completed.¹⁴¹

Likewise the private sector must have the capability and experience to undertake the project that is proposed. The private sector concessionaire, designer, and contractor must have financial capability to withstand the various events that will normally occur over a long-term contract.¹⁴²

The second largest component is that the project must be bankable. A bankable project means that the project is perceived to provide the necessary return on investment that a particular financial group requires over a fixed period of time.¹⁴³ However, the financiers are often the last to approve the final contract documents.¹⁴⁴ Finance for large projects includes capitalization, a blend of public and private financing, bondholders, equity holders, a decision as to priority, and the expected return on investment.¹⁴⁵ In essence the project must have a perceived revenue stream that the private sector can capture in exchange for its capital outlay or private borrowing. Balancing risk and reward results in the opportunity to have a successful project. Typically a project undertaken singularly by a public or private partner has a greater chance for failure.

All stakeholders should be considered before a public-private partnership is commenced. For instance, the end users' interests should be taken into account.¹⁴⁶ A recent project where end users were overlooked was the sale of parking meters in Chicago, Illinois.¹⁴⁷ The contract governing this transac-

ed. 2010) ("assess[ing] the capacity of countries in Latin America and the Caribbean to carry out sustainable public-private infrastructure partnerships").

¹⁴¹ THE SECRETARIAT FOR THE COMM. ON INFRASTRUCTURE, GUIDELINES FOR MONITORING OF PPP PROJECTS 6-11 (2009) (setting out guidelines for monitoring PPP projects).

¹⁴² CAL. DEBT AND INV. ADVISORY COMM'N, PUBLIC-PRIVATE PARTNERSHIPS: A GUIDE TO SELECTING A PRIVATE PARTNER, 11-15 (2008) ("The advantage of a [public-private partnership] . . . is that risk can be transferred to the partner that is better equipped to manage or prevent that risk from occurring or that is in a better position to recover the costs associated with the risk.").

¹⁴³ See ARD, INC., CASE STUDIES OF BANKABLE WATER AND SEWERAGE UTILITIES (2005) (detailing financially successful partnerships).

¹⁴⁴ EUROPEAN PPP EXPERTISE CENTRE, THE GUIDE TO GUIDANCE 34 (2011) ("Financial close occurs when all the project and financing agreements have been signed and all the required conditions contained in them have been met. It enables funds (e.g. loans, equity, grants) to start flowing so that project implementation can actually start.").

¹⁴⁵ E. R. YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS: PRINCIPLES OF POLICY AND FINANCE 113-187 (2007) (discussing the financial aspects of public-private partnerships).

¹⁴⁶ See BLAIR REDLIN, SECRETIVE, RISKY, UNACCOUNTABLE: HOW PUBLIC-PRIVATE PARTNERSHIPS ARE BAD FOR DEMOCRACY 1 (2004) ("[Public-private partnerships] are undermining democratic public institutions because the commercial relationships are inherently secretive, unaccountable and often very risky. Further, the commercial, business nature of these contracts is turning normal public priorities and values upside down.").

¹⁴⁷ TONY DUTZIK, BRIAN IMUS & PHINEAS BAXANDALL, ILL. PIRG EDUC. FUND,

tion was entered into under extreme time constraints. Today, most everyone in Chicago is complaining about how the private sector is operating the parking system and the excessive fines it imposes.¹⁴⁸ There are often other private businesses that may be impacted.¹⁴⁹

Mary Scott Nabers quotes Leonard Gilroy, Director of Government Reform for the Reason Foundation, in an extended interview stating that government leaders should know the following about public-private partnerships: (i) no two P3s are the same thus the partner should think carefully about the objective and then build a P3 to achieve it; (ii) contracts should be performance based and written outputs should be determined and not based upon a pre-determined budget; (iii) P3s often run into trouble which requires that the government switch its role to monitoring and evaluating; (iv) P3s need extra management; (v) government should solicit more input from contractors and governmental officials should use requests for information before contracting; (vi) build support – consensus needs to be obtained; and (vii) be transparent as possible.¹⁵⁰

Public-private Partnerships for infrastructure projects are governed pursuant to a written contract. P3 contracts incorporate many of the common infrastructure terms and conditions of non P3 infrastructure projects including: indemnity, insurances, performance bonds and default and termination clauses with some alternative dispute resolution clauses.

Public-private partnership contracts for infrastructure uniquely include terms that relate to the sharing of risk and reward along with a long term relationship; design build clauses, performance clauses, default and termination clauses with various triggering events over the course of design, construction, operation and maintenance; unique alternative dispute resolution clauses from dispute review boards to mediation to arbitration; limited liability clauses; and cost and pricing escalators for rent or tolls. The contract will require monitoring, auditing and turn over issues for the viability and durability of the project. Concessionaires may require an anti-competitive clause and conversely governmental organizations will require a most favored nations clause. The anti-competitive clause is to protect against the possibility of the government building a competing service or facility as well as mitigate

PRIVATIZATION AND THE PUBLIC INTEREST: THE NEED FOR TRANSPARENCY AND ACCOUNTABILITY IN CHICAGO'S PUBLIC ASSET LEASE DEALS 18-26 (2009).

¹⁴⁸ *Id.* at 19 (“City drivers have responded with outrage—avoiding parking their cars at meters, organizing protests, and even engaging in outright sabotage.”).

¹⁴⁹ *Id.* at 24 (explaining that avoidance of meters has impacted local businesses who noticed “less and less cars parked [and] less customers coming in.”).

¹⁵⁰ Mary Scott Nabers, *Collaboration Nation – How Public-Private Ventures are Revolutionizing the Business of Government*, YOUTUBE (June 5, 2012), <http://www.rtbob.net/play.php?id=jhjiNzNOYdk>.

the impact of changing laws, regulations and other programs that may financially impact the project for service.

Contract clauses of indemnity are always a major concern along with the extent to which municipal governmental immunity will attach. The motivation of each party and the position from which they enter this relationship is the most important factor in determining its long-term viability. The government is often dependent upon policy and politics, whereas the private sector is generally driven by efficiencies and bottom-line profit.¹⁵¹

Additional subjects often concern availability payments, excess profits, rate adjustments, and the cost of capital improvements versus operation and maintenance costs.¹⁵² These particular factors often impact the cost of capital for the project, requiring a complete analysis by consultants.¹⁵³

VI. ADVANTAGES OF PUBLIC-PRIVATE PARTNERSHIPS FOR INFRASTRUCTURE DEVELOPMENT

Over the years that public-private partnerships have been utilized, many unique advantages have become apparent. There are as many differing views regarding each advantage, as there are differing sorts of public-private partnerships. It is generally held that the private sector brings expertise in design, construction and finance that the public sector otherwise lacks.¹⁵⁴ A governmental entity will likely build only one wastewater treatment plant or one major bridge. However, private entities have developed an expertise in design, build and finance based upon multiple projects nationally and globally. The private sector develops technical expertise and the ability to marshal assets when challenges are encountered during the course of developing, building, financing and operating the project. They can do so rapidly and

¹⁵¹ See PRICE WATERHOUSE COOPERS, *DELIVERING THE PPP PROMISE* 59 (2005) (highlighting political barriers to public-private partnerships including lack of enabling legislation, availability of step in rights, difficulty of creating long-term budgetary commitments etc.); see also *ABA and NCPPP Conduct Webinar*, 24 NEWSLETTER FOR PUB.-PRIVATE P'SHIPS 3 (2010) (explaining how the ABA and the Executive Director of NCPPP conducted a webinar educating international businesses in public-private partnerships and their consequential issues).

¹⁵² See, e.g., *Delivering the PPP Promise: A Review of PPP Issues and Activity*, PRICEWATERHOUSECOOPERS 1, 18 fig.2 (2011) (illustrating that under PPPs, governments make availability payments i.e. the annual payment line, and that those payments are subject to indexation and possible periodic reviews, where the cost of delivering the underlying services is re-examined and payments are formulaically adjusted).

¹⁵³ See Sharmila Chaval, *Audit Has to Analyze Different Stages that Affect Cost of Capital to Government in PPP Projects*, THE FIN. EXPRESS (Aug. 26, 2010, 12:50AM), <http://www.financialexpress.com/news/audit-has-to-analyse-different-stages-that-affect-cost-of-capital-to-govt-in-ppp-projects/672861/> (explaining that audits performed by consultants must analyze various project stages which could ultimately affect the cost of capital in a PPP project).

¹⁵⁴ See GUIDEBOOK ON PROMOTING GOOD GOVERNANCE, *supra* note 26.

without the necessity of going back to the political subdivision for a presentation and a vote.¹⁵⁵ The private sector benefits from its multiple experiences, purchasing in quantity and obtaining quantity discounts, and developing the necessary inventory of parts and/or supplies to act on a moment's notice. Furthermore, the private sector can marshal capital and personnel in a rapid manner to meet a crisis.

Public-private partnerships provide for an all-encompassing competitiveness.¹⁵⁶ Under a program whereby the government designs and lets a project for bid to the lowest bidder, the competition is based on construction cost only.¹⁵⁷ Utilizing a public-private partnership the competition is on the basis of design, construction, finance and operation and maintenance.¹⁵⁸ Thus, all the major factors for a particular project are subject to competition among the various private sector proposers.¹⁵⁹ In addition, when the operation and maintenance is connected to the design and construction, there is an increased incentive for the construction to take into account lifecycle cost.¹⁶⁰ The design and construction of the project must be at an optimum durable level balancing initial capital costs with long-term maintenance and replacement costs.¹⁶¹

A public-private partnership project is performance oriented.¹⁶² Thus, the overall goal of the project is to provide performance at a level desired by the government.¹⁶³ This is compared to constructing within the four corners of the design by a governmental agency. Often, the project completed to the design does not meet the overall performance desired by the governmental agency. In a public-private partnership project performance, for the end user, is a major driving force.¹⁶⁴ Likewise, performance to the levels needed for financing the project drive the efficiencies of design and construction to be completed on time and within the budget.

Most often a public-private partnership project is a methodology in shifting the risk from the governmental agency to the private sector.¹⁶⁵ Generally, the risk is shifted to the private sector for technical expertise, construction issues, operating issues, revenue and financial issues, and project default.¹⁶⁶

¹⁵⁵ *Id.*

¹⁵⁶ See generally JOE WELSH ET AL., *THE AMERICAN RAILROAD: WORKING FOR THE NATION* (1995).

¹⁵⁷ *Id.* at 116.

¹⁵⁸ *Id.* at 59.

¹⁵⁹ *Id.* at 147.

¹⁶⁰ *Id.* at 222.

¹⁶¹ *Id.*

¹⁶² *Id.* at 207.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 84.

¹⁶⁵ *Id.* at 247.

¹⁶⁶ *Id.*

Issues regarding force majeure, regulatory/political issues, issues relating to tax implication remain with the public sector. Environmental questions are often subject to debate and are not necessarily shifted to the private sector.¹⁶⁷

Public-private partnership projects offer a more efficient project at lower cost with faster delivery.¹⁶⁸ Fast delivery is often required for a governmental entity to obtain partial federal funding that can only be provided for "shovel ready" projects. Public-private partnership arrangements utilize the best attributes and assets of each partner for the benefit of the project.¹⁶⁹ For instance, the public sector has stability and controls a great deal by implementation of current and future legislation.¹⁷⁰ Even though some public governmental entities have failed in recent times, they are still viewed as a sound investment from the federal, the state, and local level.¹⁷¹ The private sector brings to the table not only its expertise but, by its very nature, innovation driven by competition.¹⁷² The project itself is the private sector's main focus and priority. On the other hand, governmental agencies have many priorities and focuses driven by the goal to benefit citizens.

The assets of each partner compliment the other to a greater strength than one party can bring to cross border infrastructure development on its own. It is the belief of the United States-Mexico Border Transportation Planning

¹⁶⁷ *Id.* at 106.

¹⁶⁸ See *Alternative Project Delivery Methods Gaining Ground*, CAL. CONSTRUCTOR, Feb. 2011, at 1, 3, available at <http://www.agc-ca.org/uploadedFiles/Publications-Products/Constructor-Mag-PDFs/February2011.pdf> ("Experts have offered that among the key benefits of P3 delivery are that projects can be delivered at a lower cost and often faster than traditional project delivery methods" and "[P3s] often allow for more innovative approaches than projects delivered by traditional means.").

¹⁶⁹ See Richard Norment, *Fundamentals and Issues of Public-Private Partnerships (PPPs)*, THE NAT'L COUNSEL FOR PRIVATE-PUB. P'SHIPS, http://www.ncppp.org/publications/TransitDenver_0806/Norment_080612.pdf (last visited Feb. 25, 2012) (stating that PPP's maximize the use of the public and private sector's strengths and that each sector's skills and assets are shared).

¹⁷⁰ See PRICEWATERHOUSECOOPERS, *supra* note 152 (explaining that more countries are proposing specific legislative measures to assist PPP procurement); see also GUIDEBOOK ON PROMOTING GOOD GOVERNANCE *supra* note 26 at 6 (stating that the public sector's ability to control legislation is crucial to the success of a PPP as they require effective legislative and control framework in order for the public and private sector to recognize the objectives and needs of one another).

¹⁷¹ See *generally Agency Securities*, FIN. INDUS. REGULATORY AUTH., http://apps.finra.org/investor_information/smart/bonds/303000.asp (last visited Feb. 26, 2012) (stating that securities issued or guaranteed by federal agencies are backed by the 'full faith and credit of the U.S. government' which "is an unconditional commitment to pay interest payments, and to return the principal investment in full to you when a debt security reaches maturity.").

¹⁷² See *Public-Private Partnership FAQs*, FED. HIGHWAY ADMIN., U.S. DEPART. OF TRANSP., <http://www.fhwa.dot.gov/ipd/p3/faqs/index.htm> (last visited Feb. 26, 2012) (stating that private entities are able to compete on the basis of a broader set of technical skills and expertise as well as contribute innovative design and construction).

stakeholders that non-tax revenue sources are available with public-private partnerships such as fees, advertising revenue, lease payments, and port-of-entry access payments.¹⁷³ In addition, only tax incentives can be captured by the private sector for the benefit of public infrastructure. Non tax revenue sources increase the amount of capital that can be allocated to an infrastructure project. The ability to leverage public funds for private projects produces value.¹⁷⁴ The ultimate goal for the infrastructure project of course is further economic development and jobs.

VII. IMPEDIMENTS TO CROSS BORDER PUBLIC-PRIVATE PARTNERSHIPS

Public-private partnership projects face issues that are absent from most other infrastructure delivery methods. For instance, in P3 projects all stakeholders need to have buy-in. Operation and maintenance of facilities require long term contracts. Financing the projects at least in part privately require an examination that the project is bankable. All of these additional factors require time and patience to resolve.

Some of the impediments to public-private partnerships for cross-border trade are described by how they are addressed by various organizations previously discussed in this article. Present challenges to cross-border public-private partnerships continue. In Michigan, signatures are being gathered to amend the constitution to require a vote of the people for any cross-border bridge or tunnel. This of course would have a dampening effect on the speed and efficiency with which a public-private partnership can be developed. The owner of the Detroit Ambassador Bridge (a totally private bridge) has waged an expensive campaign against the new public-private partnership bridge from Detroit to Windsor. The outcome of the above challenges was uncertain. But recently, the vote of the people in November rejected the requirement for a “vote of the people” for the new bridge. However, other challenges through litigation and administrative approvals are expected.

Public-private partnerships for infrastructure for cross border trade raise some new issues in opposition to public-private partnerships. In 2006, Rep. Duncan Hunter (R-CA) sponsored H.R. 4881 that would bar foreign corporations from owning, operating or managing critical infrastructure assets in the United States.¹⁷⁵ H.R. 4881 included a wide range of infrastructure facilities to include highways, bridges, tunnels, airports, power plants and communica-

¹⁷³ *Id.* at 92-93.

¹⁷⁴ *Id.* at 87-91.

¹⁷⁵ National Defense Critical Infrastructure Protection Act of 2006, 109th Cong. (2006), 2005 CONG. U.S. H.R. 4881 (Westlaw).

tion facilities.¹⁷⁶ While H.R. 4881 never passed the House, it aptly depicts the concern over national security and economic security.¹⁷⁷

The use of concession type highways could affect the integrity of the integrated National Service Transportation System. But this possibility is unlikely because the primary function of FHWA is to establish highway standards and provide some funding. The problem of exclusionary tolls relates to a concern that concessionaires could make too much money by increasing tolls to such high levels as might exclude the average worker. However, city and state officials are cognizant of citizen concerns about high tolls and steps are being taken to resolve these types of issues. Due diligence can be performed and public officials can regulate private concessionaires allowable rate of return on investment and provide for terms to share excess profits.

On a social scale, the laws of supply and demand remain in effect in public-private partnerships. Toll roads are thought to penalize those who can ill afford to pay daily tolls. However, in the long run, if toll rates are not acceptable to a large number of users and the traffic volume falls, supply and demand may force lower rates. There is a concern that concession agreements lasting for forty-five, fifty, or ninety years are too long. However, there is a counter argument that long-term leases relieve future generations of increased taxes to pay for highway, bridge or tunnel upkeep and maintenance. Some public sector managers can perform at the same pace as their private sector counterparts. However, the private sector is willing to assume any risks associated with public works projects, whereas the public sector is rightfully adverse to risk assumption and takes steps to mitigate or avoid risk.

Notwithstanding some of the success that have occurred without either an overall federal public-private partnership act or a statewide public-private partnership act, a survey of international experience indicates that P3 authority is critical to the success of P3 programs. P3 authority provides a range of services and serve a variety of functions. From the public sector perspective, P3 authority establishes a transparent and standardized process for analyzing and procuring P3 projects. This helps to ensure the public interest is maintained when entering into long term contracts for infrastructure provision. From the private sector perspective, P3 authority serves as a one-stop-shop for deal flow and reduced transaction costs by standardizing, getting documents, procedures and contracts.¹⁷⁸

Mr. Desilets opines that as the P3 trend in the United States grows and states seek to roll out their P3 programs, they would benefit from reviewing

¹⁷⁶ H.R. 4881.

¹⁷⁷ See generally SYDNEY ANN LEVY, PUBLIC-PRIVATE PARTNERSHIPS CASE STUDIES ON INFRASTRUCTURE DEVELOPMENT (2011) (providing general analysis of H.R. 4881).

¹⁷⁸ Brien Desilets, *Why Your State Needs a P3 Authority*, DEV. FIN. REV. WKLY., Sept. 1, 2011, at 1.

the experience of other countries and establishing P3 authorities based on international best practices.¹⁷⁹

However, many governmental entities at the state and local level have nonetheless been able to undertake various projects without any statewide specific authorizing legislation.¹⁸⁰ Local municipalities or authorities or a state department can rely upon statutes that permit arrangements procuring services, purchasing of assets, borrowing money or that do not prohibit public-private partnerships or design build arrangements. In Michigan, the Michigan Department of Transportation has authority to enter into long term design build contracts and can pay for the same over time. The use of tax increment financing arrangements and tax incentives, tax credits are essential for many projects and do not require P3 legislation. However, in the last five years, the MDOT has undertaken public-private partnerships in order to build or rebuild surface transportation.¹⁸¹ MDOT has verbally labeled this type of arrangement “P3 Lite.” MDOT contracts with a private entity to design, on a limited basis, as well as construct or reconstruct a particular section of highway and/or bridge.¹⁸² In exchange, the State of Michigan agreed to make installment payments to the contractor until the debt was paid.¹⁸³ This arrangement was predicated on the contractor/designer obtaining financing through a private financial institution. The projects were designed, constructed, completed and were successful. MDOT is actively seeking to engage in similar projects now and in the future.¹⁸⁴

Impediments to cross border P3 often arise from differences in basic data accumulation, Internet technology, customs, rules, regulations, and enforcement.¹⁸⁵ Other impediments include the differences in political culture,

¹⁷⁹ *Id.*

¹⁸⁰ BOB PRIETO, PPPS: A CONTRACTOR/DEVELOPER’S “HOW TO” GUIDE 2 (2005) (“[T]he absence of required legislation is not necessarily a fatal flaw but rather an additional hurdle that must be considered from a cost, timing and likelihood of success perspective.”); *but see* PEW CENTER ON THE STATES, DRIVEN BY DOLLARS 10-14 (2009) (telling the story of the Pennsylvania Turnpike for bids had been placed, but were withdrawn when enabling legislation failed to pass).

¹⁸¹ *See generally* HNTB CORP., MICHIGAN STATE RAIL PLAN: TECHNICAL MEMORANDUM #4 2-5 (2011) (overview of transportation related public-private partnerships in Michigan).

¹⁸² *See Public-Private Partnership Unveils 1-94 Gateway Bridge*, MICHIGAN.GOV (June 10, 2003), http://www.michigan.gov/mdot/0,4616,7-151-9620_11057-69853--,00.html.

¹⁸³ *Types of Public-Private Partnerships*, NCPPP.ORG, <http://www.ncppp.org/how-part/ppptypes.shtml> (last visited Mar. 10, 2011) (describing various types of partnerships).

¹⁸⁴ 2012 FISCAL YEAR PROJECTED LETTINGS (2012), *available at* http://www.michigan.gov/documents/mdot/MDOT_2011_Projected_Lettings_336895_7.pdf (listing by month the number of projects and cost in millions MDOT expects to undertake in 2012).

¹⁸⁵ *See generally PPP Development Stage – Identifying Constraints: 5.2 What are the Possible Constraints on the PPP?*, U.N. DEV. PROGRAMME, http://pppue.undp.2margraf.com/en/05_2.htm (last visited Mar. 9, 2012) [hereinafter *Constraints*] (discussing a number of impediments to public-private partnerships including legisla-

structure, and external pressures.¹⁸⁶ Without regard to transporter issues, additional impediments to the utilization of P3s stem from the lack of understanding of their use and the relationship process.¹⁸⁷ There is oftentimes a lack of political will or strong political leadership to oversee a project from beginning to end. The familiarity with the old process and the fear of the unknown for any new process are also inhibiting factors to public-private partnerships.

There is also a lack of universality accepted contract documents, and in the United States there is a lack of a number of large concessionaires to design, build, finance, and operate a project.¹⁸⁸ Presently, the governmental process to produce a project under a P3 concept is too cumbersome too long, and has a greater production delay than private industry can oftentimes accommodate.¹⁸⁹

Financial institutions are still in an uncertain financial crisis mode despite the availability of private capital.¹⁹⁰ Since projects often require upfront capital to operate for a period of time, it is imperative to provide a blending of financing and capital that has been labeled “patient capital,” where the rate of return will not occur for several years.¹⁹¹

Cross border security issues continue to be an impediment to cross border trade and thus an impediment to the use of Public-private Partnerships for cross border trade.

tive and regulatory environment, institutional constraints, financial constraints, contract-related constraints, capacity constraints, public sector experience, perception, and time frame; while not directly discussed in this article, these constraints not only will impact public-private partnerships within a country, but will become more complex in a cross border context where two countries are attempting to collaborate with their own unique constraints).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (“[d]espite the growing acceptance of public-private partnerships as a legitimate means of providing municipal services, a great deal of mistrust and misunderstanding continues to exist in all three sectors of the partnership – in the public and private sectors, and among community members”).

¹⁸⁸ See generally CONG. BUDGET OFFICE, CONG. OF THE U.S., USING PUBLIC-PRIVATE PARTNERSHIPS TO CARRY OUT HIGHWAY PROJECTS vii-x (2012) [hereinafter HIGHWAY], available at <http://cbo.gov/sites/default/files/cbofiles/attachments/01-09-PublicPrivatePartnerships.pdf> (discussing the challenges of drafting contracts that are properly forward-looking and incorporate all future costs and risks; also discussing private investors that have lost money in projects from overestimating receipts).

¹⁸⁹ See generally *Constraints*, *supra* note 185 (“[m]any government officials have little experience in negotiating and managing concession contracts, which can lengthen the contract award process and increase the costs of bidding”).

¹⁹⁰ See generally Emily Maltby, *Smaller Businesses Seeking Loans Still Come Up Empty*, WALL ST. J., June 29, 2011, <http://online.wsj.com/article/SB10001424052702304314404576411901168183390.html> (describing the lending restrictions on banks to ensure that another financial crisis does not happen).

¹⁹¹ See generally *Constraints*, *supra* note 185 (“domestic markets could be weak and unable to provide long-term financing for infrastructure projects that have long pay-back times”).

Notwithstanding impediments, public-private partnerships are forming and are expected to grow as a delivery method for cross border infrastructure.¹⁹² State and federal governments are looking for ways to create incentives to establish P3s as an institutionalized process.¹⁹³

VIII. OBSERVATIONS REGARDING PUBLIC-PRIVATE PARTNERSHIPS INITIATIVES

One of the reasons P3s have increased in popularity is 30 years of successful project seasoning.¹⁹⁴ Most public-private partnerships have been successful and the downside of any failure has often been mitigated.¹⁹⁵ The experience factors provided a great deal of guidance which has instilled confidence in public officials to utilize P3. Politically, there seems to have been a paradigm shift away from government financed and operated infrastructure and surface transportation.¹⁹⁶ It appears that the necessity of jobs creation from new projects, or enhanced old projects, compels labor unions to support public-private partnerships, where they opposed them originally.¹⁹⁷

¹⁹² See CANADIAN OPINION, *supra* note 92, at 2 (“[a]s governments play catch up in meeting community infrastructure needs. P3s continue to be a model pursued by all levels of government where these arrangements offer value for money.”).

¹⁹³ See HIGHWAY, *supra* note 188, at 1-12 (2012) (discussing the profitability potential of public-private partnerships and suggesting that governments can utilize incentive payments contingent on “private contractor’s meeting specific milestones regarding costs or the project’s completion”).

¹⁹⁴ See generally, William G. Reinhardt, Remarks Before the National Council for Public-Private Partnerships in Tampa, Florida (Oct. 5, 2011), available at http://www.ncppp.org/resources/papers/Reinhardt_111005.pdf (describing the beginning of the P3 trend around 30 years ago).

¹⁹⁵ See generally, JEFFREY N. BUXBAUM & IRIS S. ORTIZ, TRANSPORTATION RESEARCH BOARD, PUBLIC SECTOR DECISION MAKING FOR PUBLIC-PRIVATE PARTNERSHIPS: A SYNTHESIS OF HIGHWAY PRACTICE (2009), available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_syn_391.pdf (synthesizing survey results discussion how public-private partnership initiatives mitigate failures).

¹⁹⁶ See generally, AECOM CONSULT TEAM, CASE STUDIES OF TRANSPORTATION PUBLIC-PRIVATE PARTNERSHIPS IN THE UNITED STATES (2007), available at http://www.fhwa.dot.gov/ipd/pdfs/us_ppp_case_studies_final_report_7-7-07.pdf (last visited Mar. 10, 2012) (indicating that transportation and infrastructure has increasingly utilized public-private partnerships for financing and development.)

¹⁹⁷ See REINHARDT, *supra* note 9, at 34, 45 (stating that unions are wary about how wage assurances and other protections are impacted by using public-private partnerships), see also DEV. BANK OF S. AFRICA, PUBLIC-PRIVATE PARTNERSHIPS (PPPs) AND THEIR IMPLICATIONS FOR JOBS AND EMPLOYMENT (2009), available at <http://www.dbsa.org/Research/Documents/Public%20private%20partnerships%20PPPs%20and%20their%20implications%20for%20jobs%20and%20employment.pdf> (indicating that public-private partnerships account for significant employment in the public sector).

Today, P3s are viewed as a viable alternative that can provide financial energy to infrastructure development. P3s continue to be applied in innovative manner to bridge the financing gap that oftentimes prevents infrastructure projects from going forward. Some of the current applications of P3 include: (i) capturing energy savings over a period of years to provide the necessary return on an investment to upgrade facilities; (ii) the use of contract and special assessments to back the repayment of public bonds which proceeds were used to construct the necessary infrastructure for a new shopping center; (iii) the use of installment purchase contracts to obtain infrastructure on a smaller scale that would qualify for the internal revenue service small issuance exemption carrying charge credit; (iv) the use of availability payments in lieu of toll road payments; (v) monetizing non-liquid assets through use of long term leases that capture tax credits, depreciation similar to private infrastructure owned properties and the current use of the installation of wind farms in exchange for the sale of electricity. The concept is to create an environment for an infusion of capital to create infrastructure development with the return on investment captured from either savings or the revenue stream.

The past and present P3 projects have gone a long way to debunk the myths that: (i) P3 results in a loss of ownership by the government; (ii) government loses control over the projects; (iii) citizens will be required to pay a second time; (iv) the cost is greater; (v) a loss of jobs will occur and governments don't like P3. A whole array of potential public-private partnership contractual relationships are possible, and have been well laid out in the literature.¹⁹⁸ With respect to infrastructure, they usually involve the public sector retaining ultimate ownership, but the private concessionaire shares risk, completes market analysis, provides design and construction expertise, and obtains financing.¹⁹⁹

It is evident that public-private partnerships work well when there are published guidelines regardless of whether or not there is specific overall statewide legislation. The Brookings Institute has published a report concerning the international experience with PPP units.²⁰⁰ The report indicates that the United States should establish dedicated PPP units to tackle bottlenecks in the PPP process and protect the public interest. They also recommend working with the federal government to address technical assistance

¹⁹⁸ See REINHARDT, *supra* note 9, at 13-17 (stating the new and alternative contracting methods for public-private relationships); see also RALL, *supra* note 31, at 3-5 (providing a table of project delivery models).

¹⁹⁹ See REINHARDT, *supra* note 9, at 16 (stating the private sector and public sponsor responsibilities for the DBFOM public-private model).

²⁰⁰ ISTRATE & PUENTES, *supra* note 22.

caps on PPPs, on an “as needed” basis.²⁰¹ Public-private partnerships are often complicated contracts that differ significantly from project to project and place to place. Many states lack the technical capacity and expertise to consider such deals and fully protect the public interest.

The most important financial question facing any project is the perceived reward/risk ratio.²⁰² Are there high-quality project developers who perceive the potential reward to be great enough to compensate for the perceived risk? Can they find financiers who agree? What level of public incentive or risk-sharing will be necessary to turn the reward-to-risk ratio positive? For infrastructure projects, this is sometimes less of a problem than for other uses of public-private partnerships. The monopoly status of many infrastructure facilities and the perceived long-term need makes them seem more stable.²⁰³ Yet, one of America’s first and largest infrastructure projects, which was financed by one of America’s first major bond issues, was the Erie Canal.²⁰⁴ At the time, the project was seen as having a multi-decade financial life, making it easy to pay off the bond.²⁰⁵ Rapid technology change, particularly, the creation of a national railroad system, rendered the canal financially obsolete long before its estimated useful life.²⁰⁶

Key to the revenue stream issue for a company that owns, leases, or operates a facility is pricing.²⁰⁷ As a public utility, how much should the bridge or road toll be? Does the concessionaire have a guaranteed income unconnected to price such as a developer fee or DBOMF concession. How much flexibility does the concessionaire have both over time and across time intervals to set or influence the toll? Financiers will recognize less risk if they see that the operator or owner can adjust prices to reflect changing demand so as to generate the revenue stream needed to cover debt service. In the early years of the Chicago Skyway, bond prices fell precipitously when revenues

²⁰¹ *Id.*

²⁰² See generally *New Project Implementation*, Partnership for Progress, <http://www.fedpartnership.gov/bank-life-cycle/grow-shareholder-value/new-product-implementation.cfm> (last visited Mar. 9, 2012) (stating a risk/reward analysis is important to evaluate long-term benefits).

²⁰³ See generally *Investment Characteristics*, NMX (Mar. 8, 2012), <http://www.lpx-group.com/nmx/listed-infrastructure/investment-char>

²⁰⁴ See generally Steven Malanga, *The Muni-Bond Debt Bomb*, MANHATTAN INST. FOR POL’Y RESEARCH (Jul. 26, 2010), <http://www.manhattan-institute.org/html/miarticle.htm?id=6401> (stating that New York State issued bonds to finance the \$7 million construction of the Erie Canal, a project whose beneficial impact was overestimated and that failed to generate enough income to pay back investors).

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ See generally Suman Babbar & Gregory Fisher, *Private Financing of Toll Roads*, WORLD BANK GROUP, http://www.worldbank.org/transport/roads/tr_docs/117.pdf (last visited Mar. 9, 2012) (stating that road pricing generates user-based funds to support further developments).

fell short of projections.²⁰⁸ If the operator must get government approval for every price change, debt service coverage may be at greater risk.²⁰⁹ Having two national governments involved in addition to the myriad of state/provincial and local agencies in a cross-border project might make price flexibility more complicated.

A critical finance question is: what happens if the project fails financially? In the event of financial failure, what are the procedures for an orderly transition of project completion and/or operation? How much do bondholders lose? Do they have some right to equity in the project if bond payments are not made? While, in most cases the public takes over ownership and control, an orderly process for transfer of management and possible completion of the project must be a part of the initial contract negotiations.²¹⁰ Strong reliance on surety instruments such as completion bonds, maintenance bonds, bond insurance, and escrowed loan-loss reserve pools might take care of the finances, but management transition must also be in place.²¹¹ Financial failure of cross-border facilities might experience an additional layer of complexity in this difficult situation because of the involvement of governments on both sides of the border.

Notwithstanding the myriad of issues regarding financing risk/reward, the United States is still viewed as a safe haven for infrastructure investment work by private financial markets. Likewise it has been opined that one of the largest sources of cross-border capital will be Canada.²¹² Randy Drummer states that in 2011, cross-border investment in real estate reached its highest level in three years.²¹³ “However, hopes for a mass of influx of foreign capital into U.S. property markets by risk/adverse international investors has gone unfulfilled” that may be changing, according to recent separate re-

²⁰⁸ Robert Davis, *City Council Sees Gold in Skyway: Bond Refinancing Plan Paints Rosy Future for Tollway*, CHICAGO TRIBUNE (Apr. 29, 1994), http://articles.chicagotribune.com/1994-04-29/news/9404290252_1_tollway-million-bond-issue-chicago-skyway.

²⁰⁹ See generally *Calculating Debt Service Coverage Ratios, The Source, Utility Enterprise Management: A publication of Advanced Engineering and Environmental Services, Inc.*, (Oct. 2004), <http://www.ae2s.com/pdf/Source/Sept04Source.pdf> (explaining debt service coverage requirements).

²¹⁰ See generally *KCP Contract Transition Plan*, ENERGY.GOV, <http://nnsa.energy.gov/sites/default/files/nnsa/multiplefiles2/SecJAppC.pdf> (last visited Mar. 9, 2012) (describing the process, details, and schedule for providing an orderly project management transition).

²¹¹ See generally *SURETY BONDS*, www.suretybonds.com (last visited Mar. 9, 2012) (defining surety bonds and explaining how the bonds work).

²¹² Randy Drummer, *Safe Haven? Europe's Investment Woes May Push More Offshore Capital to U.S.*, COSTAR GROUP NEWS: NAT'L REAL ESTATE INFORMATION, (Apr. 11, 2012), <http://www.costar.com/News/Article/SAFE-HAVEN-Europes-Investment-Woes-May-Push-More-Offshore-Capital-To-US/137503>.

²¹³ *Id.*

ports from property and portfolio research.²¹⁴ The most active offshore investments in U.S. real estate will be Canadian pension funds, which continue to make significant direct venture investments in the U.S. real estate, as well as Korean pension funds; and Asian and middle-eastern sovereign wealth funds and private capital.²¹⁵

One political problem faced by all kinds of P3 projects relates to the perceived reward-to-risk ratio. If the need for a project is great, but potential developer/concessionaire entities perceive the project to be high risk, they will require a contractual package that gives them the potential for high rewards and/or greater risk sharing on the public side. At the time of contractual negotiations, this will seem fair and necessary for the project to be implemented. However, down the road a few years, public attitudes may have changed. If the project becomes wildly successful, the public side may be attacked for giving up too much. If the project fails, the public side will be attacked for risking too much of the public's resources and causing private lender and investor chaos. Again, a cross-border political situation will be even more complex and require even tighter contractual definition of risk sharing and reward justification.

From an economic perspective, it is better to design projects that attempt to use and perhaps perfect market forces rather than try to use public-private partnerships to bypass the marketplace.²¹⁶ The "build it and they will come" attitude is always risky, and is particularly risky if the public sector takes on too much of the risk and offers giveaways to private concessionaires to induce them to engage in a project that the private sector would not otherwise see as viable. One strategy for ensuring that a project is not "a bridge to nowhere" is to make sure that a variety of stakeholders are each sharing a substantial portion of the risk.²¹⁷ The risk-sharing group should include bond holders, equity shareholders, private financing, government agencies and concessionaires. In essence, each of the parties at risk will conduct a market and financial viability review and scrutinize it from several angles.

For example, mid-risk projects can be "de-risked" without bypassing market forces or covering over potential risk through a tranche or bond financing system.²¹⁸ The lowest tranche is designed to suffer any failure of any aspect of the project to repay.²¹⁹ The lowest tranche must be sold as junk

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ CONTROLLER OF HER MAJESTY'S STATIONARY OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: THE GOVERNMENT'S APPROACH 11-12 (2000).

²¹⁷ *Id.* at 39.

²¹⁸ See American Banker Glossary: Equity Tranche, AMERICAN BANKER, <http://www.americanbanker.com/glossary/e.html> (last visited Mar. 9, 2012).

²¹⁹ *Id.*

status, but the highest tranches might qualify for AAA rating even though the project is mid-risk.²²⁰

Political issues are also critical for cross-border infrastructure development using public-private partnerships. As mentioned in the case examples, projects are long term and need long-term political stability.²²¹ In democratic societies, politicians and agencies come and go and political attitudes and public attitudes change with changing situations. Regardless, countries are seeing true progress and success with P3s. Canada is one such example.

One of the reasons Canada leads in P3 success is that the leadership of its independent agencies was set up to deliver P3s. For example, the former CEO and now Chairman of Partnerships BC, was paid a large salary in 2006 plus expenses but his true monetary incentive was tied to a bonus scheme based in part on the number of P3s undertaken.²²² A second reason is that the provincial governments decide which projects are a priority, which ones might be viable as P3s and then the agencies run the procurements. Third, the projects are not kept off the government's balance sheets; they are reflected in Canadian government's assets and liabilities and are seen as a method of procuring projects rather than a funding source.²²³

IX. CONCLUSION

"The need is there, money is available and state laws are changing to move public-private partnerships forward."²²⁴ In recent years it seems that the public has recognized the imaginative applications of private sector resources to help solve public challenges. P3s have also evolved into additional social/economic benefits. For instance, some P3 contracts require the hiring of local unemployed people to be trained to work on the project. Recently P3s have been examined as using the market process to reform government transportation programs.²²⁵ In recent years P3s have been implemented in several states and raised hundreds of millions of dollars for surface trans-

²²⁰ Tim Ord, *Tranche: Tranche Tiers*, MY STOCK MARKET POWER, <http://www.mysmp.com/bonds/tranche.html> (last visited Mar. 10, 2012).

²²¹ DARRIN GRIMSEY & MERVYN LEWIS, *PUBLIC-PRIVATE PARTNERSHIPS: THE WORLDWIDE REVOLUTION IN INFRASTRUCTURE PROVISION AND PROJECT FINANCE* 235 (2007).

²²² Van Westell, *Why Canada Leads on P3s in Public Works Financing*, 264 *PUB. WORKS FIN. CAN.* 1 (2011)

²²³ *Id.* at 2.

²²⁴ Rick Norman, *Public Private Partnerships are Ready for Takeoff*, *AM. CITY & COUNTRY* (Jan. 1, 2012), <http://americancityandcounty.com/privatization-amp-outsourcing/public-private-partnerships-are-ready-takeoff>.

²²⁵ William G. Reinhardt & Ronald D. Utt, *Can Public-Private Partnerships Fill the Transportation Funding Gap?*, *THE BACKGROUNDER*, Jan. 13, 2012, at 1.

portation. The capital raised through public-private partnerships is beginning to be viewed as a standard method of finance and not as a last resort.

While negative perceptions remain from misunderstandings, myths, poorly structured P3s or P3s done in haste, P3s continue to increase. In the last three years there has been a 50% increase in the number of states that have enacted P3 legislation framework for P3s.²²⁶

For P3s to jump to the next level of project delivery and finance it has been recommended that for any project over a certain size that seeks state or federal assistance that it undergo a formal analysis to utilize the P3 option. In addition Congress should remove or raise their limit on private activity bond volume for all qualified P3 projects.²²⁷ States should enact necessary legislation to accommodate P3s. Such legislation should protect tax payers, encourage private initiative in investment and provide a common framework for all stages of the process. Governments should ensure that the responsible managers and staff are qualified to conclude these complicated deals successfully.

Notwithstanding, legislation or a formalized federal program, the trend toward public-private partnerships is accelerating and having a profound impact on the way government does business.²²⁸ The many projects and risks assumed by both the public and private sector over the last twenty-five years have galvanized into a momentum for change and funding methodology. Nabers opines that “what is new is the sense of urgency now that public entities find themselves facing funding allocations that can no longer cover mandated services or critical needs.”²²⁹ P3s in reality and perception can produce better outcomes, capture private sector innovation, accelerate project delivery, encourage lifecycle cost efficiencies and amass upfront and long term capital for infrastructure.

To remain competitive in the rapidly changing world economy, cross-border trade must be cost and time efficient. The facilities, infrastructure, and technology associated with cross-border trade must be up-to-date and effectively utilized. The sluggish North American economy makes these statements both more critical and more difficult. Slow economic growth makes advancements in facilities, infrastructure, and technology more difficult because tax revenue growth is also slower. The vision for development of cross-border infrastructure must be private investment.

In order to engage in public-private partnerships for infrastructure development, both public and private entities must be stable organizations with strong leaders that can weather long-term vicissitudes and be flexible enough

²²⁶ See Norment, *supra* note 169.

²²⁷ Reinhardt & Utt, *supra* note 225, at 5.

²²⁸ Nabers, *supra* note 150.

²²⁹ *Id.*

to respond to changing situations.²³⁰ On the public side this means that neither political winds nor economic cycles can jostle a government's commitment to its contractual obligations or its desire to have a successful project.

When public-private partnerships are implemented across a sovereign border, stakeholders on both sides of the border must be on the same page concerning their definition of public-private partnerships and the style and structure that will be used. In addition, all of the principles and caveats described above must be extra-carefully addressed.

As a concept and methodology "public-private partnerships" is both old and new. It has a long history but is still maturing, with plenty of room for new innovation. The examples discussed in this paper indicate that when approached with an open mind, and an attitude toward win-win solutions, public-private partnerships projects can help to promote the kind of cross-border projects needed to strengthen the competitiveness of Canada - United States and Mexico - United States.

²³⁰ HM TREASURY, PUBLIC PRIVATE PARTNERSHIPS: THE GOVERNMENT'S APPROACH 48 (2000).