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Where We're Going, We'll Need Roads! Building the Bridge to the Future: Public-Private Partnerships for Future Border Infrastructure Development

Jessica R. Lesnau

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WHERE WE'RE GOING, WE'LL NEED ROADS! BUILDING THE BRIDGE TO THE FUTURE: PUBLIC-PRIVATE PARTNERSHIPS FOR FUTURE BORDER INFRASTRUCTURE DEVELOPMENT

*by Jessica R. Lesnau**

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I. INTRODUCTION

In a world where global economies are increasingly interdependent, the United States, and its North American counterparts, Canada and Mexico, are booming sources of international trade. Now, more than ever, global competitiveness necessitates developments in U.S. infrastructure, especially at major border crossings where congestion and poor infrastructure create bottlenecks interfering with the free movement of goods. Questions pertaining to international border crossings circle the debate at the most crucial international border crossing in North America: the Ambassador Bridge, which spans the Detroit River between Detroit, Michigan, and Windsor, Ontario. A legal bat-

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tle rages over the proposed construction of a new publicly owned bridge that will compete with the eighty-six-year-old privately owned bridge. Many questions surround this topic, including whether the United States may allow the construction of a bridge that competes with a private individual's livelihood. Is there a compelling case for a government taking in favor of public infrastructure? Should a private individual be able to own a major international border crossing? Additionally, in anticipation of construction of a new bridge, what will be the implications for the community that must give up its property to make way for the construction?

This Comment will focus on the conflict over the construction of the New International Trade Crossing (NITC), also known as the "Bridge to the Future," in competition with the Ambassador Bridge and its relevance to the conversation of border infrastructure. It will further demonstrate some of the pitfalls in the private ownership of an international border crossing—as well as some that inhere in government ownership—arguing for a new infrastructure model that promotes collaboration between the public and private sectors. Ultimately, this Article will argue that, like the NITC, future border infrastructure projects should be developed through the use of public-private partnerships (hereinafter "P3s") to promote North American trade development.

II. THE LEGAL BATTLE AT THE AMBASSADOR BRIDGE

Plans to construct the New International Trade Crossing, recently coined the "Gordie Howe International Crossing," a new bridge spanning the Detroit River between Detroit, Michigan, and Windsor, Ontario, by way of a P3 are well underway.¹ However, Matthew "Matty" Moroun, private owner of the Ambassador Bridge and the Detroit International Bridge Company (DIBC) and Canadian Transit Company, has vehemently opposed construction of the NITC Bridge. The conflict between the Ambassador Bridge and the NITC presents timely issues for developing infrastructure projects at international border crossings. One key consideration is the impact of allowing the private sector to own and operate international border crossings. If private ownership of international border crossings is an unsound model, can the government compete with, and ultimately divert, "customers" from this privately owned business?² These are the questions

1. Crossing Agreement, Can.-Mich., June 15, 2012, https://www.michigan.gov/documents/buildthisbridge/Agreement_389284_7.pdf [<https://perma.cc/8SCV-9PJW>] (establishing a P3 between Canada, a Canadian Crossing Authority, and Michigan).

2. This is an interesting question not raised by the case, though an analogous 1848 Supreme Court decision seems to suggest that this type of taking would be permissible under the public-use requirement of the Takings Clause of the Fifth Amendment. *See West River Bridge Co. v. Dix*, 47 U.S. 507 (1848) (holding that a bridge owned by a private company under a charter from the state may be condemned and taken as part of a public road under the laws of that state).

that surround Moroun's battle to protect his bridge company. Indications from the courts seem to signify that the government of Michigan will be permitted to construct a new bridge in direct competition with the privately owned Ambassador Bridge.³ However, DIBC is not the only entity seeking compensation, as the residents whose neighborhood will be condemned to make way for the NITC may be entitled to compensation from the government for their loss.⁴ However, despite the looming legal battle, in the absence of competition considerations, the NITC presents an excellent example of how future infrastructure projects at international border crossings can be realized.

A. *History of the Ambassador Bridge*

In 1909, Canada, by the authority of the United Kingdom, signed and ratified a treaty with the United States to govern the construction of new bridges over the boundary waters between the two countries.⁵ The treaty authorized legislation otherwise known as "special agreements" for the construction of new bridges, specifying that concurrent legislation by the United States Congress and Canada would constitute a "special agreement."⁶ In 1920, the American Transit Company was formed to construct a bridge between Detroit, Michigan, and Ontario, Canada.⁷ The company was formed because, at the time, Michigan automakers sought to connect Canada and the Midwest, but neither Detroit nor Ontario would provide funding for the project.⁸ In 1921, both the United States Congress and the Canadian Parliament passed separate legislation granting the American Transit Company the rights to construct, operate, and collect tolls on the proposed bridge.⁹ The U.S. statute (commonly referred to as the Detroit International Bridge Company (DIBC) Act) granted congressional consent for construction of the bridge to the American Transit Company and

3. See *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70 (D.D.C. 2015) (order dismissing all but one of DIBC's claims against the governments of the United States and Canada), *amended on denial of reconsideration*, 189 F. Supp. 3d 85 (D.D.C. 2016).

4. H. Adam Cohen & Jason C. Long, *Bridging the Gap: Just Compensation for Condemnees' Business Damages and the New International Trade Crossing*, 42 MICH. REAL PROP. REV. 3, 3 (2015).

5. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 77; see also Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448, 2449-50 [*hereinafter* Boundary Waters Treaty] (declaring that any new uses, obstructions, or diversions of boundary waters require approval by an international Joint Commission).

6. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 77-78.

7. *Id.* at 78.

8. Luiza Ch. Savage, *Land of the Freeloaders: The Battle for a New Cross-Border Bridge*, MACLEAN'S (May 21, 2015), <http://www.macleans.ca/news/canada/land-of-the-freeloaders-the-battle-for-a-new-cross-border-bridge/> [<https://perma.cc/PL33-DDAF>] (citing PHILIP P. MASON, *THE AMBASSADOR BRIDGE: A MONUMENT TO PROGRESS* 48, 52 (Wayne State University Press, Great Lakes Books ed. 1987)).

9. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 78.

its successors, designating that the bridge be constructed “within or near the city limits of Detroit.”¹⁰ After the failure of the American Transit Company, supporters of the bridge sought the expertise of New York businessman Joseph A. Bower. Bower raised the twelve million dollars needed to fund the project, and in 1927 the American Transit Company transferred its rights and assets to DIBC.¹¹ That same year, the United States Department of State sent a letter to DIBC stating that the DIBC Act was a “special agreement” under the Boundary Waters Treaty; thus, the bridge would not require approval of the International Joint Commission.¹² However, construction of the bridge was met with opposition as the mayor of Detroit, John Smith, sued to halt construction out of concern that a crucial piece of infrastructure would be privately owned.¹³ Despite the mayor’s opposition, the city of Detroit voted to allow the bridge to be owned and funded by a private company.¹⁴

After two years of construction, the bridge opened for traffic on November 11, 1929.¹⁵ Under the financial burden of the Great Depression, tolls did not cover the costs of operating the bridge, and in 1939 DIBC was listed on the New York Stock Exchange as a public company.¹⁶ DIBC continued as a publicly traded company until 1979 when Matthew Moroun’s family bought out the company’s shareholders (including noteworthy investor Warren Buffet) and privatized the company.¹⁷ In 1995 the Ambassador Bridge became part of the national highway system.¹⁸ Since then, DIBC has benefited from \$230 million in congressional authorizations for highway expansion projects linking the bridge to the Interstate Highway and State Highway Systems in Michigan.¹⁹ As of 2014, Mr. Moroun had amassed a \$1.7 billion fortune, and Forbes Magazine listed him as the 373rd wealthiest person in America.²⁰ The Ambassador Bridge is arguably the most important international border crossing in the United States. According to a 2002 Federal Highway Administration Report, it is the single busiest international land border crossing in North America and ac-

10. *Id.* (quoting Act of Mar. 4, 1921, ch. 167, Pub. L. No. 66-39566th, § 1, 41 Stat. 1439 (1921)).

11. *Id.* at 79; Savage, *supra* note 8.

12. *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d at 79.

13. Savage, *supra* note 8.

14. *Id.*

15. *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d at 78.

16. Savage, *supra* note 8.

17. *Id.*

18. *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d at 79.

19. Savage, *supra* note 8.

20. *Id.*

commodates twenty-seven percent of the nearly \$400 billion in annual trade between Canada and the U.S.²¹

The terrorist attacks of September 11, 2001, exposed a major weakness in the Ambassador Bridge. After the attacks, the international border was closed, and thousands of trucks were stuck along the roads on the Canadian side.²² “It was a stark demonstration of how crippling it would be if there were a long-term problem with the [eighty-six-year-old] Ambassador Bridge—especially in an era of ‘just-in-time’ inventory systems.”²³ After these events, groups began to develop plans for an alternative bridge that would be more conducive to the modern mass movement of goods between the United States and Canada.²⁴ Planners conducted exhaustive studies to determine the growth of traffic demands at the Detroit-Windsor corridor, concluding that a new bridge was necessary to accommodate cross-border volume.²⁵ Eventually, planners chose a location only two miles downriver from the Ambassador Bridge for the possible location of the new bridge that would come to be known as the “New International Trade Crossing” or “NITC.”²⁶

This was the beginning of Moroun’s battle to continue the viability of his immensely profitable business, as a new, competing bridge would divert traffic—and ultimately money—away from the Ambassador Bridge.²⁷ To confront the plan to build a new bridge, DIBC developed a plan of its own: it would build a “twin span” next to the existing bridge, adding six more lanes.²⁸ However, proponents of the NITC bridge cited issues that the Ambassador Bridge caused in downtown Windsor, as truckers are required to stop at eighteen traffic lights in order to reach the bridge, creating problems for truckers and city residents alike.²⁹ Canada ultimately announced it would provide *all* necessary capital for the NITC, which would be funded and operated through a P3 between private investors, Canada, and the State of Michigan.³⁰

21. *Ambassador Bridge Crossing Summary*, FED. HIGHWAY ADMIN., U.S. DEPT. TRANSP., http://www.ops.fhwa.dot.gov/freight/freight_analysis/ambass_brdg/ambass_brdg_ovrvw.htm [<https://perma.cc/A887-SUVN>].

22. Savage, *supra* note 8.

23. *Id.*

24. *Id.*

25. See MICH. DEP’T OF TRANSP. & FED. HIGHWAY ADMIN., DETROIT RIVER INTERNATIONAL CROSSING PROJECT: DRAFT PURPOSE AND NEED 2 (June 2005), http://www.partnershipborderstudy.com/pdf/Purpose_and_Need_2.pdf [<https://perma.cc/9XS9-2CVF>].

26. Savage, *supra* note 8.

27. Pl.’s 3d Am. Compl. at 5, *Detroit Int’l Bridge Co. v. Gov’t of Canada*, 133 F. Supp. 3d 70 (D.D.C. 2015) (No. 10-cv-476-RMC) (“Studies . . . estimate that up to 75% of the Ambassador Bridge’s truck traffic and up to 39% of its passenger traffic will be diverted to the NITC/DRIC.”).

28. *Id.* at 3–4; Savage, *supra* note 8.

29. Savage, *supra* note 8.

30. Crossing Agreement, *supra* note 1 at 2–3.

In May 2010, the Michigan House of Representatives passed a bill authorizing the creation of a P3 to build the bridge, but Republicans who controlled the state senate feared Michigan taxpayers would end up footing the bill.³¹ As Michigan prepared for the November 2010 elections, the Moroun family spent \$1.5 million in political contributions to Michigan state and federal congressional candidates in an attempt to halt construction of a competing bridge.³²

A great deal of controversy surrounds Moroun's private ownership of the Ambassador Bridge. In 2010, the Wayne County Michigan Circuit Court granted the Michigan Department of Transportation partial summary judgment in its breach of contract claim against DIBC for its refusal to comply with an agreement for the "Gateway Project."³³ Under the terms of the agreement, DIBC was to connect the Ambassador Bridge to Interstates 75 and 96 and complete other improvements on the bridge.³⁴ Subsequently, in 2012, the court held DIBC in contempt and ordered Moroun and the company's chief deputy to be imprisoned for their failure to comply with court orders.³⁵ Many have alleged that the reason for Moroun's non-compliance was his desire to push traffic past his duty-free fuel pumps, the profits of which are pocketed by DIBC and Moroun.³⁶ This controversy is mentioned to highlight the concerns expressed by many about DIBC's private ownership, as oversight of compliance with necessary expansion projects—in the case of a government-owned bridge—would typically be governed by state authorities.

While DIBC does not hold a monopoly over the Detroit-Windsor border crossing, there are currently no close substitutes to the bridge for moving goods across the border.³⁷ The majority of commercial traffic passes over the Ambassador Bridge because commercial trucks carrying oversized loads are not permitted to pass through the nearby Detroit-Windsor Tunnel.³⁸

31. Savage, *supra* note 8.

32. *Id.*

33. Mich. Dep't of Transp. v. Detroit Int'l Bridge Co., No. 09-015581-CK, Opinion and Order at 3 (Wayne Cnty. Cir. Ct., Mar. 8, 2012).

34. Detroit Int'l Bridge Co. v. Mich. Dep't of Transp., 298276, 2011 WL 6058037, at *1 (Mich. Ct. App. Dec. 6, 2011).

35. Brief of Appellees at 1–2, *In re Moroun*, 814 N.W.2d 319 (Mich. Ct. App. 2012) (No. 308053).

36. See Matt Helms & John Gallagher, *Mich. Billionaire, 84, Jailed over Bridge Dispute*, USA TODAY (Jan. 12, 2012, 1:35 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-01-12/michigan-canada-ambassador-bridge/52517112/1> [<https://perma.cc/XK3L-FFBZ>].

37. William P. Anderson, *The Windsor-Detroit Crossing: Issues in P3s When Infrastructure Crosses Borders* 4 (Laurier Ctr. for Econ. Res. & Pol'y Analysis, Research Paper 2010-05, June 2010), http://www.lcerpa.org/public/papers/APGCI_LCERPA%202010-05.pdf [<https://perma.cc/9549-5RBX>].

38. See MICH. ST. POLICE TRAFFIC SAFETY DIV., BORDER CROSSING GUIDE FOR COM. TRUCK DRIVERS 10 (2008), http://www.truckingsafety.org/Portals/0/GuideBooks/Border_Crossing_Guide.pdf [<https://perma.cc/S2PF-94WD>].

B. *Detroit International Bridge Company v. Government of Canada*

A discussion of the case brought by Moroun against the governments of Canada and the United States serves multiple purposes. First, it illustrates Moroun's protracted legal battle to maintain control of one of North America's most vital and profitable border crossings. Second, the issues raised by the case demonstrate the many legal theories on which a private entity may attempt to prevent the government from interfering with its potential property interests; namely, how private interests might be superseded by public interests. Third, the district court's dismissal of almost all of Moroun's claims against the government lends support to the arguments of NITC proponents in what seems to be the general sentiment: that an increase in trade through the pivotal Windsor-Detroit gateway necessitates construction of a new bridge that can accommodate increases in cross-border traffic.³⁹

1. Procedural History

Anticipating a massive threat to his profitable enterprise, Moroun and DIBC filed suit in March 2010 in the Federal District Court for the District of Columbia, naming as defendants the government of Canada, the United States of America, the United States Federal Highway Administration, the United States Coast Guard, and the Michigan Department of Transportation, among others.⁴⁰ DIBC sued for what it alleged were violations of its exclusive franchise right to own and operate a bridge between Detroit and Windsor.⁴¹ In July 2010, DIBC filed a voluntary dismissal of the government of Canada, believing that the Michigan legislature had blocked construction of the NITC.⁴² However, efforts to construct the NITC resumed as the proposed crossing had received the necessary permits from the United States government.⁴³ DIBC filed a second amended complaint in February 2013. Then, in May 2013, DIBC filed its Third Amended Complaint against all previously named authorities, adding the United States Department of State (and Secretary of State) and setting forth nine counts against the Federal Defendants.⁴⁴

39. See, e.g., *History of the Detroit River International Crossing (DRIC)/New International Trade Crossing (NITC) Project*, WINDSOR DET. BRIDGE AUTHORITY, <https://www.wdbridge.com/en/history> [<https://perma.cc/MA9R-DMUP>].

40. Pl.'s Compl. at 4, *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70 (D.D.C. 2015) (No. 1:10-cv-00476-RMC).

41. *Id.* at 1–2.

42. *Detroit Int'l Bridge Co. v. Gov't of Canada*, 53 F. Supp. 3d 1, 12 (D.D.C. 2014).

43. Presidential Permit Authorizing Michigan to Construct, Connect, Operate, and Maintain a Bridge Linking Detroit, Michigan, and Windsor, Ontario, 78 Fed. Reg. 25521 (May 1, 2013).

44. Third Amended Complaint, *Detroit Int'l Bridge Co. v. Gov't of Canada*, No. 1:10-cv-00476-RMC (D.D.C., filed May 29, 2013).

On May 30, 2014, a district judge for the District of Columbia issued an opinion on DIBC's fourth count, dismissing DIBC's allegations that the United States Coast Guard was arbitrary and capricious in failing to issue a navigational permit for DIBC's plan to add a twin span to the bridge,⁴⁵ a decision that was appealed and dismissed as moot because the Coast Guard later issued the permit.⁴⁶ The district court then issued a second opinion on September 30, 2015, dismissing all but one of the eight remaining counts alleged by DIBC.⁴⁷

2. Relevant Facts

In the International Bridge Act of 1972 (IBA), Congress for the first time granted consent for the "construction, maintenance, and operation of international bridges" without requiring congressional legislation.⁴⁸ The IBA has several requirements for construction of an international bridge including: foreign country consent, compliance with the 1906 Bridge Act, and a set of Executive Branch approvals as specified below:

[For] a State . . . to enter into agreements (1) with the Government of Canada, a Canadian Province, or a subdivision or instrumentality of either, in the case of a bridge connecting the United States and Canada . . . for the construction, operation, and maintenance of such bridge in accordance with the applicable provisions of this subchapter. The effectiveness of such agreement shall be conditioned on its approval by the Secretary of State.⁴⁹

The IBA also requires presidential approval, stating that the President shall "secure the advice and recommendation of . . . the heads of such departments and agencies of the Federal Government as he deems appropriate to determine the necessity of such bridge."⁵⁰ DIBC stated that it had been trying to obtain the necessary federal permits to build an addition—the "New Span"—with the goal of updating facilities, reducing costly maintenance, and improving the efficiency of traffic flow on either side of the border.⁵¹ Around the same time (late 2000) the Canadian Ministry of Transport, Infrastructure, and Communities along with the Michigan Department of Transportation, the

45. *Detroit Int'l Bridge Co.*, 53 F. Supp. 3d 1.

46. *Detroit Int'l Bridge Co. v. Gov't of Canada*, 2016 U.S. App. LEXIS 6187 (D.C. Cir. Apr. 4, 2016).

47. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d 70, 109 (D.D.C. 2015). In her opinion on motion for rehearing Judge Collyer reaffirmed her previous dismissal of several of DIBC's counts. *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 110 (D.D.C. 2016).

48. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 79; see also International Bridge Act of 1972, 33 U.S.C. §§ 535–535i (2012).

49. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 79–80 (quoting 33 U.S.C. § 535(a)).

50. *Id.* at 80 (quoting 33 U.S.C. § 535(b)).

51. *Id.*; see also State of Michigan's New International Trade Crossing Presidential Permit Application, U.S. DEP'T STATE (June 18, 2012), <http://www.state.gov/documents/organization/194997.pdf> [<https://perma.cc/A7K7-9HT8>].

provincial Ontario Ministry of Transportation, and the U.S. Federal Highway Administration formed the Ontario-Michigan Border Transportation Partnership, which ultimately became the Detroit River International Crossing Partnership.⁵²

3. Detroit International Bridge Company's Relevant Complaints Against Federal Defendants

a. Violation of the Foreign Compact Clause

DIBC's first count alleged that the Crossing Agreement was invalid because it violated the foreign compact clause of the U.S. Constitution, which gives states the authority, with the consent of Congress, to enter into agreements (compacts) with other states or foreign powers.⁵³ DIBC alleged that the IBA was an unconstitutional delegation of congressional power, requesting that the court declare the crossing agreement to be void and unenforceable because it could not be approved by the Secretary of State and had not been approved by Congress.⁵⁴ However, the court agreed with the Federal Defendants and confirmed that Congress may delegate power to the Executive Branch so long as there is "an intelligible principle to which the person or body authorized to [act] is directed to conform."⁵⁵

The court went on to note that the IBA conditions agreements with Mexico or Canada on Department of State approval, otherwise, congressional action (contrasted with a presidential permit) would be required for every proposed international bridge.⁵⁶ Additionally, in demonstrating that the delegation was, in fact, guided by an intelligible principle, the court pointed out that in passing the IBA, Congress adopted the Department of State's advice in order to insert the necessary guidance into the Act.⁵⁷ The court also pointed to the Supreme Court's statements giving deference to congressional policy decisions in the context of foreign affairs, as it "must of necessity paint with a brush broader than that it customarily wields in the domestic area."⁵⁸ Accordingly, the court dismissed DIBC's claim of a violation of the foreign compact clause because of Congress' delegation of power in the IBA.⁵⁹

52. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 83.

53. *Id.*; U.S. CONST. art. I, § 10, cl. 3.

54. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 85.

55. *Id.* at 86 (quoting *TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir.2006)).

56. *Id.*

57. *Id.*; see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

58. *Detroit Int'l Bridge Co.*, 133 F. Supp. 3d at 87 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

59. *Id.*

b. Declaratory Judgment as to Plaintiff's Franchise Rights

DIBC also alleged that it had an "exclusive statutory and contractual franchise right . . . to construct, maintain, and operate an international bridge between Detroit and Windsor," including a franchise right to construct the New Span.⁶⁰ Ultimately, the court decided that DIBC *did* have a private right of action, but that DIBC had no *exclusive* franchise right. The court noted that there is a presumption that the "law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."⁶¹ The IBA did not indicate that Congress intended to enter into a contract with DIBC, thus requiring mutuality of obligation.⁶² Accordingly, the right to repeal the legislation was expressly reserved to Congress.

The more pressing question as to franchise rights was whether Congress created a private right of action in DIBC itself; since the DIBC Act was silent as to this right, the only way it could exist was by implication.⁶³ The court further noted that DIBC was granted a time-constrained right to build a bridge, but that right was not a *requirement* that DIBC actually build or operate the bridge.⁶⁴

The court also clarified that exclusive rights to franchises are not favored, and in the rare event that they are granted, "they will be protected, but they will never be presumed."⁶⁵ In holding that DIBC's franchise rights were not exclusive, the court emphasized that the federal government has a legitimate interest in promoting trade and travel between the United States and Canada and that "[a]ny limitation on Congress's power to authorize construction of another bridge . . . must be evident in the DIBC Act by an express grant of exclusivity."⁶⁶ In dismissing DIBC's second count, the court reasoned that though the competing NITC could potentially diminish profitability of the Ambassador Bridge, that argument was not enough to support DIBC's franchise claims.⁶⁷

Count three was also dismissed and the court found that with no grant of exclusive franchise right, DIBC's allegations of a contractual right to build a new span was "reduced to a complaint about unfair increased competition and reduced profit margins."⁶⁸ Consequently, the construction of the competing NITC could not be a violation of

60. *Id.*

61. *Id.* at 89 (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)).

62. *Id.*

63. *Id.* at 90.

64. *Id.* at 92.

65. *Id.* (quoting *Wright v. Nagle*, 101 U.S. 791, 796 (1879) (holding that the government should never be presumed to have surrendered its power)).

66. *Id.* at 94.

67. *Id.* at 95.

68. *Id.*

DIBC's right to build a new span, even if the economic purpose for doing so was threatened.⁶⁹

c. *Declaratory Judgment as to Uncompensated Taking of Private Property*

DIBC sought a declaratory judgment that the government's actions were a taking of private property rights without just compensation in violation of the Fifth Amendment; but the fatal flaw of this argument was that DIBC did not seek any form of monetary relief.⁷⁰ Therefore, according to the Tucker Act, only equitable (and not monetary) relief could be provided to DIBC; thus, the court lacked jurisdiction to hear the claim.⁷¹ DIBC argued that the taking was unconstitutional because the government was, in essence, transferring its private property to a competing commercial venture that could be enjoined without regard to whether compensation was provided.

DIBC emphasized the unconstitutionality of a taking for private purposes as "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party, *B*, even though *A* is paid just compensation."⁷² The court agreed but clarified that a state may transfer property from one private party to another if future use by the public is the purpose of the taking, reasoning that the NITC will be a bridge accessible to the general public, owned and operated by sovereigns and *not* private entities.⁷³

The fact that the NITC/DRIC, if completed, will be a competitor for traffic that previously crossed the Ambassador Bridge does not turn the current sovereign actions of U.S. government entities into *private* commercial ventures. Because the alleged taking is not *per se* unconstitutional, *i.e.*, one for private purposes, [DIBC] must seek a Tucker Act remedy in the Court of Federal Claims.⁷⁴

Accordingly, the court stated DIBC would have to allege a noncompensable taking with no assurance of adequate compensation in the event of a future taking.⁷⁵ Therefore, because DIBC could present a Tucker Act claim in the Court of Federal Claims, it could not sue for equitable relief in federal district court and its claim was dismissed.⁷⁶

69. *Id.*

70. *Id.* at 95–96.

71. *Id.* at 95–98 (citing Tucker Act, 28 U.S.C. § 1491 (2012)).

72. *Id.* at 97 (quoting *Kelo v. City of New London*, 545 U.S. 469, 477 (2005)).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 98.

d. *Administrative Procedure Act Claims Based on Issuance of Presidential Permit*

In its sixth count, DIBC argued that the “State Department’s decision to grant a Presidential Permit . . . was contrary to law, arbitrary and capricious, and in excess of statutory authority”⁷⁷ The Federal Defendants responded by asserting that DIBC lacked Article III standing according to the Supreme Court’s decisions in *Lujan* and *Sebelius*.⁷⁸

DIBC had no difficulty supporting the allegations in its complaint that construction of a competing bridge would cause an immediate economic injury as a result of lost traffic and toll revenues, citing studies of U.S. and Canadian supporters of the NITC estimating that up to seventy-five percent of the Ambassador Bridge’s truck traffic and thirty-nine percent of its passenger traffic would be diverted by a competing bridge.⁷⁹ Despite the federal defendant’s arguments to the contrary, the court granted standing as to DIBC’s sixth and seventh counts.⁸⁰

The Federal Defendants argued that the permit for the NITC/DIBC was an unreviewable presidential action, further reasoning that the Department of State had power to issue the permit under Executive Order 11423 through the President’s inherent constitutional power to regulate foreign powers.⁸¹ Ultimately, the court concluded that the issuance of a permit was a presidential action not reviewable under the Administrative Procedures Act (APA).⁸² Though the APA is silent as to the President’s status as an “agency” under the Act, the court was quick to note that “textual silence is not enough to subject the President to the provisions of the APA,” and an express authorization by Congress is needed before assuming the President’s performance of duties would be reviewable.⁸³ Therefore, presidential discretionary acts are not reviewable under the APA.⁸⁴

77. *Id.*

78. *Id.* See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (reciting the standing requirements that a plaintiff establish (1) an actual ‘injury in fact’ occurred; (2) the injury is traceable to the actions of the defendant; and (3) a favorable decision is likely to redress the injury); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1279 (D.C. Cir. 2012) (requiring that the future injury to a party be imminent and the plaintiff demonstrate a “personal stake in the outcome of the controversy.”).

79. *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d at 99.

80. *Id.* at 100.

81. *Id.* at 101.

82. *Id.*

83. *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 78, 800–01 (1992)).

84. *Id.*

The President maintains authority to approve bridges through Executive Order 11423.⁸⁵ In the same vein, DIBC maintained that the President’s authority to approve bridges derived not from inherent constitutional authority, but rather from a grant of authority by Congress and the IBA.⁸⁶ However, as the court noted, the IBA requires presidential *approval* and not presidential permits, as only Executive Order 11423 sets procedures for permits.⁸⁷ Naturally, the President maintains inherent constitutional authority over foreign relations and can thus delegate authority to other agencies; in such a manner the President delegated authority to the Department of State to issue cross-border permits.⁸⁸ The necessary converse of this delegation of power by the President is that he also retains the power to modify, amend, suspend, or revoke any permit issued under his authority.⁸⁹ Effectively, such review of presidential acts, argued the court, would violate the separation-of-powers principle and require the President to personally decide each international bridge permit.⁹⁰ For these reasons, the court denied DIBC’s sixth count.⁹¹ DIBC’s seventh count—alleging that the United States Department of State’s approval of the Crossing Agreement was arbitrary, capricious, or an abuse of discretion—was ultimately dismissed on summary judgment.⁹² The court has

85. *Id.* (citing Exec. Order No. 11,423, 33 Fed. Reg. 11741 (Aug. 16, 1968)) (requiring the consultation of the Secretary of the Treasury, Secretary of Defense, Attorney General, and Secretary of Transportation).

86. *Id.* at 101–02.

87. *Id.* at 102.

88. *Id.*; *see also* Nat. Res. Def. Council, Inc. v. U.S. Dep’t of State, 658 F. Supp. 2d 105, 109 (D.D.C. 2009).

89. *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d at 103.

90. *Id.*

91. *Id.* The court also denied counts eight and nine of DIBC’s third amended complaint. Count eight, requesting judicial review of *ultra vires* and unlawful action, was dismissed because DIBC could not clearly cite an instance where the Federal Defendants acted in excess of statutory powers or prohibitions. *Id.* at 107. In count nine, DIBC alleged equal protection claims based on disparate treatment, but the court determined that DIBC and proponents of the NITC/DRIC were not similarly situated, reasoning, “[t]he fact that two independent federal agencies have granted or denied entirely distinct regulatory approvals at a similar point in time does not establish a viable equal protection claim.” *Id.* at 107–08.

92. *Detroit Int’l Bridge Co. v. Gov’t of Canada*, 192 F. Supp. 3d 54, 81 (D.D.C. 2016). In its seventh count, DIBC maintained that USDS acted in violation of the APA in its approval of the crossing agreement because the agreement has no basis in Michigan law. Third Amended Complaint at 107, *Detroit Int’l Bridge Co. v. Gov’t of Canada*, No. 1:10-cv-00476-RMC (D.D.C., filed May 29, 2013). However, in their December 2015 motion for summary judgment on Plaintiff’s-count seven, the Federal Defendants argued the legality of the crossing agreement under Michigan law, pointing to express confirmations by the Governor of Michigan and the Michigan Attorney General’s Office. Motion for Summary Judgment on Count Seven of Plaintiffs’ Third Amended Complaint and Memorandum in Support at 2, *Detroit Int’l Bridge Co. v. Gov’t of Canada*, No. 1:10-cv-00476-RMC (D.D.C., filed Dec. 22, 2015); *see also* Brief for Michigan Governor Richard D. Snyder as Amicus Curiae at 5, *Detroit Int’l Bridge Co.*, 133 F. Supp. 3d 70 (D.D.C. 2015) (No. 10-cv-476-RMC),.

since entered final judgment on all of DIBC's claims.⁹³

C. *Implications of the NITC Bridge Construction and Other Property Interests*

Having received unfavorable rulings on all of DIBC's complaints, it appears, at least for now, that the construction of the NITC will move forward despite Matthew Moroun's tireless efforts to protect his profitable interest in the Ambassador Bridge.⁹⁴ However, the property interests of another group affected by the planned construction of the NITC remain at stake. While the NITC is a highly anticipated project for many, it does not come without a cost. Concerns of eminent domain are a significant implication of the NITC construction and will be equally significant in future border infrastructure projects modeled after the NITC.

As the NITC construction advances, residents of Detroit's Delray neighborhood, through which the NITC is planned to run, will almost certainly be expelled from their community to make way for the bridge—a prospect that has many residents divided.⁹⁵ The Delray neighborhood—once a thriving immigrant community—has transformed into a post-industrial dumping ground and the proverbial pariah of Detroit, its population having dwindled from roughly 23,000 at its peak in the mid-1800s, to only 2,000 in 2012.⁹⁶ A community in major decline, most Delray residents live below the poverty line.⁹⁷ Construction of the NITC will necessitate the demolition of a large portion of Delray, but in return the government of Michigan assures it will offer compensation to residents and business owners through eminent domain. While some residents anticipate generous compensation for their properties, others remain wary of Michigan's promises.⁹⁸

Adam Cohen and Jason Long, two prominent Michigan attorneys specializing in representing property owners in eminent domain matters, argue that the implications of the NITC may not be as promising as some local business owners might hope when they seek “just compensation.”⁹⁹ Because the NITC will likely result in condemnation of a substantial part of the neighborhood, many business owners will be

93. *Detroit Int'l Bridge Co. v. Gov't of Canada*, No. 1:10-cv-00476-RMC (D.D.C., filed Aug. 24, 2016) (order to enter final judgment).

94. John Gallagher, *Bridge Chairman Vows Project Will Finish on Time*, DETROIT FREE PRESS (Jan. 18, 2016, 3:07 PM), <http://www.freep.com/story/money/business/michigan/2016/01/16/windsor-detroit-bridge-duncan-trudeau/78793016/> [<https://perma.cc/3NRH-P523>].

95. See Danielle Trauth-Jurman, *The Story of Delray: A Case Study on Environmental and Restorative Justice in Detroit 5* (Bowling Green St. U., Honors Projects Paper 124, Spring 2014), <http://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1121&context=honorsprojects> [<https://perma.cc/6U5C-PXXB>].

96. *Id.* at 6.

97. *Id.* at 7.

98. *Id.* at 9–10.

99. Cohen & Long, *supra* note 4, at 3–4.

unable to relocate because of cost. Cohen and Long argue that business owners should be able to receive just compensation for loss of going concern in addition to lost profits.¹⁰⁰ According to Cohen and Long, in the event of a taking by eminent domain, Michigan's existing legal standards "will fail to do justice as business owners who lose profits due to takings will not be placed in the same positions they would have occupied had their business properties not been taken in the first place."¹⁰¹

Many Delray residents anticipated these and other implications of the NITC, filing suit to block its construction in 2010.¹⁰² Community organizers joined forces with DIBC in the litigation to challenge the Federal Highway Administration's selection of the Delray neighborhood as the location for the new customs plaza of the NITC.¹⁰³ However, rather than citing issues of compensation, the litigants asserted violations of the National Environmental Policy Act, an argument that the Sixth Circuit ultimately rejected in affirming the district court's decision.¹⁰⁴

In sum, Matthew Moroun's legal battle against the U.S. government demonstrates the conflict between the Ambassador Bridge and the NITC as extremely relevant to the future of border infrastructure projects. This is especially true given the importance of the Detroit-Windsor corridor to North American trade. Moreover, the district court's opinion highlights the state of the law surrounding border infrastructure development, as well as the federal government's overarching power to regulate it. These issues demonstrate, now more than ever, the necessity for cooperation between the public and private sectors in future border infrastructure projects.

III. PUBLIC-PRIVATE PARTNERSHIPS FOR FUTURE INFRASTRUCTURE AT INTERNATIONAL BORDER CROSSINGS

The many legal impediments that DIBC faced—and continues to face—in its ownership of an international border crossing and its attempts to stymie a competing bridge beg the question: Who should own, operate, and fund international border crossings, and what is the best model for such an undertaking? This Author contends that P3s, the mechanism being used to develop the NITC, are a sound model

100. *Id.* at 6 ("going concern . . . which represents the intangible value of a business and is not limited to hard assets, is available where a business is dependent on its particular location and cannot be transferred") (citing *Dep't of Transp. v. Campbell*, 438 N.W.2d 267 (Mich. Ct. App. 1988)).

101. *Id.* at 8.

102. *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 858 F. Supp. 2d 839 (E.D. Mich. 2012), *aff'd*, 756 F.3d 447 (6th Cir. 2014).

103. *Id.* at 451.

104. *Id.* at 451–52, 466–77.

for future border infrastructure projects, which become increasingly necessary as the U.S. seeks to remain competitive in the international trade market.

Especially important to U.S. competitiveness is the need for cross-border trade promotion with Canada and Mexico. For example, experts at the Council on Foreign Relations underscore the necessity of bolstering economic competitiveness through the unimpeded movement of goods and services across borders.¹⁰⁵ The need for the free movement of goods in North America is evidenced by the interconnectedness of manufacturers; that is, intra-regional transfers among the U.S., Canada, and Mexico accounted for forty-eight percent of North America's total exports in 2012.¹⁰⁶ Experts point to substantial increases in North American regional integration as indicative of the recent shift toward continent-wide production.¹⁰⁷ They argue that upgrades to border infrastructure are crucial to this process and emphasize the ability to “compete in a dynamic and competitive world economy . . . by [] enhanced economic ties with Canada and Mexico.”¹⁰⁸

At the forefront of the infrastructure improvement policy discussion are P3s—an innovative strategy for leveraging private capital to fund public infrastructure projects. P3s can initiate with government identification of a project and designation of a P3 as the means by which the project will be designed, constructed, financed, and operated.¹⁰⁹ Alternatively, they can be initiated through proposals from the private sector to government agencies for purposes of constructing a public structure.¹¹⁰ Successful P3s are generally characterized by: “(1) the sharing of complementary powers and expertise, and (2) the sharing of risks and rewards.”¹¹¹

From a microeconomics perspective on P3s for highway projects, Joseph Kile describes “public-private partnerships” as “a variety of alternative arrangements for [infrastructure] projects that transfer more of the risk associated with and control of a project to a private partner.”¹¹² A more expansive definition includes “any contractual arrangement [between a public sector entity and a private company]

105. See COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 71: NORTH AMERICA 29, 67 (2014), (available at <http://www.cfr.org/north-america/north-america/p33536> [<https://perma.cc/V5KL-G5RY>]).

106. *Id.* at 31.

107. *Id.*

108. *Id.* at 29.

109. David Lick & Roger E. Hamlin, *Public-Private Partnerships for Promotion of Cross-Border Trade and Transportation*, 37 CAN.-U.S. L.J. 171, 174 (2012).

110. *Id.*

111. *Id.* at 172.

112. *Public-Private Partnerships for Highway Projects: Testimony before the Panel on Public-Private Partnerships H. Committee on Transportation and Infrastructure*, 113th Cong. 2 (2014) (statement of Joseph Kile, Assistant Director for Microeconomic Studies (2014),

that transfers more risk from the public sector to the private sector”¹¹³ To convey a general idea of the process, scholars at the Brookings Institute provide nine recommendations for executing P3s:

- (1) create a strong legal framework at the state level; (2) prioritize projects based on quantifiable public goals; (3) pick politically smart projects; (4) understand what the private sector needs; (5) find the right revenue stream; (6) create a clear and transparent process; (7) build an empowered team; (8) actively engage with stakeholders; and (9) monitor and learn from the partnership.¹¹⁴

The “design-build-finance” approach to P3s is often pointed to as one of three optimal model for highway projects.¹¹⁵ Under this approach, “the private partner provides the necessary up-front capital and is generally repaid through tolls or by a state or local government in a series of installments.”¹¹⁶

With increases in North American trade interdependency and a disparity in public capital, it is difficult to imagine the possibility of developing cross-border infrastructure without some type of sustainable economic model.¹¹⁷ Fortunately, P3s present a sustainable model to couple private capital with government entities for improving crucial border infrastructure and increasing trade.¹¹⁸

A. *Benefits of the Public-Private Partnership*

Like all major undertakings of this nature, the parties entering into a P3 must have a thorough understanding of the complexities and risks inherent in the process. However, if executed properly, P3s create major benefits for both public and private sectors—generating a shared revenue stream over time.¹¹⁹ Collaboration between the public and private sectors means harnessing not only private-sector capital, but also private-sector expertise, including access to technologies, materials, and management techniques that might exceed the capabilities of government agencies.¹²⁰ This advantage can lead to increased operational efficiency for projects, enhanced building methods, and faster completion of projects.¹²¹

05-kile.pdf [https://perma.cc/A2U6-5E56] [hereinafter *Public-Private Partnerships for Highway Projects*].

113. *Id.*

114. PATRICK SABOL & ROBERT PUENTES, PRIVATE CAPITAL, PUBLIC GOOD: DRIVERS OF SUCCESSFUL INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS 3 (Brookings Metropolitan Infrastructure Initiative, Dec. 2014), https://www.brookings.edu/wp-content/uploads/2016/07/BMPP_PrivateCapitalPublicGood.pdf [https://perma.cc/D8C9-M6YW].

115. *Public-Private Partnerships for Highway Projects*, *supra* note 112, at 3.

116. *Id.*

117. See Lick & Hamlin, *supra* note 109, at 178–79.

118. *Id.* at 179.

119. *Id.*

120. SABOL & PUENTES, *supra* note 114, at 10.

121. *Id.*

Moreover, though P3s do not present the most inexpensive method of developing infrastructure,¹²² they can create better value for the public dollar in numerous ways:

Driven by the need to deliver profit to investors and shareholders, the private sector is less tolerant of cost overruns and project delays than the public sector. Therefore, transferring construction, operational, and/or demand risk to the private sector can result in quantifiable savings for the public sector, as taxpayers or ratepayers do not bear the costs if the project takes longer than expected to complete, goes over budget, or underperforms. . . . These might not be the cheapest options in the *short term*, but have the potential to drive savings over the *long term* through decreased energy usage, lower maintenance costs, or enhanced resiliency.¹²³

Through P3s, infrastructure projects can be developed or improved without ceding public ownership.¹²⁴ Thus, the government entity can maintain oversight of the asset to ensure proper use while also having the opportunity to reevaluate its role in maintaining ownership at the termination of the P3 agreement.¹²⁵ An ancillary benefit of P3s is job creation.¹²⁶ For instance, the NITC alone, which will cost about \$3.6 billion, is estimated to create about ten thousand jobs.¹²⁷ As a consequence, P3s have also drawn the support of labor unions.¹²⁸

In contrast to all of the excitement about P3s, some argue that infrastructure should be completely privatized primarily for reasons of financing, since a lack of federal funding is often the *road block* that impedes public infrastructure projects.¹²⁹ Other critics caution that governments face risks when entering into contractual agreements with private-sector entities, which can lead to more costs than anticipated because government entities are locked into long-term deals with the potential for eventual disputes over control.¹³⁰ Critics also

122. *Id.* at 11 (citing CONG. BUDGET OFF., USING PUBLIC-PRIVATE PARTNERSHIPS TO CARRY OUT HIGHWAY PROJECTS (2012), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/01-09-PublicPrivatePartnerships.pdf> [<https://perma.cc/XK9B-7BGT>]).

123. *Id.*

124. *Id.* at 12.

125. *Id.*

126. See Christopher H. Lee & Sean A. Medcalf, *Case for Private-Public Partnerships*, POLITICO (Mar. 22, 2013, 4:49 AM), <http://www.politico.com/story/2013/03/the-case-for-private-public-partnerships-089196#ixzz424OzgdCS> [<https://perma.cc/TS7D-QK28>].

127. Lick & Hamlin, *supra* note 109, at 181.

128. *Id.* at 199 (citing WILLIAM REINHARDT, TRANSP. DEV. FOUND., THE ROLE OF PRIVATE INVESTMENT IN MEETING U.S. TRANSPORTATION INFRASTRUCTURE NEEDS 34–35 (May 2011)).

129. See Chris Edwards, *Infrastructure Investment*, DOWNSIZING FED. GOV'T (Aug. 1, 2013), <http://www.downsizinggovernment.org/infrastructure-investment> [<https://perma.cc/KX8K-HRGA>].

130. Ryan Holeywell, *Public. Private. Practical?*, GOVERNING, Nov. 2013, at 34, 40 (available at <http://www.governing.com/mag/november-2013-table-of-contents.html>).

point to a scarcity of data on P3s, questioning the belief that they actually generate profit. But others still concede that even if “[t]hey don’t produce funding . . . they can reduce costs significantly.”¹³¹

In order to dispel some of these concerns and streamline the process of P3s to derive the most benefits, experts with the Brookings-Rockefeller Project on State and Metropolitan Innovation suggest that the United States develop a separate “P3 unit” for quality control, policy formulation, and technical advice.¹³² In their report, the authors evaluate P3s (referred to in the report as PPPs) on a larger scale, but also look specifically at P3s in transportation and infrastructure projects noting that a “[P3] unit may act as a consolidator of information and policy regarding [P3s], overcoming the traditional siloed structure of government agencies.”¹³³ Similarly, a policy memorandum for the Council on Foreign Relations describes the use of P3s to solve the problem of deteriorating infrastructure.¹³⁴ The author points out that there is a general lack of knowledge among local officials on how to form P3s.¹³⁵ Therefore, to overcome this obstacle, the author suggests the adoption of a national infrastructure unit to increase knowledge among state and local officials about P3s.¹³⁶ This unit should be closely tied to the treasury so it can advise on evaluating risk, financial structuring, and public debt management.¹³⁷

Examples of P3s around the world show that the proper execution of private investment in public infrastructure can have positive results for governments, investors, and ordinary citizens.¹³⁸

B. *Public-Private Partnerships at International Border Crossings*

A critical part of implementing P3s, especially when they cross international borders, is developing the proper legal framework.¹³⁹ Governments can only enter into P3s—which are, by nature, contractual agreements—if there exists proper authorization from their jurisdiction.¹⁴⁰ Such authorizing legislation must grant authority to the government entity “to enter into concession and partnership contracts

131. *Id.* at 39.

132. EMILIA ISTRATE & ROBERT PUENTES, BROOKINGS-ROCKEFELLER, *MOVING FORWARD ON PUBLIC PRIVATE PARTNERSHIPS 1* (Dec. 2011), https://www.brookings.edu/wp-content/uploads/2016/06/1208_transportation_istrate_puentes.pdf [<https://perma.cc/JN35-TGFZ>].

133. *Id.* at 7.

134. Heidi Crebo-Rediker, *Infrastructure Finance in America—How We Get Smarter 1–3* (Council on Foreign Relations, Policy Innovation Memorandum No. 44, Mar. 2014) (available at <http://www.cfr.org/united-states/infrastructure-finance-america-we-get-smarter/p32597>).

135. *Id.* at 2.

136. *Id.* at 2–3.

137. *Id.* at 2.

138. *Id.*

139. See SABOL & PUENTES, *supra* note 114, at 13.

140. *Id.*

with private entities without a second review by the legislature.”¹⁴¹ Additionally, the authorizing legislation should provide enough flexibility for government entities to utilize P3s for a broad range of project types, and must address fundamental P3 contractual issues like allowing for the mixing of public and private funds.¹⁴²

The agreement entered into by Canada and Michigan authorizing the use of a P3 to construct the NITC was one of the largest cross-border agreements involving a P3 to date.¹⁴³ Interestingly, in the case of the NITC, the Michigan legislature failed to pass P3-enabling legislation to allow for the agreement between Michigan and Canada.¹⁴⁴ Rather, Michigan Governor Rick Snyder entered into the agreement with Canada under the authority of Michigan’s Urban Cooperation Act of 1967, which allows interlocal agreements whereby two or more governmental units enter into deals together for shared services like infrastructure.¹⁴⁵ The Crossing Agreement, executed by the Queen of Canada,¹⁴⁶ the Canadian Crossing Authority, and the State of Michigan through Governor Snyder, provides the authority for Canada to establish a Crossing Authority that will “design, construct, finance, operate and maintain a new International Crossing between Canada and Michigan, under the oversight of a jointly established International Authority . . . with funding approved by Canada, but with no funding by the Michigan Parties.”¹⁴⁷ As the agreement states, Canada has agreed to front all of the costs of the NITC.¹⁴⁸

The need for sweeping infrastructure improvements at the U.S.-Canada and U.S.-Mexico borders is no secret to the government and has resulted in several cooperative measures to address the issue. In 2000, the U.S. Department of Transportation and Transport Canada entered into a Memorandum of Cooperation.¹⁴⁹ In order to develop standard P3 model contracts for the development of transportation facilities, President Obama signed into law the House Transportation and Infrastructure Bill in 2012.¹⁵⁰ Additionally, in December 2015 the Fixing America’s Surface Transportation (FAST) Act was passed; Section

141. *Id.*

142. *Id.*

143. Lick & Hamlin, *supra* note 109, at 180.

144. Bill Shea, *Snyder Set to Bypass Legislature on Bridge*, CRAIN’S DETROIT BUS. (June 3, 2012, 8:00 PM), <http://www.crainsdetroit.com/article/20120603/FREE/306039917/snyder-set-to-bypass-legislature-on-bridge> [<https://perma.cc/F72E-QQUH>]; *see also About Us*, PPP CANADA, <http://www.p3canada.ca/about-us/> 114 (Canada created a federal public-private partnership unit as a corporation of the Crown in 2009).

145. Shea, *supra* note 144; *see also* Crossing Agreement, *supra* note 1.

146. The Queen of Canada, Elizabeth II, is a constitutional monarch who acts on the advice of Canadian Government ministers.

147. Crossing Agreement, *supra* note 1.

148. *Id.*

149. Lick & Hamlin, *supra* note 109, at 182.

150. *Id.* at 183 (citing Surface Transportation Extension Act of 2012, Pub. L. No. 112-141 (2012)).

1437 of the FAST Act specifically provides additional funding for states bordering Canada and Mexico to develop highway infrastructure supporting the cross-border movement of goods.¹⁵¹ And as recently as July 2016, the United States Senate Committee on Homeland Security reported favorably on P3-enabling legislation sponsored by Texas Senator John Cornyn. The bill, titled the Cross Border Trade Enhancement Act of 2016, would expand the authority of United States Customs and Border Patrol to enter into P3s with state and local governments in order to increase staffing and improve infrastructure at existing ports of entry.¹⁵²

In comparison with the rest of the world, the U.S. is new to the P3 process. Though as of 2011, thirty-three states had P3-enabling legislation for highways, roads, and bridges.¹⁵³ In contrast, P3s are already being utilized to fund cross-border infrastructure development across the world. On an international scale, at least thirty-one countries have institutions for the promotion, development, and management of P3s.¹⁵⁴ Experiences in the European Union (“EU”) indicate that the legal framework for P3s must be conducive to private involvement.¹⁵⁵ However, even in the EU, some member states have encountered problems in the regulatory sphere. Regulatory uncertainty and unpredictability will keep the private sector from investing; thus, examples in the EU show that legislative and regulatory provisions need to be well developed to accommodate P3s.¹⁵⁶

C. *Public-Private Partnerships for Future U.S.-Mexico Cross-Border Infrastructure Projects*

Developing freight trends at the U.S.-Mexico border highlight the increasing need for adequate border infrastructure to decrease wait times for commercial truck traffic. Experts at the Texas A&M Transportation Institute conducted a study at the U.S.-Mexico border identifying trends and variations in freight movement across the border.¹⁵⁷ Despite declines in trade movement worldwide, the study found that surface trade between the U.S. and Mexico between 1995 and 2012

151. FAST Act, Pub. L. No. 114-94; 129 Stat. 1312 (2015) (codified at 23 U.S.C. § 139).

152. S. REP. NO. 114-303 at 1–2 (2016).

153. SABOL & PUENTES, *supra* note 114, at 14.

154. Lawrence Martin et al., *Internationally Recommended Best Practices in Transportation Financing Public-Private Partnerships (P3s)*, 2 CANADIAN CTR. SCI. & EDUC. 15, 17 (2013), (available at <http://www.ccsenet.org/journal/index.php/par/article/viewFile/30857/18165>).

155. Willem van der Geest & Jorge Nunez-Ferrer, *Appropriate Financial Instruments for Public-Private Partnership to Boost Cross-Border Infrastructural Development-EU Experience* 16 (Asian Dev. Bank Inst., Working Paper 281, 2011).

156. *Id.*

157. *Tracking Freight Traffic Trends at the U.S.-Mexico Border*, TEX. A&M TRANSP. INST., http://tti.tamu.edu/wp/wp-content/uploads/2013/11/Tracking_Freight_Trends.pdf [<https://perma.cc/X4KS-LQUK>].

increased from \$100 billion to \$400 billion annually.¹⁵⁸ The study also noted that products moving across the border by truck have “an aggregate freight value four to five times higher than products carried by rail, though both modes increased steadily over time (economic downturns notwithstanding).”¹⁵⁹

Poor infrastructure at the U.S.-Mexico border creates physical barriers that delay transit times and thwart economic competitiveness. Experts at the Council on Foreign Relations contend that “chronic underinvestment in border infrastructure has slowed the movement of goods and trade” as the volume of goods crossing the border only continues to increase.¹⁶⁰ They also note that, on average, U.S. ports of entry are forty years old, though some have existed for nearly seventy years.¹⁶¹ One of the consequences of underinvestment in border infrastructure is border transit delay; on the current trajectory, wait times at some of the largest ports of entry could reach eleven hours by 2035, resulting in millions of dollars in economic losses.¹⁶² These types of delays result in costs not only to the businesses shipping the goods, but also to consumers, and even border cities.¹⁶³ The Council states that the border should not be a “chokepoint” that leaves trucks queuing for hours; consequently, they recommend investment in border infrastructure through innovative financing mechanisms like P3s.¹⁶⁴

In a study of potential Arizona-Mexico P3s for border infrastructure, the U.S.-Mexico Joint Working Committee on Transportation explored the use of P3s to fund the expansion of infrastructure for the movement of people and freight across the Arizona-Mexico border.¹⁶⁵ The study identified several points of entry where there are large amounts of vehicular and even pedestrian traffic, and it concluded by identifying several projects that may be candidates for the use of a design-build-finance P3s.¹⁶⁶ The study revealed that there is minimal overall use of P3 initiatives at border crossings around the country; though, many states are pursuing these initiatives through greater private-sector involvement with a key example in Texas at the Rio Grande River crossing.¹⁶⁷ Ultimately, the study identified sixteen projects along the U.S.-Mexico border for consideration of potential

158. *Id.*

159. *Id.*

160. COUNCIL ON FOREIGN RELATIONS, *supra* note 105, at 38.

161. *Id.*

162. *Id.* at 70.

163. *Id.*

164. *Id.* at 70–71.

165. FED. HIGHWAY ADMIN.-U. S. DEP'T OF TRANSP., PUBLIC-PRIVATE PARTNERSHIPS POTENTIAL FOR ARIZONA-MEXICO BORDER INFRASTRUCTURE PROJECTS 1 (2009), https://www.fhwa.dot.gov/planning/border_planning/us_mexico/resources/studies_and_reports/adot_ppp_report/pdfs/finalreport.pdf [https://perma.cc/3X8T-5ZKM].

166. *Id.*

167. *Id.* at 15, 20.

P3s.¹⁶⁸ Thus, this Comment argues that states along the U.S.-Mexico border should, like Michigan, look to P3 enabling agreements with Mexico to develop crucial infrastructure at the border to promote trade.

Understanding the significant role it plays in North American trade, Mexico already has well-developed laws on P3s in its “Ley de Asociaciones Públicas Privadas.”¹⁶⁹ These laws call for the construction of infrastructure to improve social welfare and investment in Mexico, creating a framework for P3s in Mexico to increase cooperation between the Mexican government and the private sector.¹⁷⁰ Furthermore, this legislation allows the private sector to submit its own proposals to relevant government agencies and allows the government to enter into contracts with private parties.¹⁷¹ This Mexican legislation acts as a compliment to its National Infrastructure Program (NIP), aimed at improving Mexican infrastructure in order to bring Mexico to the top twenty percent of the World Economic Forum’s Infrastructure Competitiveness Index by 2030.¹⁷² The logical conclusion of this strategic move by Mexico is that it, too, believes that increased border infrastructure leads to increased competitiveness in the global market.

Additionally, for the first time, Mexico’s development bank has made a loan to a U.S.-based developer to provide funding for a groundbreaking cross-border airport terminal; it will be the first time the bank has made such a loan for a U.S.-based project to be primarily collateralized by U.S. assets.¹⁷³ This cross-border pedestrian bridge links San Diego with the Tijuana A.L. Rodriguez International Airport, allowing pedestrians to walk freely between the U.S. and Mexico.¹⁷⁴

Of course, doing business with another country always involves some risk. If Matthew Moroun’s legal battle provides any lesson, it is

168. *Id.* at 102.

169. Reglamento de la Ley de Asociaciones Público Privadas [LAPP] [Regulation of the Public Private Associations Law], Diario Oficial de la Federación [DOF] [Official Journal of the Federation] 05-11-2012 (Mex.), http://dof.gob.mx/nota_to_pdf.php?fecha=05/11/2012&edicion=MAT.

170. Bram Hanono, *Mexico Continues to Entice Private Investment in Infrastructure with a New Public-Private Partnership Act*, SHEPPARD MULLIN: LATIN AMERICAN BLOG (Apr. 10, 2012), <http://www.latinolawblog.com/2012/04/articles/cross-border-transactions/mexico-continues-to-entice-private-investment-in-infrastructure-with-a-new-public-private-partnership-act/> [<https://perma.cc/C7WG-BXM8>].

171. *Id.*

172. Programa Nacional de Infraestructura 2014-2018 [Mexico National Infrastructure Program 2014-2018] (Mex.), <http://cdn.presidencia.gob.mx/pni/programa-nacion-al-de-infraestructura-2014-2018.pdf?v=1> [<https://perma.cc/7RA8-UK74>].

173. *Groundbreaking Cross-Border Airport Terminal Linking Tijuana to San Diego Breaks Ground*, SHEPPARD MULLIN: LATIN AMERICAN BLOG (July 18, 2014), <http://www.latinolawblog.com/2014/07/articles/cross-bordertransactions/groundbreaking-cross-border-airport-terminal-linking-tijuana-to-san-diego-breaks-ground/> [<https://perma.cc/N52L-WWXF>].

174. *Id.*

that anyone engaging in business with a private entity across borders will need to be aware of the complex issues of “international commercial litigation and arbitration—often involving considerable time and expense.”¹⁷⁵ Every company should evaluate several factors prior to doing business with another country including costs, how to get a judgment, where the evidence is located, the possibility of dispute taking place in the other country, and whether a private party can sue a sovereign in a U.S. court.¹⁷⁶

IV. CONCLUSION

The U.S. borders with Canada and Mexico have become major gateways for North American trade as the three countries become more interdependent in our global economy. Arguably, the privately owned Ambassador Bridge linking Detroit, Michigan, to Ontario, Canada, is the most important border crossing in all of North America, as it accommodates more than one quarter of all trade with Canada, the U.S.’s number one trading partner. The Ambassador Bridge in its current state is unlikely to support increasing trade volume into the future, and ease of access is problematic on both the Mexican and Canadian sides of the border. Accordingly, after years of studies, planning, permits, and approvals, the competing New International Trade Crossing will be constructed two miles down river from the Ambassador Bridge.

DIBC, the owner and operator of the Ambassador Bridge, has engaged in numerous legal battles to halt the NITC construction in an attempt to ward off competition. DIBC’s largest case, filed against Canada, the U.S., and a number of U.S. government officials, was largely unsuccessful. The outcome of the case has answered several questions regarding DIBC’s right to private ownership of the bridge: namely, that DIBC does not have an exclusive franchise right to own and operate the Ambassador Bridge and permit approvals for the NITC did not result in issues of uncompensated taking of private property from DIBC. Additionally, the agreement between Michigan and Canada to build the NITC, approved by U.S. officials, was not in violation of the foreign-compact clause and the issuance of a presidential permit for the NITC was a valid executive action.

In the wake of these rulings, construction of the NITC is expected to begin soon, but not without the demolition of a large portion of Detroit’s failing Delray neighborhood. Consequently, property own-

175. Neil Popovic & Alejandro Moreno, *Sovereign Litigation in Latin America: Top Five Issues To Think of When Doing Business with a Latin American Country*, SHEPARD MULLIN: LATIN AMERICAN BLOG (Aug. 18, 2014), <http://www.latinolawblog.com/2014/08/articles/other/sovereign-litigation-in-latin-america-top-five-issues-to-think-of-when-doing-business-with-a-latin-american-country/> [https://perma.cc/86VG-WA3Z].

176. *Id.*

ers in the Delray neighborhood are likely to receive compensation for their losses through the process of eminent domain. But for many Delray business owners, “just compensation” may not be enough to fully reimburse them for their losses if they are unable to relocate their businesses. This, it appears, is one of the unfortunate consequences to be anticipated in future large-scale border infrastructure projects.

The conflict with the Ambassador Bridge and NITC highlights a struggle between the public and private sectors in infrastructure ownership. However, P3s, like the one being used to construct the NITC, present a new model for the financing and ownership of international border crossings that fosters collaboration between the public and private sectors. P3s are especially attractive now because there is a measurable disparity in border infrastructure that the federal government alone cannot afford to finance. It is incumbent on not only the U.S., but also on North America jointly, to create agreements that improve border infrastructure and promote the free movement of goods, thereby increasing North America’s global trade competitiveness. With construction of the NITC set to begin soon, the focus should shift to the U.S.-Mexico border. States along the U.S.-Mexico border should work to model agreements analogous to that entered into by Michigan and Canada for the development of the NITC. P3s present a sustainable model for improving border infrastructure to alleviate the current bottlenecks that create costly delays at the U.S.-Mexico border.

