THE US BORDERS WITH MEXICO AND CANADA AFTER THE TERRORIST ATACKS OF SEPTEMBER 11th 2001. A COMPARATIVE VIEW

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Resumen: Los ataques terroristas perpetrados en Estados Unidos el 11 de septiembre del 2001, tuvieron efectos expansivos y extensivos en el espacio y tiempo, que alcanzaron a países como México y Canadá. México fue afectado directa e indirectamente por este ataque; repercutió, por ejemplo, en las personas más vulnerables, como es el caso de los indocumentados mexicanos que murieron en las Torres Gemelas, quienes no pudieron reclamar ningún derecho, pues técnicamente no existían para Estados Unidos de América. También hubo efectos indirectos, como las nuevas leyes migratorias de este país, que parecen negar cualquier posibilidad futura de apertura de sus fronteras. En el caso de Canadá, las consecuencias recayeron sobre las políticas comunes respecto a migración y seguridad fronteriza que también se vieron afectadas.

Palabras clave: terrorismo, inmigrantes, seguridad fronteriza, relaciones internacionales.

Abstract: 9/11 Terrorist attacks in the United States (US) caused expansive and extensive effects in space and time, which reached counties like Mexico and Canada. Mexico was affected both directly and indirectly too. Directly, because many Mexican illegal migrant workers died in the Twin Towers aggression, and their families were not able to claim a compensation as consequence of their status in the country. Indirectly, because of the enforcement of new immigration regulations that have tightened entry into the US. For its part, the article also describes how Canada was affected too, in areas of common frontier policies such as migration and boarder security.

***Descriptors**: terrorism, immigrants, border security, international relations.*

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> US immigration law is founded on the idea that it is permissible, desirable, and necessary to restrict immigration into the United States and to treat a border as a barrier to entry rather than as a port of entry.*

SUMMARY: I. *Introduction*. II. *Immigration Law in the USA*. III. *Immigration and Border Relations Mexico-USA*. IV. *Immigration and Border Relations USA-Canada*. V. *Contrasts of the US Southern and Northern Border*. VI. *The Redimensionning of the Relationship between the USA and the International Law*. VII. *Conclusions*.

I. INTRODUCTION

On September 11th 2001, terrorists attacked the United States and killed over 6000 people. Nineteen terrorists hijacked four commercial airlines in the US, and used them as bombs by flying two planes into the World Trade Centers, one into the Pentagon, and the fourth crashing into Pennsylvania.[1] All nineteen hijackers were foreigners, and at least sixteen entered the US through ports of entry, with a tourist visa.

In a recent research conducted by the Center for Immigration Studies[2] reporting how foreign terrorists entered the United States, it was revealed that foreign terrorists have employed nearly every possible means for admission. For example, some have come as tourists, students, and business travelers. Others have entered as legal permanent residents and become naturalized United States citizens, while others have simply crossed the border illegally or used false documentation.

The terrorist attacks on the World Trade Center and the Pentagon on September 11th 2001 have placed a new focus on immigration-re-

* Kevin R. Johnson, Symposium Law and the Border. Open Borders? 51 *UCLA L. Rev.* 193, October 2003.

[1] See Philip Martin & Susan Martin, "Immigration and Terrorism: Policy Reform Challenges", 8 *Migration News* 10 P 1 (2001), at *http://www.migration.ucdavis.edu/mn/more.php?id=2462 <uscore>0<uscore>2<uscore>0*

[2] See Panel Discussion Transcript, "How Have Terrorists Entered the US?", Center for Immigration Studies 1 (2002), available at *http://www.cis.org/articles/2002/terrorpr.html*

lated issues. Because at least some of those responsible for the attacks were foreign nationals who entered the United States either illegally or had overstayed their visas.[3]

The federal government's response to September 11th 2001 demonstrates the close relationship between immigration law and civil rights in the United States. Non-citizens historically have been vulnerable to civil rights deprivations, in no small part because the law permits, and arguably encourages, extreme governmental conduct with minimal protections for the rights of non-citizens.[4]

This work is aimed to see how every country in North America reacted to the attacks and which other alternatives I consider feasible to face the actual problems in the US-Mexico Border. In the first part the paper will briefly review the immigration laws and policies in the US before and after the terrorist attacks of September 11th, 2001. In the second chapter there is a concise description of the immigration and border relations of Mexico and US, before and after the attacks. Also in this chapter there is a brief explanation of the effects of the terrorist attacks in Mexico. To have another perspective to compare, we will review the Canada-US Border and immigration relationship before and after September 11th, 2001. The next chapter is a review of the differences between the US-Mexico and US-Canada borders. Finally I will refer to the relationship of the US with the international law because I think that in the actual context we cannot leave aside such an important alternative for the present US safety concerns.

II. Immigration Law in the USA

Immigration transforms the demographic profile of the US population, particularly in large cities. Fears of overcrowding, unemployment, scarcity of resources and fears of cultural fragmentation make

[3] See Lawrence M. Lebowitz and Ira L. Podheiser, "A Summary of the Changes in Immigration Policies and Practices after the Terrorists Attacks of September 11, 2001: The USA, Patriot Act, and other Measures: 2002", *The University of Pittsburgh Law Review*, 63 U. Pitt. L. Rev. 873.

[4] See Susan M. Akram & Kevin R. Johnson, "Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims", *New York University Annual Survey of American Law*, 2002 58 N.Y.U. Ann. Surv. Am. L. 295.

the policy of immigration extremely complex. Immigration law is the principal means by which the country not only determines who will gain access to the limited resources and opportunities in the US, but also what will be the national and cultural identity of the US On the opposite side there are some arguments supporting the idea of "free immigration" or "open borders" which stress the thought that the United States functions best as a heterogeneous diverse population, and is expansive enough to absorb many new immigrants. Contrary to fears about job security, immigration is a necessary ingredient in plans for future US economy growth and enlarged workforce. [5]

Given the US tradition as a country of immigrants it is difficult to comprehend how current citizens —almost all from whom have benefited from immigration— can claim any right to exclude future immigrants. The reasons are often based upon a fear that increased immigration will compromise the US standard of living. The tension throughout the debate comes from the fact that the US is largely a nation of immigrants who did not inherit this land by divine right, but rather, by an open immigration policy.

1. *Immigration Law before September 11th, 2001*

The United States Constitution grant to the Congress the power to "establish a uniform Rule of Naturalization"[6] and grants the Executive Branch the inherent sovereign authority to regulate immigration.[7] Aliens seeking entrance into the United States have no claim of right;[8] rather admission is a privilege granted by the sovereign nation upon such terms as it prescribes.[9]

The Immigration and Nationality Act of 1952 (INA) consolidated previous immigration laws into one coordinated statute. As amended, the 1952 Act provides the foundation for immigration law in effect

[5] David Weissbrodt, *Immigration Law and Procedure*, 4th edition, Nut Shell, West Group, 2003.

[6] US Const. art. I, 8, cl. 4.

[7] 8 *USC.* 1182(a)(27)(2001) Grants the Attorney General the power to exclude any alien seeking admission into the United States "to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States".

[8] US ex rel. Knauff *v.* Shaughnessy, 338 US 537, 542 (1950); Accord Landon *v.* Plasencia, 459 US 21, 32 (1982).

[9] *Idem.*

today. In March 1980 Congress dealt with the issue of refugees. The 1980 Refugee Act broadened the definition of refugees in accord with the international definition in the convention and Protocol Relating to the Status of Refugees. In 1981 Congress adopted another series of amendments to the immigration law, which eliminated the permanent exclusion of aliens who had been deported and permitted these deportees to return without permission five years after deportation. The immigration Marriage Fraud Amendments of 1986 amended the INA to deter immigration-related marriage fraud. In 1986 Congress adopted the Immigration Reform and Control Act (IRCA). The IRCA provided the INS with significant new resources to enforce the immigration laws. Some "success" of IRCA are: 1. The imposition of sanctions to employers, 2. Inclusion of anti-discrimination provisions and 3. Establishing an amnesty program for the legalization of many undocumented aliens.[10]

In 1990, Congress passed a series of amendments to the Immigration and Nationality Act, (IMMACT 90). The statute significantly modified many of the INA's provisions, and left virtually no area of the previous law untouched. The most visible feature of IMMACT 90 was the increase by approximately 35% in the numerical limitation system, or overall immigration allowed. IMMACT 90 established an annual limit for world wide immigration of 700,000.

In 1996 Congress responded to perceived anti-immigration sentiment with three new acts, each of which was signed by President Bill Clinton the same year. The first of these acts was the Antiterrorism and Effective Death Penalty Act (AEDPA). The second was the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Act). The third was the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which ordered the development of an automated entry-exit control system to record the entry and departure of every non-citizen arriving in the United States. While the Welfare Act removed many Federal services for non-citizens, AEDPA and IIRIRA focused on enforcement of immigration laws by

[10] See David Weissbrodt, *supra* note 5.

for example, adding Border Patrol agents, and reducing the procedures that were previously required to remove aliens from the US.[11]

For the purposes of this paper it seems important to review briefly the reactions from the US to previous attacks. The United States relies upon immigration policies to protect itself against subversives. US history includes spies, saboteurs, anarchists, and terrorists as parts of this subversive class. It has feared immigrants who seek to destroy the government. The protective immigration policies that the United States has legislated and implemented have been in response to fear, whether it is in response to a physical attack on the country, or an attack on its culture, political beliefs, or freedoms. When immigrants threaten the "American way of life", Americans respond by uniting and displaying a strong sense of nativism.[12] Nativism is defined as an intense opposition to a specific minority on the ground of its foreign ("un-American") connections. Ruchir Patel also described Nativism as "the energizing force behind the modern day theory of nationalism".[13] Nativistic activities were evidenced throughout US history, resulting in immigration reform during World War I, World War II, and against the fear of Communism. US historical immigration actions were often in response to a perceived or actual threat by immigrants.[14]

2. *Immigration in the USA after September 11th, 2001*

In response to the events of September 11, the government has acted vigorously to implement systems designed to: (a) incarcerate and prosecute those foreign nationals in the United States who are suspected of being terrorists or who may have ties to terrorist groups; (b) strengthen controls at border crossings and other ports of entry;

[11] Mailman, Stanley and Yale-Loher Stephen, "The World Turns: Immigration Law Before and After Sept. 11", *New York Law Journal*, October 22, 2001.

[12] See generally Alexander Wohl, "Comment, Free Speech and the Right of Entry Into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act", 4 Am. U. J. Int'l. L. & Pol'y. 443, 447-459 (1989).

[13] Ruchir Patel, "Immigration Legislation Pursuant to Treaths to US NaTional Security", *Denver Journal of International Law and Policy*, 2003, 32 Denv. J. Int'l L. & Pol'y 83.

[14] See Wohl, *supra* note 12, at 451.

and (c) implement computerized systems to track the status of foreign nationals in the United States.[15]

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (known as the USA Patriot Act) was enacted into law scarcely six weeks after the terrorist attacks. The USA Patriot Act marks Congress's first attempt at addressing a wide variety of immigration-related issues stemming from the events of September 11. The Act can be viewed as a starting point for implementing long-term change in a manner in which aliens are admitted into the United States. The primary features of the anti-terrorism immigration provisions of the USA Patriot Act involve broadening the definition of non-citizens classified as "terrorists" which render them either inadmissible or deportable, and granting the Attorney General new powers to "certify" and "detain" individual foreign nationals as terrorists. Perhaps those are the most controversial measures contained in the USA Patriot Act.[16] Though the USA Patriot Act implements legislation towards protecting the United States from terrorism, the question for some authors like Lawrence Lebowitz remains whether it is adequate to actually reduce or eliminate the threat.[17]

Concerning the new institutional frame created after September 11 the most important action is the Bill that creates the Department of Homeland Security (DHS), signed into law by President Bush on November 25, 2002. The DHS has cabinet level and is in charge to protect the US from terrorism. It does this by analyzing terrorism intelligence and comparing it to the nation's vulnerabilities developing new technologies to detect threats, coordinating the training and funding of state and local police and fire departments, and scrutinizing US Borders and ports of entry.

The new agency helped to bring together previously separate agencies such as the Immigration and Naturalization Service, (now is the Bureau of Citizenship and Immigration Services, BCIS) the Secret Service, the Customs Service, the Federal Emergency Management Agency, the Transportation Security Administration and the Border

[15] Lawrence M. Lebowitz *supra* note 3.
[16] *Idem*.
[17] *Idem*.

Patrol. DHS brought together 22 federal agencies with 170,000 employees in the largest reorganization of the federal government since the Defense Department was created in 1947.[18]

III. Immigration and Border Relations Mexico-USA

While commonly underestimated, the United States relationship with Mexico is, without a doubt, one of its most important. In the words of the former US Ambassador to Mexico Jeffrey Davidow, "no country in the world has a greater impact on the daily life of Americans than does Mexico [because] what we buy, sell and make, the wages we pay and receive, the languages we speak, the illicit drugs and criminality that afflict us, and, in some locales, the very air we breathe and water we use is influenced in significant measure by Mexico".[19] As evidence of this closeness, approximately 500,000 Americans reside in Mexico, 2,600 US companies operate there and 60 percent of foreign direct investment in Mexico originates in the United States. Mexico is also an important trading partner, obtaining nearly 75 percent of its imports from the United States, and directing approximately 85 percent of its exports to its northern neighbor.[20]

In early 2001 the United States and Mexico announced efforts to introduce massive immigration reform to benefit both nations. On one hand, US employers would obtain access to a multitude of persons willing to work in low-skill, low-pay positions. On the other hand, some 3.5 million Mexicans working and living in the United States illegally would earn "permanent resident" status, which could ultimately lead to full citizenship.[21] The negotiations progressed to such a point that, upon his visit to the White House, President

[18] Michael Benson *et al.*, *National Security*, Alpha, 2003.

[19] Jeffrey Davidow, "United States-Mexico: New Opportunities", *Ambassadors Rev.*, Spring 2001 available at *http://www.usembassy-mexico.gov/et0109/opportunities.html*

[20] Hale E. Sheppard, "Salvaging Trade, Economic and Political Relations with Mexico in the Aftermath of the Terrorists Attack: A Call for a Reevaluation of US Law and Policy", *Boston University International Law Journal*, Spring, 2002, 20 B.U. Int'l L.J. 33.

[21] Calling the complete immigration proposal a "whole enchilada". Michele Waslin Ph.D., "The New Meaning of the Border: US-Mexico Migration Since 9/11" (May 15, 2003). Center for US-Mexican Studies. Project on Reforming the Administration of Justice in Mexico. Paper waslin. *http://repositories.cdlib.org/usmex/prajm/waslin*

Vicente Fox of Mexico announced that an agreement on immigration reform could be reached by the end of the year. For his part, President Bush's desire to advance immigration reform seemed categorical, and his regard for his Mexican homologue was very evident.[22] Although difficult sticking points remained, a compromise appeared possible. At the same time as policymakers were attempting to make the border more secure, they were also making it more business friendly to accommodate the requirements of NAFTA. The seemingly paradoxical end result was a border more sharply demarcated than ever before.[23] After years of intensified enforcement, the tasks of drug and immigration control at the border had actually become harder. New law enforcement initiatives were systematically countered by new law evasion techniques. Tragically, this included turning to the use of more remote and dangerous entry points in the deserts and mountains for migrant smuggling, leading to hundreds of migrant deaths every year.[24]

After the terrorist attacks, the Mexican officials attempted to keep migration negotiations alive but unfortunately, without any real progress. This whole proposal was no longer a US priority. It is true that immigration issues turned to be a priority for US officials, but only as it refers to perceived enhanced security measures and not comprehensive immigration reform. It is thought that in the present the Mexicans, under their new foreign Minister, may be willing to work through a much less ambitious deal negotiating a temporary "guestworker" which would send Mexican workers to the US for short periods of time to fill alleged labor shortages.[25]

Concurrently, other actions have influenced negatively the Mexico-USA relations, like the filing of several legal claims against the US in international judiciary bodies opposing the death penalty and treatment of migrant workers in the US Additionally, in August 2002 Fox turned down an invitation to a summit at Bush's ranch to protest the execution of a Mexican national in Texas who was convicted of a

[22] Hale E. Sheppard, *supra* note 20.

[23] Peter Andreas, "A Tale of Two Borders: the US-Mexico and US-Canada Lines After 9-11", Brown University, at *http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1042&context=usmex*

[24] *Idem*.

[25] *Supra* note 23, Referred as to "half-enchilada".

1988 murder. Mexico has also filed suit against the US in the Inter American Human Rights Court, charging that US treatment of migrant workers is in violation of international law. While neither decision may have a serious impact on US policies, it appears that Mexico is committed to publicize alleged US violations of international law. Mexico also increased the issuance of consular ID cards or *matriculas*, and has actively lobbied banks, local governments and other institutions to accept them, leading to accusations of meddling in the internal affairs of the US Presidents Fox and Bush had had also very different opinions over actions in Iraq. As a non-Permanent Member of the UN Security Council, Mexico faced strong pressure from the US to support Bush's policies on the "war on terrorism" in Iraq. To date President Fox has remained firm in his antiwar convictions.

Post-September 11 ant-immigrants groups influenced by a strong sense of nativism, have repeatedly identified Mexican migration as a security threat, changing the focus of the issue away from economic and humanitarian concern to one of national security.[26] The modest new Mexico-USA negotiations are done now under the shade of the US National Security as a priority, rather than focus on the Mexicans living and working in the US Some steps undertaken under this new strategy are the "Partnership for Prosperity" and the "22-Point Border Partnership Action Plan" (known also as *Smart Borders*) which includes measures for creating a secure infrastructure while securing the flow of goods and people. The "Partnership for Prosperity" seeks to leverage private resources to create jobs and promote prosperity in less developed areas of Mexico, particularly in large migrant-producing states. The partnership would facilitate capital for small companies, bring down the cost of migrants remittances to Mexico, and create scholarships programs for Mexicans to attend higher education institutions in the US.

There are no indications that the flow of migrants into the US is slowing; indeed the trends continue largely as they have for the last 20 years. Statements by Mexican authorities indicate that Mexico is

[26] See Michele Waslin Ph.D., "The New Meaning of the Border: US-Mexico Migration Since 9/11" (May 15, 2003). Center for US-Mexican Studies. Project on Reforming the Administration of Justice in Mexico. Paper waslin. *http://repositories.cdlib.org/usmex/prajm/waslin*

not going to push for comprehensive immigration reform in the near future and will concentrate on efforts to protect Mexican nationals currently living in the US, through different less ambitious programs such as the *matricula* consular.[27]

Rather than simply being dismantled in the face of intensifying pressures of economic integration, border controls are being redesigned as part of a new and expanding "war on terrorism." The immediate US response to the terrorist attacks included a dramatic tightening of border inspections and a toughening of the policy discourse about borders and cross-border flows. Under the opinion of Peter Andreas, "the political scramble to do something about leaky borders has slowed and complicated North American economic integration".[28] Traditional border issues such as trade and migration are now inescapably evaluated through a security lens. Optimistic talk of opening borders has been replaced by more anxious and somber talk about "security perimeters" and "homeland defense".

Consequences of the Terrorists Attacks of September 11th for Mexico

While the terrorist attacks on the US were not connected to Mexican nationals in any way —except that there were Mexican victims as well—. The long-term consequences on Mexican nationals and US-Mexican migration relations are going to be felt for decades. Immigration reforms were one of the first casualties of the terrorist attacks of September 11th, 2001. In both political debates and policy practice, the border is very much "back in style".[29] Although this tightening of the border is comprehensible, it is inconsistent with one of the primary missions of the United States prior to the terrorist attacks, namely "to fulfill the promise of the North American Free Trade Agreement and to make the border as unobtrusive as possible and to build on the world's largest bilateral trade flow, now $ 420 billion year".[30]

[27] *Idem*.
[28] Peter Andreas, *supra* note 23.
[29] *Idem*.
[30] Hale E. Sheppard, *supra* note 20.

Under the new context, racial profiling enjoyed a comeback in popularity as efforts to locate Arabs and Muslim terrorists were the first priority of the federal government. The profiling of Arabs and Muslims in the terrorist dragnet promoted the legitimacy of racial profiling. Racial profiling in the "war on terrorism" poses serious risks to all minority communities in the United States, not just Arab-and Muslim-appearing people who may be subject to profiling given the current fears. The real danger here according with the opinion of Susan M. Akram is that once the government embraces the use of race-based statistical probabilities as a law enforcement tool, the argument logically follows that probabilities may justify similar law enforcement techniques across the board, from terrorism to fighting crime on the streets to apprehending undocumented immigrants. [31]

Other facially neutral provisions of the immigration laws have plainly racial impacts. The per country ceilings (annual limits on immigration from any one country) make immigrants from certain high immigrant-sending nations, such as Mexico, India, and the Philippines, wait to come to the United States years longer than prospective immigrants from other nations; consequently, similarly situated applicants are treated differently solely because of their national origins, which, of course, closely correlate to race. Similarly, the so-called diversity visa system favors white immigrants by preferring noncitizens from "low-immigrant countries" in the allocation of visas.

IV. Immigration and Border Relations USA-Canada

The Canada-US Border's long history has tracked the evolution of a relationship between their societies from savage hostility to intimate friendship. The Colonial powers began to map out their claims to North American territory in the 16th Century. The conflicts of North America may have been as sideshow for Europe but they were real economical and physical security issues at stake in the boundaries were drown from those on the ground. Access to fur trade routes and guarantees of physical securities for colonist were at the heart of

[31] See Susan M. Akram *supra* note 4.

cross-border disputes as then waged by British, French and Aboriginal protagonists. Terrorist of the most lurid kind was part of the arsenal employed in this intra North American conflict, as was what we would now label "ethnic cleansing" as borders were drawn and redrawn throughout the 17th and 18th centuries.[32]

The Civil War and its after effects had a dramatic impact on the relationship at the border. The Confederate schemes to invade the Union from Canada and a view that Britain had supported the Confederacy, led the US to abandon the form of free trade established under the Reciprocity Treaty of June 1854. A demand for passports for Canadians to enter the United States was put into effect earlier. Once the new dominion was established, however, the US acted against those who sought to invade Canada. By the beginning of the last century, the basis of the present-day-relationship was firmly established, with the settlement of the last major border dispute over the Alaska Border, and the expressed desire in both countries to formalize cross-border cooperation. That desire was driven in Canada's case in large part by a desire to assert its sovereignty and interest independent from Great Britain.

The establishment of the International Joint Commission in 1909[33] and other border arrangements signaled the beginning of this new shared approach, "good neighborliness" developed, into a value shared by both societies, a pride in having between them the "longest undefended border in the world".[34] President Roosevelt and Prime Minister Mackenzie King made the first commitment to a shared defense against external threats. They advanced the notion of "North American Space" while in 1938 they committed the two countries to mutual defense.

For George Haynal, any argument for the immutability of the border is ignoring the history. Border management has evolved top to a

[32] George Haynal, Symposium on Governance and Public Security, Interdependence, Globalization and North American Borders; January, 18, 2002. *http://www.maxwell.syr.edu/campbell/Governance_Symposium/security.htm*

[33] The International Joint Commission is an independent binational organization established by the Boundary Waters Treaty of 1909. Its purpose is to help prevent and resolve disputes relating to the use and quality of boundary waters and to advise Canada and the United States on related questions.

[34] George Haynal *supra* note 32.

comfortable (perhaps complacent) and often informal partnership. Changes in the environment demand that this partnership move now to a new level.[35] Government actions that followed the terrorists attacks of September 11 have been measured and constructive. Cooperation among agencies, already closer, was intensified. The US Administration sent signals of determination by expanding security spending and powers as well as measures as the temporary deployment of the National Guard to provide back up at Border-crossings. The Canadian government strengthened anti-terrorism legislation.

The first step toward a bilateral harmonization of policies is the Joint Statement on Cooperation on Border Security and Regional Migration Issues, signed on December 3, 2001, which calls for the coordination of certain visa and asylum requirements.[36] These include: jointly assessing incoming passengers to identify those requiring closer examination upon arrival; increasing the number of Canadian and US immigration control officers overseas to screen individuals before they reach the ports of entry; developing common biometric identifiers in passports and in residence and border-crossing cards to reduce travel document fraud and allow officials to identify passengers who require closer scrutiny while letting pre-certified travelers pass quickly; and enhancing coordination among law enforcement and other agencies addressing security threats.[37]

One major feature of the US-Canada agreement concerns reviewing the visa- waiver programs in the respective countries. These arrangements permit nationals of designated countries to travel and enter without a visa.[38] Visitor visa requirements are blunt policy instruments that often draw concerns from business interests who worry that delay in transferring or hiring executives, managers, and professionals will hurt the bottom line.

On its face, the open and very limited controls exercised at the US-Canada border would suggest that it was ripe for exploitation by

[35] *Idem.*

[36] CNN, US, Canada Sign "Smart Border" Declaration, Dec. 13, 2001, available at *http://www.cnn.com/2001/US/12/12/rec.canada.border*

[37] Arthur C. Helton & Dessie P. Zagorcheva, Symposium Terrorism's Burdens on Globalization, Globalization, Terror and the Movements of People, International Lawyer, Spring, 2002. 36 Int'l Law. 91.

[38] *Idem.*

criminals and terrorists. The reality is that the imperative to manage cross-border threats without disrupting trade that amounts to more than $1 billion a day and the travel of 220 million people each year, has led to an extraordinary degree of cross-border cooperation. On the Vermont-Quebec border, for instance, Canadian and US law enforcement officers at the federal, state, provincial, and local levels have been meeting for 18 years to discuss their criminal cases without any formal character.[39]

In Washington state and British Colombia, US and Canadian police, immigration and customs officials, stood up a bi-national team in 1996 to work on cross-border crimes with local, state, and provincial enforcement agencies. The team was called the "Integrated Border Enforcement Team" (IBET) and initially focused on drug smuggling, but the portfolio later expanded to include terrorism. Following the September 11 attacks, Washington and Ottawa agreed to establish a total of 8 of these IBETs along the border.[40]

The movement towards emphasizing a broader framework of bi-national cooperation versus focusing on the physical borderline gained impetus in 1999 when Prime Minister Jean Chretien and President Bill Clinton formed a process of consultation labeled the "Canada-US Partnership (CUSP)".

V. Contrasts of the US Southern and Northern Border

Canada has dealt with US security concerns through the signing of a 30-point "Smart Border" Accord, and Mexico has done something similar with its 22-point program. These agreements address the unique circumstances of each border, but they share three common goals: to develop secure border infrastructure, to ensure the secure flow of goods across borders, and to ensure the secure flow of people.

[39] Stephen E. Flynn, "Written Testimony before a hearing of the Committee on Foreign Relations, United States Senate", on *US-Mexico: Immigration Policy & The Bilateral Relationship*, March 23, 2004. *http://www.cfr.org/pub6906/stephen_e_flynn/rethinking_the_role_of_the_us_mexican_border_in_the_post911_world.php*

[40] 6th Annual Canada-US Cross-Border Crime Forum Press Release, July 6, 2002, at *http://www.sgc.gc.ca*

The need to keep the US-Canada and US-Mexico borders open for business has also placed enormous pressure on Canada and Mexico to work with their own counter-terrorism measures. While all three North American countries benefit from a close economic relationship, Canada and Mexico are far more reliant on trade with the United States than the other way around, and are therefore much more vulnerable to disruptions in cross-border commercial flows.[41]

However, it is important to mention that Canada, Mexico and the US recognizing the urgent need to improve their cross-border trade transactions are working jointly to implement the Free and Secure Trade Program (FAST). The program is designed to enhance the trade among the three countries while bolstering their security and safety. FAST will try to align, to the maximum extent possible, their commercial processing programs. Currently the US-Canada FAST program is in place at five US-Canada border ports of entry —Detroit and Port Huron, Michigan; Buffalo and Champlain, New York; and Blaine, Washington—. The first dedicated FAST lanes on the US-Mexico border are located in El Paso, Texas. Customs and Border Patrol, officers (CBP) began initial processing of trucks through the FAST lanes on October 27, 2003. As of November 25, 2003, CBP received 1,153 driver applications. CBP has issued FAST identification cards to 974 of these commercial truck drivers at the El Paso FAST Driver Enrollment Center. Nearly 3,000 trucks have been processed through the FAST lanes in El Paso since October 27, 2003.[42]

This structural asymmetry gives Washington significant policy leverage over its immediate neighbors, leaving them with limited space to maneuver. The United States largely sets the policy. Peter Andreas symbolize the latter by describing Canada and Mexico like "two scared mice next to a neurotic elephant. They are more worried about the elephant's reaction to terrorism than terrorism itself". In the effort to pragmatically cope with this unstable and unpredictable new policy environment, the two mice are trying to convince the ele-

[41] Peter Andreas, *supra* note 23.

[42] Free and Secure Trade (FAST) Implementation on the US-Mexico Border Office of the Press Secretary, DHS December 4, 2003 at *http://www.dhs.gov/dhspublic/display?content=3024*

phant that they are part of the solution rather than part of the problem.[43]

On the Canadian side, Ottawa has taken many measures since September 11th to demonstrate its resolve against terrorism and heightened commitment to border security. It immediately put into place a high state of alert at border crossings, enhanced the levels of security at the country's airports, added $176 million ($280 million Canadian dollars) in new funding for detection technologies and personnel to strengthen the security framework, initiated new legislation to combat the financing of terrorism, and froze the assets of known terrorist groups. Canada has also tightened its visa regime, including requiring Saudi and Malaysian visitors to obtain visas. For domestic political reasons, Canadian officials are careful to emphasize that these measures do not mean Canada is simply adopting US policies or conforming to pressures from Washington. But the political incentives are obvious: either take strong measures to enhance security or risk a unilateral hardening of the border.[44]

Although Mexicans may prove more resistant than Canadians to the notion of giving up some national sovereignty to ensure the security of the region, the Fox administration has improved cooperation on many fronts, including a degree of harmonization of immigration policies in order to reduce the attractiveness of Mexico as a gateway for people whose destination is the United States.[45] Nevertheless, many US lawmakers continue to resist the Mexican government's push for some form of legalization for the estimated 3 million undocumented Mexicans working in the United States.

Another negative impact of September 11th 2001 may be to perpetuate the existing asymmetries in the bilateral border relationships in North America with respect to the movement of people. National security takes precedence over trade under the trade agreements that apply and is perhaps the broadest exception contained in those agreements. Despite recent advances in the relationship between Mexico

[43] Peter Andreas, *supra* note 23.

[44] Tapen Sinha, *Three's Company*, February, 2002. At *http://utopia.utexas.edu/articles/tbr/threes_company.html?sec=business&sub=economics*

[45] *Idem*.

and the United States, the Canadian border remains more open to the movement of people and can be policed with fewer personnel.

Stephen Flynn who supports the notion of opening the borders remarks that "the shared risks of loss of life and massive economic disruption presented by the catastrophic terrorist threat should provide the basis for greater levels of bilateral cooperation that can remove many longstanding borders, because those barriers themselves can elevate security risks".[46]

North America finds itself in paradoxical times. On the one hand, the hemisphere's economic prosperity depends on an open continental system that facilitates the free movement of people and goods. On the other, worries over America's exposure to catastrophic terrorist attacks have transformed homeland security into one of Washington's leading preoccupations.

The experience over the past decade of stepped-up enforcement along the Mexican border suggests that US efforts aimed at hardening its borders can have the unintended consequence of creating precisely the kind of an environment that is conducive to terrorists and criminals. Draconian measures to police the border invariably provide incentives for informal arrangements and criminal conspiracies to overcome cross-border barriers to commerce and labor movements.[47] The result is that the border region becomes more chaotic which makes it ideal for exploitation by criminals and terrorists.

The current immigration law and enforcement system in place in the United States is not contributing to a more safe nation, and at the same time, as it is right now it produces immoral consequences, such as: (a) serious inequities due to national origin and racial discrimination in the legal immigration system: (b) facilitates the death of desperate undocumented immigrants, who against all odds, risk their lives in search of jobs and family reunification and (c) the law facilitates the exploitation of immigrant workers —predominantly persons of color— by increasing their vulnerability once they enter the United States.

[46] Stephen E. Flynn, *supra* note 39.
[47] *Idem*.

Before September 11, immigration was not considered to be at the top of the list of threats to national security. But the tragic events of that day dramatically shifted the immigration debate to a security imperative. Immigration rules must be designed where feasible to avoid or prevent terrorism. But the main challenge that policy makers are currently facing is to maintain the openness of society and, at the same time, the openness of the United States to the world.

VI. The Redimensionning of the Relationship between the USA and the International Law

Despite the enormous amounts of resources invested in national security, the actual situation in the borders and in the immigration issues does not seem to contribute to a definite and permanent solution, Moreover, as we have seen before, this new policies affect civil rights as well as the efficiency in the trade transactions with its two neighbors. However, and even if there is not an immediate and direct relationship with the topic of this paper, I consider extremely important to mention as a separate matter the very important role that the international law may play in the effective solution of the problems that concern the US.

US policy makers have acknowledged that terrorism cannot be effectively addressed without international cooperation. The recent events in particular have demonstrated the importance of multilateralism.[48] Therefore, it is imperative that the US realizes that this multilateral approach must extend beyond the parameters of this current crisis through a renewed engagement with the United Nations with particular attention to the norms of international law.

Indeed, the United States will have to learn to live and cooperate with others in new ways. This should include an understanding of the increased importance of the United Nations in the fight against terrorism as signified by UN Security Council Resolution 1373, which declared that international terrorism constitutes "one of the most serious threats to international peace and security in the twenty-first cen-

[48] Arthur C. Helton, *supra* note 37.

tury"[49] and condemned "all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed".[50]

It is important in the midst of this new international crisis to reiterate the need for all States to support the rule of law. Since the UN is the only truly global forum to assist with such multilateral engagement, then supporting and enforcing the international agreements should be of utmost priority to the United States and everyone else in the struggle against terrorism. Unfortunately, concerted international agreements and actions have been sabotaged by the unwillingness of some states to support them. The United States, in particular, has in recent months signaled its intention to remain outside a number of international agreements. The Anti-Ballistic Missile Treaty is in serious jeopardy as the United States plans to deploy its controversial "Star Wars" plans; the UN Small Arms Conference to tackle the illicit trade in these pernicious weapons failed to adopt a strong program of action; the entry into force of the Comprehensive Nuclear Test Ban Treaty to ban all nuclear explosions is being seriously hampered by China, Russia, and the United States, and a Protocol that would seek to enforce the Biological Weapons Convention was rejected in July by the United States. Considering the escalating concerns over bioterrrorism and the recent anthrax attacks in America the United States should be more concerned about the need to enforce the Convention through the draft Protocol, which could prevent terrorists and others in acquiring or producing biological weapons. Yet, the United States continues its opposition to the International Criminal Court (ICC), which could be, once set up and running, an appropriate forum in which terrorists such as Osama bin Laden could be prosecuted.[51]

[49] See *http://www.un.org/docs/scres/2001/res1377e.pdf*.

[50] *Idem*. See also S.C. Res. 1269, UN SCOR, 54th Sess., 4053rd mtg., UN Doc. S/RES/1269 (1999), available at *http://www.un.org/Docs/scres/1999/99sc1269.htm*.

[51] Arthur C. Helton, *supra* note 37.

VII. Conclusions

The terrorists attacks perpetrated in the US in September 11th, 2001, had extended and expanded effect through the space and the time reaching innocents parties like Mexico and Canada. Mexico as we have seen in previous sections of this paper has been direct and indirectly affected by such terrorist attacks. Unfortunately, the more undefended persons are always the more affected. The undocumented Mexicans who died in the twin tower that morning could never claim any right because technically they "did not exist", in this country. However they died and suffered, as the same as the rest of the victims of the attacks. We will never know for sure how many Mexicans casualties occurred that fatal day.

Indirect effect of such attacks has been deeply felt in the border also, through its tightening that followed to the terrorists acts, and through the new "improvements" that now have the new immigration laws of the US Indirect effects were also felt in the rest of Mexico affecting trade, commerce and tourism as well. It is clear that this new laws and policies are against any possible opening of the borders, but the question here is whether the new measures has effectively contributed to a more safe country.

The US Government has to keep in mind that the rest of the world and more deeply its closest neighbors were affected as well by the attacks in New York and Washington. Furthermore, the US should distinguish that even if there have been different opinions with Mexico about the war on terrorism and the war in Iraq (which are not the same) this does not imply that the countries that differs from those policies are in favor of the terrorism.

Mexico, on the other hand, could take single and individual steps in the bilateral cooperation to fight against the terrorism and show to our northern neighbor that within its possibilities we also are committed to halt any possible future attack. I believe that Mexico has been little enthusiastic about this cooperation. The fact that the other issues involved in the immigration policies have been placed behind the national security issues in the US political agenda, does not means that they are not longer in the list. Undoubtedly, if Mexico can demonstrate more willingness to the US to collaborate in the

fight against terrorism, Mexico will be benefited by new and more coherent immigration policies.

In the long term, Mexico can turn his face to the north and look to the good cooperative experience in Canada, even if their good border relationship has been formed during centuries, that does not mean that Mexico can not adjust its internal foreign policies and work jointly with its northern neighbor. The ambitious projects of "whole enchilada", or entire immigration reform that promoted President Fox before September 11th are evidently much more attractive, (especially for the politicians in search of "full credits') but in the actual conditions and in the light of our very eroded relationship with the US I believe that showing other attitude towards the fight against terrorism, and by giving small but firm steps to increase bilateral cooperation in the border, at the end Mexico will be able to bargain every action for a promise to exchange that will benefit at the last the Mexican workers in the US and in general our bilateral relationship. Embracing openness and advancing homeland security need not be an "either-or" proposition if Washington and Mexico are willing to apply the lessons that they had drawn from its third common partner and neighbor Canada.

There is an academic debate now in the US on how this tightness of the borders has dramatically affected many areas of the US such as the financial, and the social and cultural life. The US is facing now a social dilemma as we seen in the first chapter of this paper between giving up the progress of the trade and the civil rights towards a proved uncertain safer nation. It may be truth that there are still some politicians from across the political spectrum that have been rushing to demonstrate their commitment to securing borders.[52] At least for the time being, talking about open borders is considered in some circles as politically impolite. However, it is undeniable that the United States of America was formed by immigrants looking for a better life. Probably the combination of all those ambitious people

[52] Tapen Sinha, *supra* note 44. In this article the author make the following examples: Rep. Tom Tancredo (R-CO), chairman of the House Immigration Reform Caucus, has emphasized that defense of the country "begins with the defense of our borders." Similarly, Sen. Maria Cantwell (D-WA) says "The fundamental question" is "how are we going to ensure the security of our borders?". See *San Antonio Express News* 9-19-01.

has been the key of the economic success of this country. Therefore, the intellectuals and politicians[53] are more than aware in the present that the policy of tightening of the borders is not a feasible solution for a securer and wealthy country.

In the present it is evident that US needs the Mexican inexpensive working force, and at the same time needs certainty and reliability on who is in this country and why otherwise a secure nation will be impossible. The movement of illegal goods and undocumented migrants also points to the importance of Mexico. Ignoring Mexico leaves a large hole in the US security perimeter. If it is so easy for goods and people to move across the border, how does the United States plan to improve security without Mexican cooperation? As long as the United States cannot set up an impenetrable fence across its southern border, it needs Mexico to be a part of the security strategy.

In a long term this is beneficial for a policy supporting open borders. Towards an active bilateral cooperation (such as the smart borders and FAST), the efforts will be aimed to the same direction and will allow us to achieve safer borders and better human rights for the undocumented Mexicans. Furthermore, this proposal is not contradictory, but rather will supplement the idea of improving the participation of the US in the multilateral forums and the enforcement of the international law within this country.

All this improvements only will yield optimal benefits if they are made on shared basis rather than separately. Canadian and US agencies operate, as they must independently. But they had agreed in the

[53] Conference in Mexico by Secretary of Homeland Security Tom Ridges: "America, ladies and gentlemen, must and will remain an open, welcoming and compassionate nation. In that spirit we will work with our friends to implement the rest of the initial border agreement and then hopefully lay the groundwork for a new round of collective effort. We deal with important issues such as port security and the safety of our southern borders. And these 22 points are just a start. And as I said before, we need to find ways to advance our collective interest because the border between our nations is a human border, it must be a humane border as well. It must also be a smart border. The terrorists, drug traffickers and human smugglers watch, hide and wait for another opportunity to strike. And no nation can be truly safe from the scourge of terrorism and some of these other evils without the cooperation and commitment of other countries. You cannot attack these problems unilaterally. Specifically, we must show the terrorists that they will not hold our economy hostage. We cannot let them choke off the flow of people and trade across the United States-Mexican border. We cannot let them drive a wedge between our countries while we've made so much progress together in the past decade. Transcript of remarks by Homeland Security Secretary Tom Ridge In Mexico City on Febrary 19th, 2004, at *http://www.usembassy-mexico.gov/texts/et040219Ridge.html*

past to share many responsibilities in areas related to the cross-border transactions. The result is that they actually are sharing the "longest undefended border of the world" We will need to move beyond the conception of the border as fundamentally separating our jurisdictions, to a port of entry and a shared asset.

In Mexico there is some resistance to think in long term, especially politicians, because they would like to see immediate rewards of policies implemented during their administrations. However, I believe that the goals set forth in the above paragraphs are goals that can only be achieved in the long term. Based on current trends, the most likely scenario in short and medium terms fall somewhere in the middle, neither "open borders" nor "tight borders". Many different actions tending to promote the bilateral cooperation in the border in different areas may well be the starting point of a finally open border as it is desired, I believe, from both countries.