

FREE TRADE, FREE MIGRATION: A PATH TO OPEN BORDERS AND ECONOMIC JUSTICE IN THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA

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I. INTRODUCTION

Free trade and globalization are rapidly changing the economic face of the world. Where individual nations once vied for supremacy in trade and protected their own interests to the exclusion of all others, the twenty first century marks a shift toward increasing cooperation and the formation of regional economic blocs. Some take the form of, or aspire to become, political supra-nations, such as the European Union (E.U.) and African Union. Others are more traditional alliances such as Mercado Común del Sur (“MERCOSUR”) or the Association of South East Asian Nations (“ASEAN”). In North America, the primary vehicles of economic regionalization have been free-trade agreements, embodied in the North American Free Trade Agreement (“NAFTA”)¹ and its companion the North American Agreement on Labor Cooperation (“NAALC”).² When enacted in 1994, these agreements held out the promise of increased prosperity for the nations involved and the citizens thereof through closer cooperation and a degree of economic integration among the three nations. The terrorist attacks of September 11, 2001 caused the United States to reevaluate its position vis-à-vis many of its international alliances and obligations, and the NAFTA zone was no exception. In 2005, President Bush launched the Security and Prosperity Partnership of North America (“SPP”) to consider the course of North American cooperation in light of the new concerns the United States had for its national security.³

To date, the promises of NAFTA have gone largely unfulfilled, and discontent among workers in particular have led to calls for the rescission of the agreement and a return to a more protectionist trade policy.⁴ Reaction to the perceived threat of international terrorism has also prompted the United States to throw up

1. North American Free Trade Agreement, U.S.-Can.-Mex., Jan. 1, 1994, 32 I.L.M. 605 [hereinafter NAFTA].

2. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Jan. 1, 1994, 32 I.L.M. 1499 [hereinafter NAALC].

3. M. ANGELES VILLARREAL AND JENNIFER E. LAKE, CONGRESSIONAL RESEARCH SERVICES, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES 1 (2007).

4. See Celia W. Dugger, *Report Finds Few Benefits for Mexico in NAFTA*, NEW YORK TIMES, Nov. 13, 2003, at A8; see also *infra*, pp. 18 (“Pushback from the U.S. Right”), 36 (“Open Borders are Needed to Promote Economic Justice”).

walls, both real and virtual, to restrict the outside world from coming in. These approaches ignore the fact that globalization is the dominant trend in the world economic sphere, and refusal to engage with that trend will simply leave the United States at a disadvantage. With the leaders of the North American nations meeting to nominally enhance the prosperity of their respective nations, it is time they reconsidered withdrawing from the world and closing their borders and instead embrace the idea of a borderless North America. Open borders are necessary to achieve economic justice in a region where goods and jobs can be moved with almost no barriers, and the Schengen Agreement of the European Union,⁵ which lifted restrictions on travel within the E.U., provides a model by which this can be achieved in North America as well.

Section II of this paper will focus on how migration is addressed within the current paradigm of NAFTA and NAALC. Section III covers the current physical and regulatory systems in place at the U.S. borders with Canada and Mexico and the changes to these systems so far as proposed by the SPP. Section IV shows the effect these measures have had on cross-border migration and presents some alternative models for North American borders. Section V will explain the opposition to North American integration from several political orientations. Section VI gives a basic outline of the Schengen Agreement. Finally, Section VII shows how provisions of the Schengen Agreement have their counterpart, or at least the germ of a counterpart, in NAFTA and the SPP, and further describes how open borders serve the cause of economic justice.

II. IMMIGRATION AND BORDER CONTROL PROVISIONS IN NAFTA AND NAALC

As a free-trade agreement, NAFTA understandably focuses primarily on the movement of goods rather than the movement of people. NAFTA does address migration to the extent businesspersons are required to travel to facilitate trade,⁶ but this is one of the smallest chapters in the agreement.⁷ In general, Chapter Six provides that, subject to necessary provisions to protect national security and the permanent labor force of the receiving country,⁸ qualified business travelers shall be granted temporary entry to other NAFTA countries when engaging in their trade or profession.⁹

The broadest category of qualified travelers, described as “Business Visitors,” are also subject to the fewest restrictions, namely proof of citizenship of a party country, documentation that they will be engaging in qualified business activity,

5. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Protocol integrating the Schengen acquis into the framework of the European Union, Oct. 2, 1997, 1997 O.J. (C 340) 93 [hereinafter Treaty of Amsterdam].

6. NAFTA, *supra* note 1, at ch. 16.

7. Compare, *id.* at ch. 6 (“Energy and Basic Petrochemicals” reaching only fourteen pages in length) with 3 (“National Treatment and Market Access for Goods” reaching thirty-five pages in length) and 7 (“Agriculture and Sanitary and Phytosanitary Measures” at twenty-nine pages).

8. *Id.* at ch.6, art. 1601.

9. *Id.* at art. 1602.

and evidence they are not attempting to permanently enter the labor market of the receiving country.¹⁰ Visitors entering under this provision are not required to obtain a work visa,¹¹ and no quota may be imposed on the number allowed to enter a party state during a calendar year.¹² Other categories exist for allowing Traders and Investors,¹³ Intra-Company Transferees,¹⁴ and Professionals¹⁵ to enter party states for business purposes, but greater restrictions may be placed on their entry.¹⁶ Travelers wishing to qualify under sections A and D of Chapter Six must fall within certain prescribed job categories and may be required to hold certain certifications to qualify.¹⁷ Despite the seeming breadth of application of this section, NAFTA explicitly states that it is not meant to impose further obligations on party states' immigration policies.¹⁸

Since NAFTA focuses primarily on the status of goods in North America, a companion agreement was needed to address workers and labor conditions.¹⁹ The NAFTA nations filled this gap with the NAALC. Unlike the relatively open border policy afforded to goods under NAFTA, NAALC takes a more protectionist view toward domestic labor.²⁰ NAALC does acknowledge the realities of migrant labor, and authorizes the Commission for Labor Cooperation ("CLC") to promote cooperation among party states with regard to migrant issues.²¹ An annex to NAALC defines the goal of this cooperation as affording migrants "the same legal protection as the Party's nationals in respect of working conditions."²²

10. *Id.* at Annex 1603 § A.1.

11. *Id.* § A.3.

12. *Id.* § A.4(b).

13. *Id.* § B.

14. *Id.* § C.

15. NAFTA *supra* note 1, at ch. 6, Annex 1603 § D.

16. *But see id.* §§ D.5(a), D.7 (encouraging numerical limits be raised and eventually eliminated on professionals).

17. *Id.* §§ A.1, D.1.

18. *Id.* at art. 1607.

19. Commission for Labor Cooperation, *The North American Agreement on Labor Cooperation*, <http://www.naalc.org/english/naalc.shtml> (last visited Oct. 28, 2007).

20. *Id.* ("It provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems..."); *see also* NAALC, art. 1, ¶ 1 ("To improve working conditions and living standards in each Party's territory.") (emphasis added).

21. NAALC at art. 10 para. 1(1). The Commission for Labor Cooperation was created by the NAALC. *Id.* at art. 8. The Commission for Labor Cooperation has limited authority, and primarily plays an advisory role in implementing the current targets of the NAALC and facilitates meetings for developing new cooperative goals among the Party States. *Id.* at art. 10.

22. *Id.* at Annex 1, ¶ 11.

III. CURRENT STATE OF NORTH AMERICAN IMMIGRATION AND BORDER CONTROL AND PROPOSED CHANGES ENVISIONED BY SPP

A. Post-September 11th Changes to Border Security Infrastructure

While mid-1990s plans for North American economic integration did not envision major changes in immigration policies, the national security concerns raised by the terrorist attacks of September 11, 2001 precipitated a major shift in immigration and border control policies in the United States. This shift has resulted in new bilateral agreements with Canada and Mexico as well as multilateral arrangements among the three governments both within and outside the context of the Security and Prosperity Partnership.

Within months of the September 11th attacks, the newly created Office of Homeland Security issued a thirty-point declaration known as the Smart and Secure Border Action Plan.²³ The first thirteen points of the declaration deal with the secure flow of people across the Canadian-U.S. border.²⁴ Many of the points are specific to air travel, but some address issues specific to land crossings or issues that overlap between air and land travel. An example of the former includes resumption of the NEXUS program,²⁵ while the latter is characterized by proposals to increase the use of technology like biometric identification documents,²⁶ and increased sharing of information between U.S., Canadian, and other international authorities.²⁷ By the end of 2002, the White House was reporting significant progress on all points of the declaration.²⁸

On the southern border, the United States concluded a similar arrangement with Mexico, known as the U.S.-Mexican Border Partnership Agreement.²⁹ Points related to the secure flow of people were substantially similar to those found in the agreement with Canada,³⁰ but greater attention was given to infrastructure issues such as relieving bottlenecks,³¹ harmonizing procedures, and opening hours at crossing facilities.³² Other major points of interest particular to the Mexico agree-

23. Press Release, Office of Homeland Security, Specifics of Secure and Smart Border Action Plan (Jan. 7, 2002) *available at* http://www.dhs.gov/xnews/releases/press_release_0036.shtm (last visited Mar. 16, 2009).

24. *Id.*

25. *Id.* ¶ 3 (discussed in greater detail *infra*).

26. *Id.* ¶¶ 1-2.

27. *Id.* ¶¶ 6, 11-13, 23-26, 30.

28. Press Release, The White House Office of the Press Secretary, U.S.-Canadian Smart Border/30 Point Action Plan Update (Dec. 6, 2002), *available at* http://www.dhs.gov/xnews/releases/pres.s_release_0057.shtm (last visited Mar. 16, 2009).

29. Press Release, The White House Office of the Press Secretary, Smart Border: 22-Point Agreement – U.S.-Mexican Border Partnership Action Plan (Mar. 22, 2002), *available at* <http://www.state.gov/p/wha/rls/fs/8909.htm> (last visited Oct. 28, 2007).

30. *Id.* ¶¶ 8-15.

31. *Id.* ¶ No. 2.

32. *Id.* ¶ No. 4.

ment were deterrence of illegal immigration,³³ both by Mexican nationals and nationals of third countries.³⁴

In January of 2004, border crossing requirements for all non-immigrant alien visitors arriving via air or sea were refined as part of the United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”).³⁵ US-VISIT authorizes the collection of photographs and fingerprints, as well as any other specified biometric information, from non-immigrant visitors to the United States.³⁶ In September of 2004 the program was expanded to the 50 most-traversed land crossings,³⁷ and Mexican nationals were no longer exempt from submitting biometric information.³⁸ Increased use of technology, including wireless and radio frequency chips, is intended to expedite this process at land border crossings as well as provide more accurate tracking of foreign visitors.³⁹ The Department of Homeland Security (“DHS”) envisions a nearly automated process at some point in the future, but currently implementation of automation technology is lagging at land crossings.⁴⁰

The most recent program affecting U.S. land border crossings is the Western Hemisphere Travel Initiative (“WHTI”). The result of legislation passed by the United States Congress in response to the recommendations of the 9/11 Commission, the WHTI will require a valid passport or other designated travel document for all travelers crossing between the United States, Canada, and Mexico regardless of citizenship or method of crossing, i.e. by land, sea, or air.⁴¹ WHTI was implemented for air travel beginning in January 2007, and the program is expected to be fully rolled-out at all border-crossing points by June 2009.⁴² Due to fears of delays at land border crossings, DHS and the Department of State are currently in talks to develop an alternative document, such as a card-style passport valid only for land travel between the three nations, to replace the traditional book-style passport.⁴³ Furthermore, documents such as green cards, Merchant Mariner Docu-

33. *Id.* ¶ No. 11.

34. *Id.* ¶ No. 15.

35. US-VISIT; Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry, 69 Fed. Reg. 53, 318, 53, 320 (Aug. 31, 2004).

36. 8 C.F.R. § 235.1(d)(ii) (2009).

37. US-VISIT, *supra* note 35, at 53, 321.

38. Rey Koslowski, *Smart Borders, Virtual Borders, or No Borders: Homeland Security Choices for the United States and Canada*, 11 L. & BUS. REV. AM. 527, 536 (2005).

39. *Id.* at 538.

40. *Id.* at 538-39.

41. Department of Homeland Security, Western Hemisphere Travel Initiative: The Basics, <http://www.dhs.gov/xtrvlsec/crossingborders/whtibasics.shtm> (last visited Mar. 16, 2009) [hereinafter WHTI Basics].

42. U.S. Embassy Ottawa, Modernizing the U.S.-Canadian Border: A Timeline, http://ottawa.usembassy.gov/content/can_usa/pdfs/borderissues_modernizing_chart.pdf (last visited Apr. 25, 2009).

43. Border Policy Research Institute, Border Policy Brief, WHTI Implementation Update (2006).

ments, and trusted-traveler cards are acceptable substitutes for a passport under the WHTI.⁴⁴

Parallel to the increased security measures implemented at both of the United States' land borders has been a series of so-called trusted-traveler programs designed to streamline the entry process for frequent border crossers. Separate programs have been established at the Mexican and Canadian borders, known as the Secure Electronic Network for Travelers Rapid Inspection ("SENTRI")⁴⁵ and NEXUS⁴⁶ respectively, with a third program, Free and Secure Trade ("FAST"), that includes provisions designed specifically for commercial truck drivers, and covers trade traffic at both borders.⁴⁷

SENTRI is the longest standing of the programs, adopted in 1995.⁴⁸ It provides frequent crossers of the U.S.-Mexican border expedited processing at certain crossing locations in California, Arizona and Texas.⁴⁹ Participants submit an application and supporting documentation, including proof of citizenship, proof of admissibility to the country of non-citizenship, proof of driver's license, and proof of residence as well as submitting to a background check and in-person interview.⁵⁰ Once approved, applicants are issued a radio-frequency identification ("RFID") card for themselves and an RFID decal for their vehicle. The RFID devices allow computers at the crossing checkpoints to automatically access the traveler's records, similar to automated toll collection systems.⁵¹ The system will then signal to the customs officer if the traveler may be allowed to proceed or must clear additional screening.⁵²

NEXUS, established in 2002, operates in a similar fashion.⁵³ The application and background check procedures are identical to those in SENTRI.⁵⁴ NEXUS

44. WHTI Basics, *supra* note 41.

45. U.S. Customs and Border Patrol, Secure Electronic Network for Travelers Rapid Inspection (SENTRI) Fact Sheet, http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/sentri/sentri_fact.ctt/sentri_fact.pdf (last visited Apr. 25, 2009) [hereinafter CBP, SENTRI Facts].

46. U.S. Customs and Border Patrol, NEXUS Fact Sheet, http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/nexus_fact.ctt/nexus_fact.pdf (last visited Mar. 16, 2009) [hereinafter CBP, NEXUS Facts].

47. U.S. Customs and Border Patrol, FAST Fact Sheet, http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/fast/fast_fact.ctt/fast_fact.pdf (last visited Apr. 25, 2009) [hereinafter CBP, FAST Facts].

48. CBP, SENTRI Facts, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. CBP, NEXUS Facts, *supra* note 46.

54. *Compare* U.S. Customs and Border Patrol, NEXUS Program Description, http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus.xml (last visited Mar. 16, 2009) [hereinafter CBP, NEXUS Description] ("[a]pplications can be submitted using the U.S. Customs and Border Protection on-line application system, Global On-Line Enrollment System (GOES), or to one of the Canadian Processing Centers (CPC), along with photocopies of their supporting documentation and the US \$50 or CN \$50 application-processing fee.") *with* CBP, SENTRI Facts, *supra* note 45 ("[p]rospective SENTRI participants may now apply online at

participants are given expedited clearance at crossings at several points along the U.S.-Canadian border, in much the same way as SENTRI participants.⁵⁵ Applicants receive an identification card that also functions as a “proximity card,”⁵⁶ which speeds access to personal records at the border.⁵⁷ One feature unique to NEXUS cards, compared to their SENTRI counterparts, is the inclusion of iris scans in the encoded biometric data.⁵⁸

Finally, FAST provides a similar opportunity to drivers holding commercial driver’s licenses in conjunction with a program to expedite the movement of goods over the United States’ northern and southern borders.⁵⁹ Application procedures are similar to the other two programs and are also identical for drivers wishing to enroll in FAST-Canada or FAST-Mexico, though different countries process the applications for each branch of the program.⁶⁰ Unlike SENTRI and NEXUS cards, FAST cards do not themselves function as a travel document for the purposes of immigration.⁶¹ They merely act as proof of pre-clearance against security lists and mark the holder as a “low-risk” traveler.⁶² An additional benefit accorded SENTRI and NEXUS cards, as opposed to FAST cards, is that they satisfy the documentary requirements of WHTI.⁶³

B. Migration and the Security and Prosperity Partnership

While these programs are developing at the agency and ministerial level, executive-level talks continue among the North American leaders.⁶⁴ Major discussions on economic and border issues post-September 11th have taken place in the context of the Security and Prosperity Partnership (“SPP”). Though not legally binding, the talks do reflect an effort to reach a common direction on issues of regional policy, including security issues.⁶⁵ Border issues have been on the agenda from the SPP’s since 2005, particularly ensuring the continued effectiveness of the

www.cbp.gov as well as pay application and other program fees online.”).

55. CBP, NEXUS Description, *supra* note 54.

56. This is likely to be implemented using RFID or wireless technology. *Id.*

57. *Id.*

58. CBP, NEXUS Facts, *supra* note 46.

59. U.S. Customs and Border Patrol, FAST Overview, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/fast/us_canada/ (last visited Apr. 10, 2010) [hereinafter CBP, FAST Overview].

60. *Id.*

61. U.S. Customs and Border Patrol, FAST Commercial Driver Participant Guide, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/fast/us_canada/ (last visited Apr. 10, 2010) [hereinafter CBP, FAST Driver Guide].

62. CBP, FAST Overview, *supra* note 59.

63. WHTI Basics, *supra* note 40. SENTRI is not yet ready for use under WHTI, but U.S. Customs and Border Patrol expect it will be acceptable in the near future, SENTRI Facts, *supra* note 45.

64. VILLARREAL AND LAKE, *supra* note 3, at 1.

65. *Id.*

temporary work entry program developed under NAFTA.⁶⁶ In March 2006, after the Cancún round of SPP talks, “increased collaboration on standards and processes” for border security were listed as one of five “high-priority initiatives.”⁶⁷

Migration issues are assigned to multiple working groups under the SPP, and into both the Prosperity and Security Agendas.⁶⁸ Responsibility for the Prosperity Agenda in the United States is given to the Department of Commerce, while the Security Agenda falls within the purview of the DHS, with both Agendas ultimately coordinated by the Department of State.⁶⁹ The Prosperity Agenda defines its goals rather loosely with regard to what it calls the “[e]fficient [m]ovement of [p]eople,” calling for a broad “facilitation” of trans-border movement of business persons as well as reductions in the taxes and other monetary costs associated with the border-crossing process.⁷⁰ As for the Security Agenda, DHS identified a number of goals adopted by the SPP countries in 2005 that would aid in relieving congestion at border crossings while simultaneously improving security.⁷¹ These included creation of a single North American trusted traveler program by 2008, infrastructure improvements at ports of entry to reduce bottlenecking, and increased sharing of information such as terrorist watch lists and screening databases.⁷²

66. *Id.* at 2.

67. *Id.* President Bush explained his views of the security agenda in remarks at Cancún; “[T]he whole vision of our borders has got to be to enhance trade and tourism, but to prevent smugglers and terrorists and dope runners from polluting our countries. And I’m confident, with the use of technology and by close collaboration, we’ll be able to achieve those objectives.” President George W. Bush, President Vicente Fox & Prime Minister Stephen Harper, Press Conference at Meeting of Security and Prosperity Partnership Leaders in Cancun, Mexico (Mar. 31, 2006) [hereinafter Cancún Press Conference]. President Fox offered that “[w]e have to make borders much more modern... to guarantee security...,” *id.*, and Prime Minister Harper promised “we’re going to ask Secretary [of Homeland Security Michael] Chertoff and Minister [of Public Safety Stockwell] Day to meet as soon as possible, at the highest levels...,” President George W. Bush & Prime Minister Stephen Harper, Remarks at Meeting of Security and Prosperity Partnership Leaders in Cancún, Mexico (Mar. 30, 2006) [hereinafter Bush-Harper Remarks].

68. Security and Prosperity Partnership of North America, Prosperity Working Groups, http://www.spp.gov/prosperity_working/index.asp?dName=prosperity_working (last visited Mar. 16, 2009) (citing migration issues under the “Business Facilitation” and “Transportation” working groups); Security and Prosperity Partnership of North America, Security Agenda, http://www.spp.gov/security_agenda/index.asp?dName=security_agenda (last visited Mar. 16, 2009).

69. Department of Homeland Security, Fact Sheet: Security and Prosperity Partnership of North America, http://www.dhs.gov/xnews/releases/press_release_0695.shtm (last visited Mar. 16, 2009).

70. Security and Prosperity Partnership of North America, Prosperity Agenda, http://www.spp.gov/prosperity_agenda/index.asp?dName=prosperity_agenda (last visited Mar. 16, 2009).

71. Department of Homeland Security, Security and Prosperity Partnership: Implementation Report – Security Agenda *available at* http://www.spp.gov/SECURITY_FACT_SHEET.pdf?dName=fact_sheets (last visited Mar. 29, 2009) [hereinafter DHS Implementation].

72. *Id.*

Since announcing these goals in March 2005, the responsible departments have already reported several accomplishments toward achieving these goals. As early as June 2005, just three months after the first meeting of SPP, DHS was reporting success in improving border infrastructure, specifically laying firm plans for the expansion of existing border-crossing facilities and a shift toward customs pre-clearance on the U.S.-Canadian border, as well as a U.S.-Canadian agreement on the sharing of risk-assessment information.⁷³ The rapid implementation of these plans was credited to existing inter-agency cooperation since September 11, 2001.⁷⁴ On the Prosperity side, a trilateral initiative to revisit and update the NAFTA provisions for temporary business travel was agreed upon with the goal of clarifying each country's entry procedures and ultimately allowing more business travelers to obtain permission for temporary entry.⁷⁵ In 2006, the responsible agencies published an updated progress report to the SPP leaders following their meeting in Cancún. Issues pertaining to facilitating the flow of people across borders were not a major feature of the summary report, though progress was cited on the interdiction of smugglers of both drugs and human beings.⁷⁶ The SPP leaders themselves highlighted a fifty percent reduction in waiting times at the crossing between Detroit, Michigan and Windsor, Ontario, the busiest U.S.-Canadian crossing.⁷⁷ Although heralded as a boon for trade, this improvement also has the secondary effect of expediting regular human traffic across the border. Annexes to the report provide a more detailed view of the SPP's achievements thus far.

The Prosperity Annex names safer, faster, and more efficient border crossing as its "Signature Initiative."⁷⁸ Most aspects of the Signature Initiative were reported as on-track or already completed, including programs to measure and analyze cross-border traffic with an eye to optimizing the crossing process. Perhaps most promising was a measure that, though listed as delayed, would set up a cross-border commuter program between El Paso, Texas and Ciudad Juárez, Mexico.⁷⁹ The equivalent Security Annex reported less concrete progress, listing many programs, including the expanded use of biometric technology⁸⁰ and trusted-traveler

73. *Id.*

74. *Id.*

75. CARLOS GUTIERREZ, SECRETARY OF COMMERCE, ET AL., SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA REPORT TO LEADERS (2005), *available at* http://www.spp.gov/report_to_leaders/index.asp?dName=report_to_leaders [hereinafter 2005 REPORT TO LEADERS].

76. MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY, ET AL., SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA REPORT TO LEADERS (2006), *available at* http://www.spp.gov/2006_report_to_leaders/index.asp?dName=2006_report_to_leaders [hereinafter 2006 REPORT TO LEADERS].

77. *Id.*

78. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA, PROSPERITY ANNEX TO 2006 REPORT TO LEADERS 21 (2006) *available at* http://www.spp.gov/2006_report_to_leaders/prosperity_annex.pdf?dName=2006_report_to_leaders.

79. *Id.*

80. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA, SECURITY ANNEX TO

arrangements⁸¹ as either “on track” or “delayed” with few programs actually complete.⁸² Here, a promising measure is the program to develop a low-cost identity document for the purposes of North American travel,⁸³ likely a variant of the passport card envisioned by WHTI.

IV. EFFECTS OF INCREASED BORDER SECURITY MEASURES AND ALTERNATIVE MODELS

A. Decline in Cross-Border Trips since September 11, 2001

Though NAFTA and the SPP both recommend the facilitation of cross-border travel, at least as far as short-term business-related travel is concerned,⁸⁴ entries into the United States have declined significantly along both the northern and southern borders since 2001.⁸⁵ Both borders saw declines of approximately 10 million persons crossing per annum from 2001 to 2002 and 2002 to 2003.⁸⁶ Through 2006, the last date for which figures are available, traffic on the northern border has rebounded slightly, though it is still holding steady below pre-2002 levels, while traffic on the southern border has continued to decline.⁸⁷ So far, the prospect of eased travel seems to elude the SPP partners, in part because security arrangements deemed necessary have yet to come to fruition. The situation is further complicated when the governments of the individual nations pass further restrictions on travel, such as WHTI. If the SPP is to make progress in this regard, it appears an alternative model will have to be developed allowing for freer borders while still addressing the legitimate security and sovereignty issues raised by the North American nations.

2006 REPORT TO LEADERS 49 (2006), available at http://www.spp.gov/2006_report_to_leaders/security_annex.pdf?dName=2006_report_to_leaders.

81. *Id.* at 74.

82. *Id.* at 49, 74.

83. *Id.* at 49.

84. See VILLARREAL AND LAKE, *supra* note 3, at 2.

85. Dep't. of Transportation, Bureau of Transportation Statistics, U.S. Border Crossings by State and Year, <http://www.transtats.bts.gov/bordercrossing.aspx> (select “State Summary Only”; “Annual Summary Only”; “Northern Border States” and “Southern Border States”; and “Bus Passengers,” “Passengers in Personal Vehicles” and “Pedestrians”) (last visited Nov. 23, 2007).

86. *Id.*

87. *Id.* Dr. Hart Hodges of Western Washington University performed a study of same-day border crossings (i.e., entering the U.S. and returning the same day) by Canadians between British Columbia and Whatcom County, Washington, the county that borders Canada closest to Vancouver, BC. BORDER POLICY RESEARCH INST. WESTERN WASH. U., EXPLAINING THE DECLINE IN BORDER CROSSINGS SINCE 1990 1 (Feb. 2006). The study focused on possible economic factors that would explain the decline in quick border-hopping shopping trips from 1990 to 2005. *Id.* Overall, Hodges found a significant change in Canadian border-crossing behavior after September 11, 2001 that could not be linked to economic factors such as the relative price of goods, the availability of “big-box” stores like Wal-Mart in Canada, or the exchange rate between U.S. and Canadian dollars, though gas prices and average wages did show a greater correlation. *Id.* at 1-2. The authors propose that further studies regarding subjective factors like anti-American sentiment and perceived difficulty in crossing the border would lend greater insight into this matter. *Id.* at 2.

B. Alternative Models for Organizing North American Trans-Border Travel

When contemplating the possibilities of a more integrated “internal” travel arrangement in the NAFTA zone, the obvious place to look is a geographic economic zone where such an arrangement is already in place: the European Union. In a symposium presentation for the Institute for Research on Public Policy, Rey Koslowski of SUNY Albany discussed this sort of “perimeter” security arrangement as it exists in the European Union and the possibilities for implementing the same in North America, specifically as a common security perimeter for the United States and Canada.⁸⁸ Koslowski criticizes the current arrangement of so-called “smart borders” primarily on the basis of the phenomenal logjams created at the U.S.-Canadian border in the weeks immediately following September 11th.⁸⁹ Wait times as long as fifteen hours occurred for travelers at certain crossings, leading to the shutdown of several major automobile-manufacturing plants in Detroit because parts could not be received from Canada in a timely fashion.⁹⁰

Though the smart border programs were intended to alleviate this sort of problem in the future, Koslowski notes that this has not been entirely successful due to physical design limitations, particularly in the Great Lakes region where bridges and tunnels are a must and can only be made wider at great difficulty and expense.⁹¹ Additionally, since a true smart border program requires the registration of both entries and exits,⁹² border crossings would require either the doubling of physical infrastructure to provide an exit-processing facility at each crossing to mirror entry processing,⁹³ or would require each nation to extend a high level of trust to immigration officials from the other nation and allow them to process exits simultaneously with entry into the other nation, reporting the exit back to the appropriate authorities.⁹⁴ Koslowski contends that such a level of trust might be better aimed at establishing a perimeter border and eliminating some of the internal controls entirely.⁹⁵

Such a plan has obvious hurdles to clear and Koslowski is quick to point them out. First, matters of foreign policy, such as those related to trade, could create an issue for integration of borders in the North American context. Specifically, since Canada does not recognize the United States’ embargo on Cuba, an agreement would have to be reached on either getting Canadian agreement with such a policy or convincing the United States to relax its restrictions on the island nation.⁹⁶ Koslowski finds this prospect exceedingly unlikely given President Bush’s reliance on the Cuban community in Florida for political support and the passage of such

88. Koslowski, *supra* note 38, at 540.

89. *Id.* at 529.

90. *Id.*

91. *Id.* at 530, 537.

92. *Id.* at 537.

93. *Id.* at 538.

94. Koslowski, *supra* note 38, at 540.

95. *Id.*

96. *Id.* at 542-43.

laws as the Cuban Democracy Act, signaling a lack of Congressional support for such measures.⁹⁷ Support for such a perimeter also appears to be lacking among Canadian politicians, with one foreign minister calling the plan “simplistic” and an immigration minister stating that a perimeter based on the “European model” was simply not under discussion.⁹⁸

Second, establishing a perimeter security arrangement requires a high level of coordination on visas, including the visa type and documentation required for travelers from different countries, quotas, lengths of stay and other considerations.⁹⁹ Additional obstacles include preferential treatment given by Canada to members of the Commonwealth of Nations¹⁰⁰ and the continuing presence of tariffs on certain goods, free trade notwithstanding, that require inspection of vehicles as they cross the border, a condition the European Community eliminated long before contemplating free travel.¹⁰¹

With these obstacles currently operating on the political level, and the grassroots opposition to such a plan, Koslowski is justified in painting a less than hopeful picture for such a form of integration, at least in the near term. Dunniela Kaufman of Fraser Milner Casgrain LLP, in a paper for the American Bar Association, shares Koslowski’s pessimism concerning European-style integration.¹⁰² Instead she draws a comparison to MERCOSUR,¹⁰³ the South American trade organization that has since evolved into a vehicle for the promotion of democracy¹⁰⁴ and which could, she suggests, continue to evolve into an entity with a common external border control policy.¹⁰⁵

Since the European Union presupposes a certain level of economic and particularly political integration, it provides a problematic model for the NAFTA zone.¹⁰⁶ The United States and Canada are typically too jealous of their sovereignty to give up power to a supranational governing body.¹⁰⁷ Since the SPP shifts its focus to security issues in the context of trade, it provides a political element to the negotiations among NAFTA nations that heretofore was minimized, if not entirely nonexistent.¹⁰⁸ By introducing such a political element and taking up a security-oriented focus, Kaufman argues the SPP is in some regards moving toward a MERCOSUR-like arrangement, since MERCOSUR originally came about as a

97. *Id.*

98. *Id.* at 541.

99. *Id.* at 543-45.

100. Koslowski, *supra* note 38, at 545.

101. *Id.* at 542.

102. Dunniela Kaufman, *Does Security Trump Trade?*, 13 LAW & BUS. REV. AM. 619, 632 (2007).

103. *Id.* at 639.

104. *Id.* at 640.

105. *Id.* at 641.

106. *Id.* at 632.

107. During the creation of NAFTA this hurdle was acknowledged and the imposition of political requirements was avoided as far as practicable *Id.*

108. Kaufman, *supra* note 102, at 632.

way to increase the mutual security of Brazil and Argentina.¹⁰⁹ One requirement for MERCOSUR membership is a democratic form of government, a condition credited with heading off a coup in Paraguay, which placed a high priority on joining the agreement.¹¹⁰ Further security-oriented proposals within MERCOSUR have included drug-interdiction regulations, weapons-control initiatives to stave off political unrest and private security forces, and information sharing.¹¹¹ Kaufman argues the creation of MERCOSUR as a customs union has given it the fluidity necessary to contemplate trans-national security measures in a way not available in the North American context.¹¹² Customs unions inherently contemplate a form of shared borders, and extending those concepts to security issues as well as trade issues does not require a great leap.¹¹³

Ultimately, the comparison to MERCOSUR runs into the same problems as the comparison with the European Union. Because these arrangements were envisioned differently from the outset, with common borders seen as a desirable feature, it has been easier to expand them beyond their original trade-oriented scopes into either a “borderless” system such as the European Union or a joint-security arrangement such as in South America. In comparison, concerns about national sovereignty have created considerable backlash among certain elements of the Canadian and American public, including Congressional resolutions proposed to place concrete limits on the ability of the SPP to further any sort of North American integration.

V. PUBLIC AND POLITICAL OPPOSITION TO SPP AND NORTH AMERICAN INTEGRATION

In a Congressional Research Service report, the authors note that there is a level of misconception about the scope of the SPP’s authority, specifically the belief that it is an attempt to form an economic union among the United States, Mexico and Canada, with plans to build some sort of super-corridor from Mexico through the United States to Canada.¹¹⁴ The SPP itself has published a “Myth vs. Fact” leaflet to counter similar accusations.¹¹⁵ In both cases, the authors note that any such arrangements would require Congressional approval and thus threats to national sovereignty are greatly exaggerated. Nevertheless, organizations on both sides of the political aisle have come out in fervent opposition to any talk of North American integration.

In a case of strange political bedfellows, opposition to the goals of the SPP, both real and perceived, has managed to unite elements of the American political

109. *Id.* at 639.

110. *Id.* at 639-40.

111. *Id.* at 640.

112. *Id.* at 641.

113. *Id.*

114. VILLARREAL AND LAKE, *supra* note 3, at 3-4.

115. Security and Prosperity Partnership of North America, SPP Myths vs. Facts, http://www.spp.gov/myths_vs_facts.asp (last visited Oct. 8, 2007) (hereinafter SPP Myths).

right with elements of the Canadian political left. In the United States, organizations like the Minutemen and the John Birch Society, as well as Republican Congressmen Tom Tancredo and Virgil Goode have voiced concerns over what they perceive as a coming North American Union, similar to the European Union, complete with its own supranational government and currency that would supersede or replace existing U.S. institutions. On the other hand, Canadian groups such as the Council of Canadians, a self-described pro-democracy and anti-corporate political organization, have published “citizen action guides” providing talking points for protesting the SPP.

A. Pushback from the U.S. Right

The forefront of SPP opposition in the United States has come from organizations such as Stop the Security and Prosperity Partnership (“Stop the SPP”). Stop the SPP was co-founded by Jim Gilchrist and Jerome Corsi.¹¹⁶ Gilchrist is also the founder of the Minuteman Project, a right-wing organization that seeks to “simply enforce existing immigration laws.”¹¹⁷ Corsi is a co-founder of Swift Boat Veterans for Truth.¹¹⁸ Though the website consists primarily of an immigration policy blog and documents obtained under the U.S. Freedom of Information Act, there are also sections describing so-called “NAFTA Highways,” promoting a “call for action” that accuses the President of violating the Constitution by engaging in SPP talks, and promoting anti-North American Union rallies.¹¹⁹

The John Birch Society is a more general right-wing organization originally founded on an anti-Communist platform but which has recently taken up the SPP and North American Union as favored causes for protest. Besides devoting a portion of their website to providing information on the SPP,¹²⁰ the society publishes a magazine that features anti-SPP articles and provides posters and other materials for use at protests.¹²¹ The John Birch Society website takes a more reserved tone overall than Stop the SPP, but still conjures fears of the “end of [the United States’] independence.”¹²² Both of these organizations have thrown their support behind Congressional action that would require the U.S. government to cease par-

116. Stop the Security and Prosperity Partnership, About Stop the SPP, http://stopspp.com/stopspp/?page_id=2 (last visited Apr. 10, 2010) (hereinafter Stop the SPP).

117. Stop the SPP, Jim Gilchrist, http://stopspp.com/stopspp/?page_id=8 (last visited Apr. 10, 2010).

118. Stop the SPP, Dr. Jerome Corsi, Ph.D., http://stopspp.com/stopspp/?page_id=10 (last visited Apr. 10, 2010).

119. Stop the SPP Home Page, <http://stopspp.com> (last visited Apr. 10, 2010). The accusation of a Constitutional violation on the part of the President is a little difficult to follow as the cited clause is one that enjoins states from participating in foreign affairs without the consent of Congress, not one that enjoins the President. See U.S. CONST. art. I, § 10, cl. 3.

120. The John Birch Society, North American Union and Security and Prosperity Partnership, <http://www.jbs.org> (hover on “Where We Stand” button and select “NAU/SPP” link from the drop-down menu) (last visited Nov. 26, 2007).

121. The John Birch Society, Current Campaigns, <http://www.jbs.org/news-center> (last visited Apr. 10, 2010).

122. The John Birch Society, North American Union and Security and Prosperity Partnership, *supra* note 120.

ticipation in the SPP and any activities they see as connected to a North American Union, including the construction of “NAFTA Superhighways” and the adoption of a common North American currency called the Amero.¹²³

One such Congressional action was an October 4, 2006 letter from Rep. Tom Tancredo of Colorado, who wrote to Commerce Secretary Carlos Gutierrez asking him to suspend work on any and all SPP-related projects until those projects could be reviewed and approved by the U.S. Congress.¹²⁴ Though no public response seems to have been made, the letter was applauded on right-wing news website WorldNetDaily, also run by Corsi.¹²⁵ In addition, Rep. Virgil Goode of Virginia introduced a resolution on January 22, 2007, House Concurrent Resolution 40, stating that “the United States should not allow the Security and Prosperity Partnership (SPP) to implement further regulations that would create a North American Union with Mexico and Canada.”¹²⁶ The bill was referred to the House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit, where no further action has been taken.¹²⁷

B. Pushback from the Canadian Left

Canadian groups reach a similar conclusion – the SPP must be opposed – but arrive at it from quite the opposite direction. While the John Birch Society focuses on perceived abuses of the federal government, the Council of Canadians is far more concerned with corporate participation in the talks.¹²⁸ The Council’s primary contention is that a partnership meant to benefit all Canadians (and presumably all North Americans) would include input from average citizens, whereas the participants in SPP talks have only been government officials and business executives.¹²⁹ The Council argues that SPP poses five major issues for Canada, though some of these can be subdivided: 1. the SPP is seen as anti-democratic; 2. the SPP wastes energy resources; 3. the SPP will lead to bulk exports of water out of Canada; 4. the SPP will reduce Canadians’ security; and 5. the SPP ties Canada to U.S. foreign policy, particularly the “War on Terror.”¹³⁰

The charge that the SPP is anti-democratic stems from the fact that meetings occur only among the nations’ heads of government, cabinet ministers, and

123. *Id.* The only evidence of such plans appears in policy papers from the Council on Foreign Relations, a New York-based think tank. *Id.*

124. Press Release, Rep. Tom Tancredo, Tancredo Voices SPP Concerns to Commerce (Oct. 4, 2006), available at <http://tancredo.house.gov/PRArticle.aspx?NewsID=1238>.

125. WorldNetDaily, Tancredo: Halt ‘Security and Prosperity Partnership’ (Oct. 9, 2006), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=52357.

126. H.R. Con. Res. 40, 110th Cong. (2007).

127. The Library of Congress THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HC00040:@@@X> (last visited Apr. 10, 2010).

128. STUART TREW, BEHIND CLOSED DOORS: WHAT THEY’RE NOT TELLING US ABOUT THE SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA 3 (2007).

129. *Id.* at 4.

130. *Id.* at 7-8.

CEOs.¹³¹ To legitimize Canadian participation, the Council demands that SPP be voted on in Parliament.¹³² Related to this fear of corporate dominance is the Council's concern that workers have not been consulted in the SPP process.¹³³ The Council sees the SPP as leading to a race to the bottom for cheap labor, resulting in decreased safety standards, wages, and standards of living throughout North America.¹³⁴

Points two and three can be summed up as a charge that the SPP is anti-environmental. The Council fears that a drive for energy resource domination lies at the heart of SPP, with the exploitation of Canadian tar sands and the privatization of Mexico's oil industry at any environmental cost being the ultimate aim of the United States.¹³⁵ Alongside the oil pipelines, the Council envisions a parallel set of water pipelines designed to take Canada's water resources for use by the United States, again with no concern for the environmental consequences.¹³⁶

Much as points two and three share a common theme, points four and five are aimed at keeping Canada separate from the United States' post-September 11th foreign and domestic security policies. Using the Maher Arar case as an example,¹³⁷ the Council warns that the SPP will require Canada to participate in the United States' concept of a secure nation, including no-fly lists, secret detentions, and a loss of civil liberties and human rights, a policy it claims is grounded in racism and guilt by association.¹³⁸ Furthermore, the Council contends that "trusted traveler" programs such as NEXUS create a de facto two-tiered citizenship, one level for the moneyed, and one for the masses.¹³⁹ Beyond this, the Council is concerned that SPP membership will require Canadian participation in U.S. wars in the Middle East, wars the Council contends are illegal under international law.¹⁴⁰

C. *Pushback from the Mexican Left*

Mexican citizens and groups are no less interested in the outcome of the SPP arrangement than the citizens of the other two nations, and in Mexico it is the political left that leads the opposition to the SPP project. One such group calls itself

131. *Id.* at 7.

132. *Id.* at 10.

133. *Id.* at 11.

134. TREW, *supra* note 128 at 11-12.

135. *Id.* at 15-16.

136. *Id.* at 13-14.

137. Maher Arar is a Syrian-born Canadian citizen who was detained by U.S. officials in 2002 while changing planes in New York for a flight bound for Canada. He was accused of being a member of Al Qaeda and sent to Syria for interrogation, where he claims he was tortured before his 2003 release. He has sued the U.S. government for its treatment of him. The case was dismissed for lack of standing and for reasons of national security by a federal district court and is currently on appeal in the Second Circuit Court of Appeals. Alan Feuer, *U.S. Judge Questions Lawyers on Suit by Tortured Canadian*, N.Y. TIMES, Nov. 10, 2007 at A7. *See also* Arar v. Ashcroft, 414 F.Supp. 2d 250 (E.D.N.Y. 2006).

138. TREW *supra* note 128, at 17-18.

139. *Id.* at 18.

140. *Id.* at 19-20.

the Red Mexicana de Acción frente al Libre Comercio (Mexican Network for Anti-Free Trade Action, “RMALC”).¹⁴¹ Many of RMALC’s concerns echo those of the Canadians, in issues ranging from the non-participatory nature of SPP to the fear of U.S. imperial hegemony.¹⁴² Because SPP is not a formal treaty, it does not require ratification by the Mexican Congress, leading RMALC to denounce the process as “undemocratic.”¹⁴³ Furthermore, corporate participation and perceived U.S. dominance of the talks lead RMALC to categorize the SPP as a threat to Mexico’s sovereignty.¹⁴⁴ Other issues of concern for RMALC are the militarization of Mexico that would be required to bring the country in line with the United States’ image of post-9/11 security and the possibility of harm to indigenous cultures caused by foreign political dominance.¹⁴⁵ Trusted traveler programs at the U.S.-Mexican border are seen as an affront to the dignity of Mexican citizens, as those who wish to cross the border for work are seen as being shunted automatically into the “high-risk” category, unable to take advantage of expedited crossing programs and being subject to greater scrutiny.¹⁴⁶ Since the SPP does not contain sufficient measures to combat economic disparity, RMALC fears that this, in combination with more stringent border policies envisioned by the United States, will lead to continued illegal immigration, and the deaths that are associated with such crossings.¹⁴⁷ Also, the prospect of a “regional border” strategy poses issues for Mexico’s securing of its southern border, which remains an avenue for both increased militarization and increased corruption of officials in that region.¹⁴⁸ Mexican relations with its Latin American neighbors could also become strained, isolating Mexico from the rest of Hispanic America.¹⁴⁹

The issue of economic disparity is not just tangential to RMALC’s argument. While the economic situations of Canada and the United States are more comparable, RMALC worries that the relative poverty of Mexico leaves it vulnerable to exploitation by the more wealthy SPP nations, and in particular the multi-national corporations associated with SPP.¹⁵⁰ RMALC notes that the European Union chose to invest heavily in the poorer nations that joined, raising their standards of

141. Red Mexicana de Acción frente al Libre Comercio, Origen y Objetivos, <http://www.rmalc.org.mx/rmalc.htm> (last visited Apr. 10, 2010).

142. Red Mexicana de Acción frente al Libre Comercio, Diez preguntas sencillas y otras diez más canijas sobre la ASPAN, http://www.rmalc.org.mx/principales/aspan/diez_preguntas.htm (last visited Apr. 10, 2010) [hereinafter Ten Questions].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Ten Questions, *supra* note 142.

149. *Id.*

150. *Id.*

education and infrastructure in the process.¹⁵¹ RMALC doubts that such investment is likely in the context of SPP, particularly after the experience of NAFTA.¹⁵²

Finally, Mexico presents a special concern in the context of a regional partnership that does not exist between the United States and Canada. Unlike the common law system present in the two northern countries, Mexico follows the civil law tradition.¹⁵³ While the RMALC does not draw any specific inferences from this difference, the group sees Mexico as being used in an experimental fashion primarily because of it; using lessons learned in “integrating” Mexico, the U.S. could then go on to dominate the entire American continent.¹⁵⁴

Despite their broad political differences, the common thread between the left and right oppositions is a perceived threat to each nation’s sovereignty engendered by the SPP. For the American right, this threat is seen as a loss of national identity – indeed, the John Birch Society’s materials are all emblazoned with a mash-up of the U.S., Canadian and Mexican flags as a sort of North American Union flag¹⁵⁵ – and an influx of illegal immigrants and terrorists via a NAFTA superhighway. For the Canadian and Mexican left, the threats are corporate hegemony and the subsuming of domestic political will and policy freedom under an imperial Washington, DC. All of them see SPP as an issue affecting the sovereignty of their respective nations.

VI. THE BASICS OF THE SCHENGEN AGREEMENT

The Schengen Agreement was originally concluded between five members of the European Community (“EC”) when debate among the EC as a whole could not agree upon the appropriate means of facilitating the “free movement of persons.”¹⁵⁶ The original signatories were Belgium, France, Germany, Luxembourg and the Netherlands.¹⁵⁷ On the basis that the growing unity of Europe should find “expression” not only in free movement of people, but also goods and services,¹⁵⁸ the countries proposed a near-immediate suspension of border checks for automobile passengers displaying a plaque declaring compliance with customs regulations.¹⁵⁹ In the longer term, the parties agreed to take measures toward harmonizing entry standards at the perimeter of the Schengen zone,¹⁶⁰ increasing duty-free

151. *Id.*

152. *Id.*

153. *Id.*

154. Ten Questions, *supra* note 142.

155. *See, e.g.*, The John Birch Society, North American Union and Security and Prosperity Partnership, *supra* note 120.

156. EUROPA, The Schengen Area and cooperation (Oct 12, 2007), <http://europa.eu/scadplus/leg/en/lvb/l33020.htm> (last visited Jan 28, 2008).

157. *Id.*

158. AGREEMENT BETWEEN THE GOVERNMENTS OF THE STATES OF THE BENELUX ECONOMIC UNION, THE FEDERAL REPUBLIC OF GERMANY AND THE FRENCH REPUBLIC ON THE GRADUAL ABOLITION OF CHECKS AT THEIR COMMON BORDERS, Jun. 14, 1985, 1985 O.J. (L 239) 13, Preamble [hereinafter SCHENGEN I].

159. *Id.* at art. 2-3.

160. *Id.* at art. 17, 20.

allowances,¹⁶¹ and increasing cooperation among law enforcement agencies, particularly with regard to illegal drugs and weapons trafficking.¹⁶²

In 1990, the parties signed an implementation protocol greatly expanding on the long-term provisions of the original 1985 accord.¹⁶³ This protocol implemented provisions for the entry, movement, and settlement of foreigners,¹⁶⁴ police and security cooperation,¹⁶⁵ implementation of an information sharing system,¹⁶⁶ and regulations for the transport of goods.¹⁶⁷ The information sharing provision, appropriately named the “Schengen Information System,” is the nexus of the accord, ensuring that police and customs information, as well as other data necessary to ensure security in the Schengen zone can be maintained, and are readily available to the appropriate enforcement agencies in the member countries.¹⁶⁸ In the interest of privacy, the kind of data that can be collected is strictly limited,¹⁶⁹ and the purposes for which it may be employed are similarly limited.¹⁷⁰ The system was thus designed to provide alerts on both persons and property for the purposes of both external border checks as well as customs enforcement within the zone.¹⁷¹

After the signing of the 1990 protocol, the Schengen zone quickly expanded to include various neighboring states, with Italy joining in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and finally Finland, Denmark and Sweden in 1996, marking the accession of all European Union member states as of that date.¹⁷² The accession of newer E.U. members to the Schengen zone, particularly those in Eastern Europe, is ongoing as of the time of writing.¹⁷³ In recognition of the accession of all member states, the European Union formally incorporated the Schengen Acquis into the laws of the European Union via the Treaty of Amsterdam in 1997.¹⁷⁴ Due to a separate accord among the Nordic States, Iceland and Norway were also granted access to the Schengen zone by this treaty, and the United Kingdom and Ireland participate on a limited basis.¹⁷⁵

161. *Id.* at art. 21-22.

162. *Id.* at art. 19.

163. EUROPA, *supra* note 156.

164. CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT OF 14 JUNE 1985 BETWEEN THE GOVERNMENTS OF THE STATES OF THE BENELUX ECONOMIC UNION, THE FEDERAL REPUBLIC OF GERMANY AND THE FRENCH REPUBLIC ON THE GRADUAL ABOLITION OF CHECKS AT THEIR COMMON BORDERS, Jun. 19, 1990, 1990 O.J. (L 239) 19 (2000), tit. II [hereinafter SCHENGEN II].

165. *Id.* at tit. III.

166. *Id.* at tit. IV.

167. *Id.* at tit. V.

168. *Id.* at tit. IV.

169. *Id.* at tit. IV, ch. 1, art. 92.

170. SCHENGEN II, *supra* note 164 at tit. IV, ch. 2, art. 95-100.

171. *Id.* at tit. IV, ch. 1, art. 92-93.

172. EUROPA, *supra* note 156.

173. *Id.*

174. TREATY OF AMSTERDAM, *supra* note 5.

175. *Id.* at art. 4-5.

VII. ANALYSIS

A. *The Schengen Agreement Is a Viable Model*

Despite the allegation that the European model is too “simplistic” in the North American context,¹⁷⁶ the broad outlines of NAFTA and the Schengen Acquis lend themselves to comparison in such a way that, given the political will, a Schengen-like agreement could be reached for the North American region. The SPP is the vehicle for beginning this discussion. To understand this position, it is useful to remember the climate in which the Schengen Agreement was concluded. The idea of free movement of people arose in a region of Western Europe that was already well into the process of integrating on the economic level. The section of the Schengen Agreement devoted to trade and movement of goods is correspondingly short, but not altogether non-existent.¹⁷⁷

Discussion of the movement of goods under Schengen is confined largely to issues of customs regulation and sanitary and phytosanitary measures.¹⁷⁸ Still, the measures included in Schengen highlight the similarity of concerns between the Schengen governments and those involved in the SPP. Article 120 recommends that, insofar as practicable, customs clearance take place in the home country before crossing an internal border in the Schengen zone.¹⁷⁹ It recognizes, however, that such clearance may not be possible for certain categories of goods, particularly animals, meat products, and plants.¹⁸⁰ Still, since the goal was to create a minimum of backup at internal border crossings, the Agreement encouraged the development of a list of “safe” animal and plant products that could be waived from health inspections,¹⁸¹ with the proviso that inspections could be reinstated in the event that a contamination threat is discovered.¹⁸²

On the other hand, such provisions constitute the bulk of NAFTA. A large section of Chapter Three relates to the elimination of tariffs, also referred to as customs duties, among party states,¹⁸³ while Chapter Five addresses customs regulations among the parties.¹⁸⁴ In principle, NAFTA sought to eliminate tariffs among the parties on broad classes of goods and prohibit the levying of any new tariffs by the parties.¹⁸⁵ As to sanitary issues, NAFTA has left more local control in place, but still requires a “scientific basis” for any protective measures that are applied,

176. See Koslowski, *supra* note 38, at 542-43.

177. See SCHENGEN II, *supra* note 164, tit. V.

178. *Id.*

179. *Id.* at tit. V, art. 120, ¶ 2.

180. *Id.* at ¶ 3.

181. *Id.* at tit. V, art. 121, ¶ 1.

182. *Id.* at ¶ 2. A notable use of this provision was the outbreak of bovine spongiform encephalopathy (“mad cow disease”) in the U.K., when British beef was quarantined in the Schengen zone and disinfection measures were taken on vehicles and travelers passing from one country to another.

183. NAFTA, *supra* note 1, ch. 3, § B.

184. *Id.* at ch. 5.

185. *Id.* at ch.3, art. 302, ¶¶ 1-2.

and requires such measures be as limited as possible to avoid negative effects on trade.¹⁸⁶ The idea of clearing inspections in the interior of the country has also been addressed for sanitary inspections under Chapter Seven,¹⁸⁷ and the idea of individuals clearing customs prior to departure from the originating country has been expanded under SPP.¹⁸⁸ The overall intent leads again toward an opening of borders with respect to goods.

If the European and North American views of open borders are relatively synchronized on the free movement of goods, it seems to follow that it is not so simplistic to think of the free movement of people in similar terms. Though current legislation is aimed at closing the borders due to fears of unauthorized migration and terrorism,¹⁸⁹ the allowances made for reasonable national security measures in the Schengen zone could be tailored to meet the needs of the United States and North America as a whole, permitting free movement without sacrificing safety. In some regards, the process would be easier in North America, as a unified external border for the United States, Mexico and Canada would have only one land crossing, at the southern border of Mexico, and the natural chokepoints provided by seaports and airports would allow external border measures to be more easily handled at those locations.

The handling of internal borders is extremely straightforward in the Schengen Agreement. Quite simply, checks on individuals were completely eliminated at the internal borders of the Schengen zone.¹⁹⁰ The parties recognized, of course, that exigent circumstances might lead to occasions when border controls might need to be reinstated, particularly in emergencies or for reasons of national security. To that end, a right to suspend free crossing was built into the treaty, ideally with notice to the other parties before such suspension would be made, but also allowing for immediate suspension with notice in a “reasonable” amount of time if the situation so required.¹⁹¹ This sort of pragmatism is built into many current U.S. emergency provisions,¹⁹² so its extension into a cross-border treaty seems unobjectionable.

For such a program to work, however, it is imperative to reach an agreeable arrangement on the controls applied at the external borders of the North American zone, and this problem similarly occupied the drafters of the Schengen Agreement. A truly open border, with no checks on individual travelers, would provide no opportunity to ascertain the bona fides of non-North American citizens as they moved from one country to the other, and would require a level of trust among the three

186. *Id.* at ch. 7, § B, art. 712.

187. *Id.* at art. 715.

188. DHS Implementation, *supra* note 71.

189. *See supra* Part V, pp. 18-25.

190. SCHENGEN II, *supra* note 164, at tit. I, art. 2 ¶ 1.

191. *Id.* at tit. I, art. 2 ¶ 2.

192. *See, e.g.*, 50 U.S.C. § 1802(a)(1) (2000) (the Foreign Intelligence Surveillance Act, providing that in certain limited circumstances “the President, through the Attorney General, may authorize electronic surveillance without a court order . . . for periods of up to one year . . .”).

countries that has not yet been evinced in any great degree. The Schengen drafters handled these issues in two stages; first establishing the external border policies,¹⁹³ and then devising an information-sharing program that would allow reasonable control over internal migration without establishing physical roadblocks.¹⁹⁴

For the Schengen zone, those arriving from non-party countries are subject to the typical regime of document checks, including travel document and visa verification, proof of means of subsistence, and verification that the person is not otherwise disqualified for reasons such as national security or public policy.¹⁹⁵ These policies are typical of those used by other countries' in the admission of foreign nationals, and are in line with those of the United States.¹⁹⁶ The Schengen Agreement reserves the determination of who might constitute a national security or public policy risk to the individual nation,¹⁹⁷ so fears of a loss of sovereignty in such matters, or fears that certain persons could not be excluded merely due to a regional border agreement would appear to be invalid. The Schengen Agreement also requires third party nationals to clear immigration checks at the first nation in which they land, before transiting to another nation within the zone.¹⁹⁸ The United States already requires the same of air passengers arriving in or transiting through its territory,¹⁹⁹ so extending the principle to a regional agreement, particularly in combination with advance customs clearance and information-sharing measures, should pose little difficulty. Clearance at the point of first landing also has the advantage of consolidating a significant portion of the immigration processes at several large airports, the hubs for international travel, rather than having to spread the immigration apparatus to every airport in the country, including the tiniest of regional airports that are close enough to the border to service short-distance flights to Canada and Mexico.

The opposite side of the entry problem is tracking exits across the open-border zone. A system would need to be in place to notify all parties that a third-party national who had entered North America in Miami, for example, then traveled to Mexico City before leaving North America from Quebec had actually left the zone and had not committed any violations of visa status, particularly overstaying. The Schengen Agreement handles this issue by requiring all parties to share relevant data on third-party nationals for the purposes of maintaining an effective system of checks.²⁰⁰ The good news for this process is that certain data that would be relevant to such a process is already shared under provisions of NAFTA or is included in the Security Agenda of the SPP, requiring only a moderate expansion to be fully effective in an entry and exit tracking process for an open North Ameri-

193. SCHENGEN II, *supra* note 164, at tit. II, ch 2.

194. *Id.* at tit. IV.

195. *Id.* at tit. II, ch. 2, art. 5 ¶ 1.

196. *See* 8 U.S.C.A. § 1184 (2000).

197. SCHENGEN II, *supra* note 164, at tit. II, ch. 2, art. 5 ¶ 1(e).

198. *Id.* at art. 4 ¶ 1.

199. U.S. Customs and Border Patrol, *Transiting the U.S.*, http://www.cbp.gov/xp/cgov/travel/id_visa/iti_transit.xml (last visited Feb. 9, 2008).

200. SCHENGEN II, *supra* note 164, at tit. II, ch. 2, art. 6 ¶ 2(a), art. 7.

can zone.²⁰¹ The Schengen version does include a restriction on the sharing of personal data for reasons of privacy, but this provision could be altered to suit the legal norms in North America or simply waived if found unsuitable.

In addition to harmonizing entry and exit procedures, the Schengen nations aligned their visas so that permissible stays in one country in the zone would not be overstaying in another country.²⁰² The first step was to establish a common short-stay visa of three months in any given six month period.²⁰³ With that basic principle in mind, latitude is granted for visa extensions, valid only in the territory granting the extension, under special circumstances.²⁰⁴ Visas for stays longer than three months are permitted, but are granted by individual nations according to their domestic laws.²⁰⁵ Holders of such visas are limited to three months of travel in a six-month period, like those on short-stay visas.²⁰⁶ Holders of residency permits in one party state are permitted to travel for up to three months at a time in other party states, but are required to register their presence with local authorities in the country to which they travel.²⁰⁷ In practice, this may be done via hotel registration as well as reporting directly to an immigration office or police bureau.²⁰⁸ The time a resident alien must spend in their home territory is not specified in the Agreement.

As discussed previously, visas present some difficulties in North America, and it is here that the SPP could begin to harmonize the situation among the three countries and allow a more Schengen-like arrangement for North America. The largest problem in terms of visa applications is the situation with Cuba. While Canada and Mexico recognize the island nation and allow travel and trade with the country, the United States has severed many such ties. An embargo on Cuba has been in place since 1960²⁰⁹ which limits travel to Cuba for U.S. citizens and permanent residents,²¹⁰ cash remittances to family,²¹¹ and the import and export of goods²¹².

201. See *supra*, note 27 and accompanying text; see also DHS Implementation, *supra* note 71 (“Shared Watchlists and Integrated Traveler Screening Procedures”).

202. SCHENGEN II, *supra* note 164, at tit. II, ch. 3.

203. *Id.* at art. 10-11.

204. *Id.* at art. 11 ¶ 2.

205. *Id.* at art. 18.

206. *Id.* at art. 19 ¶ 1.

207. *Id.* at art. 21.

208. SCHENGEN I, *supra* note 158, at tit. I, art. 19.

209. See 22 U.S.C. § 6021-6091 (Helms-Burton Act, reinforcing an embargo dating back to 1963).

210. U.S. State Department, Cuba, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1097.html (last visited Feb. 4, 2009). Travel is permitted only for those who have obtained a license from the Office of Foreign Assets Control (hereinafter OFAC), usually for governmental or educational purposes. *Id.*

211. *Id.* Remittances are limited to \$300 in a three-month period. *Id.*

212. OFAC, Cuba: What You Need To Know About the U.S. Embargo, <http://www.treas.gov/offices/enforcement/ofac/programs/ascii/cuba.txt> (last visited Feb. 4, 2009). Import of Cuban goods is completely prohibited, while licenses for export can only be obtained

So far there is little hope of the embargo lifting under President Obama. The White House website has no mention of Cuba policy, but Obama stated during his campaign that he supports a continuation of the embargo, though he would favor some easing of family visitation restrictions and remittances for Cuban-Americans.²¹³ He also stated he would be willing to meet with Cuban leaders for talks, however, offering a possibility, though slight, that a diplomatic solution might be reached.²¹⁴ With the recent resignation of Fidel Castro and the ascendance of his brother Raúl to the Cuban presidency, Cuba might be poised to change directions, as well, though Raúl's desire for and commitment to a change in the style of Cuban government has so far been ambiguous.²¹⁵ With these circumstances as background, it appears that if a thaw in U.S.-Cuban relations were to occur, the situation regarding goods and travel might be alleviated. Notably, the Helms-Burton Act, which imposes the Cuban embargo, is a self-terminating law, providing for the normalization of relations once Cuba achieves a democratic form of government.²¹⁶ Another potential solution offered by Schengen, and perhaps overlooked by Koslowski, is the possibility of territorial limitations on a uniform travel visa. Where the travel documents of a particular country are not recognized by a Schengen Agreement party, the visa issued is limited to those territories that recognize the document as valid.²¹⁷ In this manner, the United States would be free to continue its exclusion of Cubans while permitting forward progress on borderless integration.

The second major problem lies in the special visa status accorded to Commonwealth nations by Canada. As a member of the Commonwealth of Nations, Canada is bound by principles of reciprocity to allow this extended visa to Commonwealth citizens.²¹⁸ The way forward on this issue is not as inherently political as the Cuba issue for the United States, and is not one that can be solved by a change of regime or change of attitude directly. While it is theoretically possible for the United States and Mexico to join the Commonwealth, this seems a somewhat far-fetched solution.

One solution to this problem is for Mexico and the United States to voluntarily grant the more generous visa provisions of Canada to Commonwealth nations, a solution the prospects for which are uncertain at best and ultimately a political matter to be decided among the nations involved. In this way, the SPP could be of

for certain foodstuffs, agricultural products and medicines. *Id.*

213. Thomas Omestad, *Obama Will Change Cuba Policy – But How?*, U.S. NEWS AND WORLD REPORT, Dec. 5, 2008.

214. *Id.*

215. James C. McKinley, Jr., *Cubans Wary of Raúl Castro's Hints at Change*, N.Y. TIMES, Feb. 27, 2008, available at <http://www.nytimes.com/2008/02/27/world/americas/27cuba.html?pagewanted=print> (last visited Apr. 10, 2010).

216. 22 U.S.C. at § 6064(c), *supra* note 209 (permitting the President to suspend the embargo against Cuba upon a determination, submitted to Congress, that a democratically elected government has come to power there).

217. SCHENGEN II, *supra* note 164, at tit. II, ch. 3, art. 14 ¶ 1.

218. *See supra* note 100 and accompanying text.

use in furthering the move toward a borderless arrangement for North America. While the actual change would require an act of Congress in the United States, and likely a legislative component in Mexico as well, the executives should seize the opportunity presented by the SPP talks to formulate a reconciliation program and present it as a coherent plan to their respective legislatures. Without coordination from the outset on the executive level, the final negotiating position between the executives and legislatures will be all the more difficult, and might lead to a situation where incompatible laws are passed in the three countries due to lack of a clear plan.

As a possible alternative, the Schengen Agreement provided that bilateral short-term visa arrangements with non-party states formed prior to accession to the Schengen Agreement could be maintained, even if they exceeded the general three-month limit provided for by Schengen.²¹⁹ If a similar provision were to be adopted by the North American states, it would allow Canada to continue its favorable treatment of Commonwealth citizens without creating an issue for the open borders arrangement. The hedge on this, as provided by Schengen, is that such extensions are only valid in the country that offers them,²²⁰ so Commonwealth citizens entitled to a six-month stay in Canada, for example, would not be permitted to spend more than three of those months outside of Canadian territory.

The two areas covered by the Schengen Agreement that have the closest analogue in the SPP as published so far are cooperation among police agencies and sharing of information among government agencies, particularly immigration and law enforcement officials.²²¹ Schengen requires closer cooperation among the parties' police agencies, but importantly, leaves the specific provisions of cooperation up to national laws.²²² Where specific judicial processes are required before assistance may be given by one country to another, such laws are given full power under Schengen, so any matter of warrants or the like must still be carried out when a country requests assistance across borders.²²³ Due to the open nature of borders in the Schengen zone and the lack of physical barriers, the other major provision of Schengen regarding police powers deals with "hot pursuit."²²⁴ Hot pursuit is authorized only if advance notice to the country to be entered has been given²²⁵ and the crimes for which hot pursuit is authorized are also specifically enumerated and are of a severity that would typically be classified a felony in the United States.²²⁶ Important for questions of sovereignty, the terms under which hot pursuit may be carried out, including granting of arresting authority, are reserved to each party,

219. SCHENGEN II, *supra* note 164, at tit. II, ch. 4, art. 20 ¶ 2.

220. *Id.* at tit. II, ch. 3, art. 11 ¶ 2.

221. *See supra* note 27 and accompanying text.

222. SCHENGEN II, *supra* note 164, at tit. III, ch. 1, art. 39 ¶ 1.

223. *Id.*

224. *Id.* at art. 41 ¶ 1.

225. *Id.*

226. *Id.* at ¶ 4.

which is then charged with informing its neighbors of said terms.²²⁷ Furthermore, if a national police force has a suspect under surveillance and the suspect crosses a national border, surveillance may be continued with advance notice to the other country so long as the second country is willing to permit such surveillance and provided the suspect would be subject to extradition.²²⁸

Increased police cooperation is already a feature of SPP, so little needs to be done to bring this program up to the level necessary to facilitate an open border policy. Agreements allowing for surveillance of suspects in other countries are likely to be needed, but there is already a degree of cooperation among the national law enforcement agencies of the United States and Canada, with FBI agents having worked inside of Canada with the approval of the Canadian government.²²⁹ A similar arrangement could be reached with the Federal Agency of Investigation in Mexico, and with some cooperation currently in place, the possibility of expanding on it becomes that much easier.

Hot pursuit may be a more difficult provision to adopt, but the idea of hot pursuit among jurisdictions within the United States is already well-established, and in order for an open border system to work it is really a pre-requisite, and would have to be adopted. Here again, the SPP could build discussion of hot pursuit measures into its Security Agenda, advancing the concept of open borders in line with planning that is already taking place.

The information sharing system used in the Schengen zone is the Schengen Information System.²³⁰ The primary function of the system is the sharing of “alerts” among customs and border officials in all party states, advising them of nationals that have been designated as ineligible for entry by one of the party states, particularly for reasons of national security.²³¹ A second use is to share data on criminals who are wanted for extradition or who are known to be fugitives.²³² The extradition laws of the countries of which the request is made, i.e. the countries not requesting the alert, limit use of alerts for this purpose.²³³ Ancillary uses include searches for missing persons.²³⁴

The sharing of databases for national security purposes, particularly the exclusion of terrorists and other dangerous foreign nationals, is already incorporated in the Security Agenda of SPP, as discussed above. Including criminal information in this database would seem a logical next step, especially if such criminal activity would already be the basis for exclusion on public policy and national security grounds; the sort of information the SPP already covers. Missing-persons alerts

227. *Id.* at ¶ 9.

228. SCHENGEN II, *supra* note 164, at tit. III, ch. 1, art. 40.

229. CBC News, “U.S. investigations on Canadian soil done within the law: Day” Oct. 5, 2006, <http://www.cbc.ca/canada/story/2006/10/05/fbi-border.html> (last visited Feb. 13, 2008).

230. *See supra* note 168 and accompanying text.

231. SCHENGEN II, *supra* note 164, at tit. IV, ch. 1, art. 93, 96.

232. *Id.* at art. 95.

233. *Id.* at ¶ 6.

234. *Id.* at art. 97.

could be extended under a version of the U.S. Amber Alert program, and this goal also seems to mesh nicely with the aims of the Security Agenda.

B. Open Borders are Needed to Promote Economic Justice

While it's easy enough to explain how a borderless North America could be achieved using an existing framework, it is also important to explain why such an arrangement would be desirable. The short answer is that while NAFTA was introduced with the promise of increased prosperity for the member nations, that prosperity has not been broadly realized. Real wages have registered little to no change in the fourteen years since its inception.²³⁵ While the blame for these situations does not lie completely with NAFTA, nor does the correlation necessarily point to a structural problem with the NAFTA agreement, the fact that the treaty has failed to deliver on its promises fourteen years later requires a reevaluation of the way the treated has been enacted and the ways in which its mechanisms might be improved. Added to this problem is the issue of illegal immigration, particularly into the United States, which has been a high priority for U.S. voters and politicians in recent years and is blamed for the general depression of wages and lack of jobs in many sectors.

If immigrants, particularly illegal ones, are the cause of so many problems, it seems counter-intuitive to open the borders and permit entry to unlimited numbers of immigrants. The problem, of course, is that illegal workers are unlikely to be afforded any of the protections of labor laws, minimum wages or the like. In fact, the threat of deportation is probably one of the best tools an employer who hires illegal immigrants can use to keep workers from protesting too much. If they are sent back to their home country, there is certainly another person waiting to take their place. If all North American citizens are allowed to freely cross borders, however, this leverage disappears, and these immigrant workers would be able to enjoy the full protection of the law. On the other side, though, the advantage of hiring illegal aliens evaporates when that class of people ceases to exist. Faced with the choice of a local applicant and a foreign applicant (who may or may not speak the native language), it may make more sense to choose the local, all other things being equal. Since open borders do not automatically confer permanent residence rights, a local worker might provide less of a paperwork issue than someone who needs special permissions. Of course this situation is different for seasonal workers such as farmhands, but in the aggregate the benefits of local versus foreign help may quickly reach a sort of equilibrium. Furthermore, the disrup-

235. Real wage is calculated by adjusting earnings for inflation, expressing the wage in constant dollars. Using U.S. Bureau of Labor Statistics data for the years available, 2000 to 2007, the median weekly earnings for full-time employees in 1982 dollars (i.e. adjusted for inflation) have increased by just three dollars, from \$325 to \$328, in the last eight-year period, with a high of \$331 in 2002 and lows of \$324 in 2001 and 2006. U.S. Bureau of Labor Statistics, Data, <http://www.bls.gov> (click on "Get Detailed Statistics", then click on "Most Requested Statistics" next to "Weekly and Hourly Earnings Data from the Current Population Survey," then choose the tick box for "Constant (1982) Median wkly earnings, Emp FT, Wage & sal wrks" and click the "Retrieve Data" button)(last visited Feb. 14, 2008).

tion of the illicit market for labor will allow some teeth to be given to NAALC, with real enforcement of labor standards possible for thousands of workers who previously could not claim that right, even though it was protected by treaty.

While the illegal immigrant problem illustrates what happens when the work is located in one place but the people have to move to get to it, there is an equivalent problem brought on by the nature of free-trade agreements. When capital and goods are free to cross borders with little to no barrier in terms of tariff, customs or the like, it makes no difference to a manufacturer if their factory is in Idaho or Alberta. When the manufacturer decides to move the factory across national lines, perhaps by only a few miles, even, perhaps in order to take advantage of favorable taxation, it is unfair to deny the workers a chance to follow the factory and keep their jobs when the only thing separating them might be a proverbial line in the sand. In recent years, major U.S. automobile manufacturers have chosen to site their new or expanded operations in Canada, in order to take advantage of Canada's national health insurance scheme.²³⁶ The workers left in Detroit are left looking for work in an industry that has been snatched away from them.

Open borders are not the only possible solution, of course, and others have been proposed or are being implemented now. Besides the plans discussed above for increased biometric scanning and more stringent checks on travel documents,²³⁷ DHS has begun construction of a massive fence along the Arizona-Mexico border.²³⁸ The logistics of fencing off and adequately patrolling a nearly 2,000-mile fence are daunting enough, not to mention the expense and need for massive recruitment of border patrol agents. There is also a saying that when you build a fifty-foot wall, a cottage industry springs up to make fifty-one-foot ladders. With the number of illegal immigrants that manage to cross the border now via tunnels, culverts and the like, it seems a lightly-patrolled fence would present only a minor obstacle to a determined crosser, particularly one who sees a golden economic opportunity if they can reach the other side.

Another measure that was proposed by President Bush but failed to pass Congress was the creation of a guest worker program.²³⁹ This would have allowed for a special temporary work visa that would allow employers to hire foreign nationals on the condition that they would leave the United States permanently when their employment finished unless they chose to pursue citizenship.²⁴⁰ This is not necessarily a bad program on its face, but the experience of Germany with its guest worker program shows some of the pitfalls; it is often easier to invite the guest workers in than it is to force them to leave.²⁴¹ The other problem this program

236. Paul Krugman, *Toyota, Moving Northward*, N.Y. TIMES, Jul. 25, 2005, at A22.

237. See *supra* Section III, pp 4-13.

238. AP, *Chertoff Allows Border Fence Construction to Continue*, N.Y. TIMES, Oct. 23, 2007, at A24.

239. Press Release, President George W. Bush, President Bush Proposes New Temporary Worker Policy, Jan. 7, 2004, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html> (last visited Mar. 29, 2009).

240. *Id.*

241. See PHILIP MARTIN, *THERE IS NOTHING MORE PERMANENT THAN TEMPORARY FOREIGN WORKERS* (Center for Immigration Studies, 2001).

has, much like any work visa program does, is that the threat of firing can be used to silence worker complaints. Even current work visas like the H-1B require continuous employment in order to maintain a valid visa.²⁴² Workers who are fired or otherwise lose their jobs are required to leave the country in short order, and no time is given to find a replacement position. Given this reality, a mistreated worker would more likely keep quiet than risk losing their home in the United States with little chance of being able to return. To bring a balance of economic justice to the NAFTA zone, free movement of workers must be coupled with free movement of capital. The SPP should live up to the promise of prosperity in its title and begin to work on these issues.

C. Answering the Criticisms

The criticisms leveled against the SPP are valid ones and any attempt to modify the SPP should take them into account. The arguments from the political left in Canada and Mexico can be answered if a good faith effort is made on the part of the SPP leaders to address concerns of democratic participation and economic fairness. Certainly any agreements going forward must be submitted through the legislatures of the various nations for ratification if not actual construction. As the U.S. Congress has shown, such agreements can be difficult to pass, especially when they are actively opposed. This is where SPP leaders must take the lead to convince legislators that protectionism will do more harm than good in the long run, particularly as global cooperation increases, thereby convincing voters that freedom of movement will allow them to pursue greater economic opportunity, giving them an impetus to lobby their government representatives.

The second important criticism from the left is that increased cooperation with the United States is likely to lead to more militarism in their own countries, particularly with regard to police and border control agents. By contrast, the European response to terrorism has been much more investigation-oriented.²⁴³ The exact ramifications of this are beyond the scope of this paper, but suffice to say that in order for an open-border arrangement to work in North America, the United States will have to extend a level of trust to its purported allies, including reasonable requests to attempt different approaches to anti-terrorism besides turning the police into a paramilitary force.

The fears of the American right are much more difficult to assuage. Such a task may in fact be impossible when their primary goal seems to be disengagement

242. U.S. Citizen and Immigration Services, Must an H-1B alien be working at all times?, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a62bec897643f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=4b18dc4d88889010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 14, 2008).

243. See, e.g., Francis T. Miko & Christian Froehlich, Germany's Role in Fighting Terrorism: Implications for U.S. Policy at 3 (2004) ("German officials do not believe that military force can serve as the principal instrument to fight terrorism..."); Patrick Seale, Spain's Response to Terrorism (2005) ("Spain's reaction to terrorism has been strikingly different from that of the United States... above all, no global 'war on terror'...").

from the United States' North American neighbors, rather than increased engagement and cooperation. It seems doubtful that those who vehemently oppose illegal immigrants now and seek to solve the problem through fence-building and armed patrols would be any happier with a solution that converted those immigrants' status to legal. The fears of lost sovereignty are perhaps within the scope of SPP to address, and a close reading of the Schengen Agreement shows that as a model, it still provides adequate assurances that it will respect state sovereignty on issues that would seem to be of greatest importance. Decisions to grant permanent residence and citizenship are in no way affected by Schengen. Criminal law and police powers remain mostly within the province of the individual states, and even those areas that require increased interstate cooperation leave the laws of the local jurisdiction intact. Finally, the path to the Euro was laid by the Maastricht Treaty,²⁴⁴ not the Treaty of Amsterdam, and was negotiated separately from the idea of incorporating Schengen into E.U. law, so it is not clear that open North American borders and a unified "Amero" currency would be inextricably linked.

VIII. CONCLUSION

Although significant obstacles exist, both structurally and politically, the idea of a borderless North America is achievable by building on the successful model provided by the Schengen Agreement of the European Union. Many of the measures considered in Schengen pertaining to the free movement of goods are addressed by similar provisions in NAFTA, while some of the provisions for the free movement of people exist in either a rudimentary form in NAFTA or are addressed by the SPP. For those issues not addressed by either process, the SPP provides a framework where migration issues are already part of the conversation and affords the opportunity for North American leaders to chart a new ideal for free trade that also incorporates principles of economic justice. National security interests need not be compromised by such an arrangement, and in fact the sharing of information and police power within a borderless North America could lead to greater security through enhanced cooperation and a sense that all countries are in it together when it comes to neutralizing threats.

In an environment where goods and capital can flow as freely as corporate needs desire, the ability of people to move just as freely to pursue their own economic interests is vital for the wealth generated by such open policies to be spread to a broad segment of the population. Legitimate criticisms of an integrated North America exist, and come from all points on the political spectrum. Yet, a transparent, democratic process that clearly spells out and demonstrates the benefits of integration for the economically disadvantaged and not just the wealthy will go a long way toward mollifying those criticisms. In a world that grows closer together every day, open borders and expanded economic horizons are the way to secure the blessings of freedom for all in North America.

244. Treaty on European Union (Maastricht Treaty), Feb. 7 1992, 1992 O.J. (C 191) 109 at tit. I, art. B.