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COMPARING THE SOUTHERN BORDER
TO THE NORTHERN BORDER
AND THE ISSUES TO BE DEALT WITH AT EACH

David A. Gantz[†]
U.S. Speaker

I am very pleased to be here, even though it is about 40 degrees colder than it was in Tucson yesterday. To begin a process of perhaps shifting your focus a little bit to the south, there is another border, as many of you are at least generally aware. I should begin with something of a disclaimer. I am not a native Arizonian or Tucsonian. I moved out West from Washington, D.C. about ten years ago when NAFTA started to teach international trade law and to try to learn something about NAFTA. So, I look at this from a less expert point of view, at least in the terms of the geopolitical and the cultural aspects than my colleague, Aurielano, but I will do my best to give you a view from our perspective.

The other caveat is that I am going to try to avoid giving the impression that the situation on the border is the same everywhere. In Arizona our major port is Nogales, Arizona/Nogales Senora. Much of the same type of activity takes place in Nogales Senora as does in Ciudad Juarez, where Dr. González Baz is from, or Tijuana or Lagos de Moreno, but on a much smaller scale. It is a smaller city and there are fewer border industry factories or maquiladoras. Therefore, it is possible that the impressions that we have in Arizona do not necessarily apply to some of these larger cities. There are a couple of various ones where I know they do not apply and I will point those out. This is something we need to keep in mind, because it is a major port. A

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very substantial portion of Mexico's agricultural exports to the U.S. come across the border in Arizona. The depth and the size of the industrial base does not really get close to Tijuana or Mexicali or Ciudad Juarez. So, there is a difference there. On the other hand, in terms of some of the real problems that we have been facing for years, such as the immigration issues, Arizona pretty much leads the nation. That is where most of it happens.

What kind of a problem do we have here and has the aftermath of 9-11 made cross border trade more complicated? Remember, this is the very trade NAFTA was designed to stimulate and which did very effectively stimulate over the last decade. Does it take longer and is it increasing costs? I am going to look at this mostly from an economic trade point of view since that is my area. For the U.S./Mexican border and for commercial traffic at least, the answer is yes. It has been more complicated and it has caused some problems, but probably not by an enormous amount. Certainly, there are not as many problems as some of us originally feared in September of 2001.

If you are using non-commercial crossings, you have probably been affected in terms of delays. However, we are also looking at this in a fairly static situation. What is the situation today? We are not addressing the question, what is the situation likely to be a month from now? If you look at some of the current proposals like an eight to twelve-hour advance notice requirement for container or truck traffic, or some of our more extreme Congressional proposals that would have the U.S. Customs Service inspecting every container that came across the border, it is still possible for the U.S. government to shut everything down pretty effectively. I do not think they would do that, but clearly some of these proposals if they are not implemented in a sensible way, would be wrong. Everything will be much worse.

From what I have been able to see is that under most circumstances the U.S./Canadian border is coping pretty well. There was a story in the Times that most of you probably saw at the end of March, which simply said delays are rare at U.S. borders.¹ I am not sure I would go that far with respect to Nogales, but I think overall the consternation that some of us felt a year and a half ago has not really turned out to be quite as serious as it was. Much of the time, the commercial truck traffic delays at our border in the south and I gather up here as well, are very small or nonexistent. One could say, we all worried about things that we did not have to worry about, but of course that is not true.

There are three basic reasons why this situation is not a lot worse than it is on the southern border. First, we have a very deep recession in the southwest

¹ Colin Campbell and Elisabeth Malkin, *Delays Are Rare at U.S. Borders*, N.Y. TIMES, March 27, 2003, available at 2003 WL 17092277.

and in Mexico. Mexico, is even more dependent on trade with the U.S. than Canada is. About 85 percent of Mexico's exports go to the U.S.² So, when the U.S. has a recession, particularly in the electronics sector, which is a big part of Mexican maquiladora production, it has an enormously serious effect on Mexico. Secondly, the U.S. Customs Service and other agencies have done a very good job in the last couple of years of implementing much more sophisticated risk analysis methodology, such as x-ray, MRI, and gamma ray technology. This technology makes it possible to do a better job of screening without delaying traffic. Thirdly, there has been a relatively high level of cooperation between U.S. government officials, the shippers and transportation companies on both sides of the border in order to try to make things work well. They are talking about problems before they become very serious.

One of the things that is important to keep in mind is the difference, the delta, before and after 9-11 on the U.S./Mexican border is totally different from what it was up here. You had a largely open border in most significant respects before 9-11. We never had that. U.S./Mexican relations were, to put it mildly, very unpleasant during most of the 19th century. I live in Tucson, Arizona, a part of the United States that was purchased from Mexico in 1852 under the Gaston Treaty. Even during much of the 20th Century, U.S./Mexican relations were something considerably less than friendly. The petroleum industry expropriations in 1938 did not really help things. Relations did improve somewhat after World War II, but even then there have been major sources of friction. In 1973, Mexico passed a foreign investment law which made it very difficult for foreign companies to own more than 49 percent of a Mexican business except for the very limited exceptions in the maquiladora industry. You had a period, which until about 1985, Mexico started to open up economically. It was not really a very good relationship overall.

It is still fair to say that there is a considerable amount of mutual mistrust by Mexicans of Americans, and vice versa. We still have to deal with this mistrust based on 150 or more years of friction. Many of us are very concerned that the conflict in Iraq occurring at the same time as Mexico is sitting as a member of the Security Council who as a body does not fully support the U.S. position will not directly, but rather indirectly have backlash affecting things that are totally unrelated.

I would also point out that for the U.S. and Canada, the Free Trade Agreement was exactly that, a Free Trade Agreement. For the U.S. and NAFTA, pretty much the same thing. For the U.S. and Mexico, NAFTA has

² Jan Gilbreath, *Hemisphere 2000: Mexico-EU Trade Accord Prompts Speculation about FTAA and New WTO Round*, CENTER FOR STRATEGIC AND INT'L STUDIES, Aug. 22, 2000, available at www.csis.org/americas/pubs/hemviii14.html

always been much more than that. It was supposed to produce not only better political and economic relations, but to deal at least indirectly with illegal immigration and drug problems by creating more and better paying jobs in Mexico, economic growth, and also greater cooperation among law enforcement officials. You had a situation where at virtually any point in the last couple of decades, commercial traffic moved pretty well to Tijuana, Nogales, and a lot of the other ports.

Non-commercial traffic is another story. For both American and Mexican citizens trying to cross the border, delays of an hour or more were not at all uncommon. You learned to plan your border crossings, so you did not hit it at five o'clock in the afternoon. You just knew that there were going to be difficulties. Those were common before 9-11 and they are still common today. We have a situation where the U.S. Customs Service has 35 or 40 different statutes it is supposed to be applying, but some of those areas take up a lot more time on the southern border than they do on the northern border. Historically, the drug interdiction issues are more significant there. There have been developments, such as the century system, laser cards, and transponders. INS has been talking about this and trying to implement it now for a decade, but it has been a very slow process and it really has not helped that much yet.

ILLEGAL IMMIGRATION

The other major factor that made the border a closed border in the past has been the focus on illegal immigration on the one side and drug interdiction on the other. It resulted in a two-pronged focus for border officials. We do have a very large number of Mexican immigrants working in the southern United States.³ The economy of Arizona depended upon that in the 1990's.⁴ I do not know what we would have done in terms of construction, hotels, restaurants, and other types of lower end service jobs without foreign workers. Whether they are there legally or illegally, in terms of the economy, the fact that many of them are there without documentation makes life a lot more complicated.

A few years ago, the U.S. Government came up with the brilliant idea of building walls in California; double walls to create a sort of no man's land.⁵

³ The Mexican population in the U.S. increased 104 percent during the 1990s, raising the total number from 4.3 million to 8.8 million persons. Additionally, Mexicans accounted for 42 percent of the new immigrants that came into the U.S. during the 1990s. *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role*, IMMIGRATION POLICY FOCUS, Vol. 1 Issue 2, Sept. 2002, at 6, available at www.aifl.org/ipc/ipf0902.pdf

⁴ See generally, *Id.*

⁵ TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* 66 (1996), (discussing the construction of

This did not cut off illegal immigration; it just shifted it all to the east. Arizona is now the place where most are forced to come across the border. This has had an enormous personal and social cost. On the average, about one immigrant dies every day in Arizona. They die either from the heat during the summer or the cold during the winter and increasingly in auto accidents that happen when the so-called coyotes bring immigrants across the border and then get chased. The chases often end with the vehicle turning over and people dying in large numbers.⁶ It has not really stemmed illegal immigration. It has just made the process much more bloody.

Mr. Fox, when he became President made as one of the focal points of his new administration the objective of trying to work out another guest worker program; going back something like what we did 30 or 40 years ago. After 9-11, I think it is fair to say the Bush Administration was concerned with other things, because they have essentially ignored these proposals during the ensuing year and a half, even though the problem has not gone away.⁷ As a result, we still have a lot of efforts such as an enormous amount of border patrol and INS Customs efforts being focused on that. This has not really changed since 9-11.

ILLEGAL DRUGS

Drug trafficking is a major problem as everybody knows and we have spent a lot of effort trying to interdict drug smuggling. These efforts made the border anything but open. One factor, which is not very pleasing to talk about, is that we probably would have had a lot more problems if the economy had been booming. Trade has been flat or declining somewhat across the border in the last year or so, which means it has been easier for everyone to deal with the additional problems of trying to interdict terrorism. In Arizona, once the war started we had a 20 percent drop-off in the number of people who made day trips across the border into Nogales, Arizona. They come to buy footwear, clothing, and groceries. If there is a silver lining at all to the recession it is that it has made things easier to deal with. Hopefully, the U.S. economy will recover in a year or two, which means the Mexican economy will recover. We have to be prepared to deal with the growing volume again at some point in the future.

a wall along the U.S.-Mexico Border by the U.S. government).

⁶ Michael Marizco, *4 more die in desert as 375 agents head north*, ARIZ. DAILY STAR, Aug. 15, 2003, at B1, available at 2003 WL 11228792; *Deadly Crossing: Senate bill stiffens smuggling charges; Trafficking could result in life sentence if immigrant dies of suffocation in a truck*, HOUS. CHRON., May 22, 2003, at 30, available at 2003 WL 3261388.

⁷ *Documenting the undocumented*, CHI. TRIB., Feb. 14, 2003, at 22, available at 2003 WL 13237131.

TECHNOLOGY AT THE BORDER

There has been a great deal of improvement in technology. Most of these areas have been discussed in terms of the U.S./Canada border over the last couple of days, so I will just touch on them briefly. Most of it has to do with improving the ability of the Customs Service and other law enforcement officials in the area of risk assessment by shifting some of the burden of the process of assuring legality of the activities onto the major shippers and transportation companies. The C-TPAT Program, for example, where self-policing becomes a bigger part of the process and assists the Customs Service in dealing with the regular large commercial traffic in a more summary fashion so the resources can be focused on the areas where problems are more likely to arise.⁸ The last data I saw indicated there were 2000 firms that had signed up for this program. Sixty of the top hundred importers in the United States were part of the process.

Then you have other programs that sort of fit in to that same type of focus. The Importer Self-Assessment Program is part of this effort to deal with large firms in a different way and to try to separate the regular or normal commercial traffic from areas which might be more controversial or more dangerous.⁹ We also have our Smart Border Program.¹⁰ We call it the Border 22 Program. The number of points are different, but still you have a fairly high level of bilateral cooperation under that process which is an attempt to do better long-term planning. We are adding some traffic lanes, for example, at Nogales, to try to make truck traffic move a little bit faster. The U.S. Government is expanding the use of this century system for individuals so that the people who are crossing twice a day will not have to wait in the same lines with the people who are occasional crossers. These people have all sorts of high tech toys to deal with.

I think it is fair to say, that the information sharing, the data sharing, and compatibility type arrangements between Mexican and U.S. authorities have significantly improved over the last year or two. Most of these developments have been in the pipeline since long before 9-11, but the fact that they were already being planned and are now being applied has been one of the saving graces of the system. It is one of the reasons why we do not have a lot more

⁸ Under Secretary Asa Hutchinson Remarks Before the Association of American Chambers of Commerce in Latin America, DEPARTMENT OF HOMELAND SECURITY PRESS ROOM, May 7, 2003, available at www.dhs.gov/dhspublic/display?content=628

⁹ *Importer Self-Assessment Handbook*, U.S. CUSTOMS SERVICE, Oct. 2002, available at www.cbp.gov/ImageCache/cgov/content/import/regulatory_5faudit_5fprogram/importer_5fself_5fassessment/isahb_2epdf/v1/isahb.pdf

¹⁰ *Smart Border: 22 point agreement, U.S. - Mexico Border Partnership Action Plan*, THE WHITE HOUSE, available at www.whitehouse.gov/infocus/usmxborder/22points.html

problems than we do. The Customs Service has worked pretty effectively. They are using a lot more overtime, but are doing a fairly good job.

Most of our traffic does move by truck, but there is a fairly significant amount of traffic that moves by rail, north and south. A lot of it stems from the auto industry. For example, with the development of gamma ray magnetic resonance technology you can actually survey a moving vehicle as it comes across the border. It has reduced the delays. The border states, particularly Texas and Arizona, have been very aggressive with the Federal Government in seeking Federal funds to develop some of this technology to develop the cyber port idea in an effort to try to work towards speeding up traffic on both the commercial and non-commercial side.

ECONOMIC IMPACT

In terms of the overall scheme of things it probably does not matter a great deal to the U.S. economy whether Mexican maquiladora workers in Ciudad Juarez or Nogales come across the border on a regular basis. They come across the border on a regular basis to buy their groceries and clothing in Nogales or El Paso, but for those economies these things are very important. There was an enormous downturn in January 1995 with the peso devaluation.¹¹ A Mexican recession has a big impact. One of the things we try to avoid in Arizona is making it anymore difficult than it already is for somebody wants to come across and do their shopping in Nogales or even Tucson.

In addition to the high tech stuff, there are some informal measures. In Nogales there has been a fairly good level of cooperation on the local levels. The U.S. Customs Service does an excellent job of talking regularly to the major shippers and transportation companies and trying to help them deal with the delay type situations. There is a much better system now than there was two years ago to coordinate freight movements.

One major difference between the two borders is that where you have Canadian trucks going into the United States and U.S. trucks going into Mexico. We do not have that. NAFTA requires it. A NAFTA panel held in early 2001 that this had to be implemented,¹² but the whole process after a long effort by the Bush Administration just got enjoined by the 9th Circuit Court of Appeals.¹³ So, if you have a container that is going from

¹¹ Michael Gonzalez, *Stocks Drop Amid Barings Failure And Fears of Trouble in Mexico*, WALL ST. J., Feb. 28, 1995, at C2, available at 1995 WL-WSJ 2115302.

¹² Chairman J. Martin Hunter, *Final Report of the North American Free Trade Agreement Arbitral Panel Established Pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services*, SECRETARIAT FILE NO. USA-MEX-98-2008-01, Feb. 6, 2001, available at www.worldtradelaw.net/nafta20/truckingservices.pdf

¹³ The Court held that the Department of Transportation acted arbitrarily and capriciously

Hermosillo to Detroit, when it gets to the border the Mexican tractor disconnects. A small a mule tractor takes the container across the border and then an American owned tractor picks it up again. You have got a multiple vehicle process every time you want to get a container across the border.¹⁴ The process involves coordination of the container arriving at one place. The mule is waiting for the container, then the mule goes on to the other side where the freight liner vehicle is waiting. This process has had some impact in dealing with that type of problem. If the Department of Transportation ends up doing an environmental impact statement as the Ninth Circuit said they have to do, I would wager it will be another three to five years before any of that actually happens.

We have a continuing situation where there are three separate vehicles for every container crossing the border zone. You have excess crossings and a lot of other problems, as well. All of these, with the exception of the truck problem have contributed to a fairly manageable situation. As I suggested at the outset, there is a good deal of room to be concerned about what might happen in the future. In my opinion, we need some sort of program to regularize the status of many of the Mexicans who are working and living in the United States in order to meet our requirements for unskilled labor.

We worry in Arizona about Mexican industry loss of competitiveness vis a vis Asia; particularly China.¹⁵ It obviously affects our economy when an electronic company picks up and goes back to Asia. It may indirectly encourage more illegal immigration. Given the fact that roughly 70 percent of the content of Mexican made goods normally represents American parts, components or technology, obviously if that industry gets moved to Asia, the ability of the U.S. to continue supplying the parts and components goes down geometrically.

by not preparing a complete Environmental Impact Statement as required by the National Environmental Protection Act and not providing a conformity determination as required by the Clean Air Act. This finding moved the Court to grant the petitions forcing the Department of Transportation to prepare a full Environmental Impact Statement and Clean Air Act conformity determination before it could legally comply with its obligations under NAFTA. *Public Citizen v. Department of Transp.*, 316 F.3d 1002 (2003).

¹⁴ *State Functions at the Texas-Mexico Border and Cross-Border Transportation: From Mexico into Texas: Border Crossing Process and Participants*, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, at Sec. 5, Exhibit 7, Jan. 2001, available at www.window.state.tx.us/specialrpt/border/sfatb5.html; See, Stephen Flynn, *Drugs, Thugs and Trade: Border Control in an Era of Hemispheric Economic Integration*, COUNCIL ON FOREIGN RELATIONS, Feb. 7, 2000.

¹⁵ See, Gordon H. Hanson, *Trade Liberalization and Wage Inequality in Mexico*, 52 INDUS. & LAB. REL. REV. 271 ; Catherine K. Lin, Linan Yan, and Andrew N. Davis, *Globalization, Extended Producer Responsibility and the Problem of Discarded Computers in China: An Exploratory Proposal for Environmental Protection*, 14 GEO. INT'L ENVTL. L. REV. 525, 552 (2002).

We have other problems. The Mexican border with Guatemala is porous. This means that some of the immigration coming across the Mexican border is from Central America and other areas. We are very concerned of the idea of an eight to twelve-hour advance notice for container cargo.¹⁶ We do not see how our just in time arrangements would work for legal reasons, primarily the lack of secured financing legislation and the effective secured finance laws in Mexico. A large number of our U.S. owned Mexican maquiladoras warehouse their parts, components, and many times their finished products on the U.S. side of the border, rather than in Mexico. That way they can get a security interest in the property and borrow money on it. If you are operating under those circumstances or with a twin plant operation, your ability to take goods out of that warehouse in Nogales, Arizona, and get it to the warehouse in Nogales Senora very quickly is critical to keeping your factory moving at an efficient rate. If we get in a situation where you have to give a lot of advance notice for that, it is going to make the process less efficient. We worry about anything these days that makes production in Mexico less efficient, because of the competition with the rest of the world.

Obviously, the orange or red conditions are extremely disruptive.¹⁷ We have got this new process called Operation Liberty Shield.¹⁸ I am not sure what it really means, but for us it means we are supposed to have increased screening. One could deal with these as long as they are negotiated between the groups that have security as their only interest, and the rest of us who are trying to look at how to balance or coordinate security concerns with some of the other problems that we are dealing with in the area.

Some of us also are very uneasy about the fact that the U.S. Customs Service is being absorbed into the Department of Homeland Security.¹⁹ The concern is partly because the change of focus. The Customs Service, at least in recent years, has been pretty cooperative in terms of keeping the goods moving consistent with the other objectives. We are not sure that the balance is the same with the Department of Homeland Security. Those of us that tend to be pessimistic about these things figure it will be five years under any circumstances before this huge, new bureaucracy begins to function

¹⁶ *Required Advance Electronic Presentation of Cargo Information*, CUSTOMS BULLETIN AND DECISIONS, Vol. 37, No. 52, CBP DEC. 03-32, RIN 1651-AA49 (2003), available at www.cbp.gov/ImageCache/cgov/content/laws/cutoms_5bulletins_5fand_5fdecisions/2003/vol37_5f12242003_5fno52/37genno52_2epdf/v1/37genno52.pdf

¹⁷ *Homeland Security Advisory System*, DEPARTMENT OF HOMELAND SECURITY, available at www.dhs.gov/dhspublic/display?theme=29 (classifying probability of terrorist threat through a series of color coded levels beginning with green and escalating to red).

¹⁸ *Operation Liberty Shield*, Fact Sheet, THE WHITE HOUSE, March 17, 2003, available at www.whitehouse.gov/news/releases/2003/03/20030317-9.html

¹⁹ Dena Bunis, *Homeland Security Open its Doors*, DESERET NEWS, A02, Jan. 25, 2003, available at 2003 WL 4350328.

smoothly. From the political side, we are very concerned that the Security Council issues do not poison the water. We need to be dealing with Mexico to facilitate traffic, to deal with the illegal immigration problem, and to deal with other structural issues. If Mr. Bush and Mr. Fox are not willing to talk to each other, this complicates our lives. Thank you very much.