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A Cooperative Conundrum? The NAALC and Mexican Migrant Workers in the United States

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A COOPERATIVE CONUNDRUM? THE NAALC AND MEXICAN MIGRANT WORKERS IN THE UNITED STATES

*Robert Russo**

"[It] is a bad joke. . .a Rube Goldberg structure of committees all leading nowhere."[1]

I. INTRODUCTION

SINCE its adoption in 1993 at the insistence of U.S. President Bill Clinton's administration, the labor side accords to the North American Free Trade Agreement (NAFTA) have been extensively examined, occasionally ridiculed, and often dismissed as irrelevant. Most analysis tends to focus on the disappointing results of the North American Agreement on Labor Cooperation (NAALC) in affecting meaningful changes in the conditions of workers in Mexico.[2] In this article, I aim to take a different approach. My analysis focuses instead primarily on the efficacy of the NAALC process when complaints are made about alleged labor law violations in the United States. To provide some context for this analysis, I will briefly examine two recent complaints submitted to the NAALC's National Administrative Office (NAO) in the United States regarding the rights of Mexican migrant workers in U.S. territory. The central contention of this article is that the NAALC offers disappointing results when applied against the United States as well, due to a fundamental conflict in the functioning of the NAALC within regional economic integration that encourages increased labor migration.

A re-examination of the NAALC is also timely because it is portrayed by the U.S., Canada, and Mexico as expanding the "legal framework for affirming the human rights and employment opportunities of migrant

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1. Lane Kirkland commenting on the North American Agreement on Labour Cooperation negotiated by the Clinton Administration as a side accord to NAFTA. *See* Frank Swoboda, *Kirkland: No Compromise On NAFTA-AFL-CIA Head Warns Labor Will 'Go For Broke' To Defeat Treaty*, WASH. POST, Sept. 1, 1993, at F3.
2. *See generally* Griselda Vega, *Maquiladora's Lost Women: The Killing Fields of Mexico—Are NAFTA and NAALC Providing the Needed Protection?* 4 J. GENDER RACE & JUST. 137 (2000-2001); Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord* 18 COMP. LAB. L.J. 161 (1996-1997); Jeffrey R. Armstrong, *A Seat at the Table: A Critical Analysis of the Right to Foreign Nation Parens Patriae Standing* 17 FLA. J. INT'L L. 39 (2005).

workers in the Hemisphere."[3] The parties to the NAALC have used its existing administrative mechanisms for recent labor agreements that are part of free trade negotiations.[4] All three NAALC parties have in recent years created government offices dedicated to administering international labor affairs, a development that built upon the government mechanisms and institutions that were created for the NAALC in 1994.[5] These institutions are expanding within a legal framework being developed throughout the hemisphere and illustrate that the principle of linking labor standards to trade negotiations is in the process of becoming a customary part of trade negotiations throughout the Western Hemisphere.[6]

II. LINKING LABOR STANDARDS TO TRADE: A SHORT EXPLANATION OF THE NAALC PROCESS

Protection of labor rights through trade agreements requires defining what types of labor rights will be protected, and whether those rights will be based on national definitions or international labor standards.[7] The NAALC is not a part of the NAFTA agreement and it does not have many of the remedies and enforcement mechanisms available under the

3. ALLAN JURY, BUREAU OF POPULATION, REFUGES AND MIGRATION, U.S. DEPT. OF STATE, IMPLEMENTATION OF THE 1998 SANTIAGO SUMMIT OF THE AMERICAS MIGRANT WORKER INITIATIVE, *available at* http://www.eclac.org/celade/proyectos/migracion/Jury.doc.

4. For example, the U.S. National Administrative Office was recently renamed the "Office of Trade Agreement Implementation" with a corresponding mandate to act as a contact point for the to help administer the labor provisions of free trade agreements with Chile and Singapore "as well as labor provisions of other free trade agreements to which the United States may become a party." *See* Notice of Renaming the National Administrative Office as the Office of Trade Agreement, 59 Fed. Reg. 77127-31 (Dec. 23, 2004), *available at* http://www.dol.gov/ILAB/programs/nao/propguide.htm.

5. The United States has its "International Labor Affairs Bureau" located within its Department of Labor. *See* U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, http://www.dol.gov/ILAB/contacts/main.htm (last visited July 22, 2010). Canada has its "International Labour Affairs Office" located within Human Resources Social Development Canada. *See* Human Resources and Skills Development Canada, International Labor Affairs, http://www.hrsdc.gc.ca/eng/labour/labour_globalization/ila/index.shtml (last visited July 22, 2010). Mexico has its section called Cooperation Laboral Internacional located within the *Secretaría del Trabajo y Previsión Social*. *See* Unidad de Asuntos Internacionals, http://www.stps.gob.mx/01_oficina/03_cgai/index.html (last visited July 23, 2010).

6. The United States has incorporated core ILO labour rights into its subsequent Free Trade negotiations with Central American countries. *See* LIBR. OF CONG., ORDER CODE RS22823, OVERVIEW OF LABOUR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS (2008). Canada has a stated policy of negotiating labour and environmental cooperation accords in tandem with free trade agreements. *See* Emma Lavoie-Evans, *Canada's Free Trade Agreements with Latin America*, May 2010, http://www.nsi-ins.ca/english/pdf/FTA%20backgrounder.pdf. In 1997, Mexico and the European Union signed a free trade agreement titled "Economic Partnership, Political Coordination and Cooperation Agreement" which addressed, among other issues, labour and human rights issues between the two parties. *See* Economic Partnership, Political Coordination and Cooperation Agreement, art. 1, 36, Oct. 8, 1997, 2000 O.J. (L276) 45.

7. Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10:13 INT'L L. & POL. 13, 15 (2003).

NAFTA.[8] Nor does the NAALC utilize international labor standards created by the International Labor Organization (ILO).[9] Instead, all three countries that are a party to the NAALC undertake to provide and effectively enforce their own labor laws.[10] Labor laws must incorporate the eleven principles outlined in the NAALC, including the protection of migrant workers and related labor issues.[11]

There is a wide spectrum of enforceability of labor standards, ranging from fully enforceable labor obligations enjoying equal status to other aspects of a trade agreement to simple pronouncements announced by the parties that contain no enforcement mechanisms for any failures to comply.[12] The NAALC clearly states that nothing in the Agreement empowers a Party's authorities to undertake any activities relating to labor law enforcement in the territory of another Party to the Agreement.[13] The NAALC does not thus create an opportunity for extraterritorial enforcement by one state within another state's territory, nor does it create a "supranational enforcement system."[14] Instead the NAALC utilizes a review and dispute resolution system that has never led to any complaints going beyond the ministerial consultation phase.[15] Any complaints made by a government, organization, or individual under the auspices of the NAALC are handled through a National Administrative Office (NAO) that each state party has created within its own labor department.[16] A complaint against one NAALC party can be made in the NAO office of either (or both) of the other parties.[17]

The establishment and functioning of the NAOs illustrate the inequality inherent among the parties in the NAALC arrangement. In theory, they are equal national bodies. In practice, the select definition of labor rights combined with the disproportionate influence enjoyed by the United States over Mexico in their trading relationship illustrates the general imbalance in the relationship. The NAALC treats violations of its 11 principles in differing ways, limiting the various levels of remedies available for violations.[18] There is no possibility of fines, arbitral panels, or even mandatory Ministerial Consultations in cases involving migrant workers' protection.[19] In effect, by using a selective process to determine

8. *See generally* North American Agreement on Labor Cooperation (NAALC), U.S.-Mex.-Can., art. 42, Sept. 14, 1993, 32 I.L.M. 1499.
9. *Id.*
10. *Id.* at 1513.
11. *Id.* at 1515.
12. Polaski, *supra* note 7, at 19.
13. NAALC, *supra* note 8, at 1513.
14. BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 109 (2005).
15. *Id.* at 110-111. There are provisions for trade sanctions for violations of certain labor principles in the NAALC (occupational safety and health, child labour, and minimum wage "technical labour standards") but in practice these have never been used.
16. NAALC, *supra* note 8.
17. *Id.*
18. *Id.*
19. *Id.*

what remedies are available for different violations of labor standards, the NAALC has created a "hierarchy among rights and obligations" that has reduced the ability to "promote, to the maximum extent possible, the [NAALC Labor Principles];. . .[and] promote compliance with, and effective enforcement by each Party of, its labor law."[20]

The relatively small number of submissions filed under the NAALC during its operation (twenty-five submissions in twenty-five years) has been explained by some advocates of the agreement as a part of the NAALC procedural emphasis on long-term cooperative outcomes.[21] But, the lack of submissions may be generally attributed to the NAALC's "soft law" procedures which, while shining an international spotlight on U.S. labor law violations, nevertheless do not result in the rapid resolution of disputes.[22] The three NAALC parties consistently emphasize the cooperative nature of the agreement when responding to issues related to complaints.[23] This cooperative process has the practical effect of furthering the interests of the United States in regulating the labor standards of a developing country such as Mexico, while maintaining the veneer of an equal relationship through consultation and cooperative activities although such activities rarely result in modifications to labor laws that affect the developed country.

III. LEGAL APPLICATION OF AMERICAN LABOR STANDARDS TO MIGRANT WORKERS

Although the NAALC references migrant workers, it does not include a specific definition for them in the agreement, so it is necessary to turn to other sources for a definition. A migrant worker is defined under international law as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[24] The ILO estimates there to be approximately ninety-six million migrant workers globally.[25]

The reasons behind the movement of migrant workers include typical ones, such as desire to travel or reunite with family, or to earn a living wage. International labor migration has been seen both as a source of "growth and prosperity to both host and source countries" and a positive

20. HUMAN RIGHTS WATCH, LABOR RIGHTS AND TRADE: GUIDANCE FOR THE UNITED STATES IN TRADE ACCORD NEGOTIATIONS (2002), *available at* http://www.hrw.org/legacy/press/2002/10/laborrights-bck.htm.
21. HEPPLE, *supra* note 14, at 109.
22. Lance Compa, *NAFTA's Labor Side Agreement and International Labor Solidarity*, 33:3 Antipode: A Radical Journal of Geography 451, 453 (2001) *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=articles.
23. Secretariat of the Commission for Labor Cooperation, NAALC-Cooperative Activities, http://www.naalc.org/coop-activities.htm (last visited on Aug. 16, 2010).
24. International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 2 (Dec. 18, 1990).
25. ILO, *Current Dynamics of international Labour Migration: Globalisation and Regional Integration*, http://ilo-mirror.library.cornell.edu/public/english/protection/migrant/about/index.htm (last visited Dec. 12, 2005).

outcome of regional economic integration.[26] But for many migrant workers, the dark side of globalization has resulted in societal inequity and a complete loss of opportunities and human rights protection. A rising number of workers in developing countries migrate because they feel they have been left with no alternative.[27] Increasing regional economic integration has led to concerns regarding the rising exploitation of migrant workers, particularly in cases where those workers should be protected under agreements negotiated in tandem with free trade arrangements.[28] The difficulty in offering protections to migrant workers through an agreement, such as the NAALC, is that exploitation of migrant workers does occur in the destination country, usually a developed country.[29] The resistance by developed countries to international intrusion on this issue is in conflict with attempts made through instruments, such as the NAALC, to enforce migrant workers' rights.[30]

A. CLARIFYING THE TERM "MIGRANT WORKER" WITHIN THE NAALC CONTEXT

The NAALC states that the Parties must provide "migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions."[31] The United States interprets the customary international law definition of "migrant worker" to exclude undocumented migrants. In 2002, a 5-4 majority in the U.S. Supreme Court case, *Hoffman Plastic Compounds v. National Labor Relations Board*, held that undocumented workers who had been fired for union organizing activities were violating provisions of the 1986 Immigration Reform and Control Act (IRCA) and were not legally entitled to all protections available to legally documented workers under the National Labor Relations Act.[32] In September 2003, the Inter-American Court of Human Rights held in an Advisory Opinion-meant in part to respond to the *Hoffman* decision-that the rights to equality and non-discriminatory treatment are *jus cogens* and applicable to any resident of a state regardless of that resident's immigration status.[33] The United States nevertheless has so far

26. *Id.*
27. Kathy Richards, *The Trafficking of Migrant Workers: What are the Links Between Labour Trafficking and Corruption?*, 42 INT'L MIGRATION 147, 151 (2004).
28. *Id.* at 150-51.
29. *See id.* at 149.
30. *See id.* (showing that as of August 2009, no destination country for migrant workers has ratified the International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families).
31. NAALC, *supra* note 8, at Annex 1, Principle 11.
32. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). *See generally* Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101—1107 (2006); *see also* National Labor Relations Act, 29 U.S.C. §§ 151—169 (2006). In his dissent, Justice Stephen Breyer noted that the legislative history of the IRCA indicated that the Congress, in 1986, had clearly not intended to strip illegal aliens of all protections available under federal employment statutes. *Hoffman Plastic*, 535 U.S. at 153.
33. Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R., Advisory Opinion, OC-18/03 (2003) ("In the area of labor law, the United

refused to extend protections to undocumented migrant workers. The NAALC complaints referenced in the two case studies below refer only to the legally admitted migrant workers inside American territory.

B. National Legislation to Protect Migrant Workers

One of the basic principles with respect to labor standards developed for migrant workers is that of equal treatment for all migrant workers and application of the same standards as those "applie[d] to nationals of the State of employment. . . "[34] U.S. legislation to protect documented migrant workers exists in the form of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)[35] and the Fair Labor Standards Act (FLSA).[36] Minimum wages and workers' deductions are covered under this legislation to ensure that migrant workers are not paid below the federal minimum wage.[37] Many problems have arisen in enforcing these laws, which American authorities often attribute to a lack of resources in enforcement. The U.S. Department of Labor has admitted that it cannot adequately investigate or prosecute allegations of abuse in markets as large and diverse as the domestic workers and agricultural fields.[38]

An analysis of forced labor conditions existing for migrant workers in the Florida citrus industry indicated the prevalence of coercive measures taken against immigrant agricultural workers from Mexico and Guatemala, who often worked for no pay or for wages far below minimum wage.[39] Another difficulty with the use of national legislation to regulate the rights of migrant workers is the reluctance of prosecutors to take on cases involving violations of migrant workers' rights as it has been historically difficult to prove criminal violations of certain laws regarding involuntary servitude.[40] The NAALC has opened the door for civil society organizations to become involved in complaints and to press for investi-

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States does not treat irregular migrants with equality before the law. . .This discriminatory treatment of irregular migrants is contrary to international law. Using cheap labor without ensuring workers their basic human rights is not a legitimate immigration policy."); Int'l Labour Conference, Geneva, Switz., 2004, *Towards A Fair Deal For Migrant Workers In The Global Economy*, at 79 (stating that the ruling "clearly reinforces the application of international labour standards to non-national workers, particularly those of irregular status").

34. *Towards A Fair Deal for Migrant Workers in the Global Economy, supra* note 33, at 42; *see also* International Labour Organization Convention, Geneva, Switz., June 4, 1975, Migrant Workers (Supplementary Provisions) Convention, ¶ 12; G.A. Res. 45/158, ¶ 25 (1), U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

35. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, *et seq.* (2003).

36. Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (2003).

37. Kevin Bales, et al., *Hidden Slaves: Forced Labor in the United States*, 23 Berkeley J. Int'l L. 47, 63 (2005).

38. *Id.* at 64.

39. *Id.* at 64-65.

40. Wendell Rawls Jr., *Migrant Slavery Persists in Southeast Farms*, N.Y. Times, Nov. 19, 1981 at A1.

gations.[41] This is what occurred in May 2000 when a Florida-based NGO called the Coalition of Immokalee Workers (CIW) began investigating the employment conditions of migrant workers employed by R&A Harvesting after receiving information about migrant farm worker abuse by the company.[42] CIW urged the U.S. Justice Department "to investigate what seemed to be a clear case of forced labor in Florida's citrus groves"; however federal investigators "initially declined to pursue the case because, without adequate resources to investigate, they felt they could not prove involuntary servitude without victims who would be willing to testify."[43] The inability (or unwillingness) to devote sufficient resources to deal with these problems continues despite much evidence pointing to large scale labor rights violations of migrant workers within the United States.

The failure of international pressure to force American compliance with international labor rulings points to a larger problem. International labor rights conventions can raise awareness of rights abuses and shame countries into action, but as they currently exist they are not designed to coerce states into enforcement of existing national labor laws. The issue of poor enforcement of U.S. labor laws when confronted with violations of migrant worker rights is one that the NAALC is meant to directly address; but the lack of coercive measures within the agreement severely limits its relevance to protecting migrant workers' legal rights. The following case studies illustrate the methods with which the NAALC deals with these complaints regarding Mexican migrant workers rights' in the United States. They reveal a similar pattern of resistance on the part of the United States when faced with unexpected complaints regarding labor rights violations arising from a developing country's concerns.

1. *Case Study #1-Mexican NAO 2003-1–Migrant Workers' Complaint Against United States and North Carolina Employers*

The issue of the U.S. H-2A Non-Immigrant Visa Program became the subject of a public communication filed in February 2003 by two farm workers' advocacy groups, who alleged that the H-2A program was discriminatory, and that North Carolina employers exploited migrant workers "by not paying overtime, blacklisting, and denying migrants access to workers' compensation benefits."[44] In September 2003, the Mexican

41. Laura Macdonald, *Civil Society and North American Integration*, (Inst. for Research on Pub. Policy, Working Paper No. 2004-09e), *available at* http://www.irpp.org/wp/archive/NA_integ/wp2004-09e.pdf.
42. Bales, *supra* note 37, at 81.
43. *Id.* It took additional work performed by CIW, and more than a year of subsequent investigations before charges were brought against R&A Harvesting.
44. Public Communication Submitted to the Mexican National Administrative Office (NAO), http://www.naalc.org/english/summary_mexico.shtml (last visited July 22, 2010). The communication was submitted on May 27, 1998 by the Unión Nacional de Trabajadores (UNT), Frente Auténtico del Trabajo (FAT), Frente Democrático Campesino (FDC), and the Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares (STIMACHS), assisted by the International

NAO accepted the public communication for review and two weeks later requested cooperative consultations with the U.S. NAO.[45]

The significance of this petition is its main allegation that conditions for many Mexican migrant workers in the United States have not substantially improved since the demise of the Bracero guest worker program in the early 1960s.[46] The H visa that is the subject of this complaint "extended the realm of guest work past the end of the bracero era" but the U.S. Congress importantly made a variety of guarantees to Mexican guest workers through H-2A protections for "workers' wages, housing, travel expenses, and access to free legal representation."[47] However, the H-2A program has failed to stop unscrupulous growers from evading many of their legal obligations through participation in the program.[48] Part of this lies in the structure of the H-2A program regulations, which do not explicitly prohibit (or protect) unionization but instead "operate in a way that discourages it."[49] Petition Mexican NAO 2003-1 refers to growers openly warning H-2A workers away from unions, and enforcing contractual bans against visitors to the fields or labor camps that keep workers from talking to union organizers, issues that may violate guarantees under both U.S. and International Law.[50]

In response to the petition, the U.S. Department of Labor concluded, in its own investigation in 2004, that North Carolina had been enforcing its laws properly.[51] In December 2007, Mexico requested cooperative consultations under Article 21 of the NAALC.[52] As of March 2010, the

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Labor Rights Fund. The two farmworkers' advocacy groups who filed the complaint were the Washington, D.C.-based Farmworker Justice Fund and the Mexico-based farmworker advocacy group *Central Independiente de Obreros Agrícolas y Campesinos.*

45. *Id.*

46. The Bracero Program, http://www.farmworkers.org/bracerop.html (last visited July 22, 2010). In August 1942, the governments of the United States and Mexico instituted the Bracero program largely to respond to crop failures and insufficient agricultural employment in Mexico during the late 1930s and early 1940s. This situation coincided with a demand for cheap manual labor brought about the entry of the United States into the Second World War. The Bracero Program suffered from criticism that it countenanced racism and harsh labor conditions for Mexican workers in the United States. The head of the U.S. Department of Labor, Lee G. Williams, famously described the Bracero Program as a system of "legalized slavery." ALICIA R. SCHMIDT CAMACHO, MIGRANT IMAGINARIES: LATINO CULTURAL POLITICS IN THE U.S.-MEXICO BORDERLANDS 110 (2008). The Bracero Program was terminated in 1964.

47. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 554 (2007).

48. *Id.*

49. *Id.* at 555.

50. *Id.*

51. *Mexico Seen Using NAFTA Labor Deal to Press Immigration Issues*, WASH. TARIFF AND TRADE LETTER, May 10, 2004, at 2, 3. The article states that workers' representatives in the complaint alleged that the number of H2-A workers has increased 700-800% in the last decade.

52. Secretariat of the Comm'n for Labor Cooperation, 2004-2007 Report, *available at* http://new.naalc.org/UserFiles/File/AnnualReports/FinalAR04-07En.pdf. The report states that cooperative consultations were requested after Mexico studied its

Mexican NAO has yet to provide a report of review on the submission.[53] This case was seen by some in the U.S. DOL and the U.S. National Advisory Committee on the NAALC as an attempt by Mexico to impose its views on immigration issues relating to its citizens working in the United States through the NAALC.[54] The Advisory Committee heard from the DOL Director in May 2004 and in turn Committee members "cautioned that Mexico has a separate agenda in its investigations of the treatment of migrant workers. *Rather than just the enforcement of current laws, Mexico wants to see changes in those laws.*"[55] The DOL Director agreed with the Committee stating that the complaint went "went way beyond the objectives in the NAFTA accord" and that cooperative programs are in place to deal with workers' complaints.[56] Both departments avoided any discussion of punitive measures or of changes to any U.S. labor laws to comply with NAALC rulings.

2. *Case Study #2-Mexican NAO–2005-1–Rights of Migrant Workers Under H-2B Visa Program in Idaho*

In April 2005, the U.S. H-2B Visa program became the subject of a public communication filed by migrant workers, several NGOs, and a Law School to the Mexican NAO. The H-2B Visa facilitates the entry of season Mexican workers into the United States.[57] The complaint alleged that migrant workers under the H-2B Visa program in Idaho were denied protection against forced labor and minimum employment standards; had suffered employment discrimination, including inequality in pay for women and men; and, had been exposed to occupational injuries and offered inadequate compensation for those injuries.[58]

Another aspect to this public communication, untested under the NAALC, deals with the inability of the migrant workers to secure free legal assistance to enforce their rights under U.S. labor laws. In Idaho, legal aid lawyers receive federal funding from the Legal Services Corporation (LSC) and lawyers receiving LSC funding are barred by federal

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NAO complaints 2003-1 and 2005-1 under its domestic rules and found similarities in the complaints.

53. U.S. Dep't of Labor, *Status of Submissions Under the NAALC*, http://www.dol.gov/ilab/programs/nao/status.htm (last visited on Aug. 16, 2010).
54. *Id.*
55. *Id.* (emphasis added).
56. *Id.*
57. H-2B visa, http://www.workpermit.com/us/employer_h-2b.htm (last visited Aug. 11, 2010).
58. U.S. Dep't of Labor, *Status of Submissions under the NAALC*, March 2010, http://www.dol.gov/ilab/programs/nao/status.htm. Lawyers working for the following groups filed the complaint: the Northwest Workers' Justice Project, the Brennan Center for Justice at New York University School of Law, and Andrade Law Office. Sixteen migrant workers from Panama, Mexico and Guatemala were joined by nine U.S. and Mexican organizations in filing the complaint, including Centro de Investigacion Laboral y Asesoria Sindical, A.C.; Frente Autentico del Trabajo; National Union of Workers (UNT); Red Mexicana de Accion Frente al Libre Comercio; Sin Fronteras, I.A.P.; Idaho Migrant Council; National Immigration Law Center; Oregon Law Center; and Pineros y Campesinos del Noroeste.

law from representing several categories of immigrants, including those who are in the U.S. on H-2B Visas.[59] This case tested a specific principle of the NAALC, which states that the United States must "enforce its laws in connection with NAALC labor principles requiring: [the provision of] migrant workers in [the United States'] territory with the same legal protection as [United States] nationals in respect of working conditions."[60]

This case illustrated the difficulty migrant workers have in obtaining legal representation in the United States. This is particularly true in remote areas of states such as Idaho, where for a variety of factors, including language and economic reasons, qualified private legal assistance is not readily available.[61] Nevertheless, the need for migrant workers to have access to proper legal representation is necessary to secure a variety of rights related to their status. Only through the legal process can migrant workers in the United States obtain a remedy under the federal legislation such as the Migrant and Seasonal Agricultural Worker Protection Act, and litigation is much more likely to be successful when migrant workers, often unfamiliar with the U.S. legal system and the English language, are represented by legal counsel.[62]

On October 24, 2007, the Mexican Labor Secretary responded to the complaint, submitting some sixty-nine questions to the United States Department of Labor dealing with issues relating to housing and transportation conditions for workers, wages, workers' access to legal assistance, and the extent to which state and federal laws protect the rights of H-2B workers from employer discrimination.[63] In addition, the Mexican government requested the petitioners to reply to the same questions, with the Brennan Center submitting its response on August 13, 2008, noting that the two federal agencies responsible for protecting H-2B workers–the U.S. Department of Labor and the U.S. Department of Homeland Security-have failed to undertake any enforcement responsibilities or investigations into the violations alleged in the complaint.[64] Although, as of August 2009, there is no response available from the U.S. Government to the petition, members of the U.S. House of Representatives have discussed the issue. On April 16, 2008, Democrat Representative George Miller spoke before the House Judiciary Committee on the need for improved legal reforms to ensure that H-2B workers receive proper legal

59. BRENNAN CENTER FOR JUSTICE, FACT SHEET: COMPLAINT TO MEXICAN GOVERNMENT REGARDING ACCESS TO LABOR RIGHTS LAWYERS FOR TEMPORARY WORKERS IN THE U.S. (2005), *available at* http://www.brennancenter.org/page/-/d/download_file_8839.pdf.

60. *Id.* (quoting NAALC, *supra* note 8, at Annex 1, Principle 11).

61. *Id.* at 1.

62. *Id.*

63. BRENNAN CENTER FOR JUSTICE, TRANSLATION OF MEXICAN SECRETARY OF LABOR AND SOCIAL PROMOTION (2007), *available at* http://www.brennancenter.org/page/-/Mexican%20Govt%20Response%20English.pdf.

64. Laura Abel, et al., *Responses to Questions of the National Administrative Office of Mexico Regarding Public Communication Mex. 2005-1 (Rights of Migrant Workers with H2-B Visas) under the North American Agreement on Labor Cooperation*, Aug. 13, 2008, http://brennan.3cdn.net/3e1529877c7d0f227d_hrm6i27gx.pdf.

access to federally funded legal aid and are "not treated simply as a cheap, easily-exploited source of labor."[65]

Both of the case studies in this article illustrate several key features of the NAALC and its operating process. On the positive side, it acts to engage non-governmental actors such as individual workers and human rights groups into international legal processes, and to publicly acknowledge problems in national programs designed to deal with migrant workers. The effects of this should not be discounted because raising awareness of migrant worker exploitation can eventually lead to political or economic pressures from concerned American citizens to do something about the problem. But, as the cases demonstrate, the NAALC process is inexcusably slow moving as a result of bureaucratic delays and political considerations. Complaints to the NAALC have dragged on for years, and usually wind up in the black hole of Ministerial Consultation or Review. Expanding on Lane Kirkland's quote at the beginning of this article, if the NAALC were a Rube Goldberg cartoon, it would be one that would take years to finish and have an incomprehensible punch line.[66] The limitations of the NAALC approach also illustrate the unwillingness of a developed country such as the United States to subject itself to measures that could result in legislative or policy changes–even if that meant simply enforcing existing national labor laws–if the impetus for that change originates from complaints initiated from Mexico.

IV. CONCLUSION

Despite its flaws–and there are many–the NAALC remains a historic agreement, one that set a precedent in this hemisphere by incorporating labor standards into free trade negotiations, even if not into the NAFTA agreement itself. This article has analyzed the structure and operation of NAALC and the NAOs, and has found that, practically speaking, the process has resulted in unsatisfactory responses when the NAALC has been used as a tool to address alleged labor rights violations of migrant workers in the United States. As the two recent NAALC complaints demonstrate, the NAALC has dealt with alleged violations of migrant workers' rights in the U.S. through a process that deliberately avoids a confrontation or litigious style. The traditional analysis of the NAALC's weaknesses tends to emphasize the Mexican government's opposition to imposition of developed world labor standards through coercive measures. But I have argued in this article that the United States also opposes such measures, based on a desire to protect the traditional nature of the labor rights relationship between the developed and developing

65. Brennan Center for Justice, Testimony of Representative George Miller, Chairman of the Education and Labor Committee before the Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (April 16, 2008), *available at* http://www.brennancenter.org/page/-/Justice/Testimony%20of%20Representative%20George%20Miller.pdf.

66. Swoboda, *supra* note 1.

world. The United States wants to maintain the American labor system as a model for the developing world and also to protect it from any changes arising from complaints from that world. An important dilemma can be seen here as well with respect to enforcing such rights within developing countries subject to an accord such as the NAALC. If a wealthy, developed country such as the United States relies on the defense of insufficient resources to deal with violations of internationally agreed-to labor standards, how can the developing countries be expected to devote sufficient resources to deal with similar problems?

The NAALC is an example of an inadequate compromise, an attempt to address the conundrum of protecting labor rights within neo-liberal economic globalization that often facilitates their exploitation. One positive result of the NAALC process has been greater cooperation and inclusiveness among various NGOs and civil society groups, including previously marginalized groups such as unofficial Mexican unions and Mexican migrant workers in the United States. The cooperative process in dealing with migrant workers is most effective when used to approach a theoretical legal problem and is clearly inadequate in confronting ongoing violations of national labor laws. But the NAALC process, an exercise in "soft law-making," is clearly not up to the task of dealing with the "hard-law" realities of ensuring a state party's compliance with its own national labor laws.