RETHINKING NAFTA'S NAALC PROVISION: THE EFFECTIVENESS OF ITS DISPUTE RESOLUTION SYSTEM ON THE PROTECTION OF MEXICAN MIGRANT WORKERS IN THE UNITED STATES

Adam Brower*

INTRODUCTION

Since its novel inception in 1994, the North American Agreement on Labor Cooperation (NAALC), a labor side agreement to the North American Free Trade Agreement (NAFTA), has been the center of heated political debate.[1] Over the past decade, experts and proletarians alike have lined up on both sides of this debate armed with conjectures and experiential data that both claim to bolster their support for and/or defiance of this truly innovative[2] agreement.[3] Mirroring that debate should be a discussion of the NAALC's inclusion of migrant worker protection in its eleven core Labor Principles, and whether the NAALC has been both proficient and effective in actually protecting Mexican migrant workers in the United States.

Protection of migrant workers' rights in the U.S. is an extremely important endeavor considering migrant workers make up an estimated three-and-one-half-percent of the U.S. labor force[4] and can be considered the "threads that hold together the tapestry we call North America."[5] Moreover,

---

* J.D. candidate, May 2008. B.A., Purdue University, 2003. The author would like to thank Professor Maria Lopez and Professor Karen Bravo, Indiana Univ. School of Law at Indianapolis; Christina Laun and Lindsay Carlberg, Indiana Univ. School of Law at Indianapolis, for their assistance with this Note. The author would also like to thank his wife, Amy Brower, for enduring four years of his law school experience, while he worked over forty-hours per week, went to school every single night of the week, and saw her in the few, brief hours in between.

1. Brianna Busch, *Free Trade Agreements and Labor Considerations After the NAALC; How the U.S.-Chile Free Trade Agreement Created a Faulty Template*, 4 INT'L BUS. L. REV. 59, 61 (2004), *available at* http://www.alsb.org/international/ijrnl/busch/busch2004.pdf.

2. Commission for Labor Cooperation, Foreword, http://www.naalc.org/english/report4_1.shtml (last visited Nov. 20, 2007). *See also infra* notes 24-33 of this Note and the accompanying text.

3. Busch, *supra* note 1, at 61.

4. Susan M. Richter et al., *Impacts of Policy Reform on Labor Migration from Rural Mexico to the United States* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 11428, 2005), *available at* http://www.nber.org/papers/w11428 (last visited Nov. 21, 2007).

5. Commission for Labor Cooperation, GUIDE TO LABOR AND EMPLOYMENT LAWS FOR MIGRANT WORKERS IN THE UNITED STATES 7, http://www.naalc.org/migrant/english/pdf/guide_en.pdf (last visited Nov. 21, 2007) [hereinafter GUIDE].

with accounts of migrant workers in America "liv[ing] in poverty, [and] endur[ing] poor working conditions," we must look long and hard at the laws and regulations in the U.S. to see if they are of sufficient standing and are utilized to their maximum potential.[6] Since the NAALC was specifically created for protecting labor rights, and given the fact that it explicitly calls for the protection of migrant workers' rights,[7] the center of that focus should be on the dispute resolution mechanism espoused in the NAALC, itself.[8]

As the NAALC may be becoming a model for new labor agreements,[9] and as the U.S. looks to regulate and conform to the continuing influx of migrant workers,[10] now is the time to start the evaluation process yet again. Part I of this Note will briefly describe the history of the NAFTA within the political climate that existed at that time. This should then shed light on how the NAALC eventually came to fruition and why it so instrumental in changing the way we look at labor guidelines.

This Note will then discuss the intricacies of the NAALC's dispute resolution system and the process by which the three countries and their inhabitants can file a claim against another participating country. This initial understanding of the resolution process will prove crucial in determining its effectiveness as a whole, especially as it relates to protecting migrant workers particularly. To comprehend the full effect this process has on the Mexican migrant workers in the U.S., Part II of this Note will focus on who comprises the migrant workforce spilling from the border of Mexico into the U.S. and why these people seek work north of their native land. This insight will give a foundation for understanding the hardships the migrant workers face while in the U.S., which then opens the door for understanding why migrant workers need the protection of the NAALC in the first place. Then, Part III of this Note discusses the tribulations the migrant workers face by analyzing their quandaries through the lens of the U.S. laws and regulations formulated and required by the NAALC to protect them.

This groundwork permits Part IV of this Note to address whether the dispute resolution system has been effective in protecting the rights of Mexican migrant workers in the U.S. This will be accomplished through evaluating the submissions filed in Mexico against the U.S. for alleged failures to protect the Mexican migrant workers within its borders. Submissions filed in Canada

---

6. Katrina Bull, *The NAALC Boomerang: Another Backfired Attempt to Advance U.S. Migrant Workers' Right of Freedom of Association*, 14 INT'L LEGAL PERSP. 6, 4 (2004).

7. COMMISSION FOR LABOR COOPERATION, PROTECTION OF MIGRANT AGRICULTURAL WORKERS IN CANADA, MEXICO, AND THE UNITED STATES, Introduction, *available at* http://www.naalc.org/english/pdf/study4.pdf (last visited Nov. 21, 2007) [hereinafter PROTECTION OF MIGRANT WORKERS].

8. Bull, *supra* note 6, at 11.

9. Busch, *supra* note 1, at 60.

10. Julie Watts, *Mexico-U.S. Migration and Labor Unions: Obstacles to Building Cross-Border Solidarity* 4 (The Center for Comparative Immigration Studies, Working Paper No. 79, 2003).

against the U.S. will also be examined as a comparative tool to determine whether the issues raised are exclusively Mexican-American labor relations or are more universally applicable. The outcome of those submissions will help analyze just how effective the submission process is overall. Ultimately, Part V of this Note will address the advantages and disadvantages of the resolution system; and in return, will promote continued improvement in the NAALC's areas of strength, while, if possible, systematically offering alternative ways to improve the process.

I. A BRIEF INTRODUCTION TO THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

A. A Broad Overview of NAFTA and Its Side Agreements

Nearly five years before NAFTA was enacted, Canada and the U.S. established their own accord, the U.S.-Canada Free Trade Agreement, to alleviate some concerns over the shared border between the two countries.[11] Having observed the initial success of the accord between the U.S. and Canada, President Salinas of Mexico initiated preliminary talks with President George H. Bush in hopes of establishing a similar agreement between the U.S. and Mexico.[12] Soon thereafter, President Bush wrote the U.S. Congress concerning Mexico's interest as well as Canada's rejuvenated curiosity in a trilateral agreement between the nations.[13] Negotiations quickly began among the three countries in mid-1992, and by December of 1992, the three countries concluded their negotiations and signed the NAFTA.[14] Its goals were to eliminate barriers to trade, promote conditions of fair competition in free trade, increase investment opportunities between the three countries, and provide adequate and effective protection and enforcement of intellectual property rights for the three countries.[15]

Shortly after signing the agreement, the U.S. was in the midst of a

---

11. Vancouver Career College, The History of NAFTA – North American Free Trade Agreement, http://www.vancol.com/history-of-nafta.cfm (last visited Nov. 21, 2007).

12. *History of NAFTA*, http://www.mtholyoke.edu/~vochoa/WorldPoliticsFolder/history2.html (last visited Nov. 21, 2007) [hereinafter Mtholoyoke]. President Salinas actually wrote President Bush a letter in an attempt to begin preliminary negotiations on August 21, 1990. *Id.*

13. *Id.* As Canada, Mexico, and the United States eventually signed a trilateral Free Trade Agreement, the original U.S.-Canada Free Trade Agreement was then "suspended due to NAFTA." Duke Law, *NAFTA*, http://www.law.duke.edu/lib/researchguides/nafta.html (last visited Nov. 21, 2007).

14. Mtholoyoke, *supra* note 12.

15. North American Free Trade Agreement, U.S.-Can.-Mex. art. 102, Dec. 17, 1992, 32 I.L.M. 289 (1983).

presidential election[16] and President Bush was "touting NAFTA as a major achievement."[17] The Democratic presidential hopeful, William Clinton, criticized NAFTA's lack of specific detail as to labor rights in all the three countries, and specifically, the deficiency of standards for Mexican workers in Mexico.[18] This was a real concern, because in 1992 the Mexican workforce was earning approximately $0.58/hour, while the U.S. federal minimum wage was much higher at $4.25/hour; therefore, Clinton often spoke of the fear that U.S. businesses would move south in search of cheaper labor.[19]

Consequently, during his race for presidency, Clinton touted his general support for the prior NAFTA accord; yet, he proposed two "side agreements" be added to address labor problems and environmental issues, both of which were scarcely mentioned in the original agreement.[20] Clinton went on to defeat President Bush during the 1992 election and, soon after taking office, immediately began talks with Canada and Mexico to discuss his suggested side agreements.[21] During those negotiations, Canada and Mexico agreed on the need for the side agreements; in August of 1993, the three countries signed the NAALC and the North American Agreement on Environmental Cooperation (NAAEC).[22] Both side provisions went into effect on January 1, 1994.[23]

B. The Specifics of the NAALC and Its Dispute Resolution System

The NAALC was the first agreement of its kind and brought about changes prior agreements had yet to encompass.[24] For example, the NAALC is "the first international agreement on labor issues that has been coupled with a free trade agreement," and the oversight commission it established within it, is the first "international body since the creation of the International Labor Organization in 1919 to be dedicated solely to labor rights."[25] Furthermore, the

---

16. Bull, *supra* note 6, at 10. The two candidates vying for the 1992 presidency were incumbent, President George H. Bush, and his challenger, and eventual winner, President William Clinton. *Id.*

17. CONCEPTS AND STRATEGIES IN INTERNATIONAL HUMAN RIGHTS 140 (George J. Andreopoulos ed., 2002) [hereinafter HR Concepts].

18. Bull, *supra* note 6.

19. *Id.* (citing Karla Shantel Jackson, *Is Anything Ever Free? NAFTA's Effect on Union Organizing Drives and Minorities and the Potential of FTAA Having a Similar Effect*, 4 SCHOLAR 307, 324 (2002)). *See also* Frederick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321, 349-50 (1997).

20. HR Concepts, *supra* note 17.

21. *Id.*

22. *Id.* Both side agreements went into effect on January 1, 1994. *Id.* at 140-41.

23. *Id. See also* NATHANIEL GOETZ ET AL., A BLUEPRINT FOR NAFTA: THE UNITED STATES, CHILE, AND THE FUTURE OF THE NORTH AMERICAN FREE TRADE AGREEMENT 14-17 (2001).

24. COMMISSION FOR LABOR COOPERATION, *supra* note 2, at Foreword.

25. ABOUT NAALC, http://www.duke.edu/web/pps114/policy2003/2f/index4.html (last

NAALC extended to the International Labor Organization (ILO) by including "protections for migrant workers and workers' compensation."[26] The NAALC is also uniquely "non-invasive," because it does not affirmatively require that any of the three countries create or adopt any new laws regarding worker rights, nor does it mandate the commitment to any international standards.[27] Instead, it requires the three countries to enforce those laws already existing within each country.[28] At the core of the NAALC, the agreement states all three countries agree to a common collaboration of seven objectives.[29] The countries must also "commit themselves" to the following eleven Labor Principles:

1. Freedom of association and protection of the right to organize;
2. The right to bargain collectively;
3. The right to strike;
4. Prohibition of forced labor;
5. Labor protections for children and young persons;
6. Minimum employment standards;
7. Elimination of employment discrimination;
8. Equal pay for women and men;
9. Prevention of occupational injuries and illnesses;
10. Compensation in cases of occupational injuries and illnesses;
11. Protection of migrant workers.[30]

These principles encompass five basic worker rights from the U.S. trade laws,[31] six core ILO labor standards,[32] and two additional rights: workers' compensation and migrant worker protection.[33] The principles are sub-divided into three groups: Group I: Labor Principles 1, 2, and 3; Group II: Labor Principles 4, 6 (as it relates to overtime pay), 7, 8, 10, and 11; Group III: Labor Principles 5, 6 (as it relates to minimum wages), and 9.[34]

---

visited Nov. 21, 2007) [hereinafter ABOUT NAALC].

26. Bull, *supra* note 6, at 11 (quoting Joel Solomn, *Trading Away Human Rights: The Unfulfilled Promise of NAFTA's Labor Side Accord*, HUMAN RIGHTS WATCH 1 (2001)).

27. U.S. DEP'T OF STATE, CRS REPORT FOR CONGRESS: NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER THE WORKER RIGHTS AND FAST-TRACK DEBATE 6, Order Code 97-861 E, *available at* http://fpc.state.gov/documents/organization/8118.pdf (last visited Nov 21, 2007) [hereinafter CRS Lessons].

28. *Id.*

29. Commission for Labor Cooperation, Objectives of the NAALC, http://www.naalc.org/english/objective.shtml (last visited Nov. 21, 2007). Those standards include improving working conditions and living standards, promoting the eleven Labor Principles in the agreement, encouraging cooperation for innovation and productivity and quality, encouraging publication and exchange of information with joint studies, pursuing cooperative labor-related activities for mutual benefit, promoting compliance and enforcement of the labor laws of each country, and to foster transparency in the administration of the laws. *Id.*

30. *Id.*

31. CRS Lessons, *supra* note 27, at n. 5.

32. *Id.*

33. *Id.* Migrant worker protection is the focus of this Note.

34. *Id.* at 7. These classifications play a major role in how each Labor Principle is treated during the dispute resolution stage of the NAALC provision, which will be discussed in Part V,

The NAALC is governed by the Commission for Labor Cooperation (Commission), located in Washington, D.C., which consists of labor ministers from the U.S., Mexico, and Canada.[35] The three labor ministers also have a support staff called the Secretariat.[36] The Secretariat conducts "regular and special research reports on comparative labor law and labor market issues as well as serv[es] as the administrative arm of the Commission."[37] All members of the Secretariat are considered "international civil servants" who should not and cannot "take instruction from any government."[38]

Significantly, a dispute can only be brought directly to the Commission when one of the countries disputes the lack of enforcement or the inappropriate application of another country's labor laws.[39] All other complaints,[40] by either individuals or those who make up a group of people, must go through the National Administrative Office (NAO)[41] of the person or group's native country.[42] For all practical purposes, any "labor law matter" relating to one of the eleven Labor Principles can be grounds for a submission.[43] Concomitantly, throughout the history of the NAALC, many entities, such as trade unions, human rights organizations, labor lawyers for associations, and student groups, have filed submissions.[44]

Once the complaint is received, each NAO of the affected country can meet with one another to confer and hold hearings on the matter in question.[45] If the NAO officials cannot come to an agreement, the labor ministers from the

---

subsection A., *infra*. *Id.*

35. HR Concepts, *supra* note 17, at 141. The ministers get together once a year to discuss the Commission's work and the "implementation of the [a]greement" as a whole. *Id.*

36. CRS Lessons, *supra* note 27, at Fig. 2.

37. HR Concepts, *supra* note 17, at 141.

38. *Id.* This is important because it gives the Secretariat a truly independent point of view, hoping decisions and research will not be biased toward outside, governmental influences. *See id.*

39. ABOUT NAALC, *supra* note 25. For example, if the United States thought Mexico was failing to implement its labor laws, the United States could file directly to the Commission. *Id.*

40. "Complaint" is a term coined by the media in place of the verbiage "submissions" or "public communication," as it is referenced in Article 16(3) of the NAALC agreement. HR Concepts, *supra* note 17, at 141.

41. Each NAO is headed by a Secretary and is located in the labor department of each of the three countries. CRS Lessons, *supra* note 27, at CRS-7. It is also important to note all three NAOs have different procedures for filing an actual dispute. *Id.*

42. *Id.* The United States and Mexico allow submissions from citizens or organizations within the United States or outside the country; however, the submission cannot involve a matter arising from the same country in which it is filed. *Id.* at n. 7. Therefore, if the claimed violation was in the United States by a Mexican citizen, the submission could not be filed in the United States and must be filed in Mexico against the United States. CRS Lessons, *supra* note 27, at CRS-7.

43. HR Concepts, *supra* note 17, at 142.

44. *Id.* "[A]ny citizen of any country or organization based in any country can submit a complaint to any of the NAOs." *Id.*

45. CRS Lessons, *supra* note 27, at CRS-7.

affected countries may be consulted regarding a potential resolution.[46] If no agreement is reached at this stage, the Ministerial Council (MC) may be summoned along with help from the Secretariat. [47]

At this stage, the distinction between the three groups of Labor Principles established under the NAALC agreement becomes important.[48] Up to this point, all three groups were entitled to NAO review and Ministerial Consultation; however, if the complaint has yet to be resolved by either stage, and if the complaint falls under Group I, the process ends.[49] For Group II, including the protection of migrant workers, and Group III, if the dispute is not settled, the MC can refer the matter on a "case-by-case basis" to the Evaluation Committee of Experts (ECE).[50] The ECE is made up of an independent,[51] three-person team which "performs a comparative study" on the labor principal(s) specifically addressed by the MC.[52] The ECE may then conduct investigations of "alleged non-enforcement" and issue its proposal, which is then evaluated by the MC once more.[53] Although the recommendations are non-binding, they are publicly declared; consequently, it is possible pressure will be placed upon the affected government to act in accordance with its offerings.[54] Nonetheless, not one complaint out of the thirty-four filed has made it past the MC's review; therefore, speculating as to what the possible results is mere conjecture.[55]

If the ECE is unable to resolve the issue, or if the MC is unwilling to follow its recommendation, all complaints under Group II principles are tabled, while complaints under Group III principles progress to the final stage, which is a review by an Arbitral Panel (AP).[56] The AP is made up of five members who are on the MC's "roster" and has the authority to implement monetary fines

---

46. *Id.*

47. *Id.* The Ministerial Council is made up of the U.S. Secretary of Labor in Washington and the equivalent counterparts from Canada in Ottawa and Mexico in Mexico City. *Id.*

48. *See supra* note 34. Part I, Subsection B., *infra* provides further explanation regarding what constitutes the three main groups.

49. GARRET D. BROWN, MAQUILADORA HEALTH AND SAFETY SUPPORT NETWORK, NAFTA'S 10 YEAR FAILURE TO PROTECT MEXICAN WORKERS' HEATH AND SAFETY, at tbl.2, *available at* http://mhssn.igc.org/NAFTA_2004.pdf (last visited Nov. 22, 2007).

50. CRS Lessons, *supra* note 27, at CRS-7.

51. Independent as used by this author suggests that it is outside of the Commission and consists of three experts summoned by the MC. *Id.*

52. HR Concepts, *supra* note 17, at 142.

53. CRS Lessons, *supra* note 27, at CRS-7. However, if the complaint is determined by the MC the "matter is not trade-related or is not covered by mutually recognized labor laws," the ECE may not rule on the matter. *Id.* at n. 8.

54. HR Concepts, *supra* note 17, at 142.

55. *See* U.S. Dep't of Labor, *Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC), available at* http://www.dol.gov/ilab/programs/nao/status.htm (last visited Jan. 7) [hereinafter Dep't of Labor Summary].

56. *See* CRS Lessons, *supra* note 27, at CRS-4, CRS-7.

against a country that has failed to "enforce its own standards."[57]

Sanctions may include trade sanctions on the "firm, industry, or sector" which is the cause of the submission in the first place.[58] The maximum penalty may be to suspend the NAFTA benefits up to "the amount of the monetary penalty (which may be no greater than NAFTA benefits from tariff reductions) for one year."[59] Importantly, only violations of the Group III principles, including minimum wage, child labor, and safety and health, can bring about sanctions, while the remaining eight Labor Principles are left without recourse.[60] In the thirteen-plus years it has been in existence, no submissions have reached the AP stage.[61] As a result, little legal authority exists to compel the three countries to enforce their own standards; instead, the process is simply seen as a "[c]ooperative consultation" process for settling disputes.[62]

II. A BRIEF LOOK AT THE TYPICAL MEXICAN MIGRANT WORKER IN THE U.S. AND THE CONDITIONS THEY FACE

> Migration is one of the major ties that bind our societies. It is important that our policies reflect our values and needs, and that we achieve progress in dealing with this phenomenon.... we [] believe there should be an order framework for migration that ensures humane treatment, legal security, and dignified labor conditions.[63]

A. The Typical Mexican Migrant Worker

A migrant worker is generally defined as "any person who for the purpose of obtaining work moves from his or her permanent residence or place of origin and takes up temporary residence elsewhere."[64] Conservative estimates have Mexican migrant workers at three-and-one-half percent[65] of the U.S. workforce, while other approximations have these numbers closer to four

57. *Id.*
58. HR Concepts, *supra* note 17, at 142.
59. CRS Lessons, *supra* note 27, at CRS-7.
60. *See id.* at Summary.
61. *See* Dep't of Labor Summary, *supra* note 55.
62. CRS Lessons, *supra* note 27, CRS-9.
63. A co-released statement by President George W. Bush and President Vicente Fox. *See* Watts, *supra* note 10, at 12, n. 23, *available at* http://www.whitehouse.gov/news/releases/2001/02/20010220-2.html (last visited Nov. 22, 2007).
64. PROTECTION OF MIGRANT WORKERS, *supra* note 7, at intro.
65. Richter, *supra* note 4, at 2.

percent.[66] The population of Mexican workers in the U.S. has more than doubled in the past decade, and nearly forty-three percent of the future U.S. jobs will not require an advanced degree to fill, opening the door further for the availability of more work for Mexican migrant workers.[67]

The actual breakdown of the jobs Mexican migrant workers are filling in the U.S. and the demographics of where the migrant workers domicile are important. Many owners and managers have consistently relied and will persistently lean on Mexican migrant labor in industries such as: "factories, restaurants, hotels, construction sites, hospitals, orchards, and innumerable other places of employment . . . ."[68] With these industries struggling with continued worker shortages in America,[69] Thomas J. Donahue, a former President and C.E.O. of the U.S. Chamber of Commerce, testified in 2001 before the U.S. Senate about U.S.-Mexico migration and queried, "[w]ho will fill the millions of essential worker positions that we will create? Immigration must be one answer."[70]

In fact, the U.S. Department of Labor found sixteen of the top thirty occupations in the U.S. with the highest projected job growth between years 2000-2010 will require only minimal education and "short-term, on-the-job training."[71] Although many of the migrant workers coming from Mexico have little to no formal education, they do have the requisite skills to satisfy these job vacancies in the U.S., as well as the ability to be trained; thus, making them perfectly suited to fit the needs the U.S. Department of Labor has determined exist and will subsist for quite some time.[72] Because of this continual need, nearly every American industry has seen a "dramatic increase in its reliance on

---

66. American Immigration Law Foundation, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role*, IMMIGRATION POLICY FOCUS, Sept. 2002, *available at* http://www.ailf.org/ipc/ipf0902.asp [hereinafter AILF]. This statistic is quite staggering when compared to 1990, where Mexican immigrants comprised only two percent of the American workforce; thus, between 1990 and 2000, the number of Mexican immigrants working in the United States doubled. *Id.*

67. *Id.* As the United States is seeing an increase in citizens with formal education and a lesser likelihood those people will fulfill these new jobs, the door is left wide open for migrant workers to perform the unattractive work that the formally educated would rather not entertain. *Id.*

68. *Id.*

69. *Id.*

70. *Evaluating a Temporary Guest Worker Proposal: Hearing Before Immigration, Border Security and Citizenship Subcommittee of the Senate Committee on the Judiciary*, 107th Cong. (2004) (quoting statement of Richard R. Birkman, President, Texas Roofing Company of Austin on behalf of the National Roofing Contractors Association (NRCA)), *available at* http://www.ewic.org/CongressionalHearing/Senate02122004.html. *See also* AILF, *supra* note 66.

71. AILF, *supra* note 66. The U.S. Dep't of Labor also found 15.1% of future employment opportunities will require only "moderate-term on-the-job training." Daniel E. Heckler, *Occupational Employment Projections to 2010*, MONTHLY LABOR Review, Nov. 2001, at 83, *available at* http://www.bls.gov/opub/mlr/2001/11/art4full.pdf.

72. *See AILF*, *supra* note 66.

Mexican workers [since] the 1990s."[73] Given the presence of these industries throughout the U.S., nearly "every state of the Union" has seen an increase in the number of Mexican immigrants looking for work.[74]

B. Where Are the Mexican Migrant Workers Living and Working in the U.S.?

In 1990, California, Texas, and Illinois employed approximately eighty-five percent of all the Mexican migrant workers in the U.S.[75] Today, this percentage has dropped to sixty-eight percent in those three states, while other parts of the U.S. have seen increases in areas not "traditionally associated with Mexican immigration."[76] The U.S. Census Bureau divides the U.S. into nine regions: New England, Middle Atlantic, East North Central, West North Central, South Atlantic, East South Central, West South Central, Mountain, and Pacific.[77] From years 1990 to 2000, all but one region more than doubled its percentage of Mexican migrant workers.[78]

Remarkably, East South Central (Alabama, Kentucky, Mississippi, and Tennessee) experienced a 3,808% increase, while West North Central had the second highest total growth at 520%.[79] The South Atlantic saw a 493% boost, while New England and the Middle Atlantic also saw increases in the mid-300% range.[80] In a purely numerical sense, the Pacific states, including California, had the highest augmentation of Mexican migrant workers, with 954,216 workers from years 1990 to 2000.[81] Texas, in the West South Central region, saw an increase of 510,000 Mexican workers during the same period.[82]

C. Conditions Migrant Workers Face in the U.S.

Most of the immigrants coming to the U.S. from Mexico do so with little or no formal education and often with little comprehension of the English language.[83] A majority seek refuge in the U.S. in hopes of "escap[ing] poverty in their countr[y] of origin, to earn money to send back to their families, most

---

73. *Id.* For specific industrial breakdowns, *see generally id.* at tbl.2.

74. Inter-American Commission on Human Rights, *Special Rapporteurship on Migrant Workers and Their Families*, para. 159, *available at* http://www.cidh.org/Migrantes/2003.eng.cap5c.htm (last visited Nov. 22, 2007).

75. AILF, *supra* note 66.

76. *Id.*

77. U.S. Census Bureau, Census Regions and Divisions of the United States, *available at* http://www.census.gov/geo/www/us_regdiv.pdf (last visited Oct. 12, 2007).

78. AILF, *supra* note 66, at tbl.4.

79. *Id. See also* AILF, *supra* note 66.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

often their children, and to save money for their futures."[84] As a result of these conditions, and due to financial, educational, and linguistic limitations, the workers are often subject to "egregious conditions" in the workplace, with little understanding of their rights while in the U.S. [85]

Unfortunately, wide spread reports indicate labor is being trafficked into the U.S., with workers being "deceived about the conditions of their [future] employment," only to be placed into programs of forced labor and servitude while in the U.S. [86] In those environments, the workers often make less than the U.S. minimum wage, work over nineteen hours a day, are subject to psychological and physical abuse, and are refused permission to speak to or come in contact with people outside their work environment.[87] As it relates to farming and the agricultural community in the U.S., "[m]ost migrant farmworkers . . . 'live in poverty, [and] endure poor working conditions[,]'"[88] with some conditions described as "sweatshops in the fields."[89] In fact, the average migrant farm worker in the U.S. makes around $7,500 per year, well below the U.S. poverty level.[90] These conditions led Cesar Chavez[91] to state, "[i]t is ironic that those who till the soil, cultivate and harvest the fruits, vegetables, and other foods that fill your tables with abundance have nothing left for themselves."[92]

While not every migrant worker who enters the U.S. from Mexico suffers from such poverty, it exists on a large enough scale it must be considered when evaluating whether migrant workers are truly protected.[93] Given the NAALC is intended as a means to voice concerns regarding the treatment of migrant workers, it is important to evaluate both the positive and

---

84. Human Rights Watch, *Hidden in the Home: Abuse of Domestic Worker with Special Visas in the United States* 1 (2001), *available at* http://www.hrw.org/reports/2001/usadom/usadom0501.pdf [hereinafter Hidden in the Home].

85. *Id.* at 1.

86. *Id.*

87. *Id.*

88. Bull, *supra* note 6, at 4 (quoting Laboris, Unofficial Translation of Public Communication on Labor Law Matters Arising in the United States submitted to the NAO of Mexico under the NAALC, *available at* http://labor.uqam.ca/anacdt.htm (last visited Oct. 12, 2007).

89. Bull, *supra* note 6, at 4 (quoting Global Exchange, *Campaigns: Farmworkers,* ,www.globalexchange.org/countries/americas/unitedstates/farmworkers/ (last visited Oct. 12, 2007).

90. *Id.*

91. *See generally* lasCulturas.com, *The Story of Cesar Chavez,* http://www.lasculturas.com/aa/bio/bioCesarChavez.htm (last visited Oct. 12, 2007). Cesar Chavez was an outspoken leader for Mexican workers' rights and fought hard, with some success, for changes both in the United States and Mexico and to raise labor standards. *Id.*

92. Bull, *supra* note 6, at 5-6.

93. Hidden in the Home, *supra* note 84. Human Rights Watch (HRW) determined that all the conditions listed in n. 86 and accompanying text of this Note were present in five of the forty-three cases they reviewed, while, at least one of those conditions was prevalent in most of the employment relationships examined. *See generally id.*

negative conditions migrant workers face once they enter the U.S. After all, "[m]igrant workers are one of the threads that hold together the tapestry we call North America."[94]

III. A BRIEF INTRODUCTION INTO THE LAWS AND REGULATIONS REGARDING MIGRANT WORKERS WITH THE U.S.

A. How Does One Become a Mexican Migrant Worker in the U.S?

A large number of Mexican migrant workers come into the U.S. by one of three legal ways: (1) the family reunification system, (2) an employment-based visa system, and/or (3) through some sort of temporary worker visa program.[95] The family reunification system allows immigrant workers within the U.S. to sponsor relatives in their native country, with hopes those relatives may eventually come to the U.S. as legally admitted immigrants.[96] Some of the larger employment-based visa system classifications include: on-campus employment as a student,[97] off-campus employment due to severe economic hardship,[98] extraordinary aliens,[99] religious workers,[100] and NAFTA professionals.[101] Under a temporary worker program, Mexican migrant workers can enter the U.S. through numerous legal avenues.[102] A few workers gain visas as H-1A nurses, H-1B aliens in specialty occupations, while many also obtain visas as H-2A temporary agricultural service workers, H-2B other workers, or a H-3 temporary trainees.[103]

Despite the numerous avenues existing for Mexican immigrants to enter the U.S. legally, a great number of Mexican migrant workers enter the U.S. illegally.[104] Estimates from 2005 suggest nearly six million unauthorized

---

94. Guide, *supra* note 5, at intro.

95. AILF, *supra* note 66.

96. Federation for American Immigration Reform, *Chain Migration*, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters3e2a, (last visited Oct. 12, 2007). As a result of the family reunification system, a large number of Mexican immigrants are not admitted for their ability to contribute to the U.S. work force, but rather because of their relationship to a current worker in the United States who has chosen to sponsor them abroad. *Id.*

97. *See* BARBARA BROOKS KIMMEL & ALAN M. LUBINER, ESQ., IMMIGRATION MADE SIMPLE, AN EASY-TO-READ GUIDE TO THE U.S. IMMIGRATION PROCESS 5, 16 (7th ed. 2006).

98. *Id.* at 5, 18.

99. *Id.* at 35. Extraordinary Aliens often times have "extraordinary ability in the sciences, arts, education, business or athletics." *Id.* Many out of country television and motion picture stars are labeled under this category while they reside in the United States. *Id.*

100. *Id.* at 37.

101. *Id.* at 38.

102. *Id.* at 20-25. *See also* notes 108-111 and accompanying text.

103. *Id. See also* notes 108-111 and accompanying text.

104. Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing*

Mexican immigrants were living in the U.S., the vast majority of whom had sought some type of employment.[105] For many Mexican immigrants, the choice of illegal entry may be attributed to the low probability they have of being allowed into the U.S. legally for employment reasons when compared to the success rate of admittance for immigrants seeking work from other countries.[106] In 1999, only 29.3% of the Mexicans admitted to the U.S. received employment visas, while immigrants from other countries averaged around 45.3% percent.[107]

Adding to the pressure to enter illegally, most migrant workers face long lines and even longer waiting periods to gain admittance into the U.S. legally.[108] All the while, the need from employers in the U.S. steadily surpasses the supply of American citizens willing to fill vacant jobs.[109] Moreover, in 1998, 43.5% percent of the Mexican migrant employment-based visas issued were for H-2A temporary agricultural jobs.[110] Therefore, if a Mexican migrant worker wishes to work in an American industry other than agriculture, his or her chances of gaining the legal, temporary visa he or she desires is both statistically unlikely and temporally burdensome.[111]

The NAFTA was enacted, partially and purposefully, to help ebb the flow of illegal immigrants from Mexico who are in search of work inside the U.S.[112] In 1986, prior to the NAFTA, the Immigration and Reform and Control Act (IRCA) was established in hopes of obtaining the same goal.[113] The IRCA had two primary functions: (1) to make the hiring of illegal aliens grounds for both fines and/or imprisonment against employers, and (2) to "provide[] amnesty to illegal aliens who . . . lived in the U.S. continually since 1982, if they applied before 1988."[114] Despite similar goals, the NAFTA and NAALC have been at odds with one another since their creation.[115] Because amnesty was granted to so many by IRCA, future generations have been rushing to the U.S. borders, hoping similar amnesty deals may be on the horizon, while employers sit willing to employ them, despite the threat of hefty fines and possible imprisonment.[116]

These elements help explain, but are by no means all-encompassing,

---

in the United States: January 2005, http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf (last visited Oct. 12, 2007).

105. *Id.*
106. AILF, *supra* note 66.
107. *Id.*
108. *Id.*
109. *See supra* notes 68-74 and accompanying text for further explanation.
110. AILF, *supra* note 66.
111. *Id.*
112. Richter, *supra* note 4, at 2.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

why the U.S. has seen a steady influx of illegal immigrants from Mexico in search of work and a better life. Once these workers enter the U.S. from Mexico, whether documented or undocumented,[117] the protections of U.S. laws and regulations along with the guarantees delineated in the NAALC instantaneously vest in those workers.[118]

B. Significant Laws and Regulations that Effect Mexican Migrant Workers in the U.S.

Once more, the NAALC requires the U.S., Mexico, and Canada to enforce the laws each respective country has in place for the protection of workers' rights, whether native or foreign-born.[119] Accordingly, it is important for the analysis of this Note to look at a few, significant laws established for the defense of workers rights in the U.S.

In general, workers in the U.S., whether documented or undocumented,[120] have many of the same rights that other workers around the world enjoy.[121] Those rights include, but are not limited to: "the right to form and join unions, the right to compensation if injured on the job, the right to a safe workplace, the right to be free from forced labor, and the right to be free from discrimination in the workplace."[122] Within those confines, migrant workers can file complaints for alleged violations in several ways: (1) with the different local or federal agencies charged with upholding the specific law(s) in question,[123] (2) with "legal aid" offices' assistance for low-income immigrants,[124] and/or (3) with the

---

117. "Undocumented workers" is a classification label for those workers who have not gained valid working permits and have not registered with the U.S. government in order to legally obtain work as a foreign born worker. *See generally* GUIDE, *supra* note 5, at Guide to Labor Relations Law in the United States. Most U.S. laws and regulations treat the documented and undocumented workers the same. *Id.* "However, certain remedies for unfair labor practices, such as reinstatement or back pay for work not performed" are available to documented workers, but are not extended to undocumented workers under the National Labor Relations Act. *Id.* Also, undocumented workers do not receive unemployment insurance. *Id.* at Foreign Workers' Guide to Labor and Employment Law in the United States.

118. *See generally* GUIDE, *supra* note 5; *see also* North American Free Trade Agreement, *supra* note 15.

119. *See supra* note 28 and accompanying text.

120. *See supra* note 114 for further explanation of benefits not afforded to undocumented workers.

121. GUIDE, *supra* note 5, at Foreign Workers' Guide to Labor and Employment Laws in the United States 1.

122. *Id.*

123. *Id.* at 2-3. Those state or federal agencies include, but are not limited to: (1) the federal Equal Employment Opportunity Commission for discrimination in the workplace, etc; (2) the federal Wage and Hour Division of the Dep't of Labor for an employer's failure to pay the minimum wage, or for overtime, or withholds payment all together, etc; (3) the state or federal Occupational Safety and Health Administration for reporting unsafe working conditions, etc; and (4) the state Dep't of Labor for unfair termination of employment, etc. *Id.*

124. *Id.* at 3.

NAO office in the country where he or she is originally from.[125]

The U.S. has specifically enumerated protections for labor relations rights under the National Labor Relations Act (NLRA) as well. These include the right to:

1. Form, join or assist labor organizations to organize the employees of an employer;
2. Bargain collectively through representatives of their own choosing;
3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, typically to modify wages or working conditions;
4. Strike to secure better working conditions;
5. Refrain from union activity.[126]

Under the NLRA, a worker must be classified as an "employee" before they can receive protection.[127] Several workers do not receive protection under the NLRA by definition, including agricultural workers, domestic workers, managers, supervisors, confidential employees, independent employees, and employees covered by the Railway Labor Act.[128] The NLRA typically covers foreign workers, which include documented or undocumented migrant workers; however, undocumented workers may not seek the remedies of reinstatement and back pay for work not performed.[129] It is important to note farm workers, who make up an average of 43.5% of those who gain visas to work in the U.S., are not included in the protection of the NLRA.[130]

The NLRA does protect against several unfair labor practices: (1) employer threats of termination of employment if the workers joins a union, (2) questioning workers of their "sympathies or activities in circumstances that tend to interfere with . . . their rights . . . ," (3) discouraging union support by offering rewards for non-involvement, and (4) "[t]ransferring, laying off, terminating or assigning" workers more difficult jobs because of their chosen enrollment in union activities.[131]

The U.S. also protects migrant workers from forced labor under The Victims of Trafficking and Violence Protection Act of 2000 and other U.S. laws.[132] Forced labor usually comes in one of the following forms: (1) an

---

125. *See generally* North American Free Trade Agreement, *supra* note 15. *See also* notes 38-47 and accompanying text for explanation on the N.A.O submission process.

126. GUIDE, *supra* note 5, at Guide to Labor Relations Law in the United States 1.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* However, a few states do provide other legal protections to help compensate for the lack of federal protection under the NLRA. *Id.*

131. *Id.*

132. GUIDE, *supra* note 5, at Guide to Laws Prohibiting Forced Labor in the United States 2. Under these provisions, it does not matter whether an individual is a foreigner or a citizen of the United States. *See generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

employer threatening physical harm on its employees if they leave the job, (2) an employer threatening to destroy passports or immigration papers, (3) an employer attempting to keep his/her employee from traveling, (4) a "coyote"[133] requiring the workers to work for free as payment for smuggling them into the country, (5) an employer requiring workers to work to pay off their debt, and (6) employers forcing workers to partake in prostitution.[134]

While in the U.S., migrant workers are also entitled to certain minimum employment standards, which include "minimum wages, overtime pay, legal wage deductions, unemployment compensation, and time off from work for family and medical leave."[135] Curiously, farm workers do not have the right to receive overtime pay, while undocumented non-farming related workers do.[136] Additionally, the Family Medical Leave Act allows all employees, both documented and undocumented, to take off work for the birth or adoption of a child; to care for a child, spouse or parent; and/or to accommodate the employee's serious health complications.[137] Mexican migrant workers are also entitled to protection from employment discrimination due to "race, color, national origin, sex, religion, age, or disability."[138] This safeguard affords workers freedom from being fired, paid less or receiving fewer benefits, and/or receiving sexual harassment because of their race, color, nationality, etc.[139]

All workers, even those absent an official work permit, are also assured a healthy and safe workplace.[140] This pledge is governed by the Occupational Safety and Health Act (OSH Act), overseen by the Occupational Safety and Health Administration (OSHA), which requires employers to: (1) maintain OSH standards, (2) inform employees of those standards, (3) retain safety equipment and tools, (4) provide training and medical exams when necessary, (5) report to OSHA when mandated, and (6) post and provide remedies for citations issued by OSHA.[141] A few programs are also designed to further

---

133. U.S. Immigration Support, *Illegal Immigration*, http://www.usimmigrationsupport.org/illegal_immigration.html (last visited Nov. 22, 2007).

134. GUIDE, *supra* note 5, at Guide to Laws Prohibiting Forced Labor in the United States 1.

135. GUIDE, *supra* note 5, at Guide to Minimum Employment Standards, Pay Deductions and Unemployment Compensation in the United States 1. Fortunately, both undocumented and documented workers are entitled to the U.S. minimum wage with very few exceptions. *Id.*

136. *Id.*

137. *See generally* The Family and Medical Leave Act, Pub. L. No. 103-3, §§ 101-601 (1993). *See* U.S. Dep't of Labor, *The Family and Medical Leave Act (FLA)*, http://www.dol.gov/compliance/laws/comp-fmla.htm (last visited Oct. 12, 2007).

138. GUIDE, *supra* note 5, at Guide to Employment Discrimination Laws in the United States 1.

139. *Id.* at 1-2. Again, these protections are guaranteed to all workers, documented, undocumented, foreign, farmer or otherwise, and are best raised with the EEOC. *Id.*; *see generally* U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/ (last visited Nov. 22, 2007) (providing more information on the EEOC).

140. GUIDE, *supra* note 5, at Guide to On-the-Job Safety and Health in the United States 1.

141. *Id.* at 1-2. *See generally* U.S. Dep't of Labor, Occupational Safety and Health Administration, http://www.osha.gov (last visited Nov. 22, 2007) (providing more information

protect farm workers, even beyond the confines of the OSH Act.[142] The Field Sanitation Standard,[143] the Office of Pesticide Programs,[144] and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)[145] are a few instances in which the U.S. government goes above and beyond OSHA regulations and requirements.[146]

In most cases, the U.S. allows workers to be compensated if and when they are injured while on the job.[147] In general, most workers are entitled to workers' compensation benefits[148] if they are hurt on the job, and employers are not allowed to "retaliate" against any worker for filing a workman's compensation claim.[149] Foreign workers, including those with H-2A visas, are entitled to workers' compensation, regardless of whether they are documented; however, farm workers are not entitled to workers' compensation in every state.[150] Interestingly, employees may not sue their employer over workers' compensation; instead, employees may merely file a workers' compensation claim and/ appeal it if all administrative remedies are denied.[151]

Despite the aforementioned protections guaranteed to migrant workers under the U.S. laws, the NAALC process has yet to remedy a single alleged violation of those laws over the past thirteen years.

IV. SUBMISSIONS FILED BY MEXICO AS AGAINST THE U.S. AND A COMPARATIVE LOOK AT CANADA'S SUBMISSIONS AGAINST THE U.S.

To appreciate the breadth of where most of the filings originate, it is essential to step back and view the entire status of submissions under the NAALC. As of July, 2006,[152] thirty-four submissions had been filed under the auspices of the NAALC.[153] Of the twenty-one submissions filed by the U.S.,

---

on OSHA).

142. GUIDE, *supra* note 5, at Guide to On-the-Job Safety and Health in the United States 2.

143. *Id.*

144. *See generally* U.S. Environmental Protection Agency, Pesticides, http://www.epa.gov/pesticides (last visited Nov. 22, 2007) (providing more information on the U.S. Environmental Protection Agency and its policies on Pesticides).

145. *See generally* U.S. Dep't of Labor, Employment Law Guide, http://www.dol.gov/compliance/guide/mspa.htm (last visited Nov. 22, 2007).

146. *See generally* U.S. Dep't of Labor, Occupational Safety and Health Administration, http://www.osha.gov (last visited Nov. 22, 2007) (providing more information on OSHA).

147. GUIDE, *supra* note 5, at Guide to On-the-Job Injuries 1.

148. Most benefits include medical benefits, wage benefits, and vocational rehabilitation benefits. *Id.* at 4.

149. *Id.* at 1.

150. *Id.* at 2. Though most states require employers of farmworkers to carry workers' compensation insurance, a few states such as Alabama, Indiana, Kansas, Kentucky, Mississippi, Nebraska, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee do not. *Id.* at 2.

151. *Id.* at 3-4.

152. The United States Dep't of Labor has yet to revise the list of submissions since its last update in July of 2006. Dep't of Labor Summary, *supra* note 55, at Overview.

153. *Id.*

nineteen were against Mexico, while the remaining two were against Canada.[154] All of Mexico's submissions were against the U.S., while Canada filed three against Mexico and two against the U.S.[155] The U.S. has had eight submissions reviewed by the MC, while Mexico has had five and Canada has had only one, none of which have gone beyond ministerial review.[156]

A. A Quick Look at the Mexican Submissions Filed Against the U.S.

On February 9, 1995, the Mexican Telephone Workers Union filed Mexico NAO Submission 9501 (SPRINT) concerning a subsidiary of the Sprint Corporation which had been purposefully closed just before a vote for union election consolidation was to occur.[157] While the NLRB originally ruled in favor of the workers, on December 27, 1996, a U.S. Appeals Court overturned its decree.[158] Nonetheless, a ministerial consultation was requested to discuss the "effects of such a plant closure on union organizing efforts."[159] The U.S. Secretary of Labor and the Mexican Secretary of Labor and Social Welfare held a public forum in California to "allow interested persons an opportunity to convey their concerns about the effects of sudden plant closings."[160] In June of 1997, the tri-national Labor Secretariat also conducted a study on effect of sudden plant closings on the freedom of association and workers' rights to organize; however, the plant was never re-opened and the workers never regained their lost jobs.[161]

On April 13, 1998, the Local 1-675 of the Oil, Chemical, and Atomic Workers International Union (OCAW), along with the "October 6" Industrial and Commercial Workers Union, the Labor Community Defense Union (UDLC), and the Support Committee for Maquiladora Workers (SCMW), filed Mexico NAO Submission No. 9801 (SOLEC).[162] The submission claimed Solec, Inc. and the U.S. despoiled their: (1) freedom of association, (2) right to organize, (3) right to bargain collectively, (4) assured federal minimum wage requirement, (5) guaranteed employment standards, and (6) right to a safe and

---

154. *Id.*

155. *Id.*

156. *Id.*

157. Human Rights Watch, *NAALC Case Summaries*, http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm (last visited Nov. 23, 2007) [hereinafter HRW Summary].

158. *Id.* The U.S. Court of Appeals for the District of Columbia reversed the decision citing the alleged violation was done under proper financial grounds. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission 9501 (SPRINT).

159. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission 9501 (SPRINT).

160. *Id.*

161. *See id. See also,* HRW Summary, *supra* note 157, at Sprint Case (Mexican NAO Case No. 9501).

162. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9801 (SOLEC).

healthy work environment free from injury and illness.[163] Allegedly, company officials fired workers who wanted an increase in pay, official inspections were not sufficient and comprehensive, and the U.S. failed to maintain fair labor tribunals.[164] Upon review by the Mexican NAO, a ministerial consultation was requested, and it was decided that final consideration of Submission 9801 should be reviewed alongside Mexico NAO Submission 9802 and 9803 discussed below.[165]

The third submission filed in the NAO of Mexico came from a group of migrant workers in the State of Washington's apple industry.[166] Mexico NAO Submission No. 9802 raised issues of "freedom of association, safety and health, employment discrimination, minimum employment standards, protection of migrant workers, and compensation in cases of occupational injuries and illnesses."[167] This was the first submission to specifically speak of a failure to explicitly protect migrant workers,[168] as guaranteed in the objectives of the NAALC provision.[169] The migrant workers claimed they were not receiving equal treatment under U.S. law as compared to domestic workers because migrant workers were receiving less than minimum employment standards and were refused their explicit right to organize a union.[170]

The migrant workers claimed they were receiving unequal protection in "a) rights to freedom of association and collective bargaining, b) the compensation system, c) the H-2A foreign agricultural workers program, and d) housing."[171] As to the infringement upon their freedom of association and collective bargaining rights, the migrant workers claimed they were being turned into the Immigration and Naturalization Service (INS) each time they tried to structure a union.[172] Furthermore, the migrant workers asserted they received less compensation in seventeen states, and, in the State of Washington, migrant workers received fifty percent fewer benefits than domestic workers for the death of a family member on the job.[173] Finally, migrant workers claimed

163. HRW Summary, *supra* note 157 at *Solec Case* (Mexican NAO Case No. 9801).

164. *Id.*

165. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9801 (SOLEC). After Mexico NAO Submission No. 9801, 9802, and 9803 were reviewed, an agreement was signed whereby all three submissions would be addressed collectively in government-to-government discussions on how effective the U.S. laws are in dealing with the issues raised in all three submissions. *Id.*

166. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9802 (APPLE GROWERS).

167. *Id.*

168. Commission for Labor Cooperation, Public communications submitted to the Mexican National Administrative Office (NAO), http://www.naalc.org/english/summary_mexico.shtml (last visited Nov. 22, 2007).

169. *See supra* note 30 and accompanying text.

170. U.S. Dep't of Labor, Public Report of Review of Mexico NAO Submission No. 9802, http://www.dol.gov/ilab/media/reports/nao/mxnao9802.htm (last visited Nov. 22, 2007).

171. *Id.*

172. *Id.*

173. *Id.*

the H-2A program provided unequal protection because it excluded workers from the Agricultural Worker Protection Act (AWPA), and they were thus unprotected against poor "work conditions and wages, records of agricultural work contractors and minimum transportation, safety and housing standards."[174] The Mexican NAO recommended ministerial consultations regarding all of the aforementioned issues raised by the migrant workers in the apple industry.[175] Again, Mexican NAO Submission 9802 was coupled alongside 9801 and 9803 for final review purposes.[176]

The Mexican Confederation of Labor (CTM) submitted Mexico NAO Submission No. 9803 (DECOSTER EGG) in August of 1998.[177] Among the issues voiced were a lack of freedom of association, protection of migrant workers' rights, employment discrimination, safety and health, and workers' compensation.[178] More particularly, the migrant workers brought forth information the U.S. "ha[d] not provided them and w[as] not providing them with any guarantee of enforcement of the U.S. laws designed to protect them."[179] "They point out that 'Mexican workers have never received the legal protection they need to ensure that they are not hired by deceitful means.'"[180] To further this contention, the migrant workers described being "required to pay for transportation and housing when they had originally been told that such costs would be covered."[181] Migrant workers also alleged they had been injured on the job with no notification of what their workers' compensation rights may be, and were given no notice of the benefits afforded under U.S. employment law; furthermore, their injuries were not properly documented.[182]

After reviewing the assertions, the Mexican NAO suggested ministerial counsel to determine whether the migrant workers were enjoying the same privileges guaranteed under U.S. law as domestic workers.[183] Once more, in May of 2000, the MC called for a collective evaluation of Mexico NAO Submission 9801, 9802, and 9803.[184] In order to comprehensively evaluate all three submissions, government-to-government meetings were held in

---

174. *Id.* The migrant workers claimed nearly 30,000 workers in Washington State "live in housing that lacks basic sanitary conditions." *Id.* The Petitioners also claimed only half of the migrant workers are protected by minimum wage standards, which then places most of those workers at or below the poverty level. HRW Summary, *supra* note 157, at Washington State Apples Case (Mexican NAO Case No. 9802).

175. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 9802.

176. *See supra* note 165 and accompanying text.

177. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

178. *Id.*

179. U.S. Dep't of Labor, Public Report of Review of Mexico NAO Submission No. 9803, http://www.dol.gov/ilab/media/reports/nao/mxnao9803.htm (last visited Dec. 22, 2007).

180. *Id.*

181. *Id.*

182. *Id.*

183. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

184. *See supra* note 165 and accompanying text.

Washington in May of 2001, with follow-up sessions in Mexico in late May and early June of that year.[185] Public forums were also held in Yakima, Washington, and Washington, D.C. in August of 2001 and in Augusta, Maine, in June of 2002.[186]

In June of 2002, a public forum was held and "[g]overnment officials, employer representatives, educators, legal counselors, advocates and other service providers" gathered to discuss all of the issues raised in the three submissions previously delineated and the need to protect Mexican migrant workers in the U.S.[187] Most importantly, at both public forums, the three countries began to devise a tri-national guide, which has since been completed, so migrant workers would know their rights while in the U.S.; however, no specific allegations in the three submissions were explicitly remedied.[188]

Mexico NAO Submission No. 9804 (YALE/INS) was presented by "a group of immigration rights and union organizations headed by the Yale Law School Workers' Rights Project" in September 22, 1998.[189] The submission charged the U.S. with failing to implement minimum employment standards and other statutes that were in place to protect migrant workers.[190] More specifically, it was alleged those protections were violated under the Memorandum of Understanding (MOU) between the U.S. Department of Labor and the INS.[191] The migrant workers claimed the MOU subjected them to deportation if the Department of Labor received grievances from them about alleged minimum wage and overtime infringements.[192]

On the same day the Yale/INS submission was accepted for review, the Department of Labor and the INS revised the MOU, and the Department of Labor vowed not to share future complaints with the INS.[193] The ministerial consultations brought about a joint declaration in June of 2002, which resulted in the following agreement: (1) informational materials were to be made in Spanish for migrant workers and (2) there was to be further "collaboration" between Mexico and the U.S. to "promote the protection of labor rights of migrant workers."[194]

---

185. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 9803.

186. *Id.*

187. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9803 (DECOSTER EGG).

188. *See generally* Commission for Labor Cooperation, *supra* note 168. That guide was eventually finished and is available online at http://www.naalc.org/migrant/english/mgtabusa_en.shtml (last visited Dec. 22, 2007).

189. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

190. HRW Summary, *supra* note 157, at Mexican NAO Case No. 9804.

191. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

192. HRW Summary, *supra* note 157, at Mexican NAO Case No. 9804.

193. *See* Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 9804 (YALE/INS).

194. *Id.*

On October 24, 2001, Mexico NAO Submission No. 2001-01 was filed by both individual employees and workers' rights groups such as the Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and Workers' Awaaz and Asociación Tepeyac.[195] The submission claimed there was a lack of "prevention of and compensation for occupational injuries and illnesses in the state of New York and labor protections for migrant workers."[196] The petitioners alleged the judges for the New York workers' compensation administration were complicating the process by failing to follow formal rules and procedures, which delayed processing claims from four to twenty years.[197]

In November of 2002 a Public Report of Review was issued to promote further consultations between the Mexican NAO and U.S. NAO about the issues raised in this submission.[198] After ministerial consultations were requested by the Mexico NAO and Mexican Secretary of Labor, the U.S. Department of Labor tabled the motion by suggesting consultations occur with the Council Designee or at the NAO level.[199]

The Farmworker Justice Fund, Inc., and Mexico's Independent Agricultural Worker Central (CIOAC) filed Mexico NAO Submission 2003-1 on February 11, 2003.[200] The submission raised concerns about the H-2A program in North Carolina, which involved the farm workers' rights to minimum employment standards, to strike, to freedom of association, against employment discrimination, to safeguards for occupational injuries/standards, and for the protection of migrant workers' rights.[201]

The Mexican NAO has yet to "issue a report of review on the submission."[202] Nevertheless, the U.S. Department of Labor and Mexico's Foreign Relations Secretariat took initiative to sign two Letters of Agreement and a Joint Declaration promoting further protection of Mexican migrant workers' rights.[203] Currently, the U.S. Department of Labor and local Mexican consulates in North Carolina are evaluating the issues and laws addressed in this submission and hope to address them "fully and satisfactorily;" however, to date, nothing particular has been done.[204]

---

195. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 2001-1.

196. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2001-01 (NEW YORK STATE).

197. Commission for Labor Cooperation, *supra* note 168, at Mexican NAO 2001-1. Also, the claim took issue with the New York workers' compensation agency, stating it was not providing translators as required. *Id.*

198. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2001-01 (NEW YORK STATE).

199. *Id.*

200. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2003-1 (NORTH CAROLINA).

201. *Id.*

202. *Id.*

203. *Id.*

204. *See generally id; see also* HRW Summary, *supra* note 157, at Mexican NAO Case No. 9501.

The most recent submission was Mexico NAO Submission 2005-1, which was filed on April 13, 2005, by the Northwest Workers' Justice Project, the Brennan Center for Justice at New York University School of Law, and Andrade Law Office.[205] The submission claims violations under the H-2B visa program in Idaho involving forced labor, failure to enforce minimum employment standards, employment discrimination, equal pay for the sexes, occupational injuries, lack of compensation, and a failure to protect migrant workers.[206] As of this writing, no reviews have been summoned for this submission, nor have there been calls for ministerial consultation.[207]

B. A Brief Look at the Canadian Submissions Filed Against the U.S.

Canada has filed a total of three submissions against Mexico and two against the U.S., with only one of those claims reaching the important level of ministerial consultation.[208] The two submissions filed against the U.S. were Canadian NAO Submission No. CAN 98-2 (YALE/INS) and Canadian NAO Submission No. CAN 99-1 (LPA), both of which the Canadian NAO was unwilling to consider for review.[209]

Canadian NAO Submission No. CAN 98-2 (YALE/INS) was filed six days after Mexico NAO Submission No. 9804 (YALE/INS).[210] The issues raised in this Canadian submission mirrored the allegations raised by its prior Mexican counterpart, 9804.[211] Here, the Canadian NAO denied review due to the latest MOU issued after Mexico NAO Submission No. 9804 (YALE/INS), which "replicate[d]" most of the concerns raised by this Canadian submission.[212]

On April 14, 1999, the Labor Policy Association and EFCO Corporation filed Canadian NAO Submission No. CAN 99-1 (LPA).[213] This submission alleged the U.S. National Labor Relations Board's construal and application of existing U.S. laws prohibiting employer domination and interference with trade unions led to the preclusion of valuable "employee involvement" programs.[214]

---

205. Dep't of Labor Summary, *supra* note 55, at Mexico NAO Submission No. 2005-1 (H-2B VISA WORKERS).

206. *Id.*

207. *See generally* The NAALC, *available at* http://www.naalc.org (last visited Dec. 22, 2007) (providing information on the NAALC and the status of all submissions filed).

208. *See* Dep't of Labor Summary, *supra* note 55, at Overview.

209. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS) - Canadian NAO Submission No. CAN 99-1 (LPA).

210. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS) - Canadian NAO Submission No. CAN 98-2 (YALE/INS).

211. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 98-2 (YALE/INS).

212. *Id.*

213. Dep't of Labor Summary, *supra* note 55, at Canadian NAO Submission No. CAN 99-1 (LPA).

214. Commission for Labor Cooperation, Public Communications Submitted to the

The submission further claimed this resulted in a "failure to provide for high labor standards, and to apply effectively and enforce laws relating to freedom of association and the right to organize unions."[215] Nevertheless, the Canadian NAO wrote a letter to the petitioners informing them the matter would not be reviewed because the information offered by the U.S. NAO, AFL-CIO, and petitioners failed to proffer evidence of non-compliance with the enumerated obligations in the NAALC.[216] Despite the request for reconsideration, the Canadian NAO refused to resurrect the issue.[217]

Canada and Mexico have both filed ten submissions in total against the U.S., none of which have gone beyond the ministerial consultation stage.[218] Mexico has had five submissions against the U.S. reach the ministerial consultation level, while Canada has failed to have a single complaint against the U.S. reach that fundamental stage.[219] As MC has been the highest level any submission has ever reached,[220] it is fascinating to see which of the three countries most utilized it in the evaluation process. Interestingly, Canada's NAO has been the strictest in using ministerial review, exemplified by only twenty percent of submissions reaching ministerial review (one of five filed), while the U.S. had slightly over thirty-eight percent (eight of twenty-one) and Mexico had 62.5% (five of eight) of their respective cases reaching the highest level of review thus far.[221]

Moreover, petitioners in the U.S. and Canada have yet to specifically address the protection of migrant workers as an issue in any of their claims, while Mexican petitioners have explicitly mentioned it in six of the eight submissions filed.[222]

V. STRENGTHS, WEAKNESSES, AND THOUGHTS OF IMPROVEMENT FOR THE NAALC AND ITS DISPUTE RESOLUTION SYSTEM

A. The Strengths of the NAALC and Its Dispute Resolution System

The NAALC was, incontrovertibly, the first in a host of free trade agreements to break ground and pioneer an accord specifically addressing labor protection.[223] In so doing, the agreement single-handedly initiated the support and encouragement for the "[e]nforcement of labor laws in the NAALC

Canadian National Administrative Office (NAO), http://www.naalc.org/english/summary_canada.shtml (last visited Dec. 22, 2007).

215. *Id.*
216. *Id.*
217. *Id.*
218. Dep't of Labor Summary, *supra* note 55, at Overview.
219. *Id.*
220. *See generally* Dep't of Labor Summary, *supra* note 55.
221. *Id.*
222. *Id.* at Overview – Mexican NAO Submission 2005-1 (H-2B Visa Workers).
223. CRS Lessons, *supra* note 27, at CRS-1.

countries."[224] Similarly, the NAFTA and NAALC are important because they have strengthened the bonds between the three conjoined nations, which, in due course, has helped to "open doors and break down barriers" previously serving as impediments.[225] Some have attributed this to the NAALC's "non-invasive" approach to advancing autonomy for each individual country to impose its own labor laws without pressure from the other two countries demanding enforcement of their own regulations.[226] Consequently, it could be argued sovereignty has brought forth trilateral communication which need not be strained by outside political pressure and governmental interference from the other countries.[227]

As trade relationships among the three countries continued to grow stronger, new lines of communication and dialogue opened.[228] Because the agreement mandates governmental agencies to communicate through the NAO office of each respective country, an increase in "cross border networking" between unions and community groups has also occurred.[229] Before the NAALC was signed, "information comparing laws and labor market indicators among the three countries was not always readily available[,]" however, the agreement has since generated "studies comparing the labor laws of the three countries, nurtured the development of a standardized system of labor market indicators, and been responsible for studies comparing productivity levels and wages."[230] These newly spawned studies, seminars, and reports have brought forth awareness in the media to the many issues workers in Mexico face and the need for further protection of immigrant workers inside the borders of the U.S.[231]

The addition of media scrutiny has been collectively referred to as "The Sunshine Effect."[232] Basically, with the advent of the NAALC, individual workers, unions, and other groups are able to use the different media outlets as

---

224. PIERRE S. PETTIGREW ET AL., NAFTA: A DECADE OF STRENGTHENING A DYNAMIC RELATIONSHIP 4, *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file606_3595.pdf (last visited Dec. 22, 2007).

225. *Id.* at 1. The opinions quoted came from three drafters of the report: Pierre S. Pettigrew, Minister for International Trade, Canada; Robert Zoellick, United States Trade Representative, United States of America; and Fernando Canales, Secretary of the Economy, Mexico.

226. CRS Lessons, *supra* note 27, at CRS-3. However, others have claimed the lack of pressure makes the NAALC "weak." *See infra* notes 268-273 and accompanying text.

227. CRS Lessons, *supra* note 27, at CRS-3.

228. *Id.* at CRS-11.

229. LINDA DELP ET AL., NAFTA'S LABOR SIDE AGREEMENT: FADING INTO OBLIVION? AN ASSESSMENT OF WORKPLACE HEALTH & SAFETY CASES 28 (2004), *available at* http://www.labor.ucla.edu/publications/nafta.pdf.

230. CRS Lessons, *supra* note 27, at CRS-11. This "tripartite participation" provides forums for discussions between the three nations about the equilibrium between policy debates and programs already in place. PETTIGREW ET AL., *supra* note 224 at 4.

231. DELP, *supra* note 229, at 24.

232. *Id.*

spotlights on the issues they were facing.[233] Though workers were initially suspicious and believed no "real concrete resolutions" would result from their submissions under the NAALC, workers also knew they could bring attention to their problems because the process was tri-nationally supported and formalized.[234]

For example, in Mexico, the NAALC and the publicity it has spawned increased the occupational safety and health of workers in Mexico by reducing the number of injuries reported and illnesses claimed by thirty percent in its first three years.[235] Specifically, the NAALC has been beneficial to Mexico by providing "greater awareness of occupational health and safety issues in some Mexican workplaces, broader knowledge of government regulations and enforcement procedures among some Mexican workers, and unprecedented cross-border solidarity and joint activities between workers, unions, women's groups, environmentalists and occupational health professionals."[236] However, it is alleged the great successes Mexico has seen may have come from the publicity created by the workers themselves, rather than the combined efforts of the Mexican government, Labor Departments, and the NAALC's respective NAO offices.[237]

Many proponents of the agreement indicate public awareness and input have helped aid and facilitate over fifty trilateral programs that have subsequently been fostered as a result.[238] In addition, after ministerial consultations were held for Mexico NAO Submissions 9801, 9802, and 9803, because of the public awareness and the inclusion of communal input during those public forums, a tri-national guide was created to insure that future migrant workers would know exactly what their guaranteed rights are within foreign borders.[239] The three countries have also formed cooperative efforts on employment standards, industrial relations, occupational safety and health, employment training, child labor, and workers' rights.[240] Finally, all three countries have provided numerous training sessions, onsite visits to workplaces, and public symposiums to better inform the public of the "best practices" available to further assist workers' rights.[241]

At the bare minimum, the NAALC and its resulting media interest have played a critical role in shedding light on the shortcomings of labor protection

233. CRS Lessons, *supra* note 27, at CRS-11.
234. DELP, *supra* note 229, at 24.
235. CRS Lessons, *supra* note 27, at CRS-12.
236. BROWN, *supra* note 49, at 2.
237. *Id.*
238. PETTIGREW ET AL., *supra* note 226, at 5.
239. *See supra* notes 185-189 and accompanying text.
240. Office of the United States Trade Representative and Related Entities, *Study on the Operation and Effect of the North American Free Trade Agreement: Chapter 3*, *available at* http://www.usinfo.org/trade/nafta/chap3_1.stm.html (last visited Dec. 22, 2007).
241. *Id.*

in all three countries, despite the effectiveness of its procedures.[242]

B. The Weaknesses of the NAALC and Its Dispute Resolution System

Over the past thirteen years, many critics have placed their criticism of the NAALC in one of three categories: (1) it has failed to live up to the original plan; (2) it sounds "alarm[s]" and raises red flags; (3) while others claim it has become completely archaic.[243] An overarching concern for all those who oppose the provision is its failure to go to the lengths needed to provide adequate protection for all workers.[244]

One of the most apparent red flags raised is that not a single complaint brought under the NAALC dispute resolution system has led to a fine, sanction, or moved beyond the ministerial consultation stage.[245] A few government and legal professionals have theorized a fear to take submissions to the ECE, one step beyond the ministerial review, exists because an independent body evaluates the submission, thus taking it out of the negotiating hands of the three countries.[246] Another theory behind this fear may be the possibility that those in power in these three countries may be forced to accept the awkward truth their respective governments have failed and are culpable for their own shortcomings.[247] In fact, all three countries are evaluated during this process, not just the country alleged to have failed to enforce the provisions of the NAALC; therefore, all three can be subject to recourse.[248]

Even more, not one illegally terminated worker, including Mexican migrant workers, has been reinstated; not one independent union has been bargained for and/or created; and, finally, not a single occupational safety or health violation has been remedied.[249] Despite the focus of this Note being on migrant workers specifically, it appears as if most of the shortcomings of the agreement actually apply equally to all the Labor Principles.[250] Though "reports, seminars, conferences, websites, and outreach sessions" have been generated in this regard, it is easy to see why many feel the enforcement mechanism of the NAALC falls short of remedying the very things sought, including the much desired and illusive sanctions.[251]

In spite of the NAALC's explicit ability to "reduc[e] or eliminat[e] trade

242. *See supra* notes 232-237 and accompanying text.

243. CRS Lessons, *supra* note 27, at CRS-8, 9.

244. *Id.*

245. *See* Dep't of Labor Summary, *supra* note 55, at Overview.

246. DELP, *supra* note 229, at 27 (quoting government and legal professionals when questioned about the "[f]ear of taking cases to the next level").

247. *Id.*

248. *Id.*

249. BROWN, *supra* note 49, at 1.

250. *Id.*

251. *Id.*

sanctions," those who have been found "persistently" non-compliant still can elude punishment by a few ancillary "escape clauses" in the narrative.[252] The NAALC takes into consideration five main decisive factors in evaluating sanctions:

1. the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards;
2. the level of enforcement that could reasonably be expected of a Party given its resource constraints;
3. the reasons, if any, provided by the Party for not fully implementing an action plan;
4. efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and
5. any other relevant factors.[253]

It is entirely possible, therefore, for a non-complying party to skirt responsibility so long as the reviewing parties can contort a few of the five aforementioned decisive factors in favor of that party.[254] Thus, this provision is unlikely to command respect from any of the three countries so long as it is not utilized and accountability fails to closely follow those committing the infractions.[255]

Many detractors allege the procedure for filing a complaint has structural weaknesses.[256] Those limitations range from: a high cost of filing petitions,[257] which specifically hurts low-income and financially insecure migrant workers, to the many years it may take for some submissions to "move from the filing stage to ministerial consultations to obtaining [a] ministerial agreement,"[258] to the diminutive level of reviews the respective Labor Principles receive,[259] to the

252. *Id.* at 5.

253. Commission for Labor Cooperation, Annex 39: Monetary Enforcement Assessments, http://www.naalc.org/english/agreement11.shtml (last visited Dec. 22, 2007). *See also* BROWN, *supra* note 49, at 5.

254. *See* BROWN, *supra* note 49, at 5.

255. *Id.* at 5, 8. *See also* notes 48-57 for explanation of the discrimination of certain Labor Principles.

256. Watts, *supra* note 10, at 24.

257. *Id.* (quoting Thea Lee of the AFL-CIO, who indicated "consultation and dispute resolution procedures are so lengthy and torturous as to discourage complaints and petitions." *Id.* (quoting Congressional testimony of Thea Lee). *See also id.* at n. 43.

258. *Id.* at 24.

259. BROWN, *supra* note 49, at 4-5.

lack of involvement and information available to those who actually file.[260]

As previously stated, the review process only calls for a limited amount of review for each of the Labor Principles.[261] Some argue many of the Labor Principles are valued more than others because of the availability of scrutiny afforded.[262] To add insult to injury, if the submission involves a failure to uphold child labor laws, minimum employment standards, or occupational safety and health principles (the only three Labor Principles which afford sanctions as a remedy), the burden of proof becomes so lofty "that it diminishes the likelihood of success" for those who file the claims.[263]

In order to be successful on the merits at this high level, the filing petitioner must show a "persistent pattern of failure"[264] on behalf of the opposing party, while the accused party need only show they acted "reasonab[ly],"[265] which, ironically, is defined by the government given the authority[266] to enforce its own laws.[267] Accordingly, despite the ability to initiate sanctions for some infractions, with the added procedures, added time restraints, and a country's ability to regulate itself, the road is often long and fruitless. [268]

Sovereignty, which some have claimed is an advantage to the NAALC, has also been raised as one of its primary faults.[269] Because each respective country is obliged to enforce its own labor laws, each county merely needs to "enforce [its labor laws] as it sees fit."[270] If a country lacks specifically protected NAALC Labor Principles, that country cannot be compelled to create laws or regulations to incorporate the principles.[271] In fact, given the autonomic nature of the NAALC, no country can force another country to impose its own existing laws regarding labor.[272] The remaining countries must, as an alternative, go through the processes spelled out in the dispute resolution system itself, bearing in mind sanctions are only available to three of the eleven core Labor Principles.[273] This problem has subsequently raised the issue of

260. *Id.* at 5.

261. *See supra* notes 48-57 and accompanying text.

262. Busch, *supra* note 1, at 70-71.

263. *Id.* at 71-72.

264. Commission for Labor Cooperation, art. 27, Consultations, http://www.naalc.org/english/agreement6.shtml (last visited Dec. 22, 2007). *See also* Busch, *supra* note 1, at 71-72 for further explanation.

265. Commission for Labor Cooperation, art. 49, Definitions, http://www.naalc.org/english/agreement7.shtml (last visited Dec. 22, 2007). *See also* Busch, *supra* note 1, at 71-72 for further explanation.

266. CRS Lessons, *supra* note 27 at Summary.

267. *Id.* at CRS-9.

268. *Id.* at CRS-5.

269. *Id.* at CRS-9.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

"harmonization" discussed *infra*.[274]

Contention has also surfaced because, once a submission is filed, the petitioners who file it instantaneously loses their ability to actively participate in the process.[275] The entire sequence is handed over to the respective NAO of each particular party's country; then, the claimants effectively lose standing and the "means to correct illegal practices by their employer . . . ."[276] The fate of the filer's claim lies entirely on acceptance for review, then on the procedures provided by the NAALC, and finally on the mercy of the agreements forged by the two negotiating factions.[277]

Even more despairingly, only Group III Labor Principles call for the ability of the governing body to issue sanctions against the party guilty of not fulfilling their obligations.[278] A few Labor Principles which do not carry the possibility of sanctions are: prohibition of forced labor, non-discrimination, equal pay, workers' compensation, and the focus of this Note, migrant worker protection.[279] Perhaps the lack of sanctions for migrant workers could be condoned if a single workers' employment had been reinstated, their freedom of association was enforced, or if their equal pay claims were seriously addressed; however, by looking at the past submissions by Mexican migrant workers, not one has occurred to date.[280]

In addition, the "three most basic of all labor rights - the right to organize, bargain collectively, and strike" are completely left off the table.[281] This inability to sanction employers who limit their workers' rights to organize, bargain, and strike have collectively been referred to as a "fatal flaw."[282] Of all the Labor Principles set forth under the NAALC, those three factions receive the least amount of procedural treatment.[283] In evaluating the Mexican NAO submissions to date, five of the eight claims specifically raise one or all of these three fundamental rights. Yet, not one of the five resulted in increased rights for the ability to organize, bargain collectively, and/or strike for those who file the claims, including migrant workers.[284] This has led many to demand higher levels of scrutiny for these three specific Labor Principles,[285] while many others have said all Labor Principles should receive the same treatment.[286]

---

274. BROWN, *supra* note 49, at 10.

275. *Id.* at 5.

276. *Id. See also* DELP, *supra* note 229, at 25.

277. *See supra* notes 45-62 and accompanying text.

278. CRS Lessons, *supra* note 27, at CRS-9.

279. BROWN, *supra* note 49, at 5 tbl.2.

280. *See supra* notes 152-222.

281. CRS Lessons, *supra* note 27, at CRS-9.

282. *Id.*

283. BROWN, *supra* note 49, at 5 tbl.2. *See also* notes 45-62 and accompanying text.

284. Dep't of Labor Summary, *supra* note 55.

285. *See generally* Bull, *supra* note 6 (discussing the importance of Freedom of Association and its effect on the Mexican migrant farmworkers in the Apple Growers' submission).

286. CRS Lessons, *supra* note 27, at CRS-9.

Perhaps the most tragic aspect of all is the failure to protect migrant workers in the U.S., and specifically migrant farm workers from Mexico. As an example, in 1999 Mexican farm workers with an H-2A visa made up an estimated 43.5% of Mexican migrant workers in the U.S.[287] Yet, while reports of forced labor and servitude still exist, and while conditions resembling sweatshops are prevalent, it is hard to claim the NAALC has been a complete success in furthering their protection.[288] Quite the opposite seems true.

Considering some workers fear physical abuse if they report their problems, it is hard to evaluate how the NAALC can help, given the fact that the process is already very lengthy, too costly, and has underscored concerns Mexican migrant workers have been handed over to the Immigration and Naturalization Services purely for voicing their concerns.[289] As Cesar Chavez so eloquently stated, "[o]ur struggle is not easy. Those that oppose our cause are rich and powerful, and they have many allies in high places. We are poor. Our allies are few."[290]

Chavez was attempting to demonstrate migrant workers rely on patronage from their guaranteed right of freedom of association because they do not have the financial means nor do they possess a powerful enough political voice.[291] Nevertheless, no matter how fundamental freedom of association may be to gaining the protection the migrant workers need, freedom of association cannot bring about sanctions under the existing dispute resolution system.[292] The collective question becomes who or what will protect migrant workers if not the unions or the employers themselves?

C. Thoughts of Improvement for the NAALC and Its Dispute Resolution System

"The first step in developing effective protections of labor rights . . . in international trade and investment agreements is a thorough and open evaluation of the NAALC experience to identify the obstacles to effective enforcement and what remedies are needed to overcome these."[293] After all, "[a]n open process for applying lessons from the NAALC to other trade agreements . . . is needed; not the closed process that brought about NAFTA and the NAALC nor the obliqueness that characterizes the submissions

287. AILF, *supra* note 66.

288. Hidden in the Home, *supra* note 84; *see also* Bull, *supra* note 6, at 4. Many farmworkers receive less than the U.S. minimum wage, work close to twenty hours a day, and are subject to abuse, both physically and psychologically. Hidden in the Home, *supra* note 84.

289. *See supra* notes 243-286 of this Note; *see also supra* notes 189-194, 257 of this Note and accompanying text.

290. Bull, *supra* note 6, at 1.

291. *Id.* at 4.

292. *See supra* notes 278-286 of this Note and accompanying text.

293. BROWN, *supra* note 49, at 10.

process."[294] The following are a few suggestions proffered by the cynics.

One of the first significant changes suggested for the NAALC process is to find ways to include the petitioners in the actual review process.[295] The "[l]ack of [t]ransparency" in the process leads to years of review without word on how the claims are being addressed; and, ultimately, once the consultation is concluded and recommendations are given, the procedure ends whether the filer believes his or her grievance has been remedied or not.[296] The closest any worker has ever come to involvement is being present at the hearing on the submission they filed, which has only happened ten times in the past thirteen years, and all of which were held for American citizens working in another country.[297]

Another diminutive way workers can get involved is to attend and participate in the public forums on their submission, assuming they can afford to travel to the specified location and miss work.[298] "Given the reliance of the National Administrative Office on public submissions to highlight violations, the NAALC will only function if workers and their advocates are encouraged to participate and if mechanisms are in place to protect workers who do . . . ."[299]

Additional steps should also be taken to eliminate some of the structural weaknesses inherent in the agreement as a whole.[300] Despite the media's ability to bring public awareness to the many issues discussed above,[301] "lack of political will to resolve [the] problems brought to light and refusals to use the process to its full potential nullifies the effectiveness of the NAALC."[302] Two remedies would help eliminate the structural weaknesses of the agreement. First, lowering the cost of filing a petition would ease financial tension on the migrant workers. Second, it would be beneficial to decrease the time it takes for a request to be filed, reviewed, and remedied.[303] If the process continues to take multiple years to reach the ministerial level, even if the process is opened up to higher review/scrutiny, the current process will only promise to take much longer.[304] If the time is shortened on each step, more claims could be processed

294. DELP, *supra* note 229, at 38.

295. BROWN, *supra* note 49, at 9.

296. *Id.*

297. *See* Dep't of Labor Summary, *supra* note 55. Not a single hearing was held for Mexican migrant workers working inside the United States. *Id. See also* BROWN, *supra* note 49, at 9.

298. *See* Dep't of Labor Summary, *supra* note 55. "[R]equiring that hearings be held at a convenient site for affected workers" has been mentioned. CRS Lessons, *supra* note 27, at CRS-11.

299. DELP, *supra* note 229, at 40.

300. Watts, *supra* note 10, at 24.

301. *See supra* notes 232-241 and accompanying text.

302. DELP, *supra* note 229, at 39.

303. Watts, *supra* note 10, at 24.

304. *See generally* Dep't of Labor Summary, *supra* note 55 (summarizing the submissions filed and chronicling the filing dates to the dates of ministerial review). *See also* Watts, *supra* note 10, at 24 (referring to the length of time the resolution process takes).

by the limited number of personnel currently devoted to processing the submissions, which then opens the door for previously unavailable claims for review.[305]

Nevertheless, if the temporal commitment is reduced, the door should be opened for utilizing all of the available avenues for review for all the Labor Principles laid out in the NAALC process.[306] After all, why should a workers' right of freedom of association, to bargain collectively, and to strike be given virtually a quarter of the available avenues of review as compared to minimum wage requirements, while the remaining five principles, including protection of migrant workers, receive just over half of the available methods?[307] Some critics have agreed, stating the tier system should be eliminated completely,[308] thereby lowering the burden of proof for those filing the claims, which happens to be regulated under the strictest of the three tiers.[309] Along those same lines, it has been suggested sanctions should be available for all of the Labor Principles, while simultaneously extending "complaint mechanisms and enforceable sanctions" to employers as well as the respective countries.[310]

This is exactly the type of reform migrant workers need, especially given workers' fundamental reliance on the unions supporting their efforts for workplace protection under U.S. law.[311] Without sanctions or a better enforcement mechanism to bring claims, the NAALC's eleventh Labor Principle, which guaranties the right to equal protection under U.S. laws, is purely rhetoric and not for application. Without doing so, the migrant workers will continue to face the hardships the public forums and seminars are facially meant to address and theoretically discuss, but continue to fail to seriously address the real problems at hand.[312]

Given the NAALC hands-off approach to enforcing the Labor Principles and Objectives set forth in the text of the agreement, other countries, as well as all the workers who have filed claims, are powerless to compel another country to enforce their own labor laws and standards.[313] Consequently, each respective NAO office has the unbridled authority to accept or reject a submission, which it knows may inadvertently have an affect on its interests with another country.[314] Even so, critics fall on both sides of the aisle, some think the NAALC should not have penalties at all, while others think it does not go far

305. CRS Lessons, *supra* note 27, at CRS-11.
306. *Id.* at CRS-9.
307. BROWN, *supra* note 49, at 5 tbl.2.
308. Bull, *supra* note 6, at 13.
309. Busch, *supra* note 1, at 71-72.
310. BROWN, *supra* note 49, at 10.
311. *See generally* Bull, *supra* note 6.
312. *See* BROWN, *supra* note 49, at 1.
313. Bull, *supra* note 6. *See also* notes 268-273 and accompanying text.
314. Bull, *supra* note 6, at 13. In so doing, the NAO office is able to ignore the claims it deems too low on its hierarchy of Labor Principles, further limiting the availability of equal protection under the agreement. *Id.*

enough.[315] A few ideas have come forth regarding how to increase enforcement: (1) "a penalty for anyone offering to waive a NAALC principle to induce or retain an investment[;]" (2) "establish an arbitral disputes panel to prevent the importation into any NAALC nation of goods produced with exploitative child labor, slave or forced labor, or by unhealthy processes[;]" and (3) simply raising penalties for those countries that do not enforce their own existing labor laws.[316]

This lack of enforcement capability has brought forth the idea of "harmonization."[317] Rather than each country having its own subset of labor laws and regulations, some claim there should be "an international 'floor' based on the conventions and recommendations of the tri-partite International Labor Organization."[318] As such, a uniform set of guidelines would be established which all the three countries could, idealistically, collectively embrace and promise to uphold.[319]

Along those same lines, some claim recognition of the ILO standards by all three countries would eliminate the need for the NAALC, because a new set of labor guarantees would be agreed upon by the three countries.[320] Those critics claim the ILO suffices because it is "a large organization with more than 1,800 employees, [and] has been working for more than 75 years to promote and monitor worker rights adoption around the world on a voluntary basis, and needs no assistance [from the NAALC] in this matter." [321]

Others have attempted to offer recommendations to further protect Mexican migrant workers who could create pressure from outside the actual political course of action. For example, some have argued the Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act need more specific protections for migrant workers.[322] There are also concerted efforts to increase the availability of the U.S. court system to migrant workers,[323] to establish more enforceable guest worker programs, and which call for a complete reform of the visa and monitoring system currently in place for migrant workers in the U.S.[324] Nevertheless, if past lack of enforcement of the NAALC is any indicator, new laws may do little to further increase migrant workers' protection.

---

315. CRS Lessons, *supra* note 27, at CRS-10.

316. *Id.*

317. *Id.* at CRS-9.

318. BROWN, *supra* note 49, at 2.

319. *See id. See also* CRS Lessons, *supra* note 27, at CRS-10.

320. CRS Lessons, *supra* note 27, at CRS-9

321. *Id.* Despite its uniqueness, this idea still presents a problem for enforceability under the current NAALC system. *Id. See also supra* notes 304-306 and accompanying text.

322. Bull, *supra* note 6, at 4.

323. Lisa J. Bauer, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725, 745 (2004).

324. Human Rights Watch, Migrant Domestic Workers Face Abuse in the U.S. (2001), http://hrw.org/english/docs/2001/06/14/usdom176.htm last visited Dec. 22, 2007.

CONCLUSION

As one stands and looks at the past thirteen years in retrospect, a unique opportunity exists to re-assess whether the goals set forth in the NAALC have been met with unparalleled achievement, capricious regret, or perhaps a little of both. Appreciatively, while over the last thirteen years critics have made their voices louder than the advocates of the agreement, it would be hasty to say it has been an absolute frustration of time and resources.[325] After all, in 1994,[326] the three nations had no model to follow, no treatises to read, nor precedent on which to rely to formulate such an ambitious principle; an idea seeking to change the way one looked at how to truly protect labor forces at home and abroad.[327] It is safe then to assume at least some failures were expected. Yet, with over a decade of scrutiny, the more appropriate question has become whether these disappointments have surmounted the usefulness of the agreement.

On one hand we have seen an increase in dialogue among the three nations and an enhanced awareness to the issue of labor protection within their borders.[328] Yet, on the other hand, stories of migrant farm worker mistreatment still runs rampant,[329] while reports indicate not a single submission under the NAALC has resulted in sanctions against an employer or government, reinstatement of lost jobs or wages, or reversal of job discrimination and lack of equal protection under the laws.[330] Though shortcomings are to be expected in most new endeavors, is that enough to skirt accountability and chalk the misfortunes up to naïveté, while we wait for the next chance to try again? Can we rest on our laurels, believing the resulting public awareness and media attention are good enough? The answer is certainly no to both.

As more and more Mexican migrant workers deluge the border into the U.S. in search of the jobs American employers frantically seek to fill, the pandemic of migrant worker mistreatment will maintain, if not grow more prevalent, in the coming years.[331] In addition, as new free trade agreements use the NAALC as a model for labor protection in other countries, it is important to make sure other countries do not purely mirror this labor agreement without evaluating first what has worked and what has not.[332] Through critical analysis and exhaustive research of the NAALC mechanism, critical mistakes can be repealed and crucial successes can be mimicked. After all, the best way to learn

---

325. *See supra* notes 225-243 and accompanying text.

326. GOETZ, *supra* note 23, at 14.

327. John S. McKennirey, *Foreword* to Commission for Labor Cooperation, http://www.naalc.org/english/report4_1.shtml (last visited Dec. 22, 2007). *See also supra* notes 24-34 and the accompanying text.

328. *See supra* notes 232-241 and accompanying text.

329. *See generally* Bull, *supra* note 6.

330. Dep't of Labor Summary, *supra* note 55.

331. *See supra* notes 95-118 and accompanying text.

332. *See* Busch, *supra* note 1, at 60.

from our blunders and misguided notions is to look into the past and examine the very things that shaped our history; and it can surely be contended the NAALC fits nicely into that mold.

It seems imprudent to entirely consent to the notion "the NAALC is headed toward oblivion[;]" however, it has become apparent reform is definitely needed to ensure proper application in the future, despite the efforts of the three countries.[333] Meanwhile, migrant workers continue to need the very protections this agreement was initially promulgated to provide, yet has truly fallen short of achieving.

333. DELP, *supra* note 229, at 40.