New architectures for migration governance: NAFTA and transnational activism around migrants’ rights

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ABSTRACT
This article analyses the way in which free trade agreements may become a new form of migration governance architecture, through an examination of the case of the North American Free Trade Agreement (NAFTA). We argue that the inclusion of migrant worker rights among the labour rights covered by the labour side accord unexpectedly resulted in new forms of migrant rights advocacy and transnational cooperation to promote migrant worker rights, especially in the United States. We examine two cases that were brought before the NAFTA labour rights tribunal. While this form of activism has had limited concrete impact on improving the actual conditions faced by vulnerable migrant workers, it has had some positive results in politicising the issue of abuses of migrant workers’ rights in the United States. It has also resulted in the transnationalisation of struggles around migrant workers’ rights and the forging of new alliances between trade unions and migrants’ rights activists.

Introduction
The negotiation of free trade agreements (FTAs) has important implications for migration and migration governance, even if these agreements rarely include provisions for labour mobility. Nevertheless, these agreements do have a strong indirect impact on migration, since the neoliberal provisions they contain often have the unintended effect of displacing labour across member state borders, and they do raise important human rights concerns regarding the treatment of migrant workers in destination countries. Additionally, the turn towards the inclusion of labour rights provisions in FTAs, including the rights of migrant workers, can open up a new terrain of struggle for migrant rights proponents.

In this article we examine how FTAs may become an example of a new form of governance architecture that gives rise to a new political opportunity structure for labour and migrant activism. We make this case based on the example of the North American Free Trade Agreement (NAFTA). We argue that the inclusion of migrant worker rights among the labour rights covered by the North American Agreement on Labour Cooperation (NAALC), the labour side accord, unexpectedly resulted in new forms of migrant rights advocacy and
transnational cooperation to promote migrant worker rights. While this form of activism has had limited concrete impact on improving the actual conditions faced by migrant workers, it has had some positive results in politicising the issue of abuses of migrant workers’ rights in North America. It has also helped promote the transnationalisation of struggles around migrant workers’ rights and the forging of new alliances between trade unions and migrants’ rights activists.

The talks around the renegotiation of NAFTA have revived interest and debate about how to promote labour rights in a transnational setting, but there has been much less attention to the implications of the existing NAFTA labour side accord for migrant workers. Nevertheless, somewhat unexpectedly, migrant rights figured prominently in the cases that were brought forward under the NAALC. The development of joint campaigns around these cases between migrant rights activists and labour activists in the three countries represents an innovative and creative new form of transnational activism, one which has received little academic attention (see, however, Compa 2017; Kay 2005; Nolan García 2013, 2017; Stillerman 2003).

In the next section of the paper we explore how trade agreements are entangled with migration governance. These entanglements are not limited to explicit mobility provisions but can be found in the use of clauses designed to address labour rights – however nominally – to create spaces to advance migrant worker claims. We review how labour and migrant transnationalism has been conceptualised and argue that there is a convergence between these dynamics as migrant workers, their civil society advocates and unions engage in a transnational politics within the context of the NAFTA. In the following section we provide an overview of the historical origins and content of the NAALC, which has been associated with the emergence of a new political opportunity structure (Stillerman 2003; Kay 2005, 2011), before turning to an examination of the activism, actors and claims associated with two cases that were brought forward specifically to promote migrant worker rights. These cases, Washington State Apples and H2B Carnival Workers, were selected to map the network of diverse activists, shifting memberships and varied outcomes. In each instance, the significance of the case is located not solely in terms of the success and failure of the petition, but also in the activist mobilisation and politicisation of migrant worker issues. Our research is based on a review of primary documents, secondary literature and several interviews with activists involved in the NAALC petitions.1

**NAFTA, governance and migration: transnational activism**

The enactment of NAFTA reconfigured continental economic space in the 1990s, resulting in massive social mobilisation in the three countries in opposition to the agreement. Transnational linkages were forged among social movements in the three countries, including labour unions, environmentalist groups, women’s organisations, faith-based groups, farmers, social justice organisations and others (see for example Foster 2005; Fox 2002; Gabriel and Macdonald 1994; Graubart 2009, 2010). Although national and transnational activists of the early 1990s did not succeed in derailing the NAFTA agreement, in order to shore up its domestic support, the Clinton administration pushed for the inclusion of labour and environmental side accords that would supposedly halt the race to the bottom in social standards that critics argued would result from continental integration. These side accords on labour and the environment were part of the 1994 agreement.
The agreement’s architecture contained expansive provisions governing trade liberalisation, and these stand in contrast to the more limited arrangements that regulate the movement of business persons including business visitors, listed (usually high skilled) professionals, traders and investors, and intra-company transferees. In short, ‘the temporary mobility provisions within NAFTA signal a neoliberal, market-orientated rationale. They are not directed towards liberalizing migration or harmonizing immigration policies among the three member countries’ (Gabriel and Macdonald 2004, 77). Indeed, NAFTA was justified on the basis that it would reduce undocumented migration from Mexico to the United States. The increase in Mexican migration, driven in part by widespread economic restructuring engendered by trade liberalisation, in the years following the agreement belied this claim (Castles, de Haas, and Miller 2014, 234).

Today, Mexicans account for a significant proportion of the immigrant population, representing 25% of the 44.5 million immigrants to the US as of 2017, and it is reported that their rate of labour force participation is higher than both the native and overall foreign-born populations’ (Zong and Batalova 2018). This is especially true in areas such as ‘natural resources, construction and maintenance occupations and service occupations …’ (Zong and Batalova 2018). Mexicans also account for a significant proportion of unauthorised migrants in the United States – making up 53% of the estimated 11.3 million unauthorized immigrants in the US’ (Bolter 2019). Many Mexican migrants in the United States are vulnerable to exploitation because of their precarious position as non-citizens (Morrison 2018/2019, 240–241).

NAFTA is not traditionally associated with migration, but we would argue the agreement and similar free trade agreements should be considered in relation to new architectures of migration governance. While NAFTA did not usher in a new migration regime, its side agreement, the NAALC, which was designed to promote labour rights, included protections for migrant workers. However, it should be noted that the NAALC does not specifically define who is a migrant worker, and the ‘United States interprets the customary international law definition of ‘migrant worker’ to exclude undocumented migrants’ (Russo 2011, 31). Nevertheless, the NAALC has been hailed as setting a precedent for including labour protections in free trade deliberations (Russo 2011, 37).

Equally important, the NAFTA and the NAALC have also been identified as implicated in creating new political opportunities structures for transnational activism (Stillerman 2003; Ozarow 2013; Kay 2005, 2011). Kay, for instance, argues that these transnational structures are distinguished from those at the national scale by three dimensions:

1. the constitution of transnational actors and interests,
2. the definition and recognition of transnational rights, and
3. adjudication of rights at the transnational level. (2005, 722)

Similarly, in an effort to consider contention beyond the nation state, Tarrow (2012, 185) draws attention to the emergence of ‘transnational activists’ – ‘individuals and groups who mobilize domestic and international resources and opportunities to advance claims on behalf of external actors, against external opponents, or in favor of goals they hold in common with transnational allies’. He flags immigrant groups, labour unionists and members of transnational advocacy networks as groups that could engage in this form of contention stating: ‘What makes them different than their domestic counterparts is their ability to shift between different scales of activity and take advantage of the expanded nodes of
opportunity in a complex international society’ (2012, 186). The architecture of the trade agreement, the provisions within the labour side agreement, and new actors are all at play in considering the deployment of NAALC provisions to promote migrant worker rights. This deployment is positioned at the intersection of labour and migrant transnationalism.

For many decades, labour transnationalism has been limited by the predominance of nation states in regulating and overseeing labour relations, and by the power of nationalist appeals to convince workers that their counterparts in other countries are threatening their jobs, wages and benefits. As Jonathan Stillerman (2003) argues, labour movements emerged in a context of nationally bound frameworks of labour law and collective bargaining institutions that encouraged identification with workers’ own nation states and acted to pit workers in one country against those in another country (see also Kay 2011). During the Cold War, these forms of international cooperation were distorted by the competition between the Western and Eastern blocs, which resulted in the creation of the International Confederation of Free Trade Unions (ICFTU), led by the US American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the World Federation of Trade Unions (WFTU), led by the Soviet Union). Before NAFTA, this Cold War rivalry discouraged cooperation among North American trade unions, as both US and Canadian unions supported the Confederación de Trabajadores Mexicanos (CTM), the official state-sanctioned labour movement tied to the corporatist Mexican state, since all of them belonged to the ICFTU (Kay 2011, 37–42). In addition, US workers often viewed Mexican migrants as a threat, and for many years supported strong enforcement of immigration laws to prevent Mexican workers from obtaining jobs in the United States.

O’Brien argues that the end of the Cold War and the process of neoliberal globalisation challenged the relatively secure position of workers in developed countries, but also opened up the prospect for the formation of transnational coalitions and networks, and the diminution of working-class nationalism (O’Brien 2000, 536–37). Stillerman maintains that NAFTA created new ‘political arenas, targets for activists, and incentives for cross-border collaboration’ around labour rights (2003). Kay similarly contends that ‘The NAFTA story … is about how political-institutional fields serve as new transnational political opportunity structures for emergent transnational social movements’ (2011, 10). The fact that NAALC provisions required petitions to be filed in a country other than the one in which the alleged violation took place created a built-in incentive for seeking out allies in one of the other states. While US-based unions could, for example, file petitions on their own to the US National Administrative office (NAO) against a labour violation in Mexico, they were more likely to succeed when allied with a Mexican organisation, which could provide local knowledge and testimony to support the case (Nolan García 2011).

Scholarship on labour transnationalism thus helps us understand how globalisation led towards greater openness on the part of organised labour to transnational engagements and how trade agreements can create a shift in the regional political opportunity structure that has shaped how labour unions engaged with transnational activism. Theorists of labour transnationalism do not, however, directly address the specific issues related to labour mobility and the systematic vulnerabilities migrant workers face when engaging with the NAALC machinery. It is therefore useful to look at theories of migrant transnationalism to illuminate these dimensions. The ‘transnational turn’ within migration scholarship in the 1990s has been described as a major paradigm shift (Faist, Fauser, and Reisenauer 2013, 53). In this context, Basch, Glick Schiller and Blanc characterise transnationalism as the processes by which
immigrants forge and sustain multi-stranded social relations that link their society of origin and settlement. We call these processes transnationalism to emphasize that many immigrants build social fields that cross geographic, cultural and political borders’ (Basch, Glick Schiller, and Blanc 1994, 8). The turn to transnationalism within migration scholarship entailed a rejection of methodological nationalism – the implied assumption that the nation state is an unproblematic unit of analysis and source of data (Sager 2016, 43–44). As Faist et al. have argued, scholars need to move beyond thinking about immigrant experiences in destination countries and immigrants’ links to countries of origins and recognise the importance of the multi-sitedness of migrants (Faist, Fauser, and Reisenauer 2013, 1). This would entail recognising, in part, how migrants’ connections are ‘embedded in broader processes of transnational ties and practices in various fields, including the cross-border transactions of goods, services, capital and ideas and the movement of people’ (Faist, Fauser, and Reisenauer 2013, 2).

Rodriguez has observed that conceptualisations of migrant political transnationalism have been characterised by an emphasis on specific political dimensions including, for instance, the ways in which migrants resist assimilation in destination countries, homeland-orientated initiatives, and forms of extra-territorial citizenship (2013, 740–742). Relatedly, the role of unions within transnational activism directed at the situation of temporary migrant workers is under-studied (Piper 2010, 116). But, as Piper points out, Migrant worker organizations can benefit from trade union structures as unions tend to have the financial leverage and political clout to force ‘government to govern’ and to institute their own legislation to support migrants’ rights. In turn, it has been suggested that organizing foreign workers can lead to a reinvigoration of the overall labour movement. (2010, 114)

Within the current environment of trade liberalisation, decline in union membership and deregulated labour markets, organised labour has been pushed to think about new strategies, constituencies and alliances (Piper 2010, 113–114; Stillerman 2003, 580; Kay 2015, 263).

Increasingly, since the 1990s there has been a convergence between the conceptualisation and dynamics associated with labour transnationalism and migrant transnationalism. Drawing on the International Migrants Alliance, Rodriguez (2013, 739), for example, outlines a different form of transnational politics – ‘migrant labour transnationalism’ in which migrants are participating in contentious politics against their ‘home states’ neoliberal development agendas’ as well as participating in a ‘cross-border coalitional politics that links migrants on the basis of their shared experiences as low-wage foreign workers’ (2013, 739). Gabriel and Macdonald also describe a dynamic of domestic transnationalism ‘in which domestic political actors engage in advocacy within domestic legal institutions to promote the rights of a transnational mobile labour force’ (2014, 66). These forms of transnational migrant activism addressing migrant workers’ concerns are strategic, specific to particular contexts, and involve a particular constellation of actors. As we discuss in the next section of the paper, the NAALC became a focus of activism and was implicated in the creation of new trinational coalitions that attempted to address the concerns and needs of low-wage migrant workers in the United States, and in doing so politicised the lived experience of migrant worker precarity.

The NAALC side accord and migrant rights transnational activism

The NAALC, the NAFTA labour side accord, entered into force with the rest of the agreement on 1 January 1994. The parties to the agreement committed themselves to promote 11
'Labor Principles,' including a commitment to protect migrant workers (US Department of Labor 2005). Under Labour Principle 11, the agreement contains a pledge to promote the principle of ‘[p]roviding migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions’ (NAALC, annex I, principle 11). The signatories committed only to encouraging compliance with each participating country’s own labour legislation, rather than setting shared standards or regulations, although they did open themselves up to critical evaluation by the other member states (Compa 2001, 452–454). Each country established a NAO ‘to review the submissions submitted regarding labor law matters arising in the territory of another Party.’ Citizens’ or organisations’ petitions thus cannot be filed with the NAO associated with the country where the alleged violation took place. The rights covered by the agreement are subject to different forms of response. For complaints related to protection of migrant workers, following ministerial consultations, the complaint may be sent to an Evaluation Committee of Experts (ECE). The ECE can carry out investigations into that complaint, and theoretically can send the case to an independent Arbitral Panel which could impose fines and sanctions. It is important to note that no case has yet gone beyond the stage of ministerial consultations in the life of the NAALC.

Despite its weaknesses, the agreement opened up a new political opportunity structure which migrant rights activists eventually responded to, in a way that required transnational cooperation. According to Nolan García et al. (nd, 10–13), a total of 46 complaints were filed between 1994 and 2018, sometimes to more than one NAO. As expected, a majority of the cases were filed against Mexico, with 28 out of the 46 complaints, or over 60%; 23 of those 28 cases included freedom of association as the main complaint. Only three complaints were filed against Canada in that period. Somewhat surprisingly, migrant rights feature prominently in the cases against the United States, since they were included in 10 of the 16 cases (67%) (Nolan García et al. nd).

The main source of critique of the NAALC is its lack of ‘teeth’ to enforce provisions (Bieszczat 2008, 1393). Many US-based labour unions and their allies were convinced that FTAs like NAFTA have done nothing but drive jobs out of the United States and depress wages, and that the labour side accord was just window dressing designed to gain political approval of the deal. Others have argued, however, that despite serious shortcomings, the NAALC resulted in some limited improvements in enforcement and observation of labour rights as well as opportunities for activism in support of these rights. Graubart contends, for example, that despite its limitations, the ‘citizen-petition mechanism presents a significant transnational political platform for challenging neoliberal-style economic integration’ (Graubart 2009, 178). The quasi-judicial mechanism provides a forum for activists to shed light on a ‘norms-based argument’ and, he contends, activists have become very good at politicising the ensuing legal process. After the campaign against NAFTA failed, labour unions and other migrant and labour activists in the United States and Mexico built upon the ties that had been built and developed a more internationalist perspective to launch a series of joint petitions. This led to involvement by more actors beginning around 1997 in a series of legally sophisticated petitions accompanied by extensive political mobilization. In this period challenges began to be raised regarding the treatment of migrant workers in the United States (Graubart 2009, 184).

Nolan García argues that the institutions created by the NAALC have acted to ‘strengthen and institutionalize contact between US and Mexican labor officials in a manner that has been constant, and at times, fruitful, for promoting labor rights protections in both countries’
(2013, 102). Graubart also argues that the successful cases of use of the NAALC mechanism required ‘a series of legally sophisticated and well-researched petitions … all of which involved extensive political mobilization of multiple actors’ (cited in Bieszczat 2008, 1396). While Mexican unions hoped that the NAALC would foster a ‘boomerang effect’ (Keck and Sikkink 1998) to put pressure on the Mexican state to democratise labour relations, ultimately independent unions remained marginal and no systematic reform of the Mexican labour relations system occurred until recently (see Compa and Brooks 2015, 28). The weakness of the NAALC institutions, the distrust between North American states and some North American unions, the strength of NAFTA’s impact in supporting and entrenching neoliberal reforms and the lack of a regime in Mexico committed to labour reform ultimately limited the positive influence of the NAALC. Nevertheless, some marginal gains were achieved, including with regards to migrant rights in the United States, a site of contestation that was not originally anticipated when the NAALC was enacted.

**NAALC and migrant rights**

The NAALC framework established a new transnational political opportunity structure that shaped migrant and labour activism and promoted new ties between the two types of activists. In this section we review some of the 10 cases that were brought against the United States by the Mexican NA. These cases represent a shift away from the petitioners’ early focus on freedom of association, which had proved difficult to attack under the NAALC (Brower 2008), towards other rights that might be more successfully addressed within the limited context of the side accord, such as rights of migrant workers to equitable and humane treatment. We focus in particular on two cases: *Washington State Apples*, which was filed in 1998, and *H-2B Carnival Workers*, which was the last in a series of cases brought against the United States in 2003, 2005 and 2011 for its treatment of workers who worked in the US under the low-skill H-2 temporary migrant worker visas (H-2A visas are for agricultural workers and H-2B are for non-agricultural workers).

While both of these cases addressed a wide variety of the labour rights covered by the NAALC, they brought in issues related to the rights of low-skill, low-wage migrant workers and highlighted the precarity and vulnerability of this group, even those with legal status in the United States. We focus on these cases because they represent both one of the earliest and some more recent submissions, and also because they illustrate particularly well the transnational linkages that were developed in response to both the nature of the transnational labour force involved and the nature of the transnational political opportunity structure provided by the NAALC. The visa cases are important because they directly target the unequal treatment of migrant workers under the existing labour relations system in the United States. The Carnival Workers case is the most recent of these visa cases and shows the way in which there was a growing and cumulative process of establishment of networks and relationships between a diverse and transnational set of actors: labour unions, migrant rights organisations, legal service advocates and some state actors including Mexican consular officials.

These cases were not isolated actions but were embedded in larger struggles to promote migrant worker rights in the United States, and promoted unprecedented linkages between labour unions and migrant activists. For the often highly vulnerable migrant workers in the United States, labour rights issues are inextricable from migrant rights issues. Our focus in
this section is primarily on the alliances that were forged, and not on the details of the cases or the concrete outcomes of the NAALC process.

**Washington State Apples case**

As argued by Kay, North American unions’ positions on immigration shifted sharply after the NAFTA agreement, away from traditional anti-migrant positions (2015, 260). The Washington State Apples case was an early sign and product of this shift towards a more progressive position, bringing together two traditional foes, the International Brotherhood of Teamsters and the United Farm Workers (UFW) union. These two actors represented very different varieties of trade unionism: the Teamsters had long been associated with corrupt practices while the UFW came out of a more radical, sometimes extra-legal tradition of organising of workers from marginalised communities. The Teamsters and the UFW had been involved in intense conflict in the late 1960s and 1970s, when growers in California had invited Teamster organisers onto their farms to organise agricultural workers, to thwart the more radical UFW, led at the time by Chicano activist Cesar Chavez. The two unions were involved in legal and grassroots battles for years, until a settlement was reached in 1977 in which the Teamsters agreed to refrain from organising agricultural workers (Turner 1977). The Teamsters subsequently moved away from its former corrupt and xenophobic practices when the leader of a democratic faction within the union, Ron Carey, was elected president in 1991, against two ‘old guard’ candidates.

The Teamsters had been organising workers in the apple warehouses of the state of Washington, while the UFW had simultaneously been organising farmworkers in the orchards, even though agricultural labourers were not covered by the National Labour Relations Act. Washington was at the time the top producer of apples in the United States, and Mexico was the top importer (Pearson 2001/2002). During the harvest season, Washington state apples were handpicked by a labour force of 45,000 workers, with the majority of the labour force coming from Mexico. The apples were packed for immediate shipment or stored in packing, shipping and warehousing centres by some 10,000 workers, the majority of whom were Mexican or Mexican-American (Public Communication 1998).

The NAALC case thus represented a highly symbolic move by mainstream unions towards recognition of the importance of migrants’ rights in the context of a shifting American labour force. The background to the complaint was the election of a progressive leader of the AFL-CIO, John Sweeney. According to former UFW organiser Guadalupe Gamboa, the AFL-CIO provided funding for the Teamsters and the UFW to organise workers in the apple industry in Washington, and the funding was contingent on them working together (Interview, May 7, 2020). The idea for the NAALC complaint came from the Teamsters. Lance Compa, who acted as a legal advisor to the unions and the petitioners and wrote the case, states that the Teamsters were attempting to organise the apple packing sector, and that the companies were attempting to break the union:

> The Teamsters thought they might be able to use the NAALC to expose the union-busting activities of the companies. We were strategising and decided to widen the scope of the complaint to have more impact – and decided to bring in the farmworkers through the UFW. (Interview, April 28, 2020)

The UFW had significant presence in the state of Washington and grassroots strength among Latino workers, and it was thought that collaboration with them would support the
unions’ strength in the industry. The leader on the Teamsters side had previously worked with the AFL-CIO Solidarity Centre in Mexico where he had developed an internationalist perspective and relationships with Mexican actors (Interview, Compa, April 28, 2020).

The Teamsters argued that two large apple industry warehouse employers had ‘unleashed a campaign of intimidation and coercion against their employees’ prior to union elections in January 1998 (Public Communication 1998). According to Compa, the decision was made to pursue an NAALC petition partly because farmworkers were excluded from labour rights under the federal labour legislation:

> It was like walking and chewing gum as the same time. As far as the packing shed workers went the the National Labor Relations Board [NLRB] was the entity that could issue binding orders etc. But it was a delay-ridden process, and it only applied to the Teamsters. They didn’t abandon their cases in the NLRB, but they added the NAALC as another track that could be used. (Interview, April 28, 2020)

Compa argues that the decision to turn to the NAALC created an incentive to adopt a transnational strategy: ‘The fact that the NAALC was set up so that you had to lodge your complaint in one of the other countries led to the idea of going transnational with the whole campaign’. However, the transnational character of the industry also played a role since it was thought that involving the UFW ‘would also evoke sympathy in Mexico – both with the Mexican government and the Mexican people’ and discourage Mexicans from buying Washington state apples: ‘involving the Mexican farmworkers would give us strength in Mexico to raise alarm [among growers] that their Mexican market would be in danger’ (Interview, Compa, April 28, 2020).

On the Mexican side, the main contact was the Frente Auténtico de Trabajadores (FAT), the independent labour union that had emerged in opposition to the government-controlled corporatist labour federation, the CTM. The FAT had been one of the major forces in the network of Mexican civil society actors opposed to the NAFTA agreement and was the main interlocutor of the Canadian and US unions that supported democratic unionism in Mexico (Roman and Velasco Arregui 2013; Kay 2011). The NAALC petition was also signed by three other independent Mexican unions.

In building the case for the petition, Compa worked closely with Mexican-American UFW activist Guadalupe Gamboa. The UFW had deep roots in the Mexican-American community, in contrast with the Teamsters who had not been present long (Interview, Gamboa, May 7, 2020). Even though on the Teamsters side the problem was initially motivated by concerns about attacks on workers’ right of association, the way the case was framed focussed heavily on claims of abuses of migrant rights: ‘Migrant workers face unequal protection under the labor laws, threats about their legal status, and discriminatory cuts in benefits under immigration and welfare reform laws’. Mexican workers claimed they received unequal treatment compared to domestic workers because they received less than minimum employment standards (for example, the families of migrant workers killed on the job received 50% less compensation than those of domestic workers) and were refused the right to organise a union. They also claimed that they were being turned in to the Immigration and Naturalization Service when they tried to create a union (Public Communication 1998). The case also included claims related to health and safety issues and wage issues that could go to a further stage in the NAALC process (Interview, Compa, April 28, 2020).
The Mexican NAO accepted the case for review in August 1998 and held its first ever hearing regarding an NAALC complaint in Mexico City. According to Compa, even though the complaint was only signed by Mexican unions,

the transnational character of the campaign coloured the strategy for the hearing .... It wasn't a public hearing like in the US or Canada. But we made sure the witnesses who testified were Mexican-American leaders like Gamboa but we also brought in Anglo packing house workers (US citizens) who testified in English and were translated, and then Mexican farmworkers who testified in Spanish – I think we had to make sure they had legal status so they wouldn't be targeted. We didn't want to put anyone in jeopardy. The transnational coalition was successful in gaining significant media coverage in Mexican media, to highlight for Mexicans the plight of Mexican workers in the US. (Interview, Compa, April 28, 2020)

After a considerable delay, in August 1999 Mexico’s Secretary of Labor requested ministerial consultations with his US counterpart regarding this and the two other cases filed in Mexico against alleged violations in the United States (Compa and Brooks 2015, 91–92). A ministerial agreement occurred that led to cooperative activities including a public forum in the state of Washington in 2001. In 2002, the US Department of Labor also produced materials in Spanish to help educate agricultural migrant workers about their rights, and other outreach programmes were launched by the federal government with similar goals. While they did not attain the ambitious goals they had set out with, Gamboa reflects, the NAALC petition

helped as a mobilising tool for workers. There were a lot of workers at the hearing and it expanded the issues of farmworkers to more of a state-level issue. We got a lot of media [attention] and made people more aware of the issues, and raised our credibility as a labour union. (Interview, May 7, 2020)

The case also promoted transnational ties between labour unions, but the ties forged in this case were not long-lasting, partly because the Teamsters failed to establish a foothold in the apple industry, a fact they blamed on growers’ use of anti-union tactics.

H-2B Carnival Workers case
Several years later, transnational coalitions began filing a series of complaints related to unfair treatment of migrant workers brought to the US under the H-2 visa programme (North Carolina H-2A Workers (2003), Idaho/H-2B Visa Workers (2005) and H-2B Carnival Workers (2011). This series of cases was the product of transnational linkages that were deeper and more sustained in nature than in the Washington State Apples case, and showed momentum in the development of strategies taking advantage of the political opportunity structure established in the NAALC. Tequila Brooks, an attorney who worked for the commission for the NAALC secretariat, states that the roots of all three cases lie in the history of migrant agricultural labour advocacy: ‘These cases were filed by legal services attorneys or legal services-adjacent attorneys. In the US we have a Legal Services Corporation and it has farm-worker representation units all over the country, and they provide excellent advocacy to farmworkers. And they file a lot of impact litigation. And then they also do day-to-day legal violations …. So, they came at the NAALC from this mindset – to be strategic and identify weaknesses in our legal system. For example, whereas H-2A workers have access to wonderful services from the farmworker Legal Services Corporation, H-2B workers are explicitly
excluded under the law establishing the Legal Services Corporation. And they beautifully argued that this was a violation of NAALC in the second (2005) visa case (Interview, May 4, 2020).

According to Michael Dale from the Northwest Workers Justice Program, who was one of the legal services attorneys referred to by Brooks and a signatory of the second case, the motivation for that case was also related to a political objective, of countering the idea President Vicente Fox (2000–2006) had proposed for a binational US–Mexico guestworker programme in the context of a deepened NAFTA:

The point was that what we wanted to do was to drive a stake through the heart of the acceptability of a migrant exchange programme that didn’t have a robust remedy in the United States that included access to council. We wanted to plant that idea in the political class in Mexico City, and I think that part of the theory was pretty effective. (Interview, May 6, 2020)

In this section we focus primarily on the third visa case, which built on some of the legal arguments raised in the first two cases. In contrast with the Washington State Apples case, while some unions were involved, including the AFL-CIO, the main actors were non-governmental organisations (NGOs) and legal advocacy groups advocating for migrant rights. The H-2B Carnival Workers submission was filed in September 2011 by three individual Mexican workers as well as the Centro de los Derechos del Migrante (CDM) and 13 other Mexican and US organisations. The case addressed the situation of Mexican migrant workers who had worked for J&J Amusements, Inc. and Reithoffer Shows, Inc. from 2007 to 2009.

About 5,000 Mexican workers travel to the US under H-2B visas for around nine months of the year to work in fairs and carnivals travelling through the United States. Two of the signatories on the complaint, CDM and the American University Washington College of Law Immigrant Justice Clinic, wrote a report on conditions in the industry as part of the broader campaign to protect workers’ rights in the industry. According to the report, ‘the H-2B visa program allows the fair industry to fill grueling, low-paid positions that require constant travel with temporary workers. This labor-intensive industry requires thousands of workers to assemble, operate, and disassemble carnival rides and concession stands’ (Centro de los Derechos del Migrante and the American University Washington College of Law Immigrant Justice Clinic 2013, 3).

In this NAALC case, the main actor involved was the transnational NGO CDM, which has offices in Mexico City, Oaxaca and Maryland. The organisation works to support migrant worker organising and advocacy in both their home communities in Mexico and their workplaces in the US. Much of this work is carried out through the Comité de defensa del migrante (Migrant Defence Committee), a group of Mexican migrant worker leaders who act as rights promoters on the ground in their home communities. CDM supports this committee in documenting migrant and labour rights violations and in connecting workers with potential advocates (Interview, Rachel Micah-Jones, May 5, 2020). CDM also engages heavily in advocacy work in the US and is involved in several networks, including the transnational Migration that Works (formerly the International Labor Recruitment Working Group). Many of the co-signatories of the Carnival Workers H-2B case are also members of these networks, and some of them were involved in the earlier visa complaints.

According to CDM Executive Director Rachel Micah-Jones, CDM made the decision to pursue an NAALC case in alliance with other migrant rights advocates for several reasons related to the transnational and mobile character of both the workforce and the firms. First,
the case came out of earlier organising by the CDM and other signatories to the petition around the issue of illegal fees charged by recruiters in Mexico, but these abuses continued in the United States, so the nature of the abuse was bi-national. Another reason was because US state-based jurisprudence failed to offer a viable complaint mechanism for the workers involved, who were travelling across the country working in multiple states. Moreover, the case was in support of a larger campaign ‘to try and change conditions for workers in the H2-B programme, but specifically for the travelling firm carnival workers. So, we decided to file the NAALC complaint as one strategy in that campaign that involved a report and also cases filed in US courts and other policy advocacy’ (Interview, May 5, 2020).

As a newer organisation, only founded in 2005, CDM had not been a petitioner on the earlier visa cases, but it had been involved in strategy conversations around the second case, and once they decided to pursue this strategy they approached organisations in both Mexico and the US that they had previously partnered with, some of whom had been involved with those cases. The submission raised allegations that the US government had failed to effectively enforce labour laws with regard to Mexican migrant workers admitted to work in the US carnival and fair industry under H-2B visas. Specific claims included that employees were denied their rights to minimum wage and overtime payments, and that the government failed to inspect and monitor workplaces, investigate complaints, and reimburse workers for pre-employment visa-related and travel expenses. The case also charged that the government had denied ‘migrant workers with H-2B visas the same access to essential legal services that other workers are entitled to’ (Petition 2011), an issue that was at the heart of the 2005 visa case in which some of the same actors had been involved (Interview, Michael Dale, May 6, 2020).

In response, the Mexican government published a report in November 2012 which included a strong critique of US labour laws and policies affecting migrant workers, based on this and two other submissions that had been made concerning workers with H-2A and H-2B visas. The report requested ministerial consultations and measures to inform workers about their labour rights (Secretariat of Labor and Social Welfare (STPS), Government of Mexico 2012). In 2014, a Ministerial Consultations Declaration was signed that committed the two governments to consult with stakeholders and develop a work plan for extensive outreach, education and enforcement. After consultation with civil society actors, the US Department of Labor held 29 outreach events in 15 states, reaching more than 2300 workers and 1000 employers. In Mexico, the Secretaría de Trabajo y Protección Social (STPS) held 11 events, reaching approximately 1600 Mexican nationals. These events involved civil society organisations, embassy and consular officials, and state and local authorities responsible for serving Mexican migrant workers (US Department of Labor 2020b). Tequila Brooks argues that another important actor in the establishment of transnational connections was the Mexican consular service, which carried out a lot of the activities in the US in response to the NAALC cases. As a result of the NAALC cases, she observed that ‘deep connections were made between consular officials, labour department officials and farmworker advocates’ in the two countries (Interview, May 4, 2020).

Rachel Micah-Jones also argues that the NAALC campaign played an important role in winning new US government regulations for the H-2B programme, that included the first comprehensive protections for visa workers (Interview, May 5, 2020). She maintains that the transnational dimension of the campaign was crucial to the success of the case:
If we didn't have any Mexican organisation – if it was just on behalf of a Mexican worker instead of the migrant defence committee and a full coalition, the political will to move that forward on behalf of Mexico would have been different. And on the US side, having the AFL-CIO and a number of organisations throughout the US signed on also made the US take it a little more seriously in terms of coming to the table with addressing a number of the issues raised in the complaint.

The transnational coalitions established in the visa cases and centred on the North American political opportunity structure have continued to develop. CDM continued its involvement in NAALC petitions by collaborating with members of the migrant defence committee in filing a joint case with the United Food and Commercial Workers Canada (UFCW) union around gender discrimination in the recruitment practices associated with both the US H-2A visa programme and the Canadian Seasonal Agricultural Workers Program (see Gabriel and Macdonald 2019).

In addition, CDM and several other NGOs and unions involved in the earlier NAALC migrant labour cases were involved in advocacy around the content of the labour chapter that was negotiated as part of the new United States–Mexico–Canada agreement (USMCA). The initial US proposal for the labour chapter did not include migrant rights partly because they are not covered by the International Labour Organization (ILO) language and were not included in post-NAFTA US trade deals. In response to this omission, a coalition of activists from the three countries, coordinated by CDM, submitted a letter to US trade representative Robert Lighthizer to

use the renegotiation of NAFTA to build upon the base of standards in the NAALC, ensuring minimum employment standards, equal pay for men and women, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protections for migrant workers, who are so often carved out of protections in the destination country. (CDM 2018a, our emphasis)

Signatories to the letter represented a sampling of individuals, NGOs and unions that had submitted complaints to the US or Mexican NAOs under the NAALC, showing the ties that continued to flourish among these activists. CDM, Migration that Works, and migrant defence committee petitioners on the 2011 and 2016 NAALC complaints provided live verbal and written testimony to these provisions during the United States Trade Representative (USTR) hearings in Washington, DC, in June 2017. In part, CDM and other groups wanted to ensure that the frustrations they had experienced during the NAALC submission process would be addressed in the new agreement (Interview, Rachel Micah-Jones, May 5, 2020).

Mexican activists also participated in hearings by the Mexican government to promote the same provisions, and a group of 47 Canadian ‘labour, trade justice and climate movements’ wrote to then Minister of Foreign Affairs Chrystia Freeland, stating that ‘A new agreement must ensure strong labour rights, including for migrant workers, that result in a demonstrated adherence to international labour standards, including the right to free collective bargaining and association’ (Trade Justice Network, 2018, our emphasis).

In 2018, the CDM announced that these efforts had been successful, since the full negotiated text of the USMCA includes a labour chapter, a stronger dispute resolution mechanism, and migrant workers’ rights. Specifically, Article 23 states,

the Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant
workers are protected under its labor laws, whether they are nationals or non-nationals of the Party. (CDM 2018b)

In contrast with the labour chapter of NAFTA, complaints under this chapter will be submitted to the same state-to-state dispute settlement process as other aspects of the agreement, and countries could theoretically be subjected to sanctions for violations. Whether this provision will have greater impact on the rights of migrant workers in the region than the NAFTA labour side accord will depend, however, in part, on the further development of transnational migrant rights coalitions, and their capacity and willingness to bring forward new cases under the new architecture.

Conclusion

The case of NAALC demonstrates that free trade agreements play a role – however unintended – in the governance of migration. In acting as a ‘new space of influence’, the NAALC can be seen as providing a new political opportunity structure at the transnational scale. Its provisions were transnational by definition insofar as its Labour Principles required that migrant workers in member countries had to have the same labour protections as domestic workers. It was also an institutional forum for the transnational contestation (or adjudication) of worker protections, including those of migrant workers. Consequently, the NAALC engendered new forms of labour and migrant transnationalism as civil society actors, migrant workers and organised labour waged struggles for cross-border social justice by fighting for migrant worker rights.

A review of the cases discussed in this article reveals some important themes regarding the state of migrant and labour transnationalism in North America. First, it is important to recognise that the cards were largely stacked against the success of migrant activists, given the precarious status of the workers involved and their often-temporary residence in the United States. Even when the cases led to concrete outcomes, they did not directly remedy the injustices to which migrant workers were exposed, but rather were often directed at raising workers’ awareness of their own rights, and awareness in the broader community of those workers’ rights. Moreover, these cases highlight the specificity of the challenges faced by migrant workers and their advocates when engaging in the NAALC process (Nolan García 2013, 110). The painfully slow progress of cases through the NAALC machinery is also a disadvantage for complaints regarding abuse of migrants’ rights, since temporary migrants’ ephemeral residence in the country where the abuse occurs makes it difficult for them to be involved in protracted quasi-legal struggles.

Nevertheless, the mobilisation incentivised by the NAALC process did lead to the construction of new alliances between labour activists and migrant rights activists. In the Washington State Apples case, the intervenors were primarily unions or labour activists, and the case focussed on and resulted from efforts by US unions to organise workers in the apple industry. The US and Mexican parties involved had forged ties during the fight against NAFTA and continued to develop those transnational linkages while also taking on migrant rights issues. Over time, as shown in the visa cases brought before the NAALC, migrant rights activists, legal advocates and NGOs became increasingly active, and developed ties with unions as well as some representatives of the US and Mexican states. The migrant activists
involved benefitted from the resources, legal expertise and organising experience of the unions, which helped partly counteract the structural disadvantages faced by migrant workers in making use of the NAALC machinery. The Carnival Workers H-2B case represents the flourishing of transnational linkages among a wide range of civil society actors promoting migrant rights, and resulted in substantial collaboration among national and sub-national states as well as civil society actors in addressing these issues. Continued transnational activism in the form of the gender discrimination case and joint advocacy to include migrant rights in the labour chapter of the USMCA shows that migrant rights activists view these struggles as an important aspect of the repertoire of contention (Tilly 2006) available to them, alongside other struggles and activities.

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Note
1. Interviews were carried out by Zoom or phone in April and May 2020.
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