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The First American Case Under the North American Agreement for Labor Cooperation

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The First American Case Under the North American Agreement for Labor Cooperation

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I. INTRODUCTION

On June 14, 1994 La Conexion Familiar, Inc. (“LCF”), a subsidiary of Sprint corporation located in San Francisco, California, terminated its business due to alleged financial difficulties within eight days of a union certification election¹ that promised to be the first successful representation drive among Sprint’s long distance operators.² LCF telemarketed long distance services, targeting recent Hispanic immigrants by providing all services and correspondence in Spanish. Notably, Sprint has no long distance employees represented by a union, although eighteen thousand employees are employed in their long distance division.³ In the face of what appeared to be a successful representation drive by the Communication Workers of America (“CWA”), LCF supervisors threatened plant closure should the union drive succeed;⁴ this despite the fact that such threats employed by management during election drives

1. On June 3, 1994, Communication Workers of America (“CWA”) filed a petition with the National Labor Relations Board requesting a certification election concurrent with a showing of support for the union by the majority of employees in the bargaining unit. On June 22, 1994, the parties stipulated to a certification election to be held on July 22, 1994. See *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 at 12, 1995 NLRB LEXIS 988, at *34 (Aug. 30, 1995).

2. See *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 at 25 n.20.

As early as 1991, Sprint became the target of unions affiliated with the Postal, Telegraph and Telephone International (“PTTI”)—the worldwide umbrella organization for postal and telecommunications unions—who urged Sprint to allow its American workers to unionize under the auspices of the CWA. The General Secretary of PTTI stated that Sprint paid several thousand dollars less per year in salaries than other unionized companies and that its health insurance scheme was inferior. See *International Union Pressuring Sprint*, Daily Lab. Rep. (BNA) No. 222, at A16 (Nov. 18, 1991).

3. See Clay Chandler and Frank Swoboda, *A Union Rehabilitates NAFTA: After Fighting Treaty, U.S. Labor Group Turns to Mexico for Help*, WASH. POST, Feb. 27, 1996, at C1.

4. See *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 at 34.

are illegal.⁵ In addition, many other unfair labor practices abounded at LCF, including the interrogation of employees concerning union activities, requests by supervisors that employees distribute anti-union buttons, management's solicitation of grievances of employees and the creation of the impression that management was conducting surveillance of employees' union activities.⁶

Sprint maintained that LCF was closed because of its financial standing.⁷ While it is uncontroverted that LCF was performing poorly financially, the contention that financial status was the predominant factor motivating the LCF board of directors in its decision to close the company is vigorously disputed.⁸ The union asserts that a discriminatory union avoidance strategy motivated the decision to close LCF in violation of the statutory guarantees of the National Labor Relations Act (NLRA)—specifically, the rights contained in Section 8(a)(3) and, by necessary implication, Section 7.⁹

The union points to evidence that, in spite of Sprint's assertions that it closed LCF due to its poor financial condition, Sprint was committed to retaining LCF as a going concern, a commitment that included giving the business time to implement a turn-around plan. This evidence includes the purchase of new expensive equipment, the expansion of office space, continued workforce training and the hiring of a new president one month before the decision to close.¹⁰ Additionally, the union argues that a falsely dated letter produced by a top Sprint labor official, memorializing a conversation that allegedly concerned placement of the soon-to-be terminated LCF employees, is circumstantial evidence of the company's anti-union sentiment. The union argues that such action demonstrates that Sprint was building a paper trail defense to the charge

5. See *NLRB v Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969).

6. See *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 at 34. The administrative law judge noted:

The Complaint herein contains various allegations of conduct violative of Section 8(a)(1) of the [N.L.R.A.]. The parties' stipulations and/or evidence presented by the General Counsel constitutes evidence of such violations, and the Respondent has proffered no contrary evidence. It therefore appears that a factual analysis of such violations is unnecessary, and I find, based on the stipulated or undenied record evidence, that the Respondent has committed such violations of Section 8(a)(1) of the [N.L.R.A.].

Id. at 34 n.27.

7. See *id.* at 14-15.

8. See General Counsel's Brief to the Board in Support of Exceptions to the Administrative Law Judge's Decision at 66-68, *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 (Aug. 30, 1995).

9. See Brief for Communication Workers of America, District Nine, and CWA Local 9410 in Support of the Decision of the Administrative Law Judge at 34, *LCF, Inc.*, N.L.R.B. Case 20-CA-26203 (Aug. 30, 1995).

10. See *id.* at 22-24.

of discriminatory closing of the plant.¹¹ The union additionally contends that Sprint's choice of paying terminated employees for sixty days pay rather than giving them sixty days notice prior to the closing of certain categories of business, as required by the Worker Adjustment and Retraining Act,¹² as is Sprint's usual pattern, demonstrates an unwillingness to risk the unionization of its workforce.¹³ This charge is buttressed by the fact that Sprint was forced to hire additional workers at its Dallas facility, where calls were routed following LCF's closing.¹⁴

Sprint argues, however, that financial considerations rather than anti-union sentiment dictated closing LCF. Sprint further contends that the decision to close LCF was all but made at a board of directors' meeting held before the company was aware of the pending union organization drive.¹⁵ Sprint also argues that a consistently smaller customer base each month precluded the operation of LCF as a profitable business.¹⁶ Sprint counters the circumstantial evidentiary value of its decision to hire Maury Rosas, a new President for LCF, one month before closing by suggesting that Rosas had value as a potential employee of Sprint,

11. *See id.* at 12-13. Sprint subsequently withdrew the falsified document. The letter's author told Sprint officials that he could not recall the alleged conversation ever taking place. *See id.* at 13. Sprint still maintains, however, that the conversation did take place. Moreover, Sprint argues because it brought forward the fact of the letter's falsification, the argument cuts the other way; *i.e.*, since it reported the falsified document to the government it clearly had nothing to hide with regard to the charge of anti-union discrimination. *See Respondent's Brief in Support of Decision by Administrative Law Judge at 21, LCF, Inc., N.L.R.B. Case 20-CA-26203 (Aug. 30, 1995).*

12. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102 (1988). Employers with one-hundred or more full-time employees or with employees, part-time and full-time, who total four thousand working hours per week are covered by the Act. *See id.* § 2101(a)(1). Notwithstanding specific exemptions and exceptions from the provisions of the Act, employers who are covered by WARN are, *inter alia*, required to give sixty days notice prior to closing their plants. *See id.*; *see also generally* Jessica L. Stein, *The Worker Adjustment and Retraining Notification Act (WARN): What is the Meaning Behind the Language?* 19 SETON HALL LEGIS. J. 648 (1995); John O'Connor, *Employers Be Forewarned: An Employer's Guide to Plant Closing and Layoff Decisions After the Enactment of the Worker Adjustment and Retraining Notification Act*, 16 OHIO N.U. L. REV. 19 (1989).

13. The risks to Sprint of union certification may be substantial insofar as operating costs. CWA offered a comparison of AT&T and Sprint salaries (based upon 1990 non-national data) which suggests a 24.7 % salary differential among operators of each company. Additionally, the figures suggest that AT&T paid 33.3% more than Sprint to its service representatives and 9.2% more than Sprint to its telephone technicians. *See Safeguards Needed for Workers on Information Highway, CWA Says*, Daily Lab. Rep. (BNA) No 134, at D19 (July 15, 1994).

14. *See Brief for Communications Workers of America, District Nine and CWA Local 9410 in Support of the Decision of the Administrative Law Judge at 32, LCF, Inc., N.L.R.B. Case 20-CA-26203.*

15. *See Respondent's Brief in Support of Decision by Administrative Law Judge at 7, LCF, Inc., N.L.R.B. Case 20-CA-26203.* Sprint contended that the board of directors merely put off the inevitable decision to close LCF at this time and resolved to give the LCF sixty more days to see if they could sell it or to see if the company could turn itself around. *See id.*

16. *See id.* at 3-4.

irrespective of LCF's viability.¹⁷ Sprint also presented evidence that closing in July rather than waiting until the end of the fiscal year resulted in net savings of four million dollars.¹⁸ In summary, Sprint argued and continues to argue that the decision to close LCF stemmed from its poor financial performance rather than a union avoidance strategy.

The NLRA grants eligible employees the statutory right to organize and form unions for the purpose of collective bargaining. Section 7 of the NLRA guarantees workers, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁹ Other statutory provisions of the NLRA are intended to safeguard the fundamental rights granted in Section 7. Section 8 of the NLRA includes as unfair labor practices, activities which interfere with Section 7.²⁰ Specifically, Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."²¹ An employer closing shop to avoid unionization of its workforce ostensibly violates the protective language of Section 8(a)(3), and by extension, the fundamental rights granted in Section 7.

American case law, however, has mitigated the clear mandate of these provisions.²² An employer may with impunity close its entire business simply to avoid unionization of its workforce, despite the statutory language of Sections 7 and 8.²³ Only when an employer closes part of a larger enterprise in a discriminatory manner is the decision properly scrutinized under the standard of Section 8(a)(3).²⁴ If, however, the plant is part of a larger concern, an employer's decision to close one of the shops is shielded from statutory remedies if it demonstrates that it had other "legitimate" motives, even where an anti-union motive exists.²⁵ Therefore, legal decisions interpreting the mandate of section

17. *See id.* at 7.

18. *See id.* at 8.

19. 29 U.S.C. § 157 (1994).

20. *See id.* § 158(a)(1).

21. *See id.* § 158(a)(3).

22. *See, e.g.,* *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

23. *See id.* at 273-74.

24. *See id.* at 275.

25. *See, e.g.,* *NLRB v. Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Supreme Court affirmed the Board's *Wright Line* standard, which allocated the burden of proof in employer discrimination cases in *NLRB v. Transp. Mgmt. Corp.*, 492 U.S. 393 (1983). Once the General Counsel of the NLRB has made a *prima facie* case that protected conduct under the NLRA has motivated discriminatory

8(a)(3) have injured the *actual rights* of American workers to organize into unions, delineated in Section 7.

This statutory structure, and, more importantly, its interpretation in case law, provided the framework through which the LCF closing was analyzed in the American legal system. Implicit to this analysis is the philosophic underpinning that capital should be able to freely and without impediment close shop, which in turn largely trumps the statutory rights granted in Section 7 of the NLRA.²⁶ Because the doctrine governing partial closings is settled law, the philosophic assumptions underlying the law are largely veiled from judicial scrutiny. Adherence to precedent in the American judicial system precludes significant re-ordering of the values embedded in the doctrine governing Section 8(a)(3) closings.

Recently, however, a new forum has opened for challenges to labor doctrines that are inimical to the broad statutory rights ostensibly granted in the express language of the NLRA. The North American Agreement on Labor Cooperation ("NAALC"),²⁷ the supplemental agreement to the North American Free Trade Agreement ("NAFTA"),²⁸ provides a new venue in which to mount challenges to enforcement and implementation of American labor law.

Although designed with marked deference for the sovereignty of each nation, NAALC allows for complaints against other member nations for non-enforcement of their own labor laws.²⁹ The result of political forces that threatened NAFTA's defeat, the labor accords were touted as an ameliorative response to poor Mexican working conditions and the downward pull they may exact on the American labor norm.³⁰ The purpose of the labor agreements was to provide a model of transna-

employer action, the burden shifts to the employer to prove that the action would have occurred regardless of the protected conduct. *See id.* at 400.

26. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 166-67 (1983).

27. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 [hereinafter NAALC].

28. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 [hereinafter NAFTA].

29. *See Review of NAFTA-Related Labor Issues to Be Conducted Cooperatively, DDL Says*, Daily Lab. Rep. (BNA) No. 66, at D11 (Apr. 7, 1994).

30. American labor organizations were decisively against NAFTA. *See* Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 404-05 (1995). The idea of supplemental labor agreements emerged during President Clinton's presidential campaign. One might surmise it was the result of his political attempt to keep the New Democratic coalition together. Although many labor groups remained vociferously opposed to NAFTA even after the NAALC was negotiated, NAALC did provide some political cover as far as the traditionally Democratic labor constituents were concerned.

tional labor relations whereby each party could monitor and spur enforcement of the other party's internal labor policy.

The international forum available under NAALC does not require that domestic labor law remedies be exhausted, merely that actions and remedies to enforce domestic labor laws have been initiated.³¹ Thus, the NAALC forum may function as a concurrent alternative to the remedy sought in any of the member nations so long as there is some credible allegation that a signatory country is not enforcing its domestic labor laws. Labor groups in the U.S., initially among the most vehement detractors of NAFTA and NAALC, and who conceived of NAALC as the barest and flimsiest of protections, have begun to employ the process implemented by the labor accords to further effectuate enforcement of American labor principles embodied in the NLRA, in addition to enforcing Mexican labor law.³²

The *LCF* case may, and arguably should, become a prototype for a new type of labor case. Major areas of American labor law are settled in ways that preclude or significantly limit judicial challenges and meaningful remedies.³³ The procedures that NAALC has put into place offer labor activists a way to challenge some of the implicit philosophic assumptions firmly embedded in American labor law. This Comment will focus upon the *LCF* case as it has and continues to proceed through the two track system contemplated by NAALC. This process will illuminate what are the beginnings of an emerging international strategy by labor unions to challenge domestic enforcement of American labor law.³⁴

Because the *LCF* case entered the NAALC arena by a complaint initiated in Mexico, this Comment primarily analyzes the interplay of

31. See Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX L.J. 159, 164-65 (1995) for the U.S NAO rules.

32. See Geri Smith & John Pearson, *Which Side (of the Border) Are You On? Well, Both: U.S. Unions Use NAFTA Side Accord to Step Up Efforts in Mexico*, BUS. WK., Apr. 4, 1994, at 50; Dora Delgado, *NAFTA: Jury Should Remain Out on Power of Labor Side Accord*, *Officials Say*, Daily Lab. Rep. (BNA) No. 42, at D25 (Mar. 4, 1996).

33. See Manuel Fuentes Muñiz, *The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 394-97 (1995). Muñiz argues that four areas where American labor law departs from the principles espoused in NAALC are anti-union discrimination, the scope of labor law coverage which excludes certain categories of employees, erosion of the right to strike through the doctrine of permanent replacement for economic strikers and doctrines governing access to unorganized workers in their workplace. See *id.* at 394-96. These doctrinal areas are arguably where American case law departs from a firm commitment to the right to organize into unions for the purpose of collective bargaining.

34. Obviously, such a strategy should be followed with regard to Mexican enforcement of labor law as well. This already has occurred. Four complaints have been issued via the NAALC process against Mexico for non-enforcement of its own laws. See Delgado, *supra* note 32, at D25. It is more important at this point to bring the American labor movement to appreciate what NAALC offers insofar as mounting challenges to U.S. enforcement of its own labor regime.

the labor laws, economies, and the NAALC processes between Mexico and the United States. This analysis is applicable to Canada as a signatory to the NAFTA agreement and any additional nations that accede to NAFTA under its present terms.³⁵

After briefly explaining the origin of NAALC, this Comment examines the initiation, complaint and adjudication or review processes in both the United States' administrative law forum and the NAALC forum as they consecutively occurred in the *Sprint* case. Although there are some limitations to this approach—perhaps it suggests a causal relationship between events that may not always be warranted and, further, falsely implies that relief under NAALC must be accompanied by judicial appeals—this is a superior way of looking at the process for a number of reasons. First, consecutive examination of the moves in each of the alternative forums helps illustrate how one action has at least the *potential* for influencing the outcome in the other forum. This has major implications as a strategy for labor unions. Moreover, comprehensive understanding of the dual track for relief available under NAALC is furthered by examining the *LCF* events as they unfolded chronologically, rather than as they navigate through each specific track.

II. THE ORIGIN OF NAALC

Political necessity gave birth to NAALC. Negotiation of NAFTA without any explicit provisions for labor standards provoked deep and spirited opposition among American labor unions and pro-labor politicians.³⁶ United States congressional representatives opposing NAFTA argued alternatively for an agreement that would harmonize labor norms in all participating countries, sanction violations from these norms as “actionable unfair trade practice[s],” and create a dispute resolution mechanism that would enforce North American labor standards.³⁷ Labor's opposition to NAFTA appeared to hinge on two ideas. First,

35. Chile is being discussed as the newest proposed member of the NAFTA. At this time it is not clear whether acceders to NAFTA would be brought under the same terms, including NAALC, as are the current signatories to the Agreement. See Pamela M. Prah, *International Labor: Talks With Chile on NAFTA Expansion Continue Unofficially, Negotiator Says*, Daily Lab. Rep. (BNA) No. 32, at D20 (Feb. 16, 1996). “Of particular interest to the U.S. Labor Department are the changes Chile is contemplating to its labor laws, Otero [Clinton's intended nominee as Labor Department's assistant secretary for international labor] said. These include reforms to make it easier for unions in Chile to enter into collective bargaining agreements with employers” *Id.*

36. There was opposition in Mexico as well. The Mexican opposition politicians advocated an alternative pact to NAFTA which would create European style structures to encourage trade and investment as well as promote North American labor solidarity. See Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 579-80 (1994).

37. See *id.* at 579 (quoting H.R. 1445, 103rd Congress, 1st Sess. (1993)).

labor feared that mutual elimination of tariffs and other trade barriers would lead to import surges from Mexico which would result in the loss of US jobs.³⁸ Second, labor feared Mexico's lack of enforcement of its labor laws would give Mexico a competitive advantage over the U.S. with a resulting loss of U.S. jobs.³⁹ Conspicuously absent from the NAFTA debate was any discussion of U.S. labor laws themselves being rife with loopholes in their commitment to workers' organizational and collective bargaining rights.⁴⁰

The dynamics of the 1992 presidential campaign paved the way for NAALC. Perot's vehement opposition to NAFTA countered President Bush's wholesale endorsement of the treaty he shepherded. Candidate Bill Clinton positioned himself between the two extremes. He supported NAFTA conditionally—he insisted upon negotiation of side accords by the signatory countries.⁴¹ Once President, Clinton negotiated labor and environmental side accords, an agreement of these issues was reached on August 13, 1993.⁴² Although the agreement addressed some of labor's concern, it hardly stemmed all of labor's opposition to NAFTA. Many labor leaders and pro-labor politicians continued to assail Clinton for his support of NAFTA and lobbied heavily against its passage.⁴³ In late November 1993, however, Congress passed the North American Free Trade Agreement Implementation Act,⁴⁴ which Clinton signed on December 8, 1993.⁴⁵

38. See Shellyn G. McCaffrey, *North American Free Trade and Labor Issues: Accomplishments and Challenges*, 10 HOFSTRA LAB. L.J. 449, 461 (1993). Import surges from Mexico were believed to be a threat to workers in general and to specific industries. A related concern was that Mexico's proximity to the U.S., the largest consumer market in the world, in conjunction with the special trade status accorded by NAFTA, would make Mexico a foreign company's dream locale for targeting the U.S. market. See *id.* at 463.

39. See *id.* at 461-62; see also *Coalition Including Labor Groups Launches Campaign to Defeat NAFTA*, Daily Lab. Rep. (BNA) No. 243, at A5, (Dec. 17, 1992) (quoting the International Brotherhood of Teamsters President as saying that NAFTA "will give companies the opportunity to eliminate even more good American . . . jobs and exploit workers in Mexico").

40. See Charles W. Nugent, Comment, *A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform*, 7 TRANSNAT'L LAW. 197, 224 (1994).

41. See Judith H. Bello, *The Current Status of the North American Free Trade Agreement*, 2 U.S.-MEX L.J. 5, 6-7 (1994).

42. See *Agreement on Side Deals Reached Among NAFTA Parties*, Daily Lab. Rep. (BNA) No. 156, at D3 (Aug. 16, 1993).

43. See Chandler & Swoboda, *supra* note 3, at C1. "U.S. labor unions in 1993 spent a small fortune in an unsuccessful effort to kill the North American Free Trade Agreement." *Id.* The bitter fight against NAFTA's passage may explain labor's slow response to the procedure's available through NAALC. There was so much vociferous anti-NAFTA rhetoric that it may now be very difficult for these detractors to switch gears and explore what the mechanism has to offer.

44. Pub. L. No. 103-82 (1993).

45. See Murphy, *supra* note 30, at 403 n.2 (1995). Congress included a provision in its implementation legislation for NAFTA that required the signatory countries to enact a North

NAALC provides an elaborate and complicated framework for protecting labor standards and conditions in the signatory countries that focuses primarily upon mutual cooperation. Basically, compliance with NAALC means compliance with and enforcement of the signatory's own domestic labor law. In this way, the agreement respects the sovereignty of the member countries' labor law.⁴⁶ Important to understanding this approach is that both Canada and Mexico have more protective labor regimes than the United States.⁴⁷ Although U.S. concerns over Mexican labor conditions were the driving impetus leading to NAALC, these conditions do not stem from a lack of Mexican constitutional or statutory guarantees; rather, problems with *enforcement* of Mexican labor laws, particularly in the *maquiladora* region, account for U.S.'s topical vision of Mexico as lacking any labor guarantees.⁴⁸ This lack of enforcement arguably stems from problems with corrupt union leaders and the alliances between the majority of Mexican unions and the gov-

American Agreement on Labor Cooperation prior to NAFTA going into effect. *See id.* at 405. NAALC opened for signature September 8, 1993, and entered into effect January 1, 1994. *See id.* at 426 n.13.

46. NAALC, *supra* note 27, art. 2, at 1503 provides:

Affirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

This is in contrast to an explicit harmonizing approach—one that establishes one standard for all member countries. The implicit hope of NAALC is that free trade with its ameliorative effect on the economies of all signatory countries and better enforcement of each country's domestic labor regime will lead to a higher degree of harmonization of the labor regimes of the three member countries.

47. MEX. CONST. arts. 5, 123. Although Mexico has had lax enforcement of its laws, Mexican labor law is constitutionally based. Both the Mexican Constitution and the 1970 Federal Labor Law grant employees and employers freedom of association and the right of unionization. *See* "Ley Federal Del Trabajo," D.O. (Mex.). Furthermore, Mexican workers are offered in some areas more substantive protections than US workers enjoy. Mexican employees are entitled to profit sharing equal to ten percent of their employer's pretax income and can only be terminated for cause. *See* Elizabeth C. Crandall, Comment, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?* TRANSNAT'L LAW. 165, 176-77 (1994). On both the federal and state level, Mexican laws provide for boards to arbitrate allegations of violations of labor protections or of collective bargaining agreements. *See id.* at 177. So long as a strike is termed "legally existent," i.e., the majority of workers voted for it and the strike comports with strict procedural requirements, upon termination of the strike all workers are entitled to return to work provided they have not been involved in illegal activity. *See* Nugent, *supra* note 40, at 208-09.

In fact, Mexican law is arguably even more protective of workers than Canadian law. *See* Francisco Breña Garduño, *The Impact of NAFTA on Labor Legislation in Mexico*, 1 U.S.-MEX. L.J. 219, 221 (1993). NAALC logically focuses on enforcement of the labor regime of each country. It would be incongruous to impose the less protective labor regime of the U.S. upon the signatory countries to ameliorate Mexico's labor conditions.

48. *See* Crandall, *supra* note 47, at 177-81.

erning party. Independent unions, with organizing goals independent from the politics of the ruling party, struggle precipitously for their own existence in a system which scarcely recognizes them.⁴⁹ NAALC addresses these concerns and others by providing mechanisms whereby the compliance of the signatory countries with their own domestic labor regimes is encouraged.

The Preamble of NAALC reiterates the signatories' resolve in NAFTA to "create an expanded and secure market for the goods and services produced in their territories, enhance the competitiveness of their firms in global markets, create new employment opportunities and improve working conditions and living standards in their respective territories, and protect, enhance and enforce basic workers' rights."⁵⁰ In pursuit of this the signatories agreed to promote and incorporate the following principles into their domestic labor law and practices:

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 protection 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.⁵¹

To more effectively promote these principles and encourage enforcement of the signatory's domestic labor law, NAALC created tri-lateral structures among the signatories, as well as internal governmental structures in each of the participating nations.⁵²

NAALC established a tri-national commission, the Commission for Labor Cooperation ("Commission"), to effectuate its goals and procedures.⁵³ The Commission consists of a ministerial council ("council") and Secretariat.⁵⁴ The council is the governing body of the Commission and is composed of labor ministers from each signatory country. The council meets at least once each year.⁵⁵ Its responsibilities include guid-

49. See *id.* at 178-79.

50. NAALC, *supra* note 27, preamble, at 1502.

51. *Id.* annex 1 at 1515-16.

52. See *id.* arts. 8-16 at 1504-07.

53. See *id.* art. 8, § 1 at 1504.

54. See *id.*, § 2 at 1504.

55. See *id.* art. 9 at 1505.

ing and prescribing the operations of the Secretariat and “of any committees or working groups convened by the council; establishing priorities for cooperative action and developing technical assistance programs; facilitating consultations and information exchange between the parties; and promoting the collection and publication of data on enforcement, labor standards, and labor market indicators.”⁵⁶

The Secretariat has an executive director and a small staff, including a labor law director.⁵⁷ The Secretariat provides reports on labor law and administrative procedures, labor conditions and human resource development.⁵⁸ It contracts with outside entities to provide many of these reports.⁵⁹ The Secretariat is also charged with preparing any special studies that the council may request under NAALC’s special study clause.⁶⁰ A “special study” may consider all pertinent information in its conclusions, including that of experts, and may make recommendations upon the subject matter.⁶¹

NAALC creates three National Administrative Offices (“NAO”s) in each of the signatory countries.⁶² They are charged with “bring[ing] labor complaints to the attention of the Commission for resolution or dispute settlement” and “provid[ing] publicly available information requested by the [S]ecretariat for background reports or studies, another party’s NAO, or an Evaluation Committee of Experts.”⁶³

Any interested person may bring a complaint to an NAO.⁶⁴ Article 16(3) provides that “[e]ach NAO shall provide for the submission . . . of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.”⁶⁵ Violations under NAALC

56. Crandall, *supra* note 47, at 183.

57. See Telephone Interview with Lance A. Compa, Labor Law Director of the NAFTA Labor Secretariat (Feb. 12, 1996).

58. See NAALC, *supra* note 27, art. 14, § 1 at 1506.

59. See Telephone Interview with Lance A. Compa, *supra* note 57.

60. See NAALC, *supra* note 27, art. 14, § 2 at 1506-07.

61. See *id.*

62. See *id.*, art. 15 at 1507.

63. Crandall, *supra* note 47, at 184. Betty Southard Murphy notes,

As part of its investigations, Article 21 of NAALC permits a NAO to seek the assistance of the NAO in the country being investigated regarding the requested country’s labor law, administration of those laws, and the labor market conditions in the country. The purpose of this provision is clear: it allows the investigating NAO to make the most informed decision as to whether the country being investigated is effectively enforcing its laws. The requested NAO, in responding to the request, must provide any publicly available information concerning its domestic laws, procedures and policies. (citations omitted).

Murphy, *supra* note 30, at 411.

64. See Crandall, *supra* note 47, at 185.

65. NAALC, *supra* note 27, art. 16, § 3 at 1507.

occur when another party to the treaty is not upholding its obligation to enforce its own labor laws. The NAO's function of bringing labor complaints to the Commission emphasizes their most interesting aspect. Despite the labor side accord's deep commitment to the sovereignty of each signatory, the NAOs necessarily encroach upon this sovereignty in some sense to investigate and evaluate complaints that other member nations are failing in their obligations under NAALC. Thus, the NAOs must evaluate and review the labor law of the other participating countries.⁶⁶ If, following the investigation and review, the NAO determines the Party has failed to comply with its obligation under NAALC, the NAO may recommend ministerial consultations.

Only three of the eleven principles listed above, however, may go forward to dispute resolution by an Arbitral Panel.⁶⁷ Complaints based upon the right of association, the right to bargain and the right to strike avail themselves only in the consultation provisions of NAALC.⁶⁸ This has spurred some of the most vehement criticism of NAALC. The argument is that in an effective labor regime these rights are more fundamental than any others and that their absence from the enforcement structure effectively eviscerates any commitment NAALC has to a potent labor movement in any of the signatory countries.⁶⁹

The second tier of enforcement provides for evaluation and recommendations by a tri-national Evaluation Committee of Experts ("ECE").⁷⁰ Five of the principles espoused in the NAALC rise no further than this second tier, including the prohibition of forced labor, equal pay for men and women, employment discrimination, compensation in the case of work accidents and occupational disease, and protection of migrant workers.⁷¹

The remaining principles that NAALC embodies—restrictions on labor by children and young persons, occupational safety and health laws and provisions relating to minimum wage—do rise above the consultation and recommendation stages.⁷² A pattern of violations here may

66. See Compa, *supra* note 31, at 163.

67. See Lance A. Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 355 (1995). This accounts for much of the criticism of NAALC. Arguably, the rights of association, the right to bargain and the right to strike are the most important rights to any labor regime that is committed to empowering its workers. Without these rights, labor has very little economic muscle to exert in protection of itself. See *id.* at 355-57.

68. See *id.* at 356.

69. See Muñiz, *supra* note 33, at 392.

70. See NAALC, *supra* note 27, art. 23 at 1508.

71. See *id.*, art. 49 at 1513-14. By defining "technical labor standards," Article 49 eliminates from treatment by the ECE the right of association, the right to organize and bargain collectively and the right to strike. See *id.*

72. See *id.*, arts 38-41 at 1511-13.

result in fines and suspension of benefits of the signatory country.⁷³

A pro-labor perspective may see only *what is not offered*, for the weaknesses of the system are glaring. As Manuel Fuentes Muñiz notes,

First, the fundamental labor rights that give voice to working people—freedom of association and the right to engage in political action, rights to organize and bargain collectively, and the right to strike—are excluded from anything more than consultation. Other issues of paramount importance are open to an evaluation, but not arbitration and potential sanctions. Finally, even the three subjects potentially susceptible to trade sanctions depend on enforcement of national law, not compliance with international standards. Weak national laws are insulated from reform, as long as they are applied.⁷⁴

This view is common and most likely accounts for the unhurried pace of labor to instigate complaints and devise innovative strategies to attempt to extract some measure of relief from NAALC.⁷⁵

The first challenges brought under NAALC alleged that Mexico failed to enforce its labor law with respect to anti-union discrimination against Mexican workers organizing for an independent union.⁷⁶ The International Brotherhood of Teamsters (“IBT”) and the United Electrical Radio and Machine Workers of America (“UE”) filed complaints with the U.S. NAO on February 14, 1994, shortly after the provisions of NAALC went into effect.⁷⁷ The IBT submission addressed alleged events at a Honeywell plant in Chihuahua and the UE submission concerned events at a General Electric plant in Ciudad Juarez.⁷⁸ The complaints alleged anti-union discrimination, unlawful under Mexican law.⁷⁹ The U.S. NAO reviewed the allegations in the complaints as they related to the principles of right of association and freedom to organize.⁸⁰ Although the U.S. NAO conducted hearings, communicated with the

73. *See id.*

74. Muñiz, *supra* note 33, at 393.

75. A more rigorous test of NAALC might include bringing cases upon each of the eleven principles contained in Annex 1. So far the cases testing the provisions of NAALC have only alleged non-enforcement of laws, with regard to the principles that may be enforced by no higher mechanism than ministerial consultations. This is a slow assault considering patterns of non-enforcement with regard to some of the principles—child labor standards, minimum wage standards and occupational safety and health—which can result in monetary fines and suspension of NAFTA benefits. *See NAALC, supra* note 27, arts. 39-41 at 1511-13.

76. *See Compa, supra* note 31, at 159.

77. *See id.* at 165.

78. *See id.*

79. *See id.* at 165-66. Compa notes, “[b]oth submissions were accompanied by sworn affidavits from Mexican workers alleging that they were discharged for union activity. Such anti-discrimination is unlawful under the Mexican Constitution, the Mexican Federal Labor Law, and ILO Convention 87, ratified by Mexico and thus part of its law.” *Id.*

80. *See id.* at 166. These principles are susceptible only to ministerial consultations. *See NAALC, supra* note 27, art. 22 at 1508.

Mexican NAO, commissioned studies of Mexican labor law and administrative procedures, and recommended a series of cooperative programs regarding associational and organizing rights, it did not, in its final report, conclude that Mexico failed to enforce its domestic labor law.⁸¹

The next claim filed against Mexico for non-enforcement of its laws involved the Sony Corporation. The complaint alleged, and the U.S. NAO report agreed, that workers were probably fired because of their independent organizing activities and that the Mexican government thwarted workers' efforts to organize an independent union.⁸² Following the U.S. NAO report, U.S. Labor Secretary Robert Reich requested ministerial consultations with his Mexican counterpart pursuant to the NAALC agreement.⁸³ The ministerial consultations resulted in an agreement that directed the Mexican NAO to bring independent experts together to study union registration.⁸⁴ In addition, the fired Mexican workers received public hearings. The consultations also led to an agreement that the signatory countries would instruct the respective NAOs to initiate a program to explain and improve union registration.⁸⁵

III. *MILLER V. LCF*

The regional office in San Francisco, California of the National Labor Relations Board (the "Board"), the agency charged with administering the NLRA, documented over fifty separate incidents of unfair labor practices in its investigation of the LCF closing. It asked Sprint to consider reaching a settlement that included reopening the plant and restoring its employees to their former positions.⁸⁶ The Board issued an unfair labor practice complaint against Sprint on September 12, 1994, that contained, *inter alia*, the allegation that Sprint had closed the facility to avoid unionization of its LCF workforce. On September 16, the Board announced its intention to seek a temporary injunction under Section 10(j) of the NLRA⁸⁷ to restore the status of the plant pending the Board's adjudication of the unfair labor practices.⁸⁸

81. See *Compa*, *supra* note 31, at 176.

82. See Pamela M. Prah, *NAFTA: U.S., Mexico Unveils Plans in Response to Sony Charge Filed Under NAFTA Accord*, Daily Lab. Rep. (BNA) No 123, at D15 (June 27, 1995).

83. See *id.*

84. See *id.*

85. See *id.*

86. See *NLRB Announces Intent to Issue Complaint Against La Conexon Familiar, a Subsidiary of Sprint, Over Closure of its San Francisco Facility*, Office of the General Counsel, National Labor Relations Board, News Release, N.L.R.B. 94-2009 (Sept. 9, 1994), available in 1994 WL 499181.

87. See 29 U.S.C. §§ 151-69 (1994).

88. See *NLRB to Seek Injunctive Relief to Compel La Conexon Familiar, a Subsidiary of Sprint Corp., to Reopen its San Francisco Facility*, Office of the General Counsel, National Labor

Section 10(j) of the NLRA empowers the NLRB to seek injunctive relief in United States District Court to “‘alleviate the threat that delay in the Board’s processing of the unfair labor practice claims would’ undermine the goals of the NLRA.”⁸⁹ At issue in *Miller v. LCF, Inc.* was the right to organize into labor unions for the purpose of collective bargaining provided for in Section 7 of the NLRA, and related anti-discrimination provision in Section 8(a)(3) which expressly promises protection from “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”⁹⁰

The right of employees to organize to form unions was an express goal of the NLRA. Protection from employer discrimination for exercising that right was also one of the NLRA’s goals. The Wagner Act was enacted during the Depression, when problems of economic stagnation and unemployment were rampant. Supporters viewed its provisions as a solution to the economic problems that beset the country: “[Senator Wagner’s] concern, and the concern of those who shared his views, was not simply with organizational rights, but with the employees’ effective use of those rights to increase their wages, and thereby to increase their purchasing power.”⁹¹ The NLRA was intended to wield economic muscle both to provide relief from industrial strife and to bolster the consumer market by providing a living wage.⁹² Thus, a retaliatory plant closing would ostensibly offend the very core of the underlying premise of the NLRA.

Case law, however, has mitigated the anti-discriminatory provision of Section 8(a)(3) despite its express mandate. In *Textile Workers v. Darlington Manufacturing Co.*,⁹³ the Supreme Court held that an employer can, under the auspices of the NLRA, lawfully close an entire business even for anti-union motives. This holding reflects a judicial reticence to interfere with the prerogatives of capital. Section 8(a)(3) is violated only when an employer closes *part of a business* for anti-union reasons. Only then, the Supreme Court asserts, can the employer expect to reap the benefit of his discrimination because discriminatory partial

Relations Board, News Release, N.L.R.B. 94-2014 (Sept. 16, 1994), available in 1994 WL 512067.

89. *Miller v. LCF, Inc.*, No. C-94-3372-VRM, 1994 WL 669837, at *1 (N.D. Cal. Nov. 18, 1994) (quoting *Miller v. California Pacific Medical Center*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc)).

90. 29 U.S.C. § 158(a)(3) (1994).

91. Joan Baker, *NLRA Section 8(a)(3) and the Search for a National Labor Policy*, 7 HOFSTRA LAB. L.J. 71, 77 (1989).

92. See Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 77 (1993).

93. 380 U.S. 263 (1965).

closing may chill exercise of the remaining employees statutory rights under Section 7.⁹⁴

Clearly, the LCF workers' attempt to form a union is a protected activity under the NLRA. Moreover, injunctive relief ordering the plant re-opened would be an appropriate interim remedy where the actual closing of the plant is a Section 8(a)(3) violation.⁹⁵ Thus, injunctive relief requires that a plant's closure be motivated by the purpose of "discourag[ing] membership in [a] labor organization."⁹⁶ The fact that LCF was a subsidiary of Sprint means that the "discouragement" need not be limited to the employees of LCF, but can include other employees of Sprint, the ultimate employer.

Evaluating motive in such cases requires sifting through competing arguments. The Board argued that Sprint closed LCF to avoid unionization of its workforce. Sprint countered with evidence that the business was closed for financial reasons. "Mixed motive" cases are evaluated under the standard which emerged from the *Wright Line* case.⁹⁷ If the union makes a *prima facie* case that the protected conduct was a motivating factor in the employer's alleged unlawful action, the *Wright Line* burden requires an employer to demonstrate that the same action would have taken place in the absence of the protected activity.

In *Miller v. LCF, Inc.*, the Board presented sufficient evidence to make out a *prima facie* case that anti-union sentiment was a motivating factor in the plant closure.⁹⁸ Therefore, Sprint had the burden of demonstrating that the closure, at the time it was announced, was a foregone conclusion. Because Sprint presented compelling evidence to that end,⁹⁹ the court concluded that the employer had a good chance of meeting its *Wright Line* burden. The judge held injunctive relief inappropriate: although the Board did have a fair chance of prevailing on the merits, Sprint could demonstrate the closure would have taken place even in the absence of union activity, as required by the *Wright Line* standard.¹⁰⁰ Thus, the balance of hardships did not favor the Board.

94. See *id.* at 275; PHILIP A. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATION, SUBCONTRACTING AND AUTOMATION* 172-73 (1983).

95. See 29 U.S.C. § 160(j) (1994).

96. *Id.* § 158(a)(3).

97. See *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The *Wright Line* test, formulated by the Board, was expressly approved as the proper standard for these types of evaluations by the Supreme Court in *NLRB v. Transp. Management, Corp.*, 462 U.S. 393, 404 (1983).

98. See *Miller v. LCF, Inc.*, No. C-94-3372-VRM, 1994 WL 669837, at *4-*6 (N.D. Cal. Nov. 18, 1994).

99. See *id.* at *6-*8. Sprint presented a projected loss of nearly four million dollars if it continued operating LCF throughout 1994. See *id.* at *6.

100. See *id.* at *9.

The court reasoning on the balance of hardship analysis is interesting. The court noted that “[it] must ‘take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the board’s remedial authority’ when balancing hardships.”¹⁰¹ The court balanced the hardship the discharged employees would endure should the Board prevail against the hardship that re-opening the facility would impose upon Sprint.¹⁰² All of the company’s equipment had been dismantled and its customer base had eroded.¹⁰³ If Sprint prevailed before the administrative law judge, it “would not be reimbursed for operating losses incurred as a result of the injunction.”¹⁰⁴ This burden was weighed against the hardship on the employees who had lost their jobs in the event the Board prevailed.¹⁰⁵ The “chill” factor was only considered with respect to former LCF employees who might be wary of exercising their statutory rights in the future. Notably missing from the opinion is any reference to the other Sprint employees whose Section 7 rights might be chilled if the plant closing was adjudicated an 8(a)(3) violation.

The *Miller* court reasoned that “[a] make-whole order awarding back pay and other damages to LCF’s former employees in this case would sufficiently fulfill the policies of the NLRA.”¹⁰⁶ Moreover, the court continued, “[r]eopening LCF now will not cure any damage done to the union or the bargaining unit. The substantial hardship to Sprint of inflicting substantial losses for which there is no possible redress significantly outweighs any public interest in reopening the facility.”¹⁰⁷ The holding, however, in *Darlington*—that partial closings motivated by union animus are unfair labor practices—was predicated on the fact that “a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.”¹⁰⁸ Back pay and other damages arguably will not remedy the chill the plant closing may have on other employees of Sprint when they consider exercising their right to unionize. The fact that Sprint was the major focus of a CWA organization drive since 1992 arguably compels consideration in the hardship

101. *Id.* at *8 (quoting *Miller v. California Pacific Medical Ctr.*, 19 F.3d 449, 460 n.5 (9th Cir. 1994) (en banc)).

102. *See id.*

103. *See id.*

104. *Id.*

105. *See id.*

106. *Id.*

107. *Id.* at *9.

108. *Darlington Mfg. Co.*, 380 U.S. at 275.

analysis of the "chill" effect on other Sprint employees.¹⁰⁹

Intuitively, the idea of ordering an employer to re-open a plant seems anti-American, despite the express statutory language of the NLRA. Perhaps this is because our sense of appreciation for employers' property prerogatives is so strong and ingrained. This denial of relief in *Miller* catapulted the facts of that case into another forum in the form of a complaint against the U.S.

IV. THE COMPLAINT AGAINST THE UNITED STATES UNDER NAALC

The U.S. district court's denial of a temporary restraining order in *Miller v. LCF, Inc.* formed the alleged violation of NAALC in a complaint filed, by the Telephone Workers of the Republic of Mexico on November 18, 1994. The complaint further alleged that the prolonged NLRB appeals process itself constitutes non-compliance with the principles espoused in Annex One of NAALC.¹¹⁰ The Mexican union brought the complaint pursuant to the provisions guaranteed in Annex One of NAALC, specifically "freedom of association and protection of the right organize."¹¹¹

To better understand the politics behind the complaint, two alliances are important to note. The first is a proposed joint venture between Sprint and Telefonos de Mexico, a company which currently enjoys a telephone service monopoly in Mexico. On December 14, 1994, Sprint Corporation announced an alliance with Telefonos de Mex-

109. See generally *International Union Pressuring Sprint*, *supra* note 2, at A16.

110. See Complaint Filed by the Union of Telephone Workers of the Republic of Mexico With the National Administrative Office of the United States of Mexico, *reprinted in Complaint Against Sprint Filed by Mexican Telephone Workers Union*, Daily Lab. Rep. (BNA) No. 28, at D27 (Feb. 10, 1995). Part of the complaint reads as follows:

According to the law in the United States of America known as the National Labor Relations Act, workers have the right to freely form unions. . . . From the beginning of February and through July the management of Sprint/La Conexion Familiar in San Francisco engaged in an anti-union campaign, engaging in at least 48 violations of the National Labor Relations Act, violations which have been documented in the records of the National Labor Relations Board. . . . This irregular action by Sprint caused the workers to turn to the appropriate judicial authorities to demand, among other things, their reinstatement. This request for immediate reinstatement through a federal injunction was denied, which constitutes [a] serious violation of the North American Agreement on Labor Cooperation by U.S. authorities.

In addition a trial was held, in which it was demonstrated that more than 50 violations of the law were committed. This trial will probably be decided between March and June. An appeal by the losing party could prolong the proceeding another two to three years according to experts. This slow process demonstrates the ineffectiveness of U.S. law in complying with the principles contained in Annex One of the North American Agreement on Labor Cooperation to which it is now obligated.

111. See *id.* NAALC, *supra* note 27, annex one at 1515.

ico to provide long-distance service between Mexico and the United States; the announcement precipitated a rise in Sprint's stock price by \$1.37 per share.¹¹² The alliance will additionally provide data and video service between Mexico and the United States.¹¹³ The long-distance monopoly enjoyed by Telefonos de Mexico expires in 1997,¹¹⁴ at which time foreign companies will be allowed to compete in the Mexican market. Other companies, such as GTE and MCI, have also formed joint ventures with Mexican companies to effectively compete in Mexico's profitable long-distance market.¹¹⁵ It is important to note these proposed joint ventures because immense profits hinge upon capturing and maintaining a large percentage of the Mexican market.

Another important alliance to the NAALC complaint process was the alliance entered into by the Communication Workers of America on February 12, 1992, with the Telephone Workers Union of the Republic of Mexico.¹¹⁶ The Telephone Workers Union of Mexico initiated the complaint in order to promote the mutual interests of the telecommunications workers that they and the CWA represented.¹¹⁷ Because of the structure of NAALC—where complaints constitute allegations that another signatory country is not enforcing its own labor laws—labor alliances likely will become increasingly utilized as a strategy to extract relief.

The following information was presented in the Complaint:

Sprint/ La Conexion Familiar fired a total of 235 employees and workers and intends to remove all traces [desaparacer] of this enterprise in San Francisco, California.

112. See *News: Business*, CHI. TRIB., Dec. 14, 1994, at 3.

113. See *World Watch: International Business*, L.A. TIMES, Apr. 20, 1995, at 4.

114. See Damian Fraser, *International Company News: GTE Agrees Mexican Telephone Venture*, FIN. TIMES, Sept. 28, 1994, at 34.

115. At the time this Comment was written Mexico's international long-distance market was valued 1.5 billion dollars. See *Sprint, Grupo Iusacell Plan Joint Venture in Mexico*, WALL ST. J., July 26, 1994, at A13.

116. See Dora Delgado, *International Labor: Mexican NAO Report Says U.S. Labor Laws May Have Been Violated in Sprint Firings*, Daily Lab. Rep. (BNA) No. 107, at D3 (June 5, 1995).

117. See *Complaint Filed by the Union of Telephone Workers of the Republic of Mexico With the National Administrative Office of the United States of Mexico*, *supra* note 110; see also Robert Collier, *Sprint Accused Under NAFTA at S.F. Hearing/U.S., Mexico Unions Protest Cutting Jobs of 235 Latinos*, S.F. CHRON., Feb. 28, 1996, at A3. This newspaper article credits Morton Bahr, president of the Communications Workers of America, with asking the Mexican union to file the complaint under the NAALC. Francisco Hernandez, President of the complaining Mexican union, makes it clear that his complaint issued in part because the case was "an example of the most flagrant violations of workers' rights." Hernandez, however, also admits that his union filed the complaint partly out of self-interest, in that Sprint, in its joint venture with Telefonos de Mexico, was trying to break the union's traditional closed shop representation of company workers. See *id.*

Throughout the United States Sprint has 16,000 long distance workers.

The workers of La Conexion Familiar are the only Sprint long distance workers who have pursued their right to a union election to the final step.

Sprint has a corporate policy of preventing the unionization of its workers.

The attempt by the workers of La Conexion Familiar to join a union raised expectations among other workers at Sprint.

These facts, together with the slow process of seeking remedies to violations of labor law in the United States, explain the vicious anti-union policy at Sprint which caused it to fire all its workers and close the facility alleging financial problems.

Because of these events, it is not illogical to believe that a multinational corporation which forms an alliance with another will try to impose conditions which threaten workers and which are violations of the rights contained in the labor laws of each country. We do not want this to happen with Sprint in Mexico.¹¹⁸

The complaint asked that the Mexican NAO investigate the charge pursuant to the power accorded it under Article 16 of the NAALC agreement.¹¹⁹ It further requested that the Mexican NAO: hold a hearing in San Francisco to obtain testimony from the fired workers and to recommend an effective judicial remedy; declare Sprint in violation of the labor norms in the NAALC; that, pursuant to the Mexican Constitution, Sprint be foreclosed from operating in this manner and be foreclosed from operating at all in Mexico because of its abysmal labor record; that Sprint reinstate the fired workers; that Sprint declare it will respect the rights of workers as set out in the principles in NAALC if it should operate in Mexico; that the signatory nations convene a forum of government, management and labor representatives from the telecommunications industry in order to better promote the workers' rights and conditions; and that the Mexican NAO develop standards that will help promote Mexican workers' rights when employed in the United States.¹²⁰

The complaint demonstrates familiarity with U.S. labor doctrine in that it comports with the elements necessary to allege a partial, illegal closing under *Darlington*.¹²¹ The non-enforcement of the signatory's domestic law—the standard for a NAALC violation—is the denial of

118. See Complaint Filed by the Union of Telephone Workers of the Republic of Mexico with the National Administrative Office of the United States of Mexico, *supra* note 110.

119. See *id.*

120. See *id.*

121. *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

injunctive relief in *Miller v. LCF, Inc.* which the complaint alleges renders the Section 7 rights expressly granted by the NLRA, nugatory. The injury, the "chill" to remaining workers of Sprint, absent in the hardship balancing done by the district court, is expressly declared in the complaint.¹²²

The veiled reference to Sprint's attempt to gain access to the Mexican market must be viewed as an exercise of *realpolitik* by the union. Now, Sprint's interest in capturing a substantial share of the Mexican market may be susceptible to heightened scrutiny and negative publicity.

V. THE MEXICAN NAO REPORT

The Mexican NAO accepted the submission and investigated the charge.¹²³ Released June 2, 1992, the Mexican NAO report concluded that U.S. workers' rights to organize were probably violated by the closing of the LCF facility by Sprint. The report noted:

After studying matters related to U.S. labor legislation related to Public Submission 9501/NAOMEX [the complaint], particularly under the rubric of freedom of association and the right of workers to organize, the NAO of Mexico is concerned about the effectiveness of certain measures intended to guarantee these fundamental labor principles.

During the analysis it became clear that legislators, and U.S. federal authorities responsible for the application of legislation, give great importance to these principles, and rights.¹²⁴

122. In fact, the "chill" in this case may be very substantial. A stipulation agreed to by Sprint and the CWA in the subsequent trial before an ALJ on the unfair labor charges indicates that union organization had been taking place at Sprint long distance facilities for some time:

The Communications Workers of America has attempted to organize Sprint workers assigned to long distance operations as a major focus for its national organizing efforts since at least 1990. Since at least 1990, CWA has had various levels of public organizing activity, led by unit employees, at various Sprint long distance locations, including [a list of at least 16 locations]. CWA buttons and T-shirts have been worn from time to time by Sprint employees at the foregoing locations. Also, employees and CWA organizers have, from time to time, publicly handed out organizational materials at all of such locations. There has, as yet, been no petition for a representation election filed on behalf of employees at any Sprint long distance locations.

LCF, Inc., N.L.R.B. Case 20-CA-26203 at 25 n.20 (Aug. 30, 1995).

123. See Dora Delgado, *NAFTA: Mexican Official Says Investigation of Sprint Not in Retaliation for Sony Case*, Daily Lab. Rep. (BNA) No. 87, at D19 (May 5, 1995). There was some speculation that the Mexican NAO had accepted the Sprint case in retaliation for the complaint issued by the U.S. NAO against Mexico in the *Sony* case. The Mexican NAO, however, vehemently denied charge. See *id.*

124. See *Report on Review of Public Submission 9501*, National Administrative Office of Mexico for the North American Agreement on Labor Cooperation, at 11 (U.S. NAO staff trans., May 31, 1995) [hereinafter *Mex. NAO Report*].

The report specifically referred to the Mexican government requirement of evaluation of the effects on workers when an employer suddenly decides to shut down.¹²⁵ In other words, Mexican law limits the employer's prerogative to unequivocally make decisions about its capital resources. The report requested ministerial consultations pursuant to Article 22 of NAALC because it could not conclude that the United States enforced its own labor laws.¹²⁶

The Mexican NAO report points out another weakness of American labor law. *First National Maintenance v. NLRB Corporation* held that an employer had no duty to bargain with its certified union over its decision to close a segment of the business and terminate the employees that worked there.¹²⁷ The union had alleged 8(a)(1) and 8(a)(5) violations, asserting that plant closure was a "term and condition" of employment and was therefore within the province of the employer's duty to "bargain in good faith."¹²⁸ Section 8(a) states "[i]t shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)]"¹²⁹ Section 9(a) defines the parameters of collective bargaining as "rates of pay, wages, hours of employment, or *other conditions of employment*."¹³⁰ Although both lower courts held for the union, the Supreme Court overruled them. The Supreme Court's decision hinged on the premise that the entrepreneurial character of the decision at issue precluded it from being a term or condition of employment.

The Court announced the standard under which bargaining over a plant closing should be evaluated: ". . . [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."¹³¹ The Court's application of the test trumped the "incremental benefit that might be gained through the union's participation in making the decision" with the employer's need to make purely economic decisions.¹³²

The Court's conclusion was far from foregone. Section 8(d) of the NLRA expressly mitigates the burden that bargaining in good faith

125. See Delgado, *supra* note 116, at D3.

126. *Mex. NAO Report*, *supra* note 124, at 12.

127. 452 U.S. 666, 686 (1981).

128. *See id.* at 670.

129. 29 U.S.C. § 158(a)(5) (1994).

130. *Id.* § 159(a) (emphasis added).

131. 452 U.S. at 679.

132. *Id.* at 686.

would impose on the employer in the face of a plant closing. It notes, "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . [it] does not compel either party to agree to a proposal or require the making of a concession."¹³³ As one commentator noted:

The flaws in [the] . . . decision . . . are too many to enumerate in full These flaws can be summed up—in much the same manner as in the *Darlington* case—as an unexamined exaltation of the employer's interest in unfettered control over major managerial decisions, without sufficient concern for a most basic statutory policy, here the participation of workers in discussing decisions (without the power to dictate the substantive terms) directly affecting their job security, literally their "terms and conditions of employment."¹³⁴

Thus, the inclusion in the Mexican NAO report of concerns about how American labor law treats plant closings, in contrast with its own legal requirements that the effect upon workers be considered in such decisions, highlights another way that American law fails to effectuate the principles committed to in NAALC.

The Mexican NAO report was received positively by the CWA, which expressed delight with the result. The report preceded the trial on the merits of the unfair labor charges before an administrative labor judge from the NLRB. The Daily Labor Report for June 6, 1995 reported:

[CWA union spokesman Jeff Miller] said [though] he was not certain whether the NAO process would result in a remedy for the workers who lost their jobs . . . he was hopeful that the attention generated by the Mexican NAO report could prevent other companies from abusing labor laws. CWA is pinning its hopes for redress in the Sprint case on a ruling expected next month from a U.S. administrative law judge. The union anticipates that the ALJ will determine that Sprint violated the NLRA and shut down the subsidiary because of the union election.¹³⁵

On June 26, 1995, Robert Reich accepted the request for ministerial consultations.¹³⁶ Moreover, at a convention of the Communication Workers

133. 29 U.S.C. § 158(d) (1994).

134. Robert A. Gorman, *The Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate*, 58 TUL. L. REV. 1354, 1361-62 (1984).

135. Pamela M. Prah, *NAFTA: U.S. Reviews Mexican NAO Charges on Sprint; CWA 'Pleasantly Surprised'*, Daily Lab. Rep. (BNA), No. 108, at D18 (June 6, 1995).

136. See *Secretary of Labor Accepts Ministerial Consultations*, Bureau of International Affairs, Office of Info., U.S. D.O.L., News Release, U.S.D.L. 95-240 (June 26, 1995), available in 1995 WL 377682. The text of the letter reads:

Dear Secretary Oate:

This is to acknowledge receipt of your letter in which you requested that we consult on the matter of the Public Communication 9501/NAOMEX, in accordance

of America, Reich announced that he would meet face-to-face with top Mexican labor officials regarding the Sprint matter.¹³⁷

Again, it is important to note the concurrent alternative track that NAALC affords creative labor organizations. At this stage, the trial on the merits had not yet been resolved. Only application for injunctive relief pursuant to 10(j) of the NLRA had been adjudicated. Hearings before an administrative law judge had been held, but the decision on the merits of the 8 (a)(3) charge of the discriminatory closing of the plant, among other charges of unfair labor practices, had not yet been resolved. Not only did NAALC provide an alternative forum for the complaint, but one that at least *potentially* could influence the disposition of the trial on the merits.

VI. *LCF, INC. v. COMMUNICATIONS WORKERS OF AMERICA*¹³⁸

As it turned out, however, relief to the terminated workers was not forthcoming from the administrative law judge ("ALJ"). In a decision rendered on September 1, 1995, the ALJ in *LCF, Inc. v Communications Workers of America* held that the plant closed due to nondiscriminatory reasons.¹³⁹ Although the ALJ found evidence of numerous 8(a)(1) violations, he held that the plant closing itself was not a violation of 8(a)(3).¹⁴⁰ Moreover, he adjudged that the numerous threats made to employees of a retaliatory plant closing, illegal under NLRA jurisprudence,¹⁴¹ were made by supervisors in their individual capacity, and did not reflect a Sprint policy of discrimination in their decision to close.¹⁴² Despite evidence that the plant hired telemarketers up to the day before closing, recently installed new equipment in its expansion to another floor, and hired a new president the month before closing, the judge

with Article 22 of the [NAALC]. I have read the report prepared by the Mexican NAO and accept your request for ministerial consultations in this case. Please be assured that the United States will continue to cooperate in fulfilling our joint obligations under the NAALC.

I share your view that Mexico and the United States have made significant progress in the implementation of the NAALC. I, too, believe that these joint efforts should be directed toward improving the standard of living of the workers of our countries and look forward to an ongoing cooperative relationship in pursuing our mutual interests.

Sincerely,
Robert B. Reich

Id.

137. See Daniel J. Roy, *NAFTA: Reich Agrees to Face-to-Face Meeting with Mexican Officials Regarding Sprint*, Daily Lab. Rep. (BNA) No. 132, at D17 (July 11, 1995).

138. N.L.R.B. Case 20-CA-26203 (Aug. 30, 1995).

139. See *id.* at 33.

140. See *id.*

141. See *NLRB v Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

142. See N.L.R.B. Case 20-CA-26203 at 33.

found Sprint's evidence that the closing was due to LCF's poor fiscal performance more compelling. To his credit, there was a plethora of evidence presented by Sprint detailing LCF's poor financial performance. Though the ALJ maintains otherwise, his holding on the 8(a)(3) charge appeared to be predicated on the fact that he found two employees, who testified that the president told them that anti-union animus contributed to the closing, to be incredible witnesses.¹⁴³ Moreover, he maintained that even had he had found them believable, he would have reached the same result because the "financial rationale for the closure advanced by the Respondent was of such overriding significance that even if the union-related matters were included within a list of contributing factors the Respondent would have sustained its burden of demonstrating that LCF would have been closed regardless of such considerations."¹⁴⁴

The remedy for the numerous unfair labor practices that Sprint committed was somewhat meaningless. The judge ordered:

The Respondent LCF, INC. d/b/a La Conexion Familiar and Sprint Corporation, their officers, agents, successors and assigns, shall:

1. Cease and desist from:
 - (a) Threatening employees verbally or in writing with the closure of LCF because of the Union.
 - (b) Interrogating employees regarding their union activities.
 - (c) Requesting that employees distribute anti-union buttons.
 - (d) Soliciting grievances from employees.
 - (e) Creating the impression of surveillance of employees' union activities.
 - (f) Implementing changes in employees' working conditions.
 - (g) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them under section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:
 - (a) Mail to the last known address of each of its former LCF employees a copy of the attached notice marked "Appendix."¹⁴⁵

The notice in the Appendix contains statements by Sprint that they will cease from engaging in any of the violative actions listed in the Cease and Desist Order and affirms the rights of workers to engage in unionization efforts.

143. *See id.* at 32.

144. *Id.*

145. *Id.* at 34-35.

The irony is clear. LCF is no longer operating. The fact that Sprint ceased from engaging in the violative acts is meaningless from the point of view of the injured employees. Refraining from threatening a retaliatory closing to employees who already lost their jobs is specious at best. The only way that the remedy could prospectively effectuate the statutory rights granted by the NLRA would be if the notice were distributed to other Sprint employees who might benefit from receipt of the Cease and Desist Order. Because the closing was held not to be a partial closing, however, such a remedy was not appropriate.

The CWA and the General Counsel of the NLRB filed briefs to appeal the ALJ's decision. Thus, the decision is proceeding under the provisions for appellate review of NLRB decisions in the U.S. judicial system.

The ALJ'S decision no doubt influenced the outcome of the allegations that the U.S. was not fulfilling its obligations under NAALC. Had the NLRB decided in favor of the union, the charge that the U.S. was not enforcing NLRA provisions would have less substance. Because the ALJ decided in favor of Sprint, the charge that NLRA provisions were not being enforced by the judiciary in the U.S. had arguable merit. Therefore, the alternative forum and quasi-judicial tract created by NAALC remained unobstructed,¹⁴⁶ and the ministerial consultations continued unabated.

VII. THE RESULT OF MINISTERIAL CONSULTATIONS

On December 18, 1996, U.S. Labor Secretary Robert Reich and Mexican Secretary of Labor and Social Welfare Javier Bonilla signed a pact.¹⁴⁷ This pact is historic in several senses. First, it is the result of the first charge against the U.S. under NAALC for non-enforcement of its own labor laws. Moreover, it is the first time the "special study clause" in the NAALC agreement has been triggered.¹⁴⁸ The pact commits the Labor Secretariat to study the effect of sudden plant closings in all three signatory nations with a view of promoting the principle of free association embodied in NAALC.¹⁴⁹ Such a study has never been done before. The pact called for the U.S. Labor Department to hold a public

146. Perhaps the ministerial consultations would have continued even if the outcome of *LCF v. CWA* was inapposite. One can only surmise, however, that if the result had been different, U.S. officials would have pointed to a favorable decision as a vindication of the rights granted by the NLRA and the judicial procedures available in the U.S. for their effectuation.

147. See Daniel J. Roy, *NAFTA: U.S., Mexico Reach Accord on Sprint NAFTA Charge; Closings Set for Study*, Daily Lab. Rep. (BNA) No 242, at D14 (Dec. 18, 1995).

148. See Telephone Interview with Lance A. Compa, *supra* note 57.

149. See Roy, *supra* note 147, at D14.

forum devoted to this inquiry within 120 days in San Francisco.¹⁵⁰ The pact also committed Reich to keeping his Mexican counterpart abreast of the status of the appeal of *LCF, Inc. v Communications Workers of America*.¹⁵¹

The public hearing was held on February 27, 1996.¹⁵² Former LCF employees were present to testify and the heads of the Mexican and German telephone unions were in attendance.¹⁵³ Former employees testified that working conditions were deplorable—they had to raise their hands to go to the bathroom, were told to monitor their intake of liquids and worked for promised commissions that did not materialize.¹⁵⁴ No Sprint officials spoke at the forum.¹⁵⁵ Moderators at the hearing—officials from the U.S., Canada and Mexico—only possessed the power to issue a report to the NAFTA overseers.¹⁵⁶

Although the hearings have no explicit power to effect change in U.S. labor law, they offer a new avenue for heightened public awareness of unionization problems. “[A] new legal channel has opened up for unions,” Daniel Mitchell, an economist at the University of California Los Angeles, “I don’t think anybody foresaw that NAFTA procedures would get used this way.”¹⁵⁷ Another comment noted, “[t]his case has given [the unions] an opportunity . . . to indicate publicly the level of problems the NLRB doesn’t seem to be capable of solving.”¹⁵⁸

150. *See id.* The public forum was not supposed to specifically focus on Sprint. *See* Telephone Interview with Lance A. Compa, *supra* note 57. Such emphasis, however, considering the factual events that precipitated the forum, was difficult to avoid.

151. *See* Agreements on Implementation—Ministerial Consultations Submission 9501 (Sprint Case), *reprinted in Agreement Reached Between Mexico and U.S. on Labor Issue*, Bureau of International Affairs, Office of Info., U.S. D.O.L., News Release, U.S.D.L. 95-521 (Dec. 17, 1995), available in 1995 WL 788333.

152. The Hearing was held between 9:30 a.m. to 6 p.m. at the ANA hotel, 50 Third Street, San Francisco. *See* Marsha Ginsberg, *Unusual S.F. Hearing for Sprint Workers Complain Phone Giant is Evading Labor Laws*, S.F. EXAMINER, Feb. 27, 1996, at D1.

153. The presence of the German telephone workers union is significant because in 1994, Sprint arranged a deal that allowed for twenty percent of its own stock to be purchased by France Telecom and Deutsche Bundespost Telekom. *See* Kevin Kelly, *Sprint Picks Up the Pace*, BUS. WK., Sept. 5, 1994, at 84. The French and German companies in 1994 shared fourteen percent of the long distance traffic of the largest multinationals. *See id.* The German union wants to thwart threats that Sprint’s presence in Germany may threaten job security, wages and working conditions there. *See* Telephone Interview with Lance A. Compa, Labor Law Director of the NAFTA Labor Secretariat (Aug. 16, 1996).

154. *See* Collier, *supra* note 117, at A3.

155. *See id.*

156. *See* *Mexico Uses NAFTA to Challenge Sprint Closure in U.S.*, ARIZ. DAILY STAR, Feb. 28, 1996, at 9A.

157. Karen Branden, *No Closure in Labor Fight Over Sprint Plant Closing*, CHI. TRIB., Feb. 25, 1996, at 1..

158. Lorraine Woellert, *Mexican Complaint Leads to Major Test for NAFTA U.S. Probes Sprint for Closing Plant*, WASH. TIMES, Mar. 1, 1996, at A1. (quoting Pharis Harvey, executive director of the International Labor Rights Education and Research Fund).

Pragmatically, a CWA spokesman noted, “[w]e have NAFTA, it’s there, so we’ll use it in an attempt to make the process work.”¹⁵⁹ The tri-national study of the effect of plant closings upon the principle of freedom of association in Annex One of NAALC is due in December, 1996.

VIII. CONCLUSION

Clearly, a public forum and a study cannot, in and of themselves, change any established policy regarding plant closings. They carry no measure of relief for the specific workers who lost their jobs at LCF, as there would have been (and may be if the result of the case is overruled on appeal) if the holding in *LCF v. CWA* had been different. This measure is not on par with reinstatement of the unemployed workers in other areas of Sprint’s enterprise. Nor is it tantamount to the financial remuneration of lost wages. It is arguably, however, no small victory for the alliance of CWA and the Telephone Workers of the Republic of Mexico. A different outcome in *LCF v. CWA* would have provided a remedy for the specifically injured workers of the closed facility, but it would not have probed into the philosophic assumptions underlying the *fairly settled* U.S. case law with regard to plant closings.¹⁶⁰

The doctrine of partial closings in American labor law has narrowly construed the statutory rights granted by the NLRA. An employer can discriminate against workers because of their union activity so long as he expects to reap no future benefits from his discrimination, *i.e.*, employees may close their entire enterprise.¹⁶¹ Such a holding is at variance with the express language of Section 7. Moreover, the *Wright Line* doctrine further eviscerates the protection available under Section 7 of the NLRA, because as long as the employer can present legal reasons for closing—such as poor finances—multiple other unfair labor practices may accompany the closing. This doctrine ignores the actual result that multiple *Wright Line* closings may have on the workers’ exercise of the right to organize. Moreover, parent companies may close subsidiaries because of anti-union discrimination with impunity under the *Wright Line* standard.

Both doctrines are predicated on the philosophic assumption that certain managerial decisions are so crucial that they must be free of government regulation, despite the clear mandate of the NLRA.¹⁶² The holding of *First National Maintenance v. NLRB* further demonstrates

159. *Id.* (quoting Jeff Miller).

160. *See, e.g.*, *Textile Workers Union of America v. Darlington Mfg. Co.* 380 U.S. 263 (1965).

161. *See id.* at 273-74.

162. *See* ATLESON, *supra* note 26, at 139.

this philosophic assumption. This case held that an employer had no duty to bargain with its certified union over its decision to close a segment of the business and terminate the employees who worked there, despite the fact that the express language of the relevant provisions of the NLRA does not mandate such a result. Therefore, a study of the *actual effects* that such plant closings have upon freedom of association may make explicit the injury to statutory rights caused by the assumptions underlying judicial interpretation of the NLRA. Although the unprecedented study will not change the law in and of itself, it can educate the public. This comports with a new "blueprint" for revitalizing the labor movement in the U.S. by the AFL-CIO. Four areas have been targeted for increased emphasis: political action, strategic campaigns, public affairs and education and training.¹⁶³

Additionally, the study may compliment specific judicial relief to the former employees of LCF in U.S. courts if the appeal of *LCF v. CWA* is successful. Such is the nature of the dual track that NAALC facilitates.

LCF v. CWA and the cases which have been brought against Mexico for non-enforcement of its own labor laws should become prototypes for a new type of quasi-judicial challenge. Thus far, unions have challenged only three of the principles espoused by NAALC. The unions, however, appear increasingly willing to utilize the relief that NAALC may offer them. NAALC not only encourages governmental cooperation with regard to labor matters, but it also facilitates, via the particular structure of the complaint process, cross-border union alliances. Moreover, the opening of the Mexican markets to foreign participants creates a unique and additional incentive for labor unions to form cross-border alliances to promote better labor conditions.¹⁶⁴ Together, they may try to turn public concern over profit margins, into public concern over better enforcement of the labor laws of the signatory countries. Bad publicity may injure targeted companies in terms of their competitive stance vis-a-vis entrance into the market. Therefore, the unions may have a chance to exert economic pressure toward greater compliance with the domestic laws of the signatory countries.

Even apart from entrance into the market, the Labor Secretariat hopes it will be able to achieve greater compliance with the laws of the signatory countries through the education provided by "special studies." Perhaps these studies, like the occasional law review article, can influence the outcome of a close case. They may be able to exert influence

163. See Michelle Amber, *Organizing: More Union Organizing Activity Predicted: Effectiveness is Questioned by Observers*, Daily Lab. Rep. (BNA) No. 24, at D22 (Feb. 6, 1996).

164. See *supra* notes 112-15 and accompanying text.

via their recommendations in pending legislation. At the very least, they can educate the public about the glaring weaknesses of a law which is, in its application, often at variance with its statutory purpose.¹⁶⁵

Currently, cases are being prepared to test the other principles of NAALC.¹⁶⁶ This is a good sign that labor is coming to terms with the fact that, while the tract afforded by NAALC may be weak in the sanctions it can impose directly, it may offer the only forum for re-opening questions that have been long settled in U.S. case law. And, rather than dismissing NAALC as an ineffective agreement, labor should explore the opportunity it does afford. Only through carefully planned challenges under each of the eleven principles that NAALC espouses can its true effectiveness be known.

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165. For example, one can imagine a Mexican labor union challenging the American labor doctrine of permanent replacement of economic strikers, introduced by the Supreme Court in dicta in *NLRB v. Mackay Radio & Telegraph Co.* 304 U.S. 333 (1938). This is certainly inimical to the principles espoused in Annex One of NAALC. Moreover, the fact that Mexican law does not permit replacement of legally striking workers provides a credible predicate for such a challenge.

166. See Telephone Interview with Lance A. Compa, *supra* note 57.