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Gregory A. Kelson

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## **International Labor Policies and the North American Free Trade Agreement: Are Women Getting Their Fair Share?**

By Gregory A. Kelson \*

### **Introduction**

The North American Free Trade Agreement (NAFTA) has always been a document of controversy. On the surface, NAFTA opened trade among its three primary parties -- Canada, Mexico, and the United States. Realistically, however, it has been a cause for tension -- mainly between the governments of the United States and Mexico. The two countries have used NAFTA and its labor side agreement, the North American Agreement on Labor Cooperation (NAALC), to dictate its economic and labor policies in each other's countries.

In the United States, a telecommunications company that employed Hispanic female workers from Mexico shut down operations eight days before a scheduled union representation vote. Although the company was absolved from any wrongdoing by the United States Court of Appeals,<sup>1</sup> a Mexican telephone union and the government of Mexico, utilizing their rights under the NAALC, asked for an inquiry into the case.

In Mexico, female workers complained that many employers discriminated against them because of their pregnancy status. The workers said that they were subject to pre-employment pregnancy screening and were subject to termination if they were found to be pregnant. After complaints by a Mexican union, the United States filed an inquiry under the NAALC into this practice, even going so far as to ask for "ministerial consultations."<sup>2</sup>

In both of these cases, the rights of female workers were involved. The U.S. issue involved the right of female employees to organize as a collective bargaining unit to fight for better working conditions. The Mexican issue involved pregnancy and sex discrimination against women. Unfortunately, neither inquiry did anything in terms of remedy -- many of the U.S. workers who were fired after the telecommunications company closed are still unemployed to this day; in Mexico, the ministerial consultations that were held have led to no progress in the practice of pre-employment pregnancy discrimination towards women.

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\* Executive Director, Institute for Women and Children's Policy, Chicago, Illinois. An earlier version of this article was presented at the 40th Annual International Studies Association Meeting, 17-20 February 1999, Washington, D.C. I would like to thank Rafael Gely, Elisabeth Prügl, and Debra Liebowitz for their comments on earlier drafts.

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<sup>1</sup> LCF, Inc. v. National Labor Relations Board, 129 F.3d 1276 (D.C. Cir. 1997).

<sup>2</sup> "Ministerial Consultations" involves talks between the highest labor officials in each country -- in this case the United States Secretary of Labor and the Mexican Secretary of Labor and Social Welfare.

This article will argue that more must be done to protect the rights of female workers under the North American Agreement on Labor Cooperation. I will do this by first examining the NAALC in closer detail to give us the background to work with. Then I will look at both NAALC inquiries in more detail. The complaint against the United States involved a telecommunications company that was a subsidiary of Sprint, Inc. that closed down eight days before a scheduled union representation vote; the complaint against Mexico involved the practice of pregnancy and sex discrimination against female workers in the Maquiladora sector. Finally, I will offer discussion points for the three NAFTA parties and scholars to consider as we move into the next millennium.<sup>3</sup>

## **I. The North American Agreement on Labor Cooperation**

As the North American Free Trade Agreement was being considered for ratification by the United States Congress, members were concerned about the impact that the NAFTA would have on worker's rights.<sup>4</sup> And so, as a condition to ratifying NAFTA, the three parties to NAFTA -- Canada, Mexico, and the United States -- negotiated a side labor agreement, the North American Agreement on Labor Cooperation (NAALC).<sup>5</sup>

The NAALC has several basic objectives among the three parties. These include the improvement of working conditions and living standards, improving productivity and quality, and encouraging compliance and enforcement of each Party's labor laws. Annex 1 of the agreement sets out "guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law."<sup>6</sup> Those principles are:

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 occupations injuries and illnesses.
10. Compensation in cases of occupational injuries and illnesses.

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<sup>3</sup> Although the possibility does exist for more countries to become part of NAFTA in the future, this article will only deal with the three current parties to the treaty. See generally Jim Landers, *The Road Ahead: NAFTA Still Has A Way To Go Before Full Implementation*, DALLAS MORNING NEWS, Jan. 30, 1999, at 1F (reporting that NAFTA may be expanded to Central America, South America, and the Caribbean by forming a "Free Trade Agreement of the Americas" by 2005).

<sup>4</sup> See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 533 (1995).

<sup>5</sup> North American Agreement on Labor Cooperation, *opened for signature*, Sept. 8, 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC]. See also Bierman & Gely, *supra* note 4, at 533.

<sup>6</sup> NAALC, *supra* note 5, at Annex 1.

## 11. Protection of migrant workers.<sup>7</sup>

In the two cases that I describe in Parts II and III of this article, I will attempt to show how the NAALC was put into practice. Unfortunately the remedy that should have been provided in these cases did not occur. As the following sections will show, there is an elaborate dispute resolution process put in place to assure the rights of workers within the three NAFTA parties. Both cases only made it as far as ministerial consultations, although the NAALC offers more serious avenues for disputes between parties. This section will look at the NAALC in a little more detail to give the reader background on how the agreement works. The background is necessary to formulate my argument.

### ***A. Commission for Labor Cooperation***

Part III of the NAALC sets up a Commission for Labor Cooperation. The Commission is comprised of “a ministerial Council and a Secretariat.”<sup>8</sup> The Commission is assisted by a National Administrative Office that is set up in each Party’s home country.<sup>9</sup>

The Ministerial Council is comprised of the three labor ministers of each country -- the Canadian Minister of Labor, the Mexican Secretary of Labor and Social Welfare, and the U.S. Secretary of Labor -- or their designees.<sup>10</sup> The Council is the governing body of the Commission.<sup>11</sup>

The Secretariat is headed by an Executive Director who is chosen by the Council - the nationality of which is rotated between the three countries -- for a three-year term which can be renewed once by the Council.<sup>12</sup> The Secretariat’s main function is to “assist the Council in exercising its function and shall provide such other support as the Council may direct.”<sup>13</sup>

The NAALC also required each Party to set up a National Administrative Office (“NAO”) within its labor ministries.<sup>14</sup> Each NAO is headed by a Secretary appointed by the labor ministers of their respective countries.<sup>15</sup> The main function of the NAO is to “serve as a point of contact with (a) governmental agencies of that Party; (b) NAOs of other Parties; and (c) the Secretariat.”<sup>16</sup>

### ***B. Procedures for Settlements of Disputes Under NAALC***

Although each Party to the NAALC pledges to “endeavor to agree on the interpretation and application of this Agreement,”<sup>17</sup> the NAALC has set up procedures for consultations and evaluations of disputes between the three countries. This section will examine those procedures in more detail.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at art. 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at art. 9.

<sup>11</sup> *Id.* at art. 10.

<sup>12</sup> *Id.* at art. 12(1).

<sup>13</sup> *Id.* at art. 13(1).

<sup>14</sup> *Id.* at art. 15(1).

<sup>15</sup> *Id.* at art. 16(2).

<sup>16</sup> *Id.* at art. 16(1).

<sup>17</sup> *Id.* at art. 20.

### 1. Consultations between NAOs

The first step is a consultation between the NAOs of each Party.<sup>18</sup> The third NAO and the Secretariat is to be informed of this request.<sup>19</sup> In order to “better understand and respond to the issues raised” by the consulting NAO, the NAO of the request party must provide the following information: “a) description of its laws, regulations, procedures, policies or practices, b) proposed changes to such procedures, policies or practices, and c) such clarification and explanations related to such matters.”<sup>20</sup>

### 2. Ministerial Consultations

If the dispute is not resolved through the consultation of each Party’s NAOs, the consulting Party can make a request, in writing, for consultations “at the ministerial level regarding any matter within the scope of this Agreement.”<sup>21</sup> The third Party must be notified of the request and will be entitled to participate on notice to the other Parties if “it has a substantial interest in the matter.”<sup>22</sup>

### 3. Evaluation Committee of Experts

If ministerial consultations do not produce a resolution of the matter in question, the consulting Party may request establishment of an Evaluation Committee of Experts (ECE) by the Council. It is the job of the ECE to analyze how a Party enforces its labor laws and policies as it relates to the matter in question.<sup>23</sup> However, if a Party obtains a ruling under Annex 23 of the NAALC,<sup>24</sup> that the dispute is either not trade-related or not covered by mutually recognized labor laws, an ECE cannot be convened.<sup>25</sup> Nor can an ECE be convened if “any matter that was previously the subject of an ECE report in the absence of such new information as would warrant a further report.”<sup>26</sup>

The ECE will draw up a draft report for presentation to the Council within 120 days of its formation for consideration by the Council.<sup>27</sup> Within 60 days of submission of

<sup>18</sup> “A NAO may request consultations . . . with another NAO in relation to the other Party's labor law, its administration, or labor market conditions in its territory.” *Id.* at art. 21(1).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at art. 21(2).

<sup>21</sup> *Id.* at art. 22(1).

<sup>22</sup> *Id.* at art. 22(2). “The consulting Parties shall make every attempt to resolve the matter through consultations . . . including through the exchange of sufficient publicly available information to enable a full examination.” *Id.* at art. 22(3).

<sup>23</sup> *See id.* at art. 23(2).

<sup>24</sup> Annex 23 of the NAALC covers Interpretive Rulings:

1. Where a Party has requested the Council to convene an ECE, the Council shall, on the written request of any other Party, select an independent expert to make a ruling concerning whether the matter is:
  - (a) trade related; or
  - (b) covered by mutually recognized labor laws
2. The Council shall establish rules of procedure for the selection of the expert and for submissions by the Parties. Unless the Council decides otherwise, the expert shall present a ruling within 15 days after the expert is selected.

*Id.* at Annex 23.

<sup>25</sup> *Id.* at art. 23(3).

<sup>26</sup> *Id.* at art. 23(4).

<sup>27</sup> *Id.* at art. 24(1).

its draft report, the ECE is to turn in its final report to the Council.<sup>28</sup> Within 30 days of receipt of the Council, the report is published.<sup>29</sup> Within 90 days of the publication of the report, “[t]he Parties shall provide to each other and the Secretariat written responses to the recommendations contained in the ECE report[.]”<sup>30</sup>

### ***C. Procedures for Resolution of Disputes Under NAALC***

There are several procedures that are open to disputing Parties under the NAALC for resolution of disputes. Only when the ECE report is made public are the following procedures initiated.

#### **1. Consultations**

A consulting Party may make a written request for consultations with another Party “regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce such standards in respect of the general subject matter addressed in the [ECE] report.”<sup>31</sup> The disputing Parties are to “make every attempt to arrive at a mutually satisfactory resolution of the matter” through these consultations.<sup>32</sup>

#### **2. Initiation of Procedures**

If the consultations fail to resolve the matter within 60 days, the consulting party may request, in writing, a special session of the Council to convene to consider the matter.<sup>33</sup> The Council must meet within 20 days of the request,<sup>34</sup> and will take one of three actions:

- a. call on such technical advisers to create such working groups or expert groups as it deems necessary
- b. have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or
- c. make recommendations, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute. Any such recommendations shall be made public if the Council, by a two-thirds vote, so decides.<sup>35</sup>

The Council may also rule that the dispute is better covered under another agreement that the disputing Parties are signatories to. If so, the Council will refer the matter to the Parties of that agreement for consideration.<sup>36</sup>

#### **3. Request for an Arbitral Panel**

If within 60 days of the convening of the special session of the Council that the

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<sup>28</sup> *Id.* at art. 26(1).

<sup>29</sup> *Id.* at art. 26(2).

<sup>30</sup> *Id.* at art. 26(3).

<sup>31</sup> *Id.* at art. 27(1).

<sup>32</sup> *Id.* at art. 27(4).

<sup>33</sup> *Id.* at art. 28(1).

<sup>34</sup> *Id.* at art. 28(3).

<sup>35</sup> *Id.* at art. 28(4).

<sup>36</sup> *Id.* at art. 28(5).

dispute still has not been resolved, the Council, upon written request of the consulting Party and a two-thirds vote, will convene an arbitral panel “to consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standard is: (a) trade-related; and (b) covered by mutually recognized labor laws.”<sup>37</sup> Within 180 days after the panel is selected, the panel is required to submit its initial report to the disputing Parties. The report is to contain:

- a. finding of fact;
- b. its determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards in a matter that is trade-related and covered by mutually recognized labor laws, or any other determination requested in the terms of reference; and
- c. in the event the panel makes an affirmative determination under subparagraph (b), its recommendations, if any for the resolution of the dispute, which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement.<sup>38</sup>

The panel’s final report is due within 60 days after the presentation of the initial report to the disputing Parties.<sup>39</sup> The disputing Parties then have 15 days to transmit the report to the Council along with any written comments.<sup>40</sup> The final report is then published within five days after transmission to the Council.<sup>41</sup>

Now that we have a working knowledge of the NAALC’s dispute resolution procedures, we are now ready to look at the two disputes that I introduced earlier in this article. Both of the NAFTA inquiries that I describe in more detail below have never made it beyond ministerial consultations, although the U.S. complaint against Mexico is still pending and could go farther. The next section will give us background on the two NAFTA inquiries.

## II. The Case Against the United States

*They had to raise their hands to get permission to go to the bathroom. No drinks were allowed at their desks, the better to limit requests for bathroom breaks. Promised commissions never materialized.*<sup>42</sup>

*[La Conexion Familiar] was described by [former] TV host Phil Donahue*

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<sup>37</sup> *Id.* at art. 29(1).

<sup>38</sup> *Id.* at art. 36(2).

<sup>39</sup> *Id.* at art. 37(1).

<sup>40</sup> *Id.* at art. 37(2).

<sup>41</sup> *Id.* at art. 37(3).

<sup>42</sup> Karen Brandon, *No Closure in Labor Fight Over Sprint Plant Closing*, CHI. TRIB., Feb. 25, 1996, at 1 (Business Section).

as a “telecommunications sweatshop.”<sup>43</sup>

In 1992, Sprint Corporation acquired La Conexión Familiar (“LCF”),<sup>44</sup> a telemarketing service that specialized in selling long-distance services to the Latino residential market, and created a wholly-owned subsidiary -- LCF, Inc. -- for it.<sup>45</sup> Sprint agreed to the purchase price for La Conexión Familiar contingent upon the future profitability of LCF in accordance with a matrix or schedule contained in the purchase agreement. Further, it was agreed that the principal owners of La Conexión Familiar would continue to manage and operate LCF pursuant to employment agreements; thus, these managers would be receiving periodic payments for the purchase of La Conexión Familiar in amounts that were dependent upon their successful management of the business.<sup>46</sup>

However, soon after acquiring LCF, Sprint discovered that the business was not producing the profits that it expected. After moving its operations from San Rafael, California, to San Francisco, to seek out a larger workforce pool, Sprint discovered that most of LCF’s employees were undocumented aliens and sued to rescind the purchase agreement. A settlement was reached with LCF in 1994 and Sprint retained LCF at a reduced purchase price.<sup>47</sup>

During the lawsuit with LCF to rescind the purchase price, Sprint did not invest significant time or money into the operations of LCF. An economic analysis from Sprint soon uncovered that LCF, which had been projected to make a profit of \$8 million in 1994, would lose \$4 million that year.<sup>48</sup> LCF was actually losing more customers than it was gaining.<sup>49</sup>

About the same time, workers at LCF began a union organizing effort for better working conditions.<sup>50</sup> Workers were paid \$7.00 per hour, which was \$5.00 less than their English-speaking counterparts.<sup>51</sup> Also key among the employee complaints were unpaid commissions and bathroom breaks. One worker stated that “[n]o matter how many new customers [the LCF workers] signed up, the workers never received sales commissions.”<sup>52</sup> Rules were often changed concerning the commissions.<sup>53</sup> Concerning the bathroom breaks, the worker noted, “Sometimes we would ask to take a bathroom break, but we were told to wait until our regular break.”<sup>54</sup> Another worker stated, “We were not allowed to go to the bathroom until our break time. Although we were on the

<sup>43</sup> Ed Pastor, *Sprint's Abuse of Hispanic Workers Justifies Labor Probe*, ARIZ. REPUBLIC, Feb. 7, 1996, at B4.

<sup>44</sup> La Conexión Familiar, which is Spanish for “the family connection,” was based in San Rafael, California at the time of the acquisition.

<sup>45</sup> LCF, Inc. v. National Labor Relations Board, 129 F.2d 1276, 1277 (D.C. Cir. 1997).

<sup>46</sup> LCF, Inc., 322 N.L.R.B. 774, 783 (1996) (opinion of Wacknov, ALJ).

<sup>47</sup> LCF, Inc., 129 F.3d at 1277.

<sup>48</sup> *Id.* at 1278.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Susan Ferriss, *Sprint's Conexión Works Win Case: NLRB Says Firm Violated Labor Laws, Owes Back Pay, New Job Offers to Those It Fired*, SAN. FRAN. EXAMINER, Dec. 31, 1996, at D1.

<sup>52</sup> Carey Goldberg, *U.S. Labor Making Use of Trade Accord It Fiercely Opposed*, N.Y. TIMES, Feb. 28, 1996, at A11.

<sup>53</sup> Ferriss, *supra* note 51.

<sup>54</sup> *Id.*



phone all day and our throats got dry and sore, they told us not to drink a lot of water so we wouldn't need the bathroom breaks."<sup>55</sup>

In February 1994, in response to these and other complaints about working conditions, the Communication Workers of America ("CWA") began an aggressive campaign to organize the LCF employees. Management at LCF learned in mid-February that "telemarketing employees were attending union meetings and engaging in other union activities."<sup>56</sup> At that point, management began to interrogate employees about their union activities and "threatened [the employees] with plant closure if the employees unionized."<sup>57</sup> Lilliette Jiron, a former LCF employee, told a reporter that "she was warned that any new hire who signed a petition to unionize would be fired." Ms. Jiron continued:

Within three weeks of arriving at LCF, I was asked to spy on my co-workers. As I was on probation for my first 90 days, I felt I had no choice but to do as asked. I couldn't lose this job. My supervisor asked me to search through my co-workers' drawers . . . after hours to see if anyone in my group was hiding union materials in their desks. I was also asked to talk with my co-workers and find out who was the leader of union supporters in my group.<sup>58</sup>

Management at Sprint's corporate offices were also being kept informed of the union activities by LCF management.<sup>59</sup>

The following April, Sprint's group manager for corporate relations met with LCF management and collected the names of employees who supported the union. The Sprint group manager told LCF managers to try to get the employees to change their minds. He told both management and employees at LCF that "LCF would not close if the employees unionized."<sup>60</sup> However, after the group manager reported this to Sprint management, Sprint's VP for Labor Relations and Employment Practices, Carl Doerr, informed Sprint's Consumer Services Group President Dave Schmieg that there was a "significant possibility" that the CWA would file a representation petition with the National Labor Relations Board.<sup>61</sup> Mr. Doerr then stated that, given the likelihood of CWA filing a petition, Mr. Schmieg should "'create a paper trail' if he intended to close LCF."<sup>62</sup>

In the meantime, on May 6, 1994, Sprint Consumer Services Group Vice President Wallace Meyer, the official who was responsible for LCF, called a meeting of LCF's board of directors to discuss LCF's financial situation. He gave the board two options: either cease operations immediately or continue operations through December 1994. After a lengthy discussion, the board "voted against closing LCF immediately and decided to reconvene in sixty days in order to review LCF's final performance and

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<sup>55</sup> *NAFTA Regulations Are Cited in Sprint Labor Dispute*, National Public Radio, Feb. 29, 1996, Transcript No. 1814-10 (Interview with Lilliette Jiron) [hereinafter Jiron NPR Interview].

<sup>56</sup> *LCF, Inc.*, 129 F.3d at 1278.

<sup>57</sup> *Id.*

<sup>58</sup> Jiron NPR Interview, *supra* note 55.

<sup>59</sup> *LCF, Inc.*, 129 F.3d at 1278.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

discuss six options for LCF's future."<sup>63</sup> Those options were "(a) immediate discontinuance of current business, (b) sell LCF business and assets, (c) continue business as planned but review progress against revised financial objections every 60 days, (d) employ an agent as business manager . . . , (e) relocate business to establish greater alignment/proximity to Sprint resources, and (f) continue business through at least December 1994 utilizing 1994 performance and 1995/96 financial projections as evaluation criteria."<sup>64</sup> The board also voted to hire Maury Rosas as president of LCF, effective June 1, 1994, for a one-year period. Mr. Rosas was never informed of LCF's financial position or the possibility that LCF might close.<sup>65</sup>

On June 3, 1994, CWA filed a representation petition for LCF with the National Labor Relations Board ("NLRB") and, on June 22, CWA and LCF entered into an agreement and scheduled a representation election for July 22, 1994.<sup>66</sup> Meanwhile, Mr. Doerr received the materials from the May 6 LCF board meeting and "became concerned that these materials did not sufficiently reflect an intent to retain the closing of LCF as an option. He therefore decided to create a paper trail showing that Sprint's intent to close LCF existed prior to the filing of the petition."<sup>67</sup> To do this, Mr. Doerr secured a falsely backdated letter requesting outplacement services for the LCF employees. This was done "to counter any contention that Sprint decided to close LCF in response to the union activity."<sup>68</sup>

The LCF board was scheduled to meet again on July 6. Mr. Meyer took two actions before the meeting took place: 1) he ordered a transition team assembled to begin the closing of LCF, and 2) he informed LCF President Rosas that the LCF board was seriously considering closing LCF.<sup>69</sup> When the board met on July 6, they assessed the financial situation of LCF fully, projecting a \$4.5 million loss in 1994. Important to note here was that the upcoming union representation election was never mentioned in the meeting. In fact, Mr. Schmieg stated in the meeting that all decisions concerning the future of LCF "would be 'based solely on the economic justification that is set forth in the financial documents.'"<sup>70</sup>

The board voted 5-0 (with Mr. Rosas abstaining) to close LCF on July 14, 1994.<sup>71</sup> This was eight days before the representation election was to take place. On July 14, Mr. Rosas gathered all of the LCF employees together to inform them that, because of financial difficulties, LCF would be closing immediately.<sup>72</sup> To get around the Worker Adjustment and Retraining Act,<sup>73</sup> Sprint terminated the LCF employees immediately and gave them 60 days wages and benefits instead of Sprint's usual practice of letting the employees work for 60 days.<sup>74</sup> Sprint then rerouted all of LCF's incoming calls to a

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1278-79 (citations omitted).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Mr. Rosas was told of the possible LCF closure on July 5, 1994. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> 29 U.S.C. §§ 2101-2109 (1994). The act requires employers to give employees sixty days notice before any plant closing or mass layoffs.

<sup>74</sup> *LCF, Inc.*, 129 F.3d at 1280.

center in Dallas.<sup>75</sup>

The CWA immediately filed a complaint with the NLRB. On December 27, 1995, a three-member panel of the board ruled that Sprint violated federal labor laws by closing LCF one week before the CWA representation election. Sprint was ordered by the Board to rehire the workers with backpay.<sup>76</sup> Sprint immediately appealed the decision to the Court of Appeals for the District of Columbia Circuit, which overturned the NLRB's order.<sup>77</sup> The court ruled that

[t]he NLRB's decision ultimately lacks substantial evidence in the record given the overwhelming record evidence that LCF was in a serious and sustained financial decline throughout the months before its closure. For the foregoing reasons, we set the NLRB's order aside.<sup>78</sup>

As the CWA tried to get a legal remedy for the LCF workers, a Mexican union, *Sindicato de Telefonistas de la Republica Mexicana* (Telecommunications Workers of the Republic of Mexico), filed a complaint with Mexico's NAO charging the United States with failing to enforce its own labor laws in light of the LCF case. Under the NAALC, the Mexican NAO requested a consultation with the U.S. NAO, which was agreed to. In its 12 page report following the consultations

the NAO of Mexico emphasized in its analysis the possible problems in the effective application of U.S. law, which could arise when an employer refuses to negotiate collectively with a union elected as the exclusive representative of the workers in the bargaining unit, or where the employer refuses to permit that an election take place. Specifically, the NAO, in light of the information obtained, was unable to assess with complete certitude the effects on the rights of workers when an employer, suddenly, closes the place of work.<sup>79</sup>

Citing a need "to further study the effects on the principles of freedom of association and the right to organize of workers of the sudden closure of a place of work,"<sup>80</sup> ministerial consultations were recommended. In December 1995, U.S. Secretary of Labor Robert Reich and Mexican Secretary of Labor and Social Welfare Javier Bonilla held high level talks on the LCF case. The two labor ministers agreed on a plan of action which included "study[ing] the effects of sudden plant closings on the principle of freedom of association and the right of workers to organize in all three

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<sup>75</sup> *Id.*

<sup>76</sup> *LCF, Inc.*, 322 N.L.R.B. at 781.

<sup>77</sup> *LCF, Inc.*, 129 F.3d at 1283.

<sup>78</sup> *Id.*

<sup>79</sup> Secretariat of Labor and Social Welfare, *National Administrative Office of Mexico for the North American Agreement on Labor Cooperation: Report on Review of Public Submission 9501/NAO MEX*, at 12 (on file with author).

<sup>80</sup> *Id.*

countries.”<sup>81</sup>

Unfortunately, this case never went any further. As of today, La Conexion Familiar remains closed. Sprint has boasted that a job placement center that was opened after LCF closed helped 133 of the 177 employees affected by the closing to find new employment with Sprint or elsewhere.<sup>82</sup>

### III. The Case Against Mexico

*“They gave me the pregnancy test both times I worked for them. If you’re pregnant, they won’t hire you.”*

-- 21-year-old mother of two<sup>83</sup>

In Mexico, a pregnant woman is entitled to several benefits. Human Rights Watch, in a 58-page report issued in 1996 entitled *Mexico’s Maquiladoras: Abuses Against Women Workers*, noted that

federal Mexican labor law requires that employers pay six weeks of maternity leave before the baby is born and another six weeks of leave after delivery. . . . Apart from the 12 weeks of maternity leave, employers must allow pregnant women to take an extra 60 days off while receiving 50 percent of their salary, so long as no more than one year after the birth has passed. . . .<sup>84</sup>

In the report, Human Rights Watch contended “that maquiladora employers routinely ask female applicants to take pregnancy tests as a condition of employment and often will tell women they will not be hired if they are pregnant.”<sup>85</sup> The report also charges “that the maquiladoras mistreat women who become pregnant after being hired, and sometimes force them to resign.”<sup>86</sup>

Maquiladoras, export-processing factories along the U.S.-Mexico border, employ more than a half-million people, of whom 50% are women.<sup>87</sup> The workers in Maquiladoras -- most of which are owned by U.S. corporations<sup>88</sup> -- accounted for some \$25 billion in exports during the first six months of 1998.<sup>89</sup> Many of those companies are American Zettler, Carlisle Plastics, Zenith Electronics Corporation, and Sanyo North

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<sup>81</sup> Commission for Labor Cooperation, *Annual Report 1995*, at IIIB (Submission #9501 to Mexican NAO; Consultation Between Mexico and U.S.A.), available at [http://www.naalc.org/english/resource/an\\_ch3.htm](http://www.naalc.org/english/resource/an_ch3.htm).

<sup>82</sup> *Raw Data*, THE PALM BEACH POST, Jan. 6, 1997, at 12 (Business Section).

<sup>83</sup> Diane Linquist, *Pregnancy Screenings in Mexico Criticized; Job-discrimination Complaints Verified by U.S. Officials*, SAN DIEGO UNION-TRIB., Jan. 13, 1998, at A1.

<sup>84</sup> *NAFTA: Sex Discrimination in Maquiladoras is Rampant, Advocacy Group Charges*, DAILY LABOR REP., Sept. 6, 1996 [hereinafter *Sex Discrimination*].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Elisabeth Malkin, *Making Life Bearable in the Maquiladoras*, BUS. WEEK, Sept. 21, 1998, at 18.

American Corporation.<sup>90</sup> An average salary is around \$50 per week.<sup>91</sup>

Based on the Human Rights Watch report, the United States NAO sought consultations with its Mexican counterpart under the NAALC in July 1997. On November 19, 1997, a hearing was held in Brownsville, Texas on the matter. The Mexican government was invited to send representatives to testify at the hearing but declined.<sup>92</sup>

U.S. NAO Secretary Irasema Garza said in an interview after the hearing that, "Several Mexican women . . . were required to prove they were not pregnant through tests and were asked questions about their sex lives and menses[.]"<sup>93</sup> At the hearing, many female Maquiladora workers testified that they were told by the employers' unions and the government that it was legal for them to be screened for pregnancy and that they had no legal recourse.<sup>94</sup> One woman testifying at the hearing stated that during her medical examination, she was asked about her pregnancy status:

[she was asked] if I was pregnant and the last date of my menstruation. They also asked me if I was sexually active and what kind of birth control methods I was using. At the end of the interview [on] the medical background, the nurse gave me a form and said "Sign it." I asked her what I was going to sign and why. She said that it was a letter stating if I became pregnant during the hiring period of three months, I would be automatically fired.<sup>95</sup>

Another woman testified that she was forced to resign after she was discovered to be pregnant by her employer. The resignation stated that the reason for her dismissal was work distraction.<sup>96</sup> Still another woman testified that after taking a pre-employment medical test confirming her pregnancy, the company nurse told her that "they would not be able to hire me, due to the insurance and coverage and leave time that the company would have to pay if I were hired."<sup>97</sup>

The U.S. NAO's report, released on January 12, 1998, noted that Mexico violated its labor laws and ILO Convention 111 by administering pre-employment screening of females for pregnancy. The report recommended ministerial consultations "for the purpose of ascertaining the extent of the protections against pregnancy-based gender discrimination afforded by Mexico's laws and their effective enforcement by the appropriate institutions."<sup>98</sup> On January 12, 1998, U.S. Secretary of Labor Alexis Herman

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<sup>90</sup> *Sex Discrimination*, *supra* note 84.

<sup>91</sup> *Id.*

<sup>92</sup> Pamela M. Prah, *NAFTA: Charges That Mexico Fails to Enforce Sex Discrimination Laws Focus on Hearing*, DAILY LABOR REP., Nov. 20, 1997.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, *Public Report of Review of NAO Submission No. 9701*, available at <<http://www.dol.gov/dol/ilab/public/media/reports/nao/pubrep9701.htm>>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

announced that she would seek ministerial consultations with Mexico.<sup>99</sup>

However, Mexican Labor Secretary Javier Bonilla informed the U.S. that he wanted to review the report.<sup>100</sup> Bonilla questioned whether ministerial consultations were appropriate, stating, “the NAALC was not conceived to question domestic legislation since each party is entitled to define its own labor regulatory framework.”<sup>101</sup> But on February 27, 1998, Secretary Herman announced that Bonilla had agreed to the ministerial consultations.<sup>102</sup>

On October 21, 1998, a “Ministerial Consultations Implementation Agreement” was signed by the labor ministers of the three NAALC Parties.<sup>103</sup> In the agreement, the three labor ministers agreed to meet concerning “(1) pregnancy discrimination in the work place; (2) the extent of relief for post-hire pregnancy discrimination in Mexico, the United States and Canada; (3) the legal mechanisms by which laws against discrimination for reason of gender are enforced in the three countries.”<sup>104</sup> It was also agreed that the NAOs of the three Parties conduct a conference “on government mechanisms in each country that guarantee the respect and protection of the labor rights of working women and plans to ensure compliance with the laws that protect against employment discrimination.”<sup>105</sup>

The conference took place March 1-2, 1999, in Merida, Yucatan, Mexico. Along with Secretary Herman, the conference heard from representatives of the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the Women’s Bureau of the Department of Labor. Dolores Crockett, Acting Director of the Women’s Bureau of the U.S. Department of Labor, told the conference of a survey that the bureau conducted several years ago which revealed some troubling statistics:

A large majority [of women] (79%) told us that they “liked” or “loved” their jobs. However, many felt that their work had been consistently undervalued and minimized. When respondents were asked if they ever lost a job or promotion because of their sex or race, 28% of African-American respondents, 23% of Hispanic respondents and 14.2% of white women said “yes.” Women, regardless of color, told us that “insuring equal opportunity” was a high priority for change.<sup>106</sup>

<sup>99</sup> Pamela M. Prah, *NAFTA: United States Seeks Top-Level Talks with Mexico on Pregnancy Discrimination*, DAILY LABOR REP., Jan. 13, 1998.

<sup>100</sup> *NAFTA: Mexico Wants to Review U.S. Report Detailing Pregnancy Discrimination*, DAILY LABOR REP., Jan. 15, 1998.

<sup>101</sup> Jose A. Zabalgoitia, *Mexico’s Secretary of Labor to Review U.S. Report on Maquiladora*, U.S. NEWSWIRE, Jan. 13, 1998.

<sup>102</sup> *NAFTA: U.S., Mexican Labor Secretaries to Consult on Charges of Maquiladora Pregnancy Bias*, DAILY LABOR REP., Mar. 2, 1998.

<sup>103</sup> I should note here at this point that the Secretary of Labor and Social Welfare of Mexico at the time of the signing was Jose Antonio Gonzalez Fernandez.

<sup>104</sup> Ministerial Consultations Implementation Agreement, U.S. NAI Submission No. 9701, *available at* <<http://www.dol.gov/dol/ilab/public/programs/nao/mcia.htm>>.

<sup>105</sup> *Id.*

<sup>106</sup> Remarks of Dolores Crockett at Protecting the Labor Rights of Working Women, A Trilateral Conference under the North American Agreement on Labor Cooperation, Merida, Yucatan, Mexico, March 2, 1999, *available at* <<http://www.dol.gov/dol/wb/public/speeches/mexico.htm>>.

Follow-up outreach sessions took place August 17-18, 1999 in McAllen, Texas by the United States and in Reynosa Tamaulipas by Mexico. The purpose of the outreach sessions was to inform female workers of their rights in the workplace. Participants were also able to learn about workers legal protections and employer obligations in the workplace.

The full report from the Secretariat is still pending as of this writing.

#### IV. Discussion

Annex 1 of the NAALC outlines 11 labor principles that each party is “committed to promote.”<sup>107</sup> In this section, I will cover two of those principles briefly as they relate to the NAFTA complaints that were discussed above.

##### ***A. Principle 1: Freedom of Association and Protection of the Right to Organize***

Annex 1 explains principle 1 as: “The right of workers exercised freely and without impediment to establish and join organizations of their choosing to further and defend their interests.”<sup>108</sup> U.S. law guarantees this right:

Employees shall have 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.<sup>109</sup>

Thus, an employer is prohibited, under the National Labor Relations Act, “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”<sup>110</sup>

Sprint came into a very gray area when it closed La Conexion Familiar eight days prior to the CWA representation vote. Sprint claimed to have closed down its subsidiary for financial reasons. However, there are some problems with Sprint’s logic. To begin with, there is the matter of Sprint ordering LCF managers to spy on employees who were showing favor to the union. Lilliette Jiron was warned that “any new hire [to LCF] who signed a petition to unionize would be fired.”<sup>111</sup> Employees were “illegally interrogated . . . about the union and threatened . . . with plant closure if the employees unionized.”<sup>112</sup> This violates section 158(a)(1) of the National Labor Relations Act.

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<sup>107</sup> NAALC, *supra* note 5, at Annex 1.

<sup>108</sup> *Id.*

<sup>109</sup> 29 U.S.C.A. § 157 (1994).

<sup>110</sup> 29 U.S.C.A. § 158(a)(1) (1994).

<sup>111</sup> Jiron NPR Interview, *supra* note 55.

<sup>112</sup> *LCF, Inc.*, 129 F.3d at 1278.

The way that the workers were dismissed was another problem. Sprint *immediately* closed LCF -- giving the workers 60 days pay instead of keeping them on the job for 60 days, as required by the Worker Adjustment and Retraining Act. Sprint's usual practice is to keep workers for 60 days before laying them off.<sup>113</sup> One could deduce that Sprint took this action to prevent the union vote, which still could have taken place during the 60-day period.

LCF's workforce was predominantly Hispanic females. Many of them were legal residents of the U.S., although a portion of them were allegedly undocumented aliens. Sprint had problems with this when they acquired LCF and tried to rescind the agreement that gave LCF to Sprint. But after realizing that Sprint was stuck with LCF, the workers were treated like sweatshop employees. Fernanda Diaz, a former LCF employee, stated, "They could fire us at will. When you got sick they told you [to] take sick days from your vacation time."<sup>114</sup> Lilliette Jiron told a reporter that "she resented having her bathroom breaks timed and her intake of liquids limited."<sup>115</sup>

This case was never appealed to the U.S. Supreme Court and, by all rights, it should have been. Besides the union representation vote issue, one could also raise issues of discrimination by race (e.g., pay discrepancies between LCF workers and their English-speaking counterparts), and unsafe working conditions (e.g., improper restroom breaks).

#### **B. Principle 7: Elimination of Employment Discrimination**

This principle is explained as

Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, *bona fide* occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.<sup>116</sup>

Both the Mexican Constitution and the Mexican Federal Labor Law guarantee this principle. Title VI of the Mexican Constitution covers labor and social security with article 123(A) covering labor contracts. Paragraph VII states that "[e]qual wages shall be paid for equal work, regardless of sex or nationality."<sup>117</sup> Paragraph V, which covers pregnant workers, states:

During the three months prior to childbirth, women shall not perform physical labor that requires excessive material effort. In the month following childbirth they shall necessarily enjoy the benefit of rest and

<sup>113</sup> *Id.* at 1280.

<sup>114</sup> Barbara Grady, *Sprint's Labour Practices Cause Cross Border Controversy*, REUTERS EUR. BUS. REP., July 4, 1995.

<sup>115</sup> Brandon, *supra* note 42.

<sup>116</sup> NAALC, *supra* note 5, at Annex 1.

<sup>117</sup> 1917 Constitution of Mexico, as amended, at Art. 123(A)(VII), *available at* <[http://www.msstate.edu/Archives/History/Latin\\_America/Mexico/1917const.html](http://www.msstate.edu/Archives/History/Latin_America/Mexico/1917const.html)>.



shall receive their full wages and retain their employment and the rights acquired under their labor contract. During the nursing period they shall have two special rest periods each day, of a half hour each, for nursing their infants.<sup>118</sup>

Under Mexico's Federal Labor Law (*Ley Federal del Trabajo*), which enacted Article 123 of the Mexican Constitution, these rights are further strengthened. Under Article 47 of the Federal Labor Law, an employer can only terminate an employee under certain conditions including dishonesty, endangerment of self and others, being absent for more than three days without cause, insubordination, and intoxication.<sup>119</sup> The law continues by stating "Women are entitled to equal pay for equal work performed. Women in the workplace have the same rights, and are under the same obligations, as men."<sup>120</sup>

The Federal Labor Law also covers the employment of women during pregnancy. Under the law,

Pregnant women are prohibited from performing work that would endanger their health, or the health of their unborn children, for the entire gestation period. They are entitled to twelve weeks paid maternity leave, divided as six weeks before and six weeks after giving birth, paid by the Mexican Social Security Institute (IMSS). An additional leave of up to nine weeks is available in cases of illness. In cases of extended leave due to illness, employees are entitled to fifty percent of the regular wages also paid by the IMSS. After these periods of maternity leave, the employer must offer the employee her former position, including any rights she has accrued such as seniority and vacation pay.

When a nursing mother returns to work, she is entitled to two extra half-hour breaks each day, at full pay, in order to nourish her child. Child care services are to be provided by the IMSS and funded by employers through a one percent payroll deduction, regardless of whether or not the employer actually employs female workers.<sup>121</sup>

It is easy to see why Mexican employers would not want to hire pregnant women or make sure that women in their employ never become pregnant -- it is very costly for them under the law. Fortunately, Mexican law recognizes this and has put safeguards into place to assure that women are able to work and have job security during their pregnancy.<sup>122</sup>

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<sup>118</sup> *Id.* at Art. 123(A)(V).

<sup>119</sup> Linda Escandón Ojeda and Marina L.C. Bottone, *Mexican Labor Law*, in *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* 151, 160 (Jorge A. Vargas, ed., West Group 1998).

<sup>120</sup> *Id.* at 170-71.

<sup>121</sup> *Id.* at 171.

<sup>122</sup> In fact, Mexican officials noted during the Merida conference that "employment discrimination, both pre- and post-hire, on the basis of gender and pregnancy is illegal under Mexican law. See <<http://www.dol.gov/dol/ilab/public/programs/nao/status.html>>.

Regardless of what the employers say, there is nothing in the law mandating that employers must include pregnancy screening in any pre-employment physical examination, or that female employees must undergo a pregnancy test during their tenure of employment.<sup>123</sup> Many employers also state that pregnant women are not hired because “many women applicants not enrolled in Mexican social security have sought employment only to take advantage of company-funded maternity benefits and many would quit after the benefits run out.”<sup>124</sup>

Granted, there will always be those who will try to use the system to their advantage. But I believe that this is more the exception than the rule. Trying to weed out a few bad apples by discriminating against an entire class is not legal. It is against Mexican law. The most prominent factor is that most of the employers in the maquiladora sectors are U.S.-based companies. The policies that they are using in Mexico would never be tolerated in the United States.

### Conclusion

Since the NAALC was brought into force in 1994, there have been 22 complaints filed by the three NAFTA Parties.<sup>125</sup> The United States has filed 14 complaints,<sup>126</sup> Mexico has filed five complaints,<sup>127</sup> and Canada has filed three.<sup>128</sup> Of these 22 complaints, ten have gone to ministerial consultations.<sup>129</sup> None of the complaints have gone further than ministerial consultations.

In the complaint by the Mexican NAO against the United States, several issues were ignored. Although this was a complaint that was based on the issue of freedom of association, this is a unique case because the employees were of one gender and ethnicity (i.e., Hispanic females). The Mexican NAO’s final report dealt with the major issues of the missed union vote and the sudden plant closing, but it missed other issues such as unsafe working conditions and pay discrimination. Even though these were the issues that brought up the union vote to begin with, they were virtually ignored during ministerial consultations and subsequent hearings.

In the U.S. complaint against Mexico, the Ministerial Council let go of a golden opportunity to study the effects of sex discrimination in the workplace. The Secretariat report on the Merida conference has not yet been made public, but it will probably be the

<sup>123</sup> Zenith Electronics Corp., in a response to the Human Rights Watch report on pregnancy discrimination in Mexico that spurred the NAFTA inquiry, stated that “It is common practice among Mexican and maquiladora employers . . . to inquire about pregnancy status as a pre-existing medical condition.” *See NAFTA: Sex Discrimination in Maquiladoras is Rampant, Advocacy Group Charges*, DAILY LABOR REP., Sept. 6, 1996.

<sup>124</sup> *Id.*

<sup>125</sup> This number is as of January 11, 2000. The U.S. Department of Labor web site gives a summary of each of the complaints filed. *See* <<http://www.dol.gov/dol/ilab/public/programs/nao/status.html>>.

<sup>126</sup> Twelve of the complaints involve freedom of association issues, three involve safety and health along with freedom of association, one involved child labor, and one involved pregnancy-based gender discrimination. Eleven of the complaints filed by the United States were against Mexico. *See id.*

<sup>127</sup> All of the complaints filed by Mexico were against the United States.

<sup>128</sup> One complaint was filed against Mexico with the remaining two filed against the United States.

<sup>129</sup> The United States has had five complaints go to ministerial consultations, Mexico has had four go to that level, and Canada has had one. *See id.*

last action taken on this complaint.<sup>130</sup> I really had hoped that an Evaluation Committee of Experts (ECE) would have been formed to review this situation.<sup>131</sup> There are obviously some interpretations within the Mexican Federal Labor Law that require clarification. And if it is proven that the companies are discriminating against women, then sanctions against the companies should be imposed. But, at the very least, a plan of action to study the effects of sex discrimination in the workplace should be put in place. If this step is taken, the study should conclude with policy recommendations for laws and enforcement of those laws in Mexico.

It is still too early to determine whether the NAALC will be an effective tool for improving working conditions for women. Thus far, there has only been one complaint filed that specifically deals with the rights of working women. The outcome of this case is still pending but it is safe to say that the more serious dispute resolution steps in the NAALC will not be implemented. How this will affect issues such as affirmative action, pay equity, sexual harassment, parental leave, day care, and other issues important to female workers remains to be seen.

Bringing the North American Agreement on Labor Cooperation into force has, for the most part, been an integral part of fair trade among the three NAFTA Parties. However, the agreement should not be used as a political tool to dictate the labor policies of one country to another. The agreement should be used to ensure that fair employment practices are put into place. Are women getting their fair share under the NAFTA? I would give a qualified no to this. While the Council has been looking out for the interests of workers, it especially needs to look out for the special needs of female workers. The NAALC is now six years old -- still a relatively new agreement. As time progresses and more countries are added to the NAFTA, more opportunities will present itself to looking out for the world's female workers

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<sup>130</sup> I spoke with the United States National Administrative Office in April 2000 and was told at that time that the Secretariat's report on this complaint was still pending. Two more conferences were held in 1999 in McAllen, Texas and Reynosa, Tamaulipas to educate women workers about their rights in the workplace. More hearings are expected to take place before a final report is released. See <<http://www.dol.gov/dol/ilab/public/programs/nao/status.htm#iia6>> (status of NAO Submission 9701).

<sup>131</sup> See NAALC, *supra* note 5, at art. 23(1).