Sexual Harassment in Mexico: Is NAFTA Enough

Adrienne Speas

Follow this and additional works at: https://scholar.smu.edu/lbra

Recommended Citation
Available at: https://scholar.smu.edu/lbra/vol12/iss1/6
SEXUAL HARASSMENT IN MEXICO:
Is NAFTA Enough?

Adrianne Speas*

I. INTRODUCTION

SEXUAL harassment has been around at least as long as man has been recording events, and probably as long as men and women have been working together.1 Social and legal awareness of the problem, however, only began developing in the United States in the 1970s.2 Sexual harassment is a problem in Mexico, yet because of cultural reasons, many Mexicans do not know what constitutes sexual harassment, and others do not think it is a problem.3

The second section of this comment will explore the problem of sexual harassment in Mexico. First, the depth of the problem is examined, and the causes of sexual harassment are considered. Additionally, the sexual harassment law in Mexico is discussed but found to be inadequate to address the sexual harassment faced by many women. Finally, the second section contemplates the role that the North American Agreement on Labor Cooperation (NAALC), the labor side agreement to the North American Free Trade Agreement (NAFTA), plays in addressing sexual harassment. Ultimately, however, the NAALC is found to be ineffective.

The third section of this comment discusses the various international options for alleviating the problem of sexual harassment in Mexico. First, the option of amending the NAALC to include a prohibition on sexual harassment is considered but found to be unlikely. Second, other mul-

---

* J.D., Southern Methodist University, 2006; B.S., Texas Christian University, 2001. The author would like to thank the staff of the Law & Business Review of the Americas for their comments and suggestions. This article was completed in the Spring of 2005 and does not reflect economic, social, and political events that have transpired since.


tinational treaties of which Mexico is a part are examined with the purpose of finding an agreement obligating Mexico to take steps to eradicate sexual harassment. Third, the idea of persuading corporations doing business in Mexico to commit to preventing and punishing sexual harassment in their workplaces is contemplated. Finally, the recently-developed tactic of foreign nationals bringing tort and contract suits in the United States is evaluated for its effectiveness in remedying sexual harassment.

Although sexual harassment exists in all major industries in which women are employed, this comment will focus on sexual harassment in the export-manufacturing plants, called maquiladoras.4 The reason for this focus is that maquiladoras, as an employment sector, have the highest rates of sexual harassment, employ large numbers of women, and are largely owned by U.S.-based corporations.5 Maquiladoras were created by the Mexican government in 1965, as part of the Border Industrialization Program (BIP), to take advantage of a U.S. tariff regulation, which limited customs duties on U.S. goods assembled in Mexico.6 Only the value to the goods added by the assembly process is subject to duties, not the entire value of the goods themselves.7 Maquiladoras have since become an important part of the Mexican economy, accounting for over 2,400 plants, 650,000 employees, and over $31 billion a year in exports.8 Mexico's dependence on maquiladoras for the health of its economy does nothing to encourage the government to enforce or expand the existing labor laws.9

II. THE PROBLEM

This section will focus on the current state of sexual harassment in Mexico, including the extent of the problem and the cultural and economic reasons for its prevalence. Additionally, Mexico's current law on sexual harassment is examined, and the NAALC's effectiveness in addressing sexual harassment is evaluated.

A. SEXUAL HARASSMENT IN MEXICO

Sexual harassment is a problem not exclusive to Mexico; it exists in all cultures and throughout all social classes in the world.10 Nevertheless, this section focuses on the problem of sexual harassment in Mexico; both

4. International Labor Rights Fund, supra note 3, at tbl. 3.
6. Chaveriat, supra note 5, at 335-36.
7. Id.
8. Id. at 338.
9. Id.
10. Penn, supra note 2, at 139.
the causes and effects of sexual harassment are examined. The definition of sexual harassment varies by culture, but most definitions will fall in one of two categories. Quid pro quo harassment is when an employee's boss or supervisor uses his or her authority to condition employment or job benefits on sexual favors. Hostile work environment harassment is unwelcome sexual advances and other verbal or nonverbal sexual conduct that affects an employee's ability to perform his or her job duties. The use of the term sexual harassment in this comment will encompass both types of sexual harassment.

Sexual harassment is prevalent in Mexican society. A recent International Labor Rights Fund (ILRF) survey of 160 women workers, from four sectors of the economy in which women are most active, revealed that 47 percent of them had either experienced sexual harassment themselves, or watched or heard someone else being subject to harassment. Those seventy-five employees who had experienced or witnessed sexual harassment collectively recalled 321 instances of sexual harassment. Twenty-five percent of the incidents involved unwanted touching, 15 percent involved being exposed to pornography, 12 percent involved quid pro quo harassment, and 2 percent involved sexual assault. The women were harassed by co-workers, supervisors, union leaders, customers, and in eight instances, by police officers. The survey covered women working in hospitals, schools, retail, and maquiladoras. Almost half of the respondents in hospitals and retail, and about a quarter of respondents in schools, had witnessed or experienced sexual harassment; 70 percent of respondents working in maquiladoras reported witnessing or experiencing sexual harassment.

Sexual harassment is generally viewed as either a type of sex discrimination or as a form of violence against women. The concept of sexual harassment in the legal sense first developed in the United States, where sexual harassment is seen as a violation of the prohibition against sexual discrimination. This theory is supported by evidence that women in traditionally male-populated sectors are more likely to experience sexual harassment than their peers in traditionally female-populated sectors. Some notable organizations, including the United Nations, view sexual harassment as a type of violence against women. Regardless of how it is characterized, literature on this subject suggests that harassment has to

11. Husbands, supra note 3, at 536, 541.
12. Id.
13. Id.
15. Id. at tbl. 4.
16. Id.
17. Id. at tbl. 5.
18. Id.
19. Id. at tbl. 3.
20. Husbands, supra note 3, at 536-37, 543.
21. Id. at 545.
22. Penn, supra note 2, at 142.
do with the "perceived vulnerability of the recipient, not her physical appearance." Unmarried women and young women are therefore harassed in higher numbers than their older, married counterparts. The fact that 50 percent of female maquiladora workers are under the age of twenty-five, and nearly 40 percent are single, helps to explain why sexual harassment in maquiladoras is commonplace.

Viewed from any perspective, sexual harassment in Mexico is largely a product of the culture of machismo and marianismo. A macho is a man who believes he is superior to women. The term marianismo refers to the ideals of the Virgin Mary, which women are expected to uphold by staying at home and protecting their purity. Mexican culture idealizes the concept of women as mothers. Women are expected to dedicate themselves to having and raising children; women are viewed as the glue that holds the family together. These cultural norms do not support women participating in the workforce, especially those women who are married and have children. Mexican culture expects men to control economic activity and to provide financially for their wives and children. The machismo culture also stresses the dominance of males and the passivity of females. These factors have led Mexicans of both genders to regard sexual harassment as a peculiar concept.

Sexual harassment is especially recurrent in maquiladoras, where it is not just incidental to the job, but a tool management used to control women. One technique is for male supervisors to use sexual harassment to ensure that the female group chiefs will inform them of any organizing activity going on among the workers. Maquiladoras also use recreational activities, such as parties, sports competitions, and beauty pageants to keep their workers' time and minds occupied, therefore limiting their ability to organize. While there is nothing inherently wrong with most of these activities, the beauty pageants reaffirm cultural standards of fem-

23. Id. at 141; Husbands, supra note 3, at 539.
24. Penn, supra note 2, at 141; Husbands, supra note 3, at 539.
27. Id.; Susan Tiano, Patriarchy on the Line: Labor, Gender, and Ideology in the Mexican Maquila Industry 49 (1994).
29. Id.
30. Id.
32. Id. at 204-05; Tiano, supra note 27, at 195.
33. Scherlen & Strickland, supra note 2, at 109.
35. Id. at 119.
Such activities may reinforce gender roles and serve to perpetuate the idea that women do not belong in the workplace, further fueling disrespect for women as workers and resulting in sexual harassment.

Maquiladora managers also manipulate female workers through the affection of young, handsome supervisors. One technique involves supervisors flirting with the women in a way that encourages them to compete for the affection of the supervisors. If the women later complain about job conditions, they are told that arguing is unladylike and unattractive. Additionally, the supervisors often invite women workers to parties, dinners, and dances. Those who go, and ultimately, those who give in to the sexual advances of the supervisors, are rewarded with job benefits such as pay raises, bonuses, and vacations.

This use of sexual harassment as a means to control the women in the maquiladoras is illustrated by the personal account of one victim. Chela Delgado, an electronics assembly plant employee, described how two supervisors began flirting with her, and then how one tried to use the relationship to his advantage:

At first, they were very kind, always asking how the work was going, asking if we needed any help. Pretty soon, these men were hanging around us all the time, making suggestions about how good-looking we were and how much they would like to take one or the other of us out alone to dine and dance. I was one of the faster workers, a sort of group leader, and so Eduardo... started paying a lot of attention to me. He asked me out, saying that if I dated him he could get me a raise and some extra vacation time. He also said that I could get promoted if I would help him keep track of the workers on the line.

It was at this point that Chela Delgado realized what was going on. After she told her supervisor that she was not interested in a relationship with him, the harassment escalated:

He started fondling me, at first making it look like it was an accident, you know, brushing his hand across my breasts. Then he started grabbing me from behind. Finally, one night as I was leaving the plant... he grabbed me in the parking lot and kissed me. He said something like, "If you don't give it to me, I'll make sure you never work in Juárez again."

37. Id.
38. Peña, supra note 34, at 119.
39. Prieto, supra note 36, at 76.
40. Id.
41. Peña, supra note 34, at 95, 119.
42. Id.
43. Id. at 120.
44. Id.
45. Id.
46. Id.
47. Peña, supra note 34, at 95, 120.
After this incident, she complained to the personnel manager. She got no relief, and Eduardo actually became more insistent. Because of this, Chela Delgado eventually quit her job.

Although sexual harassment can be used to control some women, there are costs that accompany the harassment. First, it is common for a victim of sexual harassment to quit her job in response to the harassment. This costs the employer in recruiting and training new employees. Second, sexual harassment victims experience a variety of symptoms, including: "anxiety, tension, irritability, depression, inability to concentrate, sleeplessness, fatigue, [and] headaches . . ." Stress caused by sexual harassment can manifest in physical illness, causing harassed employees to take time off from work. Even in jobs where employees are not compensated for time missed due to illness, their absence inevitably affects productivity and profits. In addition, productivity and profits are affected when a harassed employee reports for work because she is probably not motivated to do a good job and likely unable to work to her potential under the stress caused by the harassment.

The fact that so many women quit their jobs instead of reporting sexual harassment or quit their jobs after reporting the harassment has not garnered them any relief, may be caused by some people's attitude that any worker who does not like the harassment can just leave and find a new job. This attitude tries to justify harassment by appealing to the principle of free contract. Specifically, if a place of work has a reputation for sexual harassment, and the job applicant knows this, the theory is that employee and employer both benefit from the agreement. Essential to this argument, however, is the assumption that the employer who sexually harasses pays higher wages because of this, and the employee has a real choice in occupations, so as to avoid sexual harassment if she wishes.

However, the reality in the maquiladoras is that the wages are low, and the female workers do not have many job opportunities because they are not highly educated and do not have much work experience. Even for

48. Id.
49. Id.
50. Id.
51. Shively, supra note 1, at 1097; Husbands, supra note 3, at 540; Penn, supra note 2, at 142.
52. Penn, supra note 2, at 143 (one study found that the number was 53%).
53. Shively, supra note 1, at 1097.
54. Id.
55. Id.
56. Id.
58. Id. at 2-3.
59. See, id.
60. Smith, supra note 5, at 201.
workers who do have a choice, allowing sexual harassment on a large scale is harmful to those employees who avoid harassment because they will pay a financial price for their preference. Sexual harassment on a large scale would only serve to widen the pay gap between Mexican men and women.

B. Mexican Law

It is established that sexual harassment is harmful to both the employees, and to an extent, the employers involved. The next step is to consider the role that Mexican law plays in controlling sexual harassment. In Mexico, sexual harassment is not addressed in the labor laws but in the federal penal code. It is categorized as a “Crime against Liberty and Normal Psychosexual Development,” and results in a fine of forty days’ wages for “any person who, with lustful intentions, repeatedly harasses a person of any sex, and who takes advantage of their hierarchical position deriving from relationships in the workplace, educational establishments, or in the domestic arena, or from any other relationship that implies subordination.”

The strength of this law is that it specifically mentions and provides protection for domestic workers, but the weakness is the fact that its overall protection is very narrow. First, the Mexican Penal Code limits the definition of sexual harassment to quid pro quo harassment; there is no provision for hostile work environment harassment. Second, there is no provision for recourse in civil courts, and no way for a victim to recover damages. Third, the code does not require any system of preventing harassment, such as personnel training.

The situation is not much better in Mexico’s thirty-one states. Sixteen of the states do not have a criminal law against sexual harassment, and most that do criminalize sexual harassment only prohibit quid pro quo harassment. Guerrero is the only state that criminalizes both quid pro quo and hostile work environment harassment.

While labor law does not specifically address sexual harassment, the federal constitution does provide up to three months’ salary to workers subject to “wrongful treatment.” But for harassment that takes place during non-working hours, victims are only eligible for compensation if the harassment would “make it impossible to continue with the working

63. Id.; Scherlen & Strickland, supra note 2, at 110; Gaby Ore-Aguilar, Sexual Harassment and Human Rights in Latin America, 66 Fordham L. Rev. 631, 634 (1997).
64. Ore-Aguilar, supra note 63, at 634-35.
65. Id. at 635.
66. Scherlen & Strickland, supra note 2, at 110.
67. Id.
68. Id.
69. Id.
70. International Labor Rights Fund, supra note 3, at ¶ 12.
71. Id. at ¶ 9.
relationship." This is a high hurdle to cross in order to receive compensation.

The public's lack of knowledge of sexual harassment impedes the effectiveness of sexual harassment laws, limited as they are. In a survey of 160 female workers, 28 percent of the respondents were unfamiliar with the concept of sexual harassment. Further, when asked whether they were aware of any legislation, criminal or labor, federal or state, that prohibited sexual harassment, 53 percent were unaware of any legislation. The fact that many people do not know what sexual harassment is, and do not know what they can do about it, means that few charges are filed, making it easy to minimize the problem of sexual harassment.

Finally, it is important to note that in the eyes of the Mexican government, there is much to be lost from regulating foreign-owned maquiladoras by enforcing claims of sexual harassment. Maquiladoras account for several billion dollars in annual export earnings for Mexico and employ nearly one million Mexican workers. Given these economic pressures, any further protection against sexual harassment will likely have to come from international sources.

C. IS THE NAALC DOING ENOUGH TO HELP?

This section will briefly review the history of NAFTA and the NAALC. This section will then examine the objectives and requirements of the NAALC. Finally, this section will discuss the enforcement provisions of the NAALC, with the purpose of evaluating the ability of aggrieved persons or interested groups to address the issue of sexual harassment through the NAALC.

Former President Bush's February 1991 announcement that Canada, Mexico, and the United States would begin negotiating a trade agreement was not met with universal enthusiasm. Criticisms ranged from Ross Perot's famous "giant sucking sound" comment and labor union concerns that jobs would be lost to Mexico, to environmentalists and human rights activists concerned with the environmental and social impact of the agreement. Multinational corporations based in the United States, however, were strong supporters of NAFTA, as they were eager to raise their competitiveness in the global marketplace by utilizing Mexico's affordable labor, thereby decreasing costs.

72. Id.
73. Scherlen & Strickland, supra note 2, at 110.
74. International Labor Rights Fund, supra note 3, at tbl. 1.
75. Id. at tbl. 2.
76. Scherlen & Strickland, supra note 2, at 110.
77. Smith, supra note 5, at 201.
78. Id.; Grimm, supra note 5, at 182; Chaveriat, supra note 5, at 335-36.
81. Acuff, supra note 80, at 412.
The concerns of many activist groups were heightened when President Bush sought congressional pre-approval in negotiating NAFTA.\footnote{82. Andrias, \textit{supra} note 79, at 531-32.} Many groups demanded congressional hearings to address how NAFTA would affect "labor, food safety, and human rights."\footnote{83. \textit{Id.} at 532.} Additionally, some members of Congress insisted that President Bush provide estimations of how NAFTA would affect "the environment, jobs, and worker rights."\footnote{84. \textit{Id.}} Despite this significant opposition, in the end, Congress did not have enough votes to deny President Bush fast-track authority.\footnote{85. \textit{Id.}}

NAFTA was a major issue in the 1992 presidential election, and in his campaign, President Clinton assured the country that NAFTA would be accompanied by agreements that would protect U.S. workers and the environment.\footnote{86. \textit{Id.}} Mexico did not want to negotiate side agreements after NAFTA had been completed but agreed to do so once it realized that they were key to passing NAFTA in the United States.\footnote{87. \textit{Id.; Acuff, \textit{supra} note 80, at 414.}} President Clinton proposed a uniform standard of labor that could be enforced by sanctions.\footnote{88. \textit{Id.}} Mexico, however, refused to compromise its sovereignty over its labor laws and did not want trade sanctions for violations.\footnote{89. \textit{Id.}} Canada supported Mexico's arguments.\footnote{90. \textit{Id.}} Eventually, a compromise was reached: the NAALC promotes joint labor principles but only requires each country to enforce its own labor law.\footnote{91. \textit{Id.}}

This compromise is articulated in the Preamble, which affirms each country's "continuing respect for each Party's constitution and law," while resolving to encourage "employers and employees in each country to comply with labor laws and to work together in maintaining a progressive, fair, safe and healthy working environment."\footnote{92. See, e.g., NAALC, \textit{supra} note 92, at Preamble ("Recognizing that their mutual prosperity depends on the promotion of competition based on innovation and ris-}
NAALC sets out the seven objectives of the agreement, two of which are applicable to controlling sexual harassment in the workplace.95 These are to: "(a) improve working conditions and living standards in each Party’s territory; (b) promote, to the maximum extent possible, the labor principles set out in Annex 1;..."96 As can be seen from the earlier discussion of the effects of sexual harassment, the elimination of sexual harassment from the workplace will fulfill Part (a) by greatly improving the working conditions of the victims and their co-workers.97

Annex 1 sets out labor “principles that the Parties are committed to promote” covering “broad areas of concern.”98 These principles are merely an aspirational guide; they are “subject to each Party’s domestic law [and] do not establish common minimum standards for their domestic law.”99 Nevertheless, one of the principles is the “[e]limination of employment discrimination on such grounds as race, religion, age, sex or other grounds. . . .”100 The elimination of sexual harassment is included in this labor principle under the theory that sexual harassment is a form of sex discrimination.

The next section of this comment discusses the reality that even if this reading of Annex 1 is accepted, the NAALC only creates a narrow avenue for an interested person or organization to promote the elimination of sexual harassment in the workplace. Despite this, there would be value in including the elimination of employment discrimination in the NAALC. First, an official recognition that the Parties are committed to promote the elimination of discrimination is an important, if modest, starting point.101 Second, while not requiring a Party to adopt any particular labor regulation or law, the principles provide a guide to the direction in which labor laws should move.102 Finally, the Commission for Labor Cooperation, the organization that monitors the current state of each Party’s labor laws and facilitates the development of labor laws, could focus more energy on the issue of sexual harassment.103

In determining whether the NAALC can be used to eradicate sexual harassment in the workplace, the obligations imposed by NAALC must be examined. Primarily, each Party is required to enforce its own labor

95. Id. at art. 1(a)-(b).
96. Id.
97. Penn, supra note 2, at 143.
98. NAALC, supra note 92, at Annex 1.
99. Id.
100. Id. (emphasis added).
102. Id.
103. See, id.; NAALC, supra note 92, at arts. 10, 11, 14.
laws. While the NAALC does not proscribe specific labor laws to which the Parties must adhere, it does provide guidance as to how labor laws should be enforced. Article 3 suggests specific ways that governments can effectively enforce their labor laws. Some of the suggestions include conducting inspections, keeping records, and seeking voluntary compliance. Additionally, article 7 requires the Parties to publish and promote public education of their labor laws. Furthermore, NAALC requires each Party to ensure a right of private action, that judicial proceedings shall be "fair, equitable and transparent," and that final decisions on the merits of the case be "in writing and preferably state the reasons on which the decisions are based."

Assuming, for the moment, that Mexico’s prohibition of sexual harassment in its penal code is considered labor law, the next step is to determine what sanctions NAALC imposes on a Party who does not enforce its labor law. The NAALC distinguishes what type of remedy is available based on the type of labor right that is allegedly violated. The NAALC provides for consultations between the National Administrative Offices (NAOs) “in relation to . . . labor law.” Labor law, as defined by the NAALC, includes “laws and regulations, or provisions thereof, that are directly related to: . . . (g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party’s domestic laws; . . .” If nothing comes from the consultations between the NAOs, a Party may request “consultations with another Party at the ministerial level regarding any matter within the scope of this Agreement.” These provisions are not adequate to address the problem of sexual harassment because the Parties are only required to consult with one another, there does not have to be a public record of their consultations, and the Parties are not required to take any action. At this point in the process, there is little incentive for a Party to change its labor laws or to modify its enforcement thereof.

The next step in enforcing NAALC is the establishment of an Evaluation Committee of Experts (ECE). Only technical labor standards, including non-discrimination and occupational safety and health laws can be examined by an ECE. This panel of three impartial labor experts is convened to draft a report on the patterns of each Party in enforcing the subset of labor laws mentioned above. In drafting their report, the ECE can consider submissions and information from a wide range of

104. NAALC, supra note 92, at art. 3.
105. Id.
106. Id.
107. Id. at art. 7
108. Id. at arts. 4, 5.
109. Id. at art. 21.
110. NAALC, supra note 92, at art. 49.
111. Id. at art. 22.
112. Id. at art. 23.
113. Id.
114. Id. at arts. 23, 25, 26.
sources, including the Parties themselves and the public. The ECE will make a recommendation in its final report, and the Parties are obligated to provide each other and the Secretariat written responses to the recommendations within ninety days of its publication.

While this does require a little more of the Parties, they do not have to commit to following the recommendations of the ECE. Additionally, there are no penalties or sanctions should an ECE find even the most egregious violations. If one Party believes another has persistently failed to effectively enforce labor standards, and the issue has not been resolved by the ECE, Part Five of the NAALC provides a method for the resolution of disputes, which can include arbitration and may ultimately end in financial penalty.

Despite the low level of obligation of a Party whose labor practices are the subject of an ECE, there is no guarantee that an ECE could be convened to examine the issue of sexual harassment in Mexico. Article 23 says that an ECE cannot be convened if an independent expert has ruled, at the request of a Party, that the matter “is not covered by mutually recognized labor laws.” Because sexual harassment is prohibited under Mexico's penal code, and not its labor laws, Mexico could argue that sexual harassment could not be the subject of an ECE. Further, as discussed above, Mexico's penal code defines sexual harassment as the use of power to gain sexual favors, so at best, an ECE would only have the authority to investigate a complaint of quid pro quo sexual harassment. Mexico's objection to an ECE also would be supported by the argument that the elimination of sexual harassment is not specifically listed as one of the labor principles, and, it is not listed as a type of harassment under the principle advocating the elimination of employment discrimination.

This argument that sexual harassment is not subject to the NAALC is the primary reason why the NAALC is not adequate to address of sexual harassment in Mexico. Second, the NAALC's enforcement provisions, which are arguably applicable to this area of law, are woefully weak. The most a Party is ever required to do is give information and statistics to the Secretariat or an ECE and then prepare a written response to recommendations issued by an ECE. Given the shortcomings of the NAALC, alternate international solutions to the problem of sexual harassment in Mexico must be explored.

115. Id. at art. 24.
116. NAALC, supra note 92, at arts. 25, 26.
117. Id. at art. 27.
118. Id. at art. 23, Annex 23.
119. Scherlen & Strickland supra note 2, at 110.
120. NAALC, supra note 92, at Annex 1.
121. Id. at arts. 14, 23.
This section discusses a host of international options to remedy the problem of sexual harassment, and each is evaluated according to its feasibility and effectiveness. These options are an amendment to the NAALC, enforcement of other treaties to which Mexico is a party, independently adopted corporate codes of conduct, and enforcement of U.S. tort law. Because public awareness of sexual harassment is wide-spread, any successful strategy will incorporate education geared towards employers and employees.\(^{122}\)

### A. Amendments to the NAALC

One solution to the problem of sexual harassment in Mexico would be the inclusion of the term “sexual harassment” as prohibited grounds of employment discrimination and strong enforcement mechanisms. While the NAALC does provide that the Agreement may be modified by the Parties, given the Mexican opposition to the creation of the NAALC, it seems unlikely that Mexico will agree to such changes in the foreseeable future.\(^{123}\) Despite this obstacle, the European Union’s (EU) approach will be examined as a model. While the NAALC and the EU approach to sexual harassment are substantially different, it is helpful to compare the two because NAFTA and the EU are both economically-focused, multinational agreements.

The EU law on gender equality and sexual harassment comes from various sources, each with its own strength. The primary sources of EU law are the Constitutional Treaties, which form the organizational law of the

---


123. Id. at art. 52(1); Acuff, supra note 80, at 414.
EU. The Treaties are self-executing, meaning that they automatically become the law of the Member States as soon as they are ratified. The Treaty establishing the European Communities (EEC Treaty) incorporates the principles of gender equality. One of the principles of the Community is promoting equality between men and women. Additionally, in carrying out its activities, "the Community shall aim to eliminate inequalities, and to promote equality, between men and women."

Acts of Community institutions are secondary sources of EU law, and they flow directly from the authority granted by the Treaties. Recommendations and Opinions are non-obligatory secondary sources that nevertheless cannot be dismissed because of their persuasive nature. It is in this way that the EU first began addressing the issue of sexual harassment in the workplace. In May of 1990, the Council, composed of ministerial representatives from each Member State, called on Member States, the Commission, and other institutions and organs of the European Communities to address the issue of sexual harassment. In doing so, the Council recognized sexual harassment as both an issue of equal treatment of men and women, and of violence against women.

In response, the Commission, composed of twenty independent nationals of the Member States, issued a Recommendation for Member States in November of 1991. Sexual harassment is defined in article 1 as "conduct of a sexual nature, or other conduct based on sex" which is "unwanted, unreasonable and offensive to the recipient," and also includes quid pro quo and hostile working environment harassment. Article 1 recommends that Member States promote awareness of sexual harassment.

Article 2 recommends that Member States implement the Commission's code of practice in the public sector, thereby serving as an example to the private sector. Article 3 asks Member States to encourage employers and employee representatives to adopt the code of practice. Finally, article 4 required the Member States, in November 1994, three years after the date of the recommendation, to report to the Commission

125. Id.
127. Id. at art. 3(2).
128. Lasok, supra note 124, at 132.
129. Id. at 157-58.
131. Resolution, supra note 130.
133. Id. at art. 1.
134. Id. at art. 2.
135. Id. at art. 3.
the measures taken by the Member States to give effect to the Recommendation.\footnote{136}

The Code, attached in the Annex to the Recommendation, is entitled: "Protecting the Dignity of Women and Men at Work: A Code of Practice on Measures to Combat Sexual Harassment."\footnote{137} The Code is very thorough and addresses employers' responsibilities in prevention and resolution of sexual harassment, collective bargaining and trade unions' responsibilities, and employees' responsibilities.\footnote{138} The Code is designed to give practical advice and should be tailored to the size and structure of the employer or union.\footnote{139} The purpose of the Code is to prevent sexual harassment, and in the cases where it does occur, make sure that proper procedures are in place to address the harassment and to prevent it from recurring.\footnote{140}

After briefly addressing the extent of sexual harassment in the EU and the effect such harassment has on employees and employers, the Code defines sexual harassment as both quid pro quo and hostile working environment.\footnote{141} The Code's subjective focus of the definition of sexual harassment is notable. The Code says that "[t]he essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive."\footnote{142}

In focusing on effectively preventing sexual harassment, the Code suggests that employers implement a series of safeguards.\footnote{143} These include creation of a policy statement against sexual harassment, communication of the policy, and training for managers and supervisors.\footnote{144} For sexual harassment that occurs despite the preventative measures, the Code recommends clear and precise procedures for dealing with the harassment.\footnote{145} These include assigning someone to provide advice and assistance for the harassed employee, a formal complaints procedure, internal investigations conducted with sensitivity and respect for the rights of the complainant and alleged harasser, and disciplinary penalties for harassment.\footnote{146} Additionally, the Code encourages the recipient to first try to resolve the problem informally by asking the harasser to stop the offensive behavior.\footnote{147} The Code also recommends that trade unions take steps to prevent sexual harassment by educating their members and including the provisions of the Code in their collective bargaining agree-

\begin{itemize}
\item \footnote{136}{Id. at art. 4.}
\item \footnote{137}{Id. at Annex.}
\item \footnote{138}{Recommendation, supra note 132, at Annex.}
\item \footnote{139}{Id. at § 1.}
\item \footnote{140}{Id.}
\item \footnote{141}{Id. at § 1,2.}
\item \footnote{142}{Id. at § 2.}
\item \footnote{143}{Id. at § 5(A).}
\item \footnote{144}{Recommendation, supra note 132, at § 5(A).}
\item \footnote{145}{Id. at § 5(B).}
\item \footnote{146}{Id.}
\item \footnote{147}{Id. at § 5.}
\end{itemize}
ments. Finally, the Code maintains that employees have a role in helping to create a harassment-free workplace by making it clear that they do not approve of sexual harassment and by supporting coworkers who are victims of sexual harassment.

Regulations and directives, which are other secondary sources, are binding on Member States. Directives are binding as to the result to be achieved, but they leave it up to the Member States' discretion in achieving the result. In 1997, the Council issued a directive on the burden of proof in cases of sex discrimination. Although the Recommendation on sexual harassment is not referenced in the preamble of the Directive, the fact that the Code treats sexual harassment as sex discrimination may mean that the Directive applies to cases of sexual harassment. The Directive provides that if a complainant establishes "facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment." This burden of proof is favorable to victims of sex discrimination because, if the complainant can establish a prima facie case, it requires the respondent to prove that there was no discrimination.

Some commentators believe that the Recommendation is problematic because it is non-binding and because the EC treats sexual harassment as a form of sex discrimination, therefore not addressing harassment that is non-sexual or non-discriminatory. Other commentators believe that the Recommendation is currently the best solution to the problem of sexual harassment, because differences in cultural attitudes prohibit the adoption of a uniform solution.

For many of the same reasons, an amendment to the NAALC that loosely followed the Recommendation would be a good solution. First, any amendment to the NAALC, which recognized the issues of sexual harassment, would be a step in the right direction. Second, in the spirit of the NAALC, an amendment must not mandate any specific law or regulation to be adopted. Thus, the NAALC provision on the elimination of discrimination is essentially non-binding. Third, cultural differences between the United States, Canada, and Mexico should be reflected in an amendment. The benefit of the EU Recommendation is that in defining sexual harassment, it focuses on the unwanted nature of the harass-
ment. What is unwanted in the United States may not be unwanted in Canada or Mexico. Finally, the Recommendation sets out policies that Member States and employers are advised to follow, much like the NAALC sets out ways in which a Party may effectively enforce its labor law.

B. ENFORCEMENT OF OTHER MULTINATIONAL TREATIES

1. International Labor Organization

The International Labor Organization (ILO) is the main international organization concerned with labor standards. In 1958 the ILO passed the Convention Concerning Discrimination in Respect of Employment and Occupation. Commonly referred to as C111, this convention was ratified by Mexico in September of 1961. Ratification of C111 obligates Mexico to follow the principles of the Convention and also to make an annual report to the ILO on the conditions in its country regarding the Convention.

C111 requires each ratifying member “to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.” The term discrimination is defined as including “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” While the term “sexual harassment” is not mentioned in the Convention, a good argument can be made that the Convention protects against sexual harassment as discrimination based on sex. First, sexual harassment is a “distinction, exclusion or preference made on the basis of . . . sex. . . .” Victims of sexual harassment are often distinguished by their reaction to sexual harassment; often those employees who give into the harasser are rewarded, or given employment preferences. Employees who resist the harassment are often excluded from receiving benefits afforded either to women who acquiesce to harassment or to men. Second, sexual harassment “impair[s]
equality of . . . treatment in employment or occupation." This characterization supports the elimination of even hostile work environment sexual harassment.

Under article 2 of C111, Mexico is obligated to pursue a national policy that promotes equality of treatment in employment and occupation. If an industrial association of workers or employers does not think that a member to a Convention is adequately observing that Convention, the organization may file a complaint with the ILO. The Governing Body of the ILO may then invite the government of that member to reply to the complaint, and if the Governing Body does not feel that the government's response is adequate, it has the option of publishing the statement.

If one member to a Convention files a complaint regarding the non-observance of the Convention by another member, the stakes are even higher. The Governing Body may appoint a Commission of Inquiry to investigate. The government in question is then obligated to supply the Commission with all the information they have on the pertinent subject-matter. The Commission will write a report of its findings, including any recommendations, and the report will be published. The government then has three months in which to inform the ILO whether it accepts the recommendations or proposes to refer the issue to the International Court of Justice. The decisions of the International Court of Justice are final.

Under the ILO Constitution, a General Conference of representatives of the Members is held annually, and the Conference can appoint committees "to consider and report on any matter." A committee has considered and reported on C111 in the years 2000, 2002, and 2003. The focus of these reports has been the existence of rampant employment discrimination in regards to pregnancy. In response to requests from

167. Id.
168. Id. at art. 2.
169. ILO CONST., supra note 163, at art. 24.
170. Id. at arts. 24, 25.
171. Id. at art. 26.
172. Id. at art. 27.
173. Id. at arts. 28, 29.
174. Id. at art. 29.
175. ILO CONST., supra note 163, at art. 31.
176. Id. at arts. 3(1), 17.
the Committee, the government of Mexico, between 1998 and 2000, conducted 27,387 inspections regarding discrimination, focusing on the maquiladoras. Noting this, the Committee still has requested the government to take further measures to investigate and eliminate discriminatory hiring practices, to amend the federal labor code to "explicitly prohibit discrimination based on sex in recruitment and hiring for employment," and to provide information on cases filed alleging employment discrimination based on sex.

The fact that the Mexican government has been somewhat responsive to these Committee requests is encouraging. If a labor organization or union made an observation to the General Conference regarding sexual harassment in Mexico, it is possible that the General Conference would consider sexual harassment as another problem in maquiladoras that needs to be addressed.

2. Organization of American States

In 1994, Mexico and other members of the Organization of American States met in Belem do Para, Brazil, and adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. This Convention, commonly referred to as the Convention of Belem do Para, was signed by Mexico in 1995, and ratified in 1998. The Convention accorded women "the right to be free from violence in both the public and private spheres." Violence is defined to include "physical, sexual and psychological violence . . . including, among others . . . sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place. . . ." Further, "[t]he right of every woman to be free from violence includes, among others . . . The right of women to be free from all forms of discrimination. . . ."

The Convention requires the State Parties to condemn "all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence . . . ." Likewise, the Convention provides a detailed list of policies, procedures, and programs that the State Parties should undertake to meet this obligation. Additionally, the Convention requires the State Parties to submit an annual report on measures adopted to effectuate the Convention and provides procedures for lodging and investigating com-

180. Id. at para. 8.
181. Wagner, supra note 26, at 356.
182. Id. at 360.
184. Id. at art. 2.
185. Id. at art. 6.
186. Id. at art. 7.
187. Id. at arts. 7, 8.
plaints of violations.\textsuperscript{188} If the State Parties do not come to an agreement, then the Committee will draft a report with recommendations for the Party against whom the complaint was filed.\textsuperscript{189}

This Convention is so important because it explicitly maintains the right of women to be free from sexual harassment. The weakness, however, is that it does not define sexual harassment, so there is no guarantee that the Convention prohibits hostile work environment harassment. In fact, in a 1998 report on human rights in Mexico, the Inter-American Commission on Human Rights did not mention the fact that Mexico's sexual harassment law omits a penalty for hostile work environment harassment.\textsuperscript{190} Encouragingly though, the Committee recognized the persistent sexual harassment in the maquiladoras, and recommended that Mexico "promote a wholesome working environment which would provide greater safety for women and enhance their on-the-job performance."\textsuperscript{191} While recommending a wholesome work environment alludes to the cultural ideal of the purity of women, it is a step in the right direction of recognizing hostile work environment harassment. It is not too far of a stretch to expect the Commission to eventually recommend that Mexico include hostile work environment in its prohibition of sexual harassment.

C. CORPORATE CODES OF CONDUCT

Advocacy and human rights groups may be able to change the practice of sexual harassment in Mexico by encouraging individual corporations to adopt codes of conduct pledging not to sexually harass employees of the parent company or subsidiaries. Such groups have been successful in getting General Motors to change its policy on pre-hiring pregnancy screening of female maquiladora workers and persuading Starbucks to develop a code of conduct for workers at its supplier plantations in Guatemala.\textsuperscript{192}

Corporate codes of conduct are not a new idea; in fact they have been around in the United States since the 1970s.\textsuperscript{193} In 1977, Rev. Sullivan, a Philadelphia pastor and Member of the Board of Directors of General

\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at arts. 10, 12; see, American Convention on Human Rights Pact of San Jose, Costa Rica, Nov. 22, 1969, U.N. Doc. 17955, at art. 48, \textit{available at} \url{http://www.oas.org/juridico/english/Treaties/b-32.htm} \textit{[hereinafter Pact of San Jose, Costa Rica].}
\item \textsuperscript{189} \textit{Pact of San Jose, Costa Rica, supra} note 188, arts. 50, 51.
\item \textsuperscript{191} \textit{Id.} at paras. 635, 639.
\item \textsuperscript{193} Jorge F. Perez-Lopez, \textit{Promoting International respect for Workers Rights Through Business Codes of Conduct, 17 FORDHAM INT'L L.J. 1, 5 (1993).}
\end{itemize}
Motors, proposed a set of employment principles promoting racial equality for U.S. corporations working in apartheid South Africa. When Rev. Sullivan announced the Principles, twelve major U.S. corporations had already agreed to adopt the Principles. Subsequent codes that did not garner a comparable following included the MacBride Principles, aimed at eliminating anti-Catholic discrimination in Northern Ireland, the Slepak Principles, designed for U.S. corporations doing business in the former Soviet Union, and the Miller Principles, created to encourage political freedom and liberalization in China.

A code of conduct targeting the maquiladora sector has already been developed. The Maquiladora Standards of Conduct were developed in 1991 by the Coalition for Justice in the Maquiladoras, a group composed of the AFL-CIO and U.S. and Mexican religious, labor, and environmental groups. The twenty-nine Standards deal with environmental, health, safety, and employment concerns. In terms of fair employment practices, the Standards specifically provide that “[i]n the workplace, U.S. corporations will take positive steps to prevent sexual harassment.” Unfortunately, the Standards have not been met with enthusiasm in the corporate arena.

Although the above examples of corporate codes were spearheaded by interest groups, a survey by the Organisation for Economic Co-Operation and Development (OECD) reveals that most codes are promulgated by the corporations themselves. The 1998 survey analyzed 233 codes, 107 of which were created by corporations. While the survey did not collect information on the countries in which different corporations operated, sixteen Canadian, three Mexican, and fifty-six U.S. corporations or business associations reported having codes of conduct. Of the American codes of conduct, only a handful do not incorporate some standards on fair employment and labor rights. Forty-three of the 233 codes surveyed use international standards as a reference for their guarantees. The ILO Conventions, including C111, Discrimination (Employment and
Occupation) were often cited. Given the chance that a corporation or association may cite to C111 in its code, it is important for advocacy groups and lobbyists to work towards the inclusion of sexual harassment as a prohibited grounds for discrimination in C111.

Creating a corporate code of compliance that adequately addresses sexual harassment and other issues facing Mexican employees would not be difficult, as evidenced by the superior example of the Maquiladora Standards. The challenge is to get corporations to adopt the codes. While some corporations will altruistically adopt standards, most will only do so if it is in their and their shareholders' self-interest. Companies most likely to adopt codes are those whose success is tied into their corporate and brand image. It is not surprising, then, that the companies most cited for their codes of conduct – Levi Strauss, Starbucks, Reebok, Sears, JC Penney, Wal-Mart, Home Depot, Philips Van-Heusen, Timberland, Nike, Gillette, Polaroid, Hallmark – have names recognizable to the American consumer. For these companies, a good public image is essential to success. Many consumers want to buy goods that are made under socially responsible conditions and are willing to pay an extra cost in order to get it. The success of using corporate codes to address the issue of sexual harassment in Mexico depends, at least in part, upon American consumers believing the issue is important and communicating this belief to corporations doing business in Mexico.

The examples of General Motors and Starbucks are illustrative. In 1994, the U.S.-Guatemala Labor Education Project, a coalition of religious, labor and environmental organizations, began trying to persuade Starbucks to develop a code of conduct for the workers on Guatemalan coffee bean plantations. The organization started out by attempting to meet with Starbucks, but their requests were denied. The president of Starbucks recognized the purpose of a proposed code but cited the steps Starbucks had taken to be socially responsible and declined to consider the matter further. The group proceeded to raise public awareness about the issue by handing informational leaflets out in front of Starbucks stores and encouraging people to write Starbucks in support of a code. Eventually, Starbucks agreed to consult with the group, and subsequently, Starbucks "adopted a code of conduct that requires its overseas suppliers to pay subsistence level wages, employ child labor only if it does

207. Id. at 16, tbl. 10.
209. Id. at 115-16.
210. Id. at 115-16, 128; Compa & Hinchcliffe-Darricarrere, supra note 192, at 686; Perez-Lopez, supra note 193, at 26.
211. Liubicic, supra note 208, at 114-16.
212. Id. at 117.
213. Id. at 115; Compa & Hinchcliffe-Darricarrere, supra note 192, at 683-85.
215. Id.; Liubicic, supra note 208, at 115.
not interfere with mandatory education requirements, and help workers obtain acceptable levels of housing, health facilities and the like.”

Similarly, Human Rights Watch (HRW) persuaded General Motors (GM) to change its policy of pre-employment pregnancy testing. As part of a fact-finding mission on the status of sex discrimination in maquiladoras, HRW wrote a letter asking GM about its policies of pregnancy testing. In their first response, GM defended its practice of pre-employment pregnancy testing, saying that it is a common practice, lawful in Mexico, and is the financially responsible thing to do considering the Mexican law on maternity leave and benefits. Approximately eight months later, after continued correspondence with HRW, GM reviewed its policies and “decided to discontinue the practice of pre-hire maternity testing and the consequent denial of job offers to pregnant applicants.”

For some employers, a persistent message of interest from advocacy groups and consumers may be enough to persuade them to reconsider and change their discriminatory practices.

Once a corporate code is drafted and accepted by a corporation, the next challenge is to see that it is adequately enforced. For obvious reasons, many corporations do not want to submit their voluntary codes to monitoring by an outside source. In fact, the OECD survey found that only three of 107 corporations’ codes mention monitoring by independent auditors or bodies, and forty-one do not mention a monitoring system at all. Levi-Strauss monitors itself, Wal-Mart uses accounting firms, and The Gap uses an independent monitoring system. It is preferable that the monitoring system be maintained by an independent party, and that the results of such monitoring are public. For corporations inspired to develop corporate codes because of consumer pressure, it is essential that the consumer know the true working conditions in order for the code to remain effective.

D. Enforcement of U.S. Tort Law

Sexual harassment victims also have the option of attempting to litigate their grievances in United States federal and state courts. Although the U.S. Supreme Court has ruled that Title VII does not apply extraterritorially, Mexican citizens have the option of bringing a state tort action. There are many torts that are applicable to sexual harassment, including intentional infliction of emotional distress, battery, and invasion of pri-

216. Id.
217. HRW, supra note 192, at app. D.
218. Id.
219. Id.
220. Id. at app. B.
221. OECD Survey, supra note 202, at 18, fig. 6.
222. Compa & Hinchliffe-Darricarrere, supra note 192, at 677-78; Liubicic, supra note 208, at 134, 138.
Mexican citizens who file complaints in the United States will have two procedural hurdles: jurisdiction and choice of law.

In order for a court to have personal jurisdiction over the corporate defendant, the corporation must have minimum contacts with the forum State; in other words, the defendant must have done something that “purposefully avails itself of the privilege of conducting activities within the forum State. . . .”\(^{226}\) If a maquiladora is the subsidiary of an American company, and that company has offices or a finishing plant in the United States, then it is almost certain that the United States company can be sued in the United States.\(^{227}\)

When the plaintiff and the defendant of a lawsuit are residents of different States, or the residency of the parties is the same, but the alleged wrong took place in a different State, the court must apply its choice of law principles to determine which State’s laws it will apply. Assuming that personal jurisdiction is met, Mexican plaintiffs would most likely prefer to bring suit in either Texas or California, the two states closest to major Mexican cities. For that reason, the choice of law provisions of Texas and California will be examined, although personal jurisdiction could probably be exercised in other states.

Texas has adopted the most significant relationship test for determining choice of law in torts cases.\(^{228}\) Some of the factors to be considered in determining which State’s laws have the most significant relationship are: "(a) the place where the injury occurred. . . (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."\(^{229}\) Also, account must be given to "(a) the needs of the interstate and international systems . . . (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue . . . ."\(^{230}\) In evaluating the defendant’s contacts with the State, the extent, not the number, of contacts is controlling.\(^{231}\)

It is likely to be difficult for the typical Mexican citizen sexually harassed at a maquiladora in Mexico to get relief in Texas courts, because Mexico will almost always have the most significant relationship to the wrong. The injury will have occurred in Mexico, and it is likely that the relationship between the parties will have been centered in Mexico. The maquiladora worker’s contacts with the company will almost certainly be exclusively with the Mexican subsidiary. The court will take into account that the company has a place of business in Texas, and may be incorpo-

\(^{225}\) Husbands, \textit{supra} note 3, at 548-549.
\(^{226}\) Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985).
\(^{227}\) \textit{Id.} at 475-76.
\(^{228}\) Gutierrez v. Collins, 583 S.W.2d 312, 318 (1979).
\(^{229}\) \textit{Id.} at 319 (quoting from \textit{RESTATEMENT (SECOND) OF CONFLICTS} § 145 (1971)).
\(^{230}\) \textit{Id.} at 318 (quoting from section \textit{RESTATEMENT (SECOND) OF CONFLICTS} § 6 (1971)).
\(^{231}\) Crisman v. Cooper Indus., 748 S.W.2d 273, 276 (1988).
rated in Texas, but equally as important will be the fact that the plaintiffs will be Mexican residents and nationals.

Additionally, consideration will be given to "the needs of ... international systems," meaning that a judge could take the NAALC into account in determining whether Mexico or the U.S. has the most significant contacts.\(^\text{232}\) If a judge took the NAALC into account, she would probably find the agreement’s theme of national sovereignty very persuasive. The fact that the NAALC does not establish a prohibition against sexual harassment and does not require Mexico to implement any specific labor law may lead a judge to conclude that applying United States tort law related to sexual harassment would not be respectful of the international system created by NAFTA and the NAALC.

California has adopted a governmental interest test for resolving choice of law.\(^\text{233}\) Accordingly, if the two States’ laws differ, the court must "examine each state’s interest in applying its law to determine whether there is a ‘true conflict’; and if each state has a legitimate interest [the court] must compare the impairment to each jurisdiction under the other’s rule of law."\(^\text{234}\) A federal court applying California choice of law has already addressed the issue of sexual harassment suit brought in the state although the harassment happened in a foreign country.\(^\text{235}\) Carolyn Arno, a California resident, applied for a job with Club Med through their New York office, and Club Med made all of Arno’s international job assignments through their New York office.\(^\text{236}\) Arno alleged that she was raped by her boss while on assignment in Guadeloupe, a French island in the Pacific.\(^\text{237}\)

The court looked at Arno’s tort and contract claims under California’s choice of law provisions.\(^\text{238}\) After determining that the tort law of France and California differ, the court compared California’s interest in providing compensation to its residents and Guadeloupe’s interest in encouraging local industry.\(^\text{239}\) The court determined that previous courts had resolved this conflict in favor of the foreign jurisdiction and therefore found that Arno’s tort claims were governed by French law.\(^\text{240}\) The court then determined that the contract law of France and California were different, but that California law governed Arno’s bad faith breach of contract claim.\(^\text{241}\) The court reasoned that Guadeloupe had no legitimate interest in applying French contract law to “a contract made in California between a California resident and a British West Indies corporation [Club Med] doing business in New York,” while California had “an interest in

\(^{232}\) 583 S.W.2d at 318.
\(^{234}\) Id.
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id. at 1468.
\(^{239}\) 22 F.3d at 1468.
\(^{240}\) Id.
\(^{241}\) Id. at 1468-69.
protecting the contract rights of its residents, particularly when the resident negotiates those rights from California.\textsuperscript{242}

Based on the court's opinion in \textit{Arno}, it would seem unlikely for a California court to recognize a tort or contract claim made by maquiladora employees because Mexico has a strong interest in encouraging U.S. businesses to locate factories in Mexico, and the likelihood is that the employment contract was negotiated in Mexico. But one case by Mexican nationals against a U.S. corporation has proven this assumption wrong. \textit{Aguirre v. American United Global} was filed in Los Angeles Superior Court in 1994.\textsuperscript{243} The impetus for the case was a company picnic, organized by a Tijuana maquiladora plant, which was attended by employees and the president and CEO of the plant's Los Angeles-based parent company.\textsuperscript{244} The president and CEO, John Shahid, forced female workers to participate in a bikini contest, which he videotaped.\textsuperscript{245} In October of 1995, after American United Global's (AUG) motion for summary judgment was denied, the case settled for an undisclosed amount.\textsuperscript{246}

The success of this case flows from several factors. First, the women filed a complaint with Tijuana's labor arbitration board, which AUG refused to answer, thereby rejecting Mexican jurisdiction over the matter.\textsuperscript{247} Second, the Superior Court Judge found that AUG was the parent company of the maquiladora plant in Tijuana, \textit{Exportadora Mano de Obra} (EMO).\textsuperscript{248} Finally, the judge found that the plaintiffs had legal standing in the United States to sue in California courts.\textsuperscript{249} Unfortunately for legal scholars (but certainly not for the plaintiffs), AUG did not appeal the denial of summary judgment, so the case carries no precedent.\textsuperscript{250} It does, however, break new ground and gives foreign workers some guidance and a framework for bringing suits in state courts in the United States.\textsuperscript{251}

\section*{IV. CONCLUSION}

Sexual harassment is a problem in Mexico and should be addressed. It is a violation of gender equality and a form of violence against women. It should be remedied because it violates the near-universal principle of gender equality in the workplace, and because it causes emotional, psychological, and sometimes physical harm to the victims. Sexual harassment should also be eradicated because it is costly to employers; profits

\begin{thebibliography}{999}
\bibitem{Id.} Id.
\bibitem{245.} Orihuela & Montjoy, \textit{supra} note 244, at 341.
\bibitem{249.} Id.
\bibitem{250.} Id.
\bibitem{251.} Id.
\end{thebibliography}
are lost when workers quit, miss work, or cannot concentrate on their work because of sexual harassment. This problem warrants an international solution because Mexico's dependence on the maquiladora industry gives them a disincentive to regulate behavior in the workplace.

While something must be done about sexual harassment, Mexico's cultural beliefs about the roles of men and women make an international solution tricky. Any solution must protect women from unwanted behavior but should not chill natural interaction between men and women in the workplace. For these reasons, the Organization of American States, which promulgated the Convention of Belem do Para, may be in the best situation to influence Mexico on this issue. A treaty coming from the Americas is more likely to be sensitive to Mexico's cultural beliefs than one developed by a worldwide organization such as the ILO. Similar cultural benefits could be expected from an amendment to the NAALC. The structure and history of the NAALC, however, do not realistically support the option of a mandatory prohibition of sexual harassment in the workplace.

In addition, cultural considerations can be addressed in drafting the definition of sexual harassment. The EU option, which subjectively defines sexual harassment as behavior of a sexual nature that is offensive to the recipient, serves the purpose of protecting women but avoids the problem of one culture defining sexual harassment for another. The only problem with this approach is that it depends on the victim being able and willing to articulate that some behavior was offensive to her. Without education about sexual harassment, many women will not know that they have a right not to be subject to such treatment. It also depends on the victim believing that she can address such behavior without facing increased harassment in retaliation.

Voluntary codes of corporate compliance could be very effective in addressing the problem of sexual harassment. As sexual harassment is something already prohibited in the United States, U.S.-based corporations may not find it a stretch to prohibit it in maquiladoras they own or with which they are affiliated. There would be costs and challenges with educating employees about sexual harassment and monitoring the policy, but it is plausible that these costs would be offset by the savings gained by a harassment-free environment. To maximize effectiveness of any sexual harassment policy, workers on the line and women workers, not just supervisors or men, should be involved in developing and carrying out the policy.

The two challenges with voluntary codes are persuading a corporation to adopt and enforce a code. Corporations, however, can be influenced by pressure from advocacy groups and by the desire to preserve their brand image. Grassroots organizations wishing to address sexual harassment in Mexico are likely to be the most effective through this avenue. Changes through treaties or international labor standards cannot be ig-
nored in favor of pursuing corporate codes of compliance, as some corporations look to these international standards in developing their policies.

Finally, Mexican nationals can attempt to bring their complaints in U.S. courts. There are not yet enough cases to know the limits of this option, but the Arno and Aguirre cases show that the personal jurisdiction and choice of law hurdles can be crossed. There are several advantages of bringing suit in the United States. One is the potential of monetary damages, which both empowers the victims and forces the corporations to take notice. Lawsuits also attract media attention, which may raise awareness of the issue and may cause a corporation to pledge to alleviate the problem in order to deflect the negative attention.