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Pregnancy Discrimination in Mexico’s Maquiladora System: Mexico’s Violation of its Obligations under NAFTA and the NAALC

Laurie J. Bremer*

I. Introduction.

Pregnancy discrimination is a form of sex discrimination based on a woman’s pregnancy status.1 This is considered a form of sex discrimination specifically because it is discrimination based on a condition that is unique to women.2 In Mexico’s maquiladora sector several “legally objectionable practices” occur based on pregnancy status: hiring based on pregnancy status, forced resignations, job altering or reassignment, and violations of health and safety laws.3 Pregnancy discrimination is a regular occurrence in Mexico’s maquiladoras, is an invasion of a woman’s right to privacy, and can sometimes be an unlawful restraint on a woman’s ability to choose the spacing and number of her children.4 Because pregnancy is a condition tied directly to being female, when women are treated differently by employers or future employers simply because they are pregnant—or may become pregnant, they are being discriminated against in a manner that men are not.5 Pregnancy discrimination targets women for a condition that only women can experience. For this reason, pregnancy screening and the resulting discrimination constitutes sex discrimination.6

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2. See id.
5. See id.
6. See id.
Over 500,000 workers are employed by maquiladoras and over fifty percent of those workers are women. Women are considered strong and productive workers, making them very desirable candidates for employment in U.S.-owned corporate production facilities in Mexico. Maquiladoras, or exporting processing factories, generate $29 billion in exports for the United States. While maquiladoras are very dependent on the productivity of women workers, so too are the women workers dependent on the maquiladora. For many of the women working in maquiladoras, there is no alternate source of employment. Women are often uneducated and do not contest pregnancy testing. Women lack the requisite understanding of what their basic rights are under Mexican law, and they have little hope of finding employment elsewhere even if they are aware of the discriminatory nature of the practice. Working conditions are poor and workers are often deprived of many of their basic rights. Furthermore, there is very little bargaining power for workers. As one former employee of a maquiladora in Cuidad Acuña, Mexico stated, "poor working conditions and an uneducated work force foster an environment that leaves the employee with little bargaining ability."

While Mexico's "official" unemployment rate is only 6.3 percent, this figure is "widely acknowledged by the U.S. Commerce Department and other U.S. agencies as being significantly underestimated." In reality, there are very few job opportunities other than working in the maquiladora system available to the many poor, uneducated women. Many Mexican women, particularly those of childbearing age, are incredibly limited as to where they can find employment. These women are faced with the option of objecting to the practice of pregnancy screening and losing their opportunity for employment within the maquiladora or submitting to the test and being employed. With little or no redress available, women often realize that this is the least of their problems in working in the maquiladora.

This pregnancy screening is also contrary to Mexican law and to the objectives of the North American Agreement on Labor Cooperation (NAALC). NAALC is the labor side agreement to the North American Free Trade Agreement (NAFTA). Through NAALC, Mexico has committed itself to promoting and enforcing its preexisting labor laws, and it

7. See id.
8. See id.
10. See id.
13. The former employee that was interviewed for this paper is an American woman who worked in the management side of the maquiladora. Jenna Stitzel did not work on the assembly or production lines, and she was not personally forced to undergo pregnancy screening.
14. Stitzel, supra note 11.
16. See id.
17. See id.
has committed itself to striving to improve its labor laws. Mexican domestic law is very comprehensive and provides adequate protection for women against pregnancy discrimination; however, the Mexican government has chosen a policy of nonenforcement of its laws. This is done to protect the foreign investment that is generated by the maquiladoras, and it is in direct violation of Mexico's obligations under NAFTA and NAALC. While the American corporations deserve to bear some of the fault for implementing such intrusive and illegal practices, the Mexican government readily allies itself with these corporate interests at the expense of workers' rights and NAALC.

This article is divided into sections that will generally explore why the problem of pregnancy discrimination is so rampant in Mexico's maquiladora system. It will also address why pregnancy discrimination is a violation of Mexican domestic law and how nonenforcement of these domestic laws by the Mexican government is a violation of Mexico's obligations under NAALC. Finally, this article will address how the problem of pregnancy discrimination is being addressed through a cooperative effort of the United States and Mexican governments via NAALC.

Section II explains the objectives of NAALC, considers Mexico's obligations as a signatory of NAALC, and addresses the effectiveness of NAALC in promoting labor principles and cooperation among member countries. Section III is an overview of Mexican domestic laws that relate to the subject of pregnancy screening and illustrates the course of nonenforcement implemented by the Mexican government.

Section IV includes a comparative look at the maternity benefits of all three NAFTA member countries (the United States, Canada, and Mexico) and includes a discussion of the impact of foreign direct investment on Mexico's decision making. Section V covers the United States National Administrative Office (U.S. NAO) Submission No. 9701 that was filed against Mexico by several non-governmental organizations (NGOs), both Mexican and American. Section VI addresses Mexico's resistance to the idea of altering its behavior and considers the impact that NAALC's dispute resolution system has had in the past, and will have in the future, on Mexican governmental policies.

II. NAALC, NAFTA, and Mexico's Obligations.

NAALC is the supplemental labor agreement to NAFTA. NAALC developed out of concerns of the labor movement of the effect NAFTA would have on the rights of workers, particularly in Mexico. NAALC is the first labor treaty to be linked to a trade agreement. Considered a "political compromise," NAALC serves to monitor and challenge member countries.

19. See Kevin Banks, NAALC Secretariat, Lecture to SMU International Trade and Labor Course (Apr. 6, 1999).
20. See id.
21. See id.
Initially, NAALC, as proposed by the United States, was an ambitious agreement that provided binding social norms apart from those already in place in the member countries' own domestic laws. This was similar to the International Labor Organization (ILO) structure, whereby countries are bound to uphold international norms and standards. However, Canada and Mexico were reluctant to agree to this agreement because of concerns about sovereignty. What ultimately resulted was a Canadian draft that was far less ambitious. In fact, the member countries are not bound by any international norms. The countries are committed by their agreement under NAALC to enforce their own domestic labor laws.

Essentially, the governments of Canada, the United States, and Mexico, in an effort to abide by their commitments under NAFTA, agreed to "create an expanded and secure market for the goods and services produced in their territories, enhance the competitiveness of their firms in global markets, create new employment opportunities and improve working conditions and living standards in their respective territories, and protect, enhance and enforce basic workers' rights." Through NAALC, each country agreed to focus on the following: "affirming their continuing respect for each Party's constitution and law; desiring to build on their respective international commitments and to strengthen their cooperation on labor matters; seeking to complement the economic opportunities created by NAFTA with the human resource development; [and] resolving to promote... economic development in North America."

A. THE PURPOSES OF NAALC.

On September 14, 1993, the United States, Mexico, and Canada signed NAALC. The purpose of NAALC is not to create a bureaucracy but rather to enhance the standards in each country and to improve working conditions and living standards. NAALC is designed to promote labor principles, exchanges of information, cooperation among member countries, and collaboration. The labor principles, as set out in Annex 1 of NAALC, are intended to guide each country but do not establish any minimum standards. NAALC defers to each country's sovereignty, and no one country can impose
on another. It does "not create new levels of government, rather it establishes a coordinating structure among the countries." NAALC includes objectives to which Mexico, Canada, and the United States are committed, including the promotion of the labor principles established in Annex 1:

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

NAALC does not create new standards; instead, each country is committed to the enforcement of its own laws. NAALC member countries are further committed to:

* investing in continuous human resource development, including for entry into the work force and during periods of unemployment;
* promoting employment security and career opportunities for all workers through referral and other employment services;
* strengthening labor-management cooperation to promote greater dialogue between worker organization and employers . . . ;
* promoting higher living standards as productivity increases;
* encouraging consultation and dialogue between labor, business and government both in each country and in North America;
* fostering investment with due regard for the importance of labor laws and principles;
* encouraging 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.

NAALC essentially seeks to encourage countries to enforce their own laws and to strive to improve their labor conditions. Any failure to do so is a clear violation of the spirit of NAALC. Particularly, concerning the Mexican government's failure to enforce domestic anti-

33. While no one country may impose its rules or standards on another country, according to NAALC, the structure of NAALC is such that recommendations may be issued from other countries through the National Administrative Offices. Depending on the labor principle involved, the offending country may then be required to submit to ministerial consultation and more.
34. See McGrady, supra note 9.
35. See NAALC, supra note 25, art. 1 & annex 1.
36. See id. at 1515-16.
37. See id. at preamble.
38. See id. at 1502-03.
discrimination laws in light of violations through pregnancy screening, NAALC has many provisions. The relevant articles of NAALC state that countries must enforce their own laws and must take appropriate government action in response to violations. Article 2 of NAALC states that each country “shall ensure that its labor laws and regulations shall provide for high labor standards.” Article 3 of NAALC obligates each country to “promote compliance with and effectively enforce its labor law through appropriate government action . . . .” NAALC obligates Mexico to allow access to tribunals and to promote the elimination of sex discrimination. Article 4 of NAALC provides that each country shall “ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals . . . .”

The three member countries (the United States, Mexico, and Canada) are required to eliminate employment discrimination and to establish minimum employment standards. The most pertinent articles regarding pregnancy discrimination are the previously mentioned article 3, regarding government enforcement action, and article 4, regarding private action. Additionally, article 7, Public Information and Awareness, obligates Mexico, the United States, and Canada to “promote public awareness of its labor law.” This is to be accomplished through the following means: “(A) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and (B) promoting public education regarding its labor law.”

Also of great importance is Mexico’s obligation under article 1 of NAALC. Under the “Objectives” article, the member countries are bound to “promote compliance with, and effective enforcement by each Party of, its labor law, and foster transparency in the administration of labor law.” Clearly, Mexico has defied the very premise on which NAALC is based. Mexico’s violation of the articles of NAALC negates the spirit and the objectives of NAALC.

Of great importance are these two primary objectives of NAALC: (1) to promote labor principles and extensive cooperation in labor and (2) to provide effective enforcement of labor regulations and laws. In understanding the effect of Mexico’s violation of its obligations under NAALC, it is necessary to briefly address NAALC’s effectiveness in these areas.

39. See id. arts. 2, 3, 4.
40. See NAALC, supra note 25, art. 2.
41. See id. art. 3.
42. A Job or Your Rights: Continued Sex Discrimination in Mexico’s Maquiladora Sector (Human Rights Watch, Mexico) (Dec. 1998) at 6 [hereinafter HRW A Job].
43. See Human Rights Watch, supra note 4, at 3.
44. See NAALC, supra note 25, art. 4.
45. See id.
46. See NAALC, supra note 25, arts. 3, 4.
47. See id. art. 7.
48. See id.
49. See id. art. 1.
B. NAALC'S EFFECTIVENESS IN PROMOTING LABOR PRINCIPLES AND COOPERATION.

NAALC has enjoyed a high degree of success in promoting labor principles and international cooperation. In this area, where flexibility is necessary to gain ground over the derogation of the labor market, NAALC fits well into this framework. In the forum of international cooperation and promotion of workers' rights, NAALC has been called the essential element, the "lost piece of jigsaw" in the international order. Even critics of NAALC have been forced to grudgingly admit that in this area, NAALC has had at least "modest successes in labour's favor."

Perhaps the strongest aspect of NAALC is its ability to generate a heightened public awareness. The NAALC process creates a forum that enables NGOs, countries, and the public as a whole an opportunity to become aware of and comment on the complaints that are filed. Because this international scrutiny, generated through NAALC's procedural mechanisms, often leads to some level of compliance, it is argued that NAALC has been an overwhelming success. "In an international system convened on the basis of labor cooperation, the notion of cooperation should prevail over any kind of disciplinary system."

International scrutiny has played a commanding role in the case of Mexico's nonenforcement of domestic protections for pregnant women. The Human Rights Watch (HRW) investigation is one example of the effective use of NAALC's ability to publicly disseminate information. The HRW filed the complaint under NAALC (U.S. NAO Submission 9701). This submission, as well as the HRW investigation, received a tremendous amount of attention that would likely not have been focused on this issue otherwise. Knowing that NAALC obligated Mexico to enforce its labor laws and that NAALC had a procedural system for filing grievances, the HRW launched the following investigation:

In March 1995 the Human Rights Watch Women's Rights Project sent a mission to Mexico to investigate discrimination against pregnant workers or women who might become pregnant in the maquiladora sector. We interviewed women's rights activists, maquiladora personnel, labor rights advocates, Mexican government officials, community organizers, and victims of sex-based employment discrimination in five cities. We interviewed women who currently or in the recent past worked as line workers or assemblers in forty-three maquiladora plants along the border.

52. See Lara, supra note 27.
54. See McGrady, supra note 9.
55. See Saenz, supra note 51.
56. The complaint filed against Mexico under NAALC for its violations regarding pregnancy discrimination will be discussed in further detail in this paper. Particular attention will be paid to the procedures and outcome of U.S. NAO Submission No. 9701.
57. See Human Rights Watch, supra note 4.
58. See id.
In addition to prompting NGOs to increase their efforts, the publicity created by NAALC has also impacted governments, corporations, and NAALC itself. The heightened awareness on the matter has led to extensive activities and research by the administrative bodies of NAALC. There have also been a series of cooperative activities between governments and international conferences. In a review of NAALC's progress, the Council of NAALC commented "[t]he Council is pleased to recognize that over the past four years under the NAALC, important new institutions and networks have been established, many fields of common concern have been explored, significant challenges have been identified, and much experience in international cooperation has been gained."

Under NAALC, parties, either governmental or private, are now accountable to the other member nations. This has met with some criticism because it focuses on a party's desire for good will and essentially relies on a government's whims; however, in the area of public awareness and moral pressure, NAALC has been generally successful. For example, companies in the maquiladora region have become more cautious in their pregnancy screening practices. In some cases, companies have gone to great lengths to avoid being affiliated with a complaint to NAALC. General Motors has even changed its policy of screening for pregnancy although they continue to maintain the legality of the practice. A recent letter from General Motors to Human Rights Watch stated in relevant part:

General Motors has conducted a review of its hiring practices in Mexico and has decided to discontinue the practice of pre-hire maternity testing and the consequent denial of job offers to pregnant applicants. Our review revealed that the practice of pre-hire maternity testing and refusal to hire pregnant job applicants is legal and very common in Mexico. General Motors is unilaterally taking this step to discontinue the practice and is hopeful that other companies will do the same.

Clearly General Motors, like other corporations, recognizes that the cost attached to a meritorious claim under NAALC outweighs any benefit the company has in continuing the practice of pre-hire pregnancy screening. This is a prime example of NAALC's success. NAALC's ability to generate an awareness of the issues to which it pertains has been an overall success. From prompting NGOs to conduct investigations to generating public interest and encouraging corporations to voluntarily comply with laws, NAALC has been an effective publicity mechanism.


61. See McGrady, supra note 9.


63. See Adams & Singh, supra note 53, at 176.


65. See id.
C. NAALC'S EFFECTIVENESS IN ENFORCEMENT.

In the area of enforcement, rather than cooperation and public awareness, NAALC is subject to greater criticism. NAALC has been called "a model of regulatory toothlessness." And although defenders of NAALC have argued that it is a "toothless tiger," there is merit to the claim that NAALC lacks effectiveness in enforcing its decisions.

One complaint that has surfaced is that NAALC's procedural system is limited. A complaint, such as the submission filed by the HRW against Mexico, is limited because of the type of labor principle it involves. NAALC provides for differing levels of review depending on the labor principle at issue. This means a complaint based on a labor principle, such as the elimination of employment discrimination, is limited as to how far it may travel through NAALC's procedural system. The three tiers of review of a complaint depend on the labor principle involved and can be summarized as: (1) a general review by the NAO; (2) a review by an independent Evaluation Committee of Experts; and (3) arbitration and sanctions (very restricted and as yet untested).

Critics note that NAALC has no real means of enforcing its decisions for a majority of labor principles as sanctions are reserved for violations of only three of the eleven labor practices. To date, the issue of pregnancy discrimination in Mexico has not been classified into one of the three labor standards that permit sanctions. This means that even if Mexico were to fully ignore any recommendations by the U.S. NAO on this matter, clearly violating Mexico's obligations under NAALC and NAFTA, there would be no procedural ramifications under NAALC. This has led one critic to note that Mexico's self-interest could in effect negate the very agreement itself.

NAALC's dispute resolution system has not yet been extensively tested, and it allows for a great deal of rhetoric. "Major instances of abusive practices have been identified . yet, to date, not a single enforcement action has been leveled against an offending country nor a targeted practice abolished." Despite the harsh criticism NAALC has received for its inability to actually bind countries to any of its recommendations, NAALC is still an effective body in its persuasive powers.

In the case of Mexico and its noncompliance with NAALC's requirement that countries enforce its own labor laws, NAALC has had moderate, albeit laboriously slow,
progress. Ultimately, even the identifying of relevant portions of Mexican law and having the Mexican government concede that these provisions protect women against pregnancy discrimination proved an arduous task.

III. Mexican Domestic Law.

Because each country is required by NAALC to enforce its own laws and because any failure to do so by Mexico is a violation of its obligations under NAFTA, it is necessary to look at the domestic law of Mexico. Theoretically, Mexican law is very comprehensive. As will be discussed, the maternity leave provisions established by Mexican law are very thorough and, on their face, appear to completely provide for and protect pregnant women. Mexican labor legislation is intended to remedy abuses and implement social justice. While Mexican legislation may be comprehensive and "as beautiful as poetry," even the most precise laws are useless when they are not enforced.

A. Mexican Laws That Are Violated by Pre-Hire and Post-Hire Pregnancy Discrimination.

Pregnancy screening violates many of Mexico's domestic laws. Mexico's legislation guarantees equality between the sexes. It also guarantees the right to decide on the number and spacing of one's children. Mexico's legislation prohibits sex discrimination and protects pregnant women. Article 4 of the Political Constitution of the United Mexican States (Mexican Constitution) guarantees equality among the sexes under the law. This entitles women to be free of intrusive questioning and discriminatory practices that men, by virtue of their inability to be pregnant, do not undergo.

The Mexican Constitution very clearly defines an individual's absolute right to determine the spacing and number of one's children. The Mexican federal labor code also addresses the issue of sex discrimination/pregnancy discrimination. The Mexican federal labor code prohibits sex-based distinctions among workers in articles 3 and 56, prohibits hiring discrimination based on sex in article 133(I), and ensures equality among the sexes in article 164. Again, the fact that being pregnant is a condition unique to women entitles women, under Mexican domestic law, to be free from discrimination based on this condition.

75. See Lara, supra note 27.
76. Ironically, these "comprehensive" laws have actually led critics to take aim at the under-inclusive United States maternity provisions and to encourage the United States to try to model its laws after provisions similar to Mexico's.
77. See id.
78. See id.
79. See Isa, supra note 12.
80. See HRW A Job, supra note 42.
81. See CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] art. 4 (Mex.) [hereinafter MEXICAN CONSTITUTION].
82. See LEY FEDERAL DEL TRABAJO (L.F.T.) arts. 3, 56, 133(I), and 164 (Mex.) [hereinafter FEDERAL LABOR CODE]; see also HRW Questions, supra note 1.
There are areas that speak to sex discrimination similarly in both the Mexican Constitution and the Mexican federal labor code. Article 123 (A)(V, XV) of the Mexican Constitution and articles 170(1) and 166 of the Mexican federal labor code protect pregnant women's right to work in healthy and safe environments. They also prohibit an employer from assigning a pregnant woman to a position involving unhealthy and unsafe conditions. This is designed to protect a woman's unborn fetus from unhealthy exposure prenatally.

While these domestic laws exist, both in Mexico's Constitution and in the articles of the federal labor code, Mexico has still generally followed a policy of nonenforcement. Mexico's laws may in fact be too comprehensive at times, too protective for a government, therefore limiting its resources to enforce its laws.

B. MEXICAN NONENFORCEMENT POLICY.

Clearly, Mexico's policy of nonenforcement is against the spirit and letter of both Mexican law and NAALC. Mexican government agencies do not enforce anti-discrimination laws, particularly those designed to protect women. Mexican protection of pregnant women through private action is virtually nonexistent. Although there are complaints filed with the government, Mexican labor rights mechanisms refuse to hear such matters. "The Mexican government does little to protect workers despite laws designed to do just this."

In its defense, the Mexican government claims that pregnancy screening is not illegal. The Mexican Ministerial Department of Labor and Social Security (DTPS) released a statement that not only is this practice legal, "it is a fulfillment of the authority granted by labor laws." Due to this position, Mexico has taken a nonenforcement approach.

Corporations argue that the federal labor code is so precise that silence on pre-hire pregnancy screening means the practice is not prohibited. The Mexican government has interpreted its statutes, particularly those allowing pre-hire medical exams, to say that pre-hire pregnancy testing is permitted. As one Mexican labor inspector conceded, "it is hard to get the company on a violation." Mexican agencies claim they lack authority because of the Mexican government's policy of not enforcing its labor laws.

83. See Mexican Constitution, supra note 81, art. 123(A)(V, XV); Federal Labor Code, supra note 82, arts. 166 and 170(1); see also HRW Questions, supra note 1.
84. See id.
85. See HRW A Job, supra note 42, at 3.
86. See Isa, supra note 12, at 628.
87. See id.
88. See HRW A Job, supra note 42, at 1.
89. See id.
90. See Interview with Bill McGowgn, Banca Serfin, Mexico City, in Dallas, Tex. (Apr. 5, 1999).
92. See HRW A Job, supra note 42, at 2.
93. See Isa, supra note 12, at 635.
94. See HRW A Job, supra note 42, at 1.
95. See Isa, supra note 12, at 629.
96. See id. at 628.
Mexico has strongly advocated the position that without an existing employment relationship, there is no jurisdiction to hear pre-hire discrimination cases. The Mexican government has taken the position that a woman who alleges she has suffered pregnancy discrimination in the pre-hiring process cannot use the adjudicative mechanisms because she has not established a labor relationship. However, it is argued that redress is available without a labor relationship.

The Mexican federal labor code states that even if there is no preexisting labor relationship, a complainant is entitled to have access to labor tribunals and remedies for violations of the law. Article 154 of the Mexican federal labor code establishes conditions that obligate an employer to select "Mexican over non-Mexican, those who have served satisfactorily for a great time, those having no other source of economic earnings and have in their charge a family and those who are unionized over those who are not." Directly related to this is article 157 of the Mexican federal labor code, which grants to individuals who have met the requirements of article 154 but who have not yet established an employment relationship, the right to "present a case before the cab for indemnization or reinstatement." Arguably, pregnant women who are denied employment simply because of their pregnancy status would be similar to an individual with no other source of economic income and would have family in her charge. Again, these standards are directly proscribed by the Mexican federal labor code. The Mexican federal labor code already addresses the issue of individuals who have not yet established a working relationship, and it ensures "access to adjudication and that those adjudicative structures will receive and investigate the allegations fully." Therefore, it is argued that a pregnant woman's lack of an established employment relationship should not be a hindrance to Mexico properly affording her redress. As the HRW stated, "Mexican Ministry of Labor officials' failure to investigate and address pregnancy testing is a failure of political will, not of legal mandate." The Mexican government did at least, however, concede that pregnancy screening is a problem worth addressing. In government documents, Mexico took efforts to address this problem, adding legitimacy to NAO Submission 9701 on this matter.

97. See Interview by Human Rights Watch with Javier Moctezuma Barragán, Ministry of Labor, Mexico City, Mex. (May 27, 1997).
98. See id.
100. See id.
101. See FEDERAL LABOR CODE, supra note 82, art. 154 (as quoted in HRW A Job, supra note 42).
102. See HRW A Job, supra note 42, at 4.
103. See id.
104. See id.
105. See id.
106. See Banks, supra note 19.
107. See id.
IV. Corporate Responsibility and Maternity Benefits.

A. MEXICO'S MATERNITY BENEFITS: RICH ON PAPER, POOR IN PRACTICE.

The primary reason that companies implement pregnancy screening is that Mexican labor laws are considered very generous. Through Mexico's social security system, the law guarantees that pregnant workers will be provided with medical and financial aid. Mexico's maternity leave provisions are considered very inclusive and, on their face, appear to afford pregnant women in Mexico a very large amount of protection and compensation during the maternity period. However, for a woman to take maternity leave, she must have been employed for thirty weeks prior to taking leave for Mexico's social security system to provide coverage. Otherwise, she is not eligible for social security. However, even if a woman is not covered by social security, the Mexican law still provides protection for the pregnant woman through other maternity benefits. In this case, the employer is required to provide maternity aid to the worker for six weeks before and six weeks after delivery. Essentially, if a woman has not worked the requisite time period, the burden of bearing the cost of a woman's twelve weeks of paid maternity leave shifts from the Mexican government to the employer. Herein lies the problem.

In Mexico, many U.S. companies do not want to bear the burden of maternity costs and have actually relocated production factories to Mexico because of the Mexican government's nonenforcement policies. In the 1960s, many U.S. corporations relocated their production plants to northern Mexico to "take advantage of favorable tariff structures for importing unassembled goods and exporting finished products; low wages; and an abundance of available workers." Many corporations readily admit to practicing pre-hire pregnancy screenings and actively defend this practice. For example, Zenith Corporation stated that there are "applicants in these markets whose sole interest is gaining maternity benefits." Zenith also maintained that it was too costly to "unilaterally end" pregnancy testing. In defense of the U.S. corporations, it must be noted that, indeed, some applicants do in fact attempt to gain employment for the sole purpose of receiving maternity benefits. However, this is not normally the case.

Companies readily admit that in Mexico they "cannot always meet the standard . . . [they] would like to achieve," and many actively defend pregnancy screening as "legal and
very common in Mexico." Corporations operating in Mexico's maquiladora sector practice pregnancy screening and discrimination against women who are, or potentially may become, pregnant. This generally includes women who are sexually active, are of childbearing age, and who use contraceptives. "Hiring or employing pregnant women could entail higher costs because Mexico's federal labor law contains explicit maternity provisions."

Corporations do not deny that these expensive costs imposed by the federal labor code prompt them to base their hiring decisions on a potential employee's pregnancy status. In a January 1998 letter from General Motors to the HRW, General Motors readily admitted to participating in these practices.

[It is our policy to base hiring decisions upon our assessment of the candidate's ability to do the job as well as results of the general physical examination.... That policy has not changed. To ensure proper adherence to this policy, each Plant Manager and Human Resource Director as well as all medical personnel and others responsible for hiring decisions have been made aware of its intent.

However, General Motors insisted it did not always disqualify a candidate based on her pregnancy status:

We have underscored the importance of ensuring that those instances where maternity status can be determined without resorting to a medical test, or when knowledge of maternity is discovered incidental to routine physical examinations, that hiring decisions continue to be based solely on the applicant's ability to do the job.... As you may be aware, urine sampling is used by the medical profession to determine a number of physical conditions, including drug usage, and we do continue to utilize urine sampling to determine other conditions.

Clearly, Mexico's "comprehensive" maternity leave fails to protect the pregnant female employee and applicant. Rather, these very inclusive and protective laws actually force women to undergo intrusive interrogations and invasive physical examinations to screen potentially expensive applicants out of the applicant pool. Ironically, in its attempt to protect women by passing very comprehensive protective legislation, Mexico has essentially created a disincentive for corporations to hire these "protected" women. At the same time, the Mexican government refuses to enforce its other protective labor laws designed

120. See id.
121. In a subsequent letter from General Motors to the HRW, General Motors indicated that in response to the investigation by the HRW (and the potential for a NAALC complaint being filed) it had decided to change its practice and no longer required an applicant to undergo a pregnancy screening.
123. See 5 FEDERAL LABOR CODE, art. 170 (as found in Public Report of Review of NAO Submission No. 9701).
to prevent this very scenario. Rather, the Mexican government imposes, but does not enforce, massive economic obligations on corporations regarding maternity leave.

In addition to forcing the employer to bear the cost of a woman's maternity leave if she has not met the requirements for coverage by Mexico's social security system, the federal labor code imposes other obligations on the employer. Corporations are required to protect women from performing tasks that would endanger the health of the pregnant woman's fetus. The company must allow the woman, after childbirth, two additional thirty-minute breaks for breast-feeding purposes. Also, the company is required by Mexican federal labor law to give pregnant women the option of taking sixty extra days off from work at a pay rate of fifty percent of her normal wages if no more than one year has passed since the woman gave birth.

While women workers are actively recruited by maquiladoras because they are considered hard and productive workers, corporations still screen employees and future employees in an effort to weed out the additional costs these women may create as a result of Mexican federal laws regarding maternity benefits.

B. A Brief Comparison with the Maternity Provisions of the Other NAFTA Countries.

On their face, Mexico's provisions for maternity leave appear to be more advantageous for pregnant women than the similar provisions of other NAFTA countries. The United States and Canada do not, at least legislatively, provide nearly as well for pregnant women as Mexico does. The Canadian system is set up in such a way that the employer does not bear the full cost of employing the non-working woman on maternity leave. Under Canada's provincial system, a woman is able to take maternity leave from her job for fifteen weeks or more, most of this time paid at over fifty percent of the woman's salary. Additionally, a woman is entitled to receive at least ten weeks of partially paid family leave. A woman may take a longer amount of time as family leave, but it will be uncompensated.

In the United States, maternity benefits provided for by law are often criticized as not being comprehensive. As stated by Ellen Bravo, director of 9to5, National Association of Working Women: "Yes, we don't burn brides or practice genital mutilation, [but] when I see that countries like South Africa are progressive enough to offer three months of paid

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124. Id.
125. Id.
126. Id.
127. Id.
128. The United States and Canada do not have as comprehensive maternity legislation as Mexico does. This is, however, misleading. The problem for Mexico is not that its laws are not comprehensive, but rather that the law shifts the burden of the maternity leave to the employer. The United States and Canada do not impose this sort of a burden on the employer, and therefore, their maternity laws, although not as comprehensive as Mexico's, are more enforceable.
130. See id.
maternity leave, and we're not, I'm certainly not proud." 131 In fact, according to a recent study by the ILO, the United States has one of the least comprehensive maternity leave policies in the world. According to the ILO survey, Costa Ricans receive four months of maternity leave at 100 percent of their salaries. Italians are entitled to five months leave at eighty-percent pay. Over seventy countries provide compensated maternity benefits through their country's social security system. 132

The Family and Medical Leave Act (FMLA) is the only national childbirth provision available in the United States. The FMLA entitles both women and men who work for companies with over fifty employees to twelve weeks of unpaid leave to care for either a newborn baby, a recently adopted child, or a very ill family member. 133 The FMLA ensures that a job will be held for the employee when they return to work; however, the employee must bear the burden of taking the leave without receiving any compensation during that period. 134 While this may appear to be the most undesirable of maternity laws of all three of NAALC's member countries, 135 it should be noted that while the FMLA does not provide extensive benefits for pregnant women, by not making the employer bear the burden of maternity leave, pregnancy screening does not actively occur in the United States. 136

The United States may have a policy that guarantees very few maternity rights to women in comparison to other countries; however, Mexican laws are deceptively over-inclusive. The Mexican system provides for greater maternity benefits, but because a great burden is placed on the employer, the Mexican government often defers to the employer and does not enforce its laws. This deference that the Mexican government shows to corporations is a primary element in Mexico's violation of its obligations under NAALC.

C. FOREIGN DIRECT INVESTMENT.

Foreign corporate interests heavily influence the Mexican government's actions and inactions. U.S. corporations relocating to Mexico for the tariff structures, low wages, and available number of workers, has proven to be an integral part of Mexico's economy. There are economic incentives for the Mexican government to not enforce its laws, 137 and corporate interests prevail in the maquiladora sector. The Mexican government, whether directly due to political corruption or to increased investment, has readily overlooked the practices that the maquiladoras employ to screen out potentially costly workers.

131. See id.
132. See Uncle Sam, supra note 129.
133. See id.
134. See id.
135. Some American companies provide additional coverage for maternity leave beyond that which is required by FMLA. Many corporations provide for a woman to take maternity leave at all or part of her normal salary. In this instance, the companies, as part of their internal corporate policies, willingly assume the burden of funding this maternity leave.
136. Pregnancy screening does not actively occur in Canada either. Of the three member countries in NAALC, pregnancy screening has only been documented in Mexico.
137. See Smith, supra note 3.
Arguably, the Mexican government has continually allowed discrimination to occur and has routinely failed to enforce protective provisions in the name of encouraging foreign investment.\textsuperscript{138} Rather than forcing corporations to abide by the federal maternity provisions, the Mexican government has willingly ignored its discrimination provisions to permit corporations to screen applicants and employees for pregnancy. A balancing between the protection of human rights of pregnant women, who have little bargaining power, and the powerful maquiladoras, who have an inordinate amount of bargaining power, inevitably leads to a finding in favor of the maquiladoras by the Mexican government. Because the economic disincentives to regulate the maquiladora industry outweigh the benefits of enforcement, the Mexican government has failed to regulate the maquiladora industry effectively.\textsuperscript{139}

Foreign investment is vital to the Mexican economy as it diversifies the market place. Investment from U.S. corporations also advances technology.\textsuperscript{140} Foreign investment, particularly U.S. corporations operating in the maquiladora sector, also increases employment and cost efficiency.\textsuperscript{141} Maquiladoras have become so powerful and are so vital to the Mexican infrastructure that enforcement of domestic protections may not be viable.\textsuperscript{142} Maquiladoras generate billions of dollars in export products for the U.S. corporations operating in Mexico. This system of economic "power houses" also generates a great amount of capital investment for Mexico. Clearly, the Mexican government does not want to lose the benefits its economy gains from foreign investment in the maquiladoras.\textsuperscript{143} While it seems to be the Mexican government's prerogative to chose whether or not to acknowledge and enforce its own domestic laws, this is not the case. Not only does this nonenforcement policy fail to safeguard workers' rights, it also signals a violation of Mexico's obligations under NAFTA to enforce its domestic labor laws.\textsuperscript{144}

V. U.S. NAO Submission No. 9701.

Mexico's nonenforcement policy regarding pregnancy discrimination led to the filing of NAO Submission No. 9701.\textsuperscript{145} NAO Submission No. 9701 was filed, in accordance with NAALC, by the HRW, the National Association of Democratic Lawyers of Mexico (ANAD), and the International Labor Rights Fund (ILRF).\textsuperscript{146}

\textsuperscript{138} See Isa, supra note 12, at 632.
\textsuperscript{139} See Human Rights Watch, supra note 4.
\textsuperscript{140} See Isa, supra note 12, at 632.
\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
\textsuperscript{144} Article 1 of NAALC (Objectives) obligates each country (the United States, Canada, and Mexico) to "promote compliance with, and effective enforcement by each Party, of its labor law." See NAALC, supra note 25, art. 1.
\textsuperscript{146} See id.
A. BACKGROUND.

The investigation by the HRW spanned from maquiladoras in Tijuana to Matamoros. The HRW interviewed:

... women's rights activists, maquiladora personnel, labor rights advocates, Mexican government officials, community organizers, and victims of sex-based employment discrimination in five cities: Tijuana, in Baja California state; Chihuahua, in Chihuahua state; and Matamoros, Renosa, and Rio Bravo, in Tamaulipas state. We interviewed women who currently or in the recent past worked as line workers or assemblers ... In its investigation, the HRW found with few exceptions that during the hiring process, women are continually forced to submit to pregnancy exams. This often consists of exams in which urine samples are taken by doctors and nurses who are employed by the maquiladoras or who are contracted independently by the maquiladoras. Also, the HRW investigation uncovered the fact that the staff of the maquiladoras ask intrusive questions about a woman's menstrual cycle, her sexual activities, and her use of contraceptives. The HRW also found that pregnancy discrimination in Mexico's maquiladora sector is not limited to pre-hire pregnancy screening. Current discriminatory practices include reassigning women who are employed, but who have become pregnant, to demanding, difficult work hoping that the woman will elect to resign rather than be forced to endure the harsh conditions. The HRW has expressed a great concern that "such discriminatory treatment may directly compromise women worker's regulation of their pregnancies by forcing them into a situation of fearing the loss of their jobs if they become pregnant." The HRW also reported: "in cases when women workers become pregnant, the fear of losing their jobs often compels women to hide their pregnancies, and risk their and their fetuses' well being. In many instances women find themselves in the untenable position of choosing between their jobs and their rights."

B. SUBMISSION PROCESS.

In response to all of the HRW discoveries, NAO Submission No. 9701 was filed according to the provisions of NAALC. The submission was filed on May 16, 1997, and it was accepted for review on July 14, 1997. A public hearing was held on November 19, 1997 in the border town of Brownsville, Texas.

147. See HRW A Job, supra note 42.
149. See id.
150. See id.
151. See HRW A Job, supra note 42.
152. See Human Rights Watch, supra note 4, at 5.
153. See id.
154. See NAO PUBLIC REPORT, supra note 18.
In addition to the charges of discriminatory pre-hire and post-hire practices by maquiladoras, Submission No. 9701 alleged that pregnancy discrimination in Mexico's maquiladora sector "is widely countenanced by Mexican government officials charged with enforcing Mexico's labor laws, and may even be condoned as part of a wider effort to curb population growth."\(^{156}\) The submission also asserted that relief in Mexico is unavailable to remedy this problem.\(^{157}\) Submission No. 9701 claimed that through its policy of nonenforcement, Mexico violated several articles of NAALC.\(^{158}\) These articles include article 3(1), enforcement of labor laws, and articles 4(1) and 4(2), access to tribunals and recourse availability.\(^{159}\) The submission was supported by investigations and interviews performed by the HRW,\(^{160}\) and it named the corporations\(^{161}\) of Teledyne, AT&T, Panasonic, ITT, Sunbeam, and Zenith as violators.\(^{162}\)

The U.S. NAO was required by procedural guidelines to complete a review and release a public report in 180 days from the date of acceptance of the complaint.\(^{163}\) In its review, the U.S. NAO was faced with two issues: one legal and one factual. The U.S. NAO needed to determine: (1) what Mexican law is regarding pregnancy discrimination and (2) if pregnancy screening was an illegal and systematic problem.\(^{164}\)

C. \textbf{FINDINGS.}

On January 12, 1998, the U.S. NAO issued a report on its findings.\(^{165}\) The U.S. NAO concluded that post-hiring discrimination does occur in Mexico,\(^{166}\) and it recommended the "Secretary of Labor [of NAALC] engage in ministerial level consultations with the Secretary of Labor and Social Welfare of Mexico."\(^{167}\) The result of this conclusion was mixed. First, it was difficult for the U.S. NAO in Washington, D.C. to convince Mexico to agree to a consultation.\(^{168}\) Under NAALC, no other member country can directly impose its laws on another member country. Instead, the countries are limited to "building on existing institutions and mechanisms in Canada, Mexico, and the U.S. to achieve the preceding economic and social goals."\(^{169}\) This

\(^{156}\) See NAO Public Report, supra note 18, at 3.

\(^{157}\) See id. at 5

\(^{158}\) See id. at 3.

\(^{159}\) See id.

\(^{160}\) See id. at 4.

\(^{161}\) Some corporations, such as General Motors, were also in violation of Mexican law by practicing pregnancy screening. However, due to the investigation by Human Rights Watch and the threat of a complaint under NAALC, such corporations remedied their practices. By doing this, the corporations avoided any negative attachment to NAO Submission No. 9701.

\(^{162}\) See McGrady, supra note 9, at 14.

\(^{163}\) See NAO Executive Summary, supra note 145, at 1.

\(^{164}\) See Banks, supra note 19.

\(^{165}\) See HRW A Job, supra note 42.


\(^{167}\) See NAO Executive Summary, supra note 145, at 1.

\(^{168}\) See Banks, supra note 19.

\(^{169}\) See NAALC, supra note 25, at 2.
undoubtedly was an obstacle in convincing the Mexican government to submit to scrutiny by an American branch of NAALC (the U.S. NAO).

Second, while the U.S. NAO recognized that post-hire pregnancy discrimination was a violation of NAALC and noted that pre-hire discrimination regularly occurred, it did not directly find that pre-hire screening was illegal. The report concluded that there was ambiguity regarding the legality of this practice and that women workers in the maquiladoras of Mexico were uneducated as to what their rights are.

On October 21, 1998, Mexico and the United States entered into a nine-month agreement (to be implemented by July of 1999). The purpose of this agreement is to end pregnancy discrimination. To date there have been only action plans, workshops, and intergovernmental conferences on this matter. However, the U.S. NAO process is still limited by Mexico and its general unwillingness to fully discuss matters or to accept responsibility for enforcement.

VI. An Attempt at Resolution by NAALC.

NAALC’s dispute resolution system has not been extensively tested. Some critics claim that the process has a loophole that allows Mexico to remain non-compliant. There are no effective means of enforcing the findings of NAALC’s administrative bodies in this matter due to the fact that pregnancy discrimination is not alleged to involve labor principles that permit sanctions against the offending country by the other member countries. The HRW has publicly stated that the NAALC process has been disappointing and inadequate. The HRW has also stated its belief that even consultations between the countries will not have a significant impact on the problem of pregnancy discrimination in Mexico’s maquiladora sector. It is interesting to note that to date, none of the women who were dismissed from their positions have been reinstated.

Mexico has repeatedly shown that it is resistant to the spirit of NAALC. Critics claim that the Mexican government readily accepts the benefits of NAFTA but refuses to abide by its rules and obligations. For example, in response to Submission No. 9701, Mexico first argued that the complaint was beyond the scope of NAALC and that the practice was not illegal. Mexico also claimed that the entire complaint, as set out by the

170. See HRW A Job, supra note 42, at 7.
171. See Banks, supra note 19.
173. See Banks, supra note 19.
174. See id.
175. See Isa, supra note 12.
176. See NAALC, supra note 25, art. 40
177. See HRW A Job, supra note 42.
178. See id. at 9-10.
179. See McGrady, supra note 9.
180. See Griffin, supra note 31, at 139.
181. See id.
182. See NAO PUBLIC REPORT, supra note 18, at 10.
HRW, was insubstantial and lacked merit.\textsuperscript{183} Mexico argued that its government is incapable of enforcing anti-screening provisions and that it was not obligated to enforce or defend the discrimination finding.\textsuperscript{184} Because the benefits of foreign investment so strongly outweigh the benefits of enforcement, Mexico continues to ignore its commitments under NAALC.\textsuperscript{185}

Despite Mexico's failures in this area, NAALC's administrative process has not been without its successes. This process has been very effective through informal channels. Some U.S. corporations have sought to minimize their exposure to this process.\textsuperscript{186} General Motors, for example, changed its policy of pre-hire pregnancy screening in Mexico in order to avoid the stigma of being included in a U.S. NAO complaint.\textsuperscript{187} The Mexican Congress has also introduced legislation in response to the publicity surrounding the U.S. NAO submission. Although pregnancy discrimination is already against the law of Mexico, new legislation to prevent this from happening was proposed.\textsuperscript{188} To date, however, there has been no new passage of laws in Mexico.\textsuperscript{189} The most recent potential impact that NAALC has had is that Mexico may have recently conceded that in some instances pregnancy pre-hire screening may be contrary to Mexican domestic law.\textsuperscript{190} Unfortunately, there is some disagreement over whether Mexico actually intended this statement or whether it was a misinterpretation. However, even with this recent progress, there are still no mechanisms in place for Mexican labor courts to hear a matter without a preexisting labor contract.\textsuperscript{191} Clearly, any resolution on this matter is not very effective when there is no access to, and thus, no redress available from, labor courts.\textsuperscript{192}

\section*{VII. Conclusion.}

Mexican resistance to the labor side agreement of NAFTA, NAALC, is well illustrated by the continued practice of pre-hire and post-hire pregnancy discrimination in the maquiladora sector. The amount of fault lying with American corporations actively recruiting women of childbearing age to work in the maquiladora system but continuing to implement pregnancy screening procedures, and the amount of fault lying with the Mexican government that has chosen a policy of nonenforcement regarding the policing of its protective labor laws, is difficult to determine. Aside from negative publicity, American corporations remain unaccountable for their actions in Mexico. Without Mexico first agreeing to enforce its laws and abide by its obligations under NAALC, a resolution remains illusive.

\begin{footnotesize}
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\item \textsuperscript{183} See HRW \textit{A Job}, supra note 42, at 1.
\item \textsuperscript{184} See id.
\item \textsuperscript{185} See Isa, supra note 12, at 631.
\item \textsuperscript{186} See id. at 650.
\item \textsuperscript{187} See Letter from Walter Ralph, supra note 64.
\item \textsuperscript{188} See HRW \textit{A Job}, supra note 42, at 2.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See Banks, supra note 19.
\item \textsuperscript{191} See id; see also E-mail from Kevin Banks, \textit{NAALC Secretariat}, to Laurie J. Silver (Sept. 15, 1999) (on file with author).
\item \textsuperscript{192} See id.
\end{itemize}
\end{footnotesize}
Mexico continues a policy of nonenforcement of its own domestic law, even in light of recent concessions that both pre-hire and post-hire pregnancy discrimination are contrary to Mexican domestic laws. NAALC's dispute resolution system is still in its infancy and has proven relatively ineffective in its ability to remedy the situation. Clearly, Mexico continues to actively violate its obligations under NAFTA as it continues to resist its obligations under NAALC.

Perhaps NAALC's dispute resolution system should be modified to incorporate greater enforcement capabilities and more regulatory strength. Whether the critics are right in blaming the labor agreement itself for the failure of Mexico to protect pregnant workers or whether the balance should rightly be divided between NAALC, Mexico, and the corporations is of little consequence. In reality, until reforms are made in the actions of all three, the practice of pregnancy discrimination in Mexico will continue at the expense of female workers' rights.