

1999

Testing the Naalc's Dispute Resolution System: A Case Study

John P. Isa

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>



Part of the [International Law Commons](#), [Labor and Employment Law Commons](#), and the [Women Commons](#)

Recommended Citation

Isa, John P. "Testing the Naalc's Dispute Resolution System: A Case Study." The American University Journal of Gender, Social Policy & the Law 7, no.1 (1998-1999): 179-217.

This Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Journal of Gender, Social Policy & the Law by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

TESTING THE NAALC'S DISPUTE RESOLUTION SYSTEM: A CASE STUDY^{*}

JOHN P. ISA^{**}

I. INTRODUCTION	179
II. CONTROVERSY OVER NAFTA AND THE DRAFTING OF THE NAALC...	182
A. <i>The Goals and Aspirations of NAFTA</i>	182
B. <i>Opposition to NAFTA and the NAALC by Human Rights Activists and Labor Unions</i>	184
III. MEXICO'S FAILURE TO ABIDE BY ITS OBLIGATIONS UNDER THE NAALC.....	186
A. <i>Mexico's Failure to Afford Protection</i>	186
B. <i>Failure To Provide Enforcement and Private Action</i>	191
C. <i>Article 40: A Means to Avoid Enforcement</i>	194
1. <i>Mexico's Economic Dilemma: Protecting the Cash Cow</i>	195
D. <i>Arguments in Favor of Enforcement</i>	199
IV. TESTING THE NAALC'S DISPUTE RESOLUTION SYSTEM.....	205
A. <i>The Human Rights Watch Submission: Allegations of Non-Enforcement of Pregnancy Discrimination Laws</i>	205
1. <i>First-Tier Enforcement: Commission for Labor Cooperation</i>	206
2. <i>Second-Tier Enforcement</i>	210
3. <i>Third-Tier Enforcement</i>	211
B. <i>Effectiveness of Public Awareness</i>	214
V. CONCLUSION	216

I. INTRODUCTION

Luz Elena Corona felt the gnawing pains in her stomach intensify.¹

^{*} Editor's Note: This article was published in 6 AM. U. J. GENDER & L. 615 (1998) without the first six footnotes. This article is now being published in its corrected form. Please cite to this volume when referring to this article.

^{**} J.D. Candidate, 1999, American University Washington College of Law.

1. See Molly Moore, *Rights of Pregnant Workers At Issue On Mexican Border*, WASH. POST, Aug. 21, 1996, at A20 (recounting the experience of an employee who worked in Mexico for a United States based company).

She asked her supervisor for permission to go home early, but he refused her request.² A few minutes later, shortly after 1:00 a.m., Luz Elena Corona ran to the bathroom where she had a miscarriage.³ She returned to work, leaving her dead fetus in the factory bathroom.⁴ Although Luz Elena Corona was bleeding, her supervisor refused to allow her to leave work in order to go to a doctor.⁵ Instead, he forced her to continue packing plastic skirt hangers.⁶ Unfortunately, Luz Elena Corona's story is not unusual; her supervisor punished her because she was pregnant.⁷

A 1996 investigation in Mexico by Human Rights Watch, a Washington, D.C.-based non-profit human rights organization, found that pregnant workers in *maquiladoras*,⁸ or export processing factories, are discriminated against in order to maintain low production costs.⁹ Such gender discrimination occurs during the hiring process and during employment.¹⁰ The 1996 Human Rights Watch study found that United States U.S.-based Multi-National Enterprises ("MNEs") including: General Motors, Zenith, Teledyne, Carlisle Plastics, American Telephone & Telegraph, International Telephone & Telegraph Corp., TRW, W.R. Grace, General Electric, and Sunbeam-Oster,¹¹ often partly or wholly own or subcontract these factories or *maquilas*.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* During her interview, Luz Elena Corona remarked that she "felt like a cow in a market." In 1993, after eleven years of employment with Carlisle Plastics, Inc., she claims she was fired for distributing workers' rights literature at the plant. *See id.*

6. *See* Moore, *supra* note 1, at A20 (addressing the exploitation of Mexican women in the labor industry).

7. *See generally No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT (Human Rights Watch Women's Rights Project Report), Aug. 1996, at 2-10 [hereinafter HUMAN RIGHTS WATCH].

8. *See* DENNIS R. APPEYARD & ALFRED J. FIELD, JR., INTERNATIONAL ECONOMICS 341 (1995) (explaining that the *maquiladoras* are industrial parks located in Northern Mexico). The first *maquiladoras* were established during the mid-1960s to encourage foreign direct investment in Mexico by U.S. companies. *Id.* In addition to cheap labor, the Mexican government offered these companies other economic incentives, such as tariff reductions, to encourage them to locate their production facilities in Mexico. *Id.*

9. *See* HUMAN RIGHTS WATCH, *supra* note 7, at 7 (stating that pregnancy discrimination persists because the government's interest in attracting and retaining foreign investment dovetails with the economic interests of *maquiladora* operators to keep their operating costs as low as possible).

10. *See generally* HUMAN RIGHTS WATCH, *supra* note 7, at 2 (noting that, as a condition of employment, women must undergo a pregnancy test and may not be hired if they are pregnant).

11. *See* HUMAN RIGHTS WATCH, *supra* note 7, at 3 (implicating U.S.-based companies in the reported findings).

Part I of this Comment uses the 1996 Human Rights Watch investigation¹² to argue that the North American Agreement on Labor Cooperation ("NAALC")¹³ dispute resolution system should be assessed for its effectiveness, or lack thereof, in protecting workers' rights. To date, the NAALC's dispute resolution system has not been extensively tested. The Human Rights Watch investigation is particularly timely because it reflects the emerging conflict between protecting workers' rights in Mexico and Mexico's policy of encouraging increased trade and foreign direct investment ("FDI").¹⁴

Part II briefly outlines the history of the North American Free Trade Agreement ("NAFTA"),¹⁵ its role in Mexico's economic growth, and the controversy it created in the U.S. concerning whether NAFTA sufficiently protects workers' rights.¹⁶ This Part outlines the NAALC, a side agreement that was written to provide external mechanisms to compel NAFTA members to enforce their own domestic labor laws.¹⁷

Part III analyzes Mexico's labor laws. This section focuses on the underlying economic reasons that Mexico has not enforced its laws while simultaneously using the Human Rights Watch investigation to support the allegation of non-enforcement. Part III concludes that national economic development justifications proffered by free trade economists should not take precedent over the economic and moral reasons for enforcement of labor laws.

12. This Comment uses the terms "sex discrimination" and "pregnancy discrimination" interchangeably. See HUMAN RIGHTS WATCH, *supra* note 7, at 2 (classifying that pregnancy discrimination is sex discrimination because pregnancy is unique to females). This Comment does not address whether protections for pregnant workers constitute special treatment or equal treatment. See also SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 73-75 (1992) (outlining the strengths and weaknesses of special treatment and equal treatment theories in ending sex discrimination).

13. *North American Agreement on Labor Cooperation*, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter NAALC]. The NAALC entered into force on January 1, 1994. See U.S.C. § 3311(b) (1994) (enabling member countries to monitor each others' enforcement of labor laws).

14. See generally *infra* Part III.C.1 (discussing the economic reasons for Mexico's lax enforcement of its labor laws).

15. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., H.R. DOC. NO. 103-159 (effective Jan. 1, 1994) [hereinafter NAFTA]. See also NAFTA NOW! THE CHANGING POLITICAL ECONOMY OF NORTH AMERICA viii (Brenda M. McPhail ed., 1995) [hereinafter NAFTA NOW!] (discussing the economic and social changes that NAFTA will bring to North America).

16. Sidney Weintraub, *NAFTA: For Better or Worse*, in NAFTA NOW!, *supra* note 15, at 7.

17. See Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 582-83 (1994) (noting that the Trilateral Alliance composed of NAFTA members drafted the NAALC and appended it to NAFTA on August 13, 1993). It became effective on January 1, 1994. *Id.*

Part IV describes how Mexico lacks effective labor law enforcement to prevent pregnancy discrimination. Consequently, this Comment explores whether external remedies under the NAALC may be used to prevent gender discrimination in Mexico. In particular, it focuses on a recent submission¹⁸ filed by Human Rights Watch with the U.S. National Administrative Office ("NAO")¹⁹ urging a U.S. government investigation into pregnancy discrimination in Mexico.²⁰ This section describes the NAALC investigative process and speculates how a submission regarding alleged pregnancy discrimination might progress through the NAALC's dispute system. Part IV also briefly discusses the NAO's response and rendered decision to the Human Rights Watch's allegation. It recommends that human rights organizations continue to file submissions regarding allegations of workers' rights violations with the NAO to test the NAALC dispute resolution system.

Finally, Part V recommends that any country that wants to join NAFTA be required to sign the NAALC and abide by its obligation to enforce domestic labor laws. It also discusses how future trade negotiations in the U.S. may become more complicated and controversial than NAFTA if the NAALC fails.

II. CONTROVERSY OVER NAFTA AND THE DRAFTING OF THE NAALC

A. *The Goals and Aspirations of NAFTA*

NAFTA's main goal is to promote economic development for its members by eliminating impediments to free trade in goods, capital, and services among signatory countries.²¹ Modern economists and politicians believe that increased international trade is essential to facilitate economic development and prosperity.²²

18. SUBMISSION CONCERNING PREGNANCY-BASED SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR TO THE U.S. ADMINISTRATIVE OFFICE 4 (Human Rights Watch Women's Rights Project ed., 1997) [hereinafter HUMAN RIGHTS SUBMISSION] (documenting Mexico's failure to enforce anti-discrimination laws or address labor rights violations).

19. See NAALC, *supra* note 13, sec. C (establishing three NAOs, one each for Mexico, Canada, and the United States, and discussing the functions of the NAO).

20. See McGuinness, *supra* note 17, at 582-86 (summarizing the dispute resolution process under the NAALC and the various governmental organizations that carry out the process).

21. See Weintraub, *supra* note 16, at 6 (stating that from the U.S. viewpoint, such impediments include high tariffs, administratively burdensome investment requirements, and other protectionist measures).

22. Globally, the value of trade in goods exceeded \$3.7 trillion in 1992, and the value in services equaled approximately \$1 trillion. See *generally* APPLEYARD & FIELD, *supra* note 8, at 12-14 (noting the increased importance of international trade and the need for adjustment by countries).