

# TESTING THE NAALC'S DISPUTE RESOLUTION SYSTEM: A CASE STUDY

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## I. INTRODUCTION

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

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because she was pregnant.<sup>1</sup>

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*,<sup>2</sup> or export processing factories, are discriminated against in order to maintain low production costs.<sup>3</sup> Such gender discrimination occurs during the hiring process and during employment.<sup>4</sup> 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,<sup>5</sup> often partly or wholly own or subcontract these factories or *maquilas*.

Part I of this Comment uses the 1996 Human Rights Watch investigation<sup>6</sup> to argue that the North American Agreement on Labor Cooperation ("NAALC")<sup>7</sup> 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

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1. 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].

2. 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.*

3. 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).

4. 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).

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

6. 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).

7. *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).

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").<sup>8</sup>

Part II briefly outlines the history of the North American Free Trade Agreement ("NAFTA"),<sup>9</sup> its role in Mexico's economic growth, and the controversy it created in the U.S. concerning whether NAFTA sufficiently protects workers' rights.<sup>10</sup> 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.<sup>11</sup>

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.

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 submission<sup>12</sup> filed by Human Rights Watch with the U.S. National Administrative Office ("NAO")<sup>13</sup> urging a U.S. government investigation into pregnancy discrimination in Mexico.<sup>14</sup> This section describes the NAALC investigative process and speculates how a submission regarding alleged pregnancy discrimination might

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

9. 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).

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

11. 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.*

12. 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).

13. 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).

14. 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).

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.<sup>15</sup> Modern economists and politicians believe that increased international trade is essential to facilitate economic development and prosperity.<sup>16</sup>

NAFTA can also be a potential tool to improve worker productivity, employment prospects, benefits, and wages.<sup>17</sup> It does not require a member to change its domestic laws or to integrate its legal systems.<sup>18</sup> NAFTA, however, is a separate document from the NAALC<sup>19</sup> and does not establish minimal labor standards<sup>20</sup> or contain any mechanisms to enforce the improvement of worker rights.<sup>21</sup> Furthermore, NAFTA

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15. 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).

16. 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).

17. See Elizabeth Crandall, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165, 172-73 (1994) (discussing the arguments made by proponents of NAFTA).

18. See Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1006-07 (1995) (distinguishing NAFTA from the European models of labor regulation, which aim to unify regulatory systems).

19. See *infra* Part II.B (noting the various concerns and oppositions to NAFTA and the NAALC).

20. See Van Wezel Stone, *supra* note 24, at 1006-08 (explaining the creation of the NAALC, which only establishes NAFTA members' obligations).

21. See Crandall, *supra* note 23, at 166-67 (noting that the absence of such provisions led to heated debates regarding the ratification of NAFTA). President Clinton, in an effort to save NAFTA, pledged that a labor agreement would be drafted that would motivate NAFTA

cannot be used to impose U.S. labor standards on Mexico.<sup>22</sup>

The ability to enforce labor laws effectively through NAFTA is limited<sup>23</sup> because it is a trade agreement, "not a treaty of association."<sup>24</sup> NAFTA drafters deliberately restricted the agreement to facilitate trade.<sup>25</sup> According to free trade theorists, restrictions on free trade, such as the strict enforcement of labor laws, impose trade barriers that defeat NAFTA's central purpose.<sup>26</sup> The drafters' concern, however, encompassed more than restricting NAFTA's focus to trade; it included sovereignty issues. Hence, all three NAFTA signatory countries and its members identified the importance of sovereignty.<sup>27</sup> Specifically, Mexico stressed that NAFTA could not be used to intervene in their domestic labor policy.<sup>28</sup>

### *B. Opposition to NAFTA and the NAALC by Human Rights Activists and Labor Unions*

NAFTA is a controversial treaty.<sup>29</sup> During treaty negotiations, opponents of the agreement were skeptical about NAFTA's idealistic prospects.<sup>30</sup> Human rights organizations and labor unions<sup>31</sup> opposed

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members to enforce labor laws. *Id.* The NAALC was a direct result of such political pressure. *Id.*

22. See Crandall, *supra* note 23, at 171 (stating that NAFTA could not be used to force social change on Mexico by applying U.S. law as a social standard).

23. See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 535 (1995) (clarifying NAFTA's commitment to "free" trade).

24. See *id.* (noting a desire by the negotiating countries to maintain their national sovereignties).

25. Countries disagree about the extent to which labor rights and trade policy should be integrated. For instance, the European Union's position is that the two are permanently intertwined. See Transcript, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 364-66 (1996) [hereinafter *International Trade and Social Welfare*] (discussing the linkage between trade and social rights as perceived by the European Community).

26. See Crandall, *supra* note 23, at 170-71 (explaining that President Bush treated negotiations regarding labor and free trade issues on parallel tracks and that President Clinton continued the Bush Administration's policy in a similar manner); see also Bierman & Gely, *supra* note 29, at 535-36 (noting that NAFTA opponents acknowledged that enforcing labor laws might undermine the goal to encourage free trade).

27. See Bierman & Gely, *supra* note 29, at 534-36 (indicating that to address the concerns of national sovereignty, the NAALC was designed within a framework of trilateral cooperation).

28. See Bierman & Gely, *supra* note 29, at 535 (adding that each country expressed an interest in maintaining national sovereignty).

29. See Bierman & Gely, *supra* note 29, at 535 (discussing various countries' initial hesitation to NAFTA).

30. See generally Bierman & Gely, *supra* note 29, at 533-34 (noting that U.S. labor unions, which vehemently opposed ratifying NAFTA, were primarily concerned about their members' jobs being exported to Mexico where labor costs were artificially low partly because of poor enforcement of labor laws).

31. See Bierman & Gely, *supra* note 29, at 533-34 (expressing that human rights

its ratification because they alleged that Mexico's already lax enforcement of its labor laws would further deteriorate.<sup>32</sup> They predicted an era where corporations would exploit Mexican workers and force them to work under unsafe conditions.<sup>33</sup> According to labor unions, Mexico would not enforce the laws without outside pressure because:

NAFTA is mistakenly predicated on Mexico being a democracy in which citizens can freely organize trade unions, sue in independent Mexican courts to enforce laws and receive compensation for their harms, speak freely as citizens, and engage in honest elections. Yet, Mexico is a country in which political and economic powers are concentrated in the hands of a few enormously wealthy families. Forget the rule of law! [I]t is the rule of a dictatorial regime with many of the characteristics of a police state.<sup>34</sup>

Ultimately, lobbying by unions and public pressure<sup>35</sup> from the United States<sup>36</sup> to condition NAFTA's ratification on including protections for workers' rights was politically successful.<sup>37</sup> As a result, NAFTA negotiators were forced to respond to this issue to reduce the possibility that the U.S. Congress would not ratify the treaty.<sup>38</sup> The United States ultimately conditioned its ratification of NAFTA on the drafting of a separate labor agreement.<sup>39</sup> Therefore, the U.S., Canada, and Mexico negotiated the NAALC as a side agreement and

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organizations and labor unions raised concerns about the effect of NAFTA on workers' rights and employment in the United States).

32. See generally Alejandro Sobarzo, *NAFTA and Human Rights in Mexico*, 27 U.C. DAVIS L. REV. 865, 866 (1994) (noting that some concerns were legitimate while others were not).

33. See *id.* at 867 (noting concerns of U.S. organized labor that U.S. companies would relocate to Mexico to reduce production costs).

34. Daniel J. "Duke" McVey, *NAFTA'S Future*, in *NAFTA NOW!*, *supra* note 15, at 97.

35. See Manuel Fuentes Muniz, *NAFTA Labor Side Accord in Mexico and Its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 381-82 (1995) (arguing that labor unions lobbied to prevent NAFTA's ratification because union influence was deteriorating with economic globalization); see also Weintraub, *supra* note 16, at 3 (explaining that labor unions feared that U.S. companies would shift their production facilities to Mexico, or at least have the option to do so, thus further weakening organized labor's bargaining power).

36. See Muniz, *supra* note 41, at 397 (theorizing that the United States economically and politically needed NAFTA).

37. See Jack I. Garvey, *Trade Law and Quality of Life — Dispute Resolution Under NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 445 (1995) (explaining the importance of "fairness" and practicality to NAFTA's formal approval); see also Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 918 (1994) (discussing President Clinton's efforts to provide an amended agreement satisfactory to opposing key interest groups).

38. See Weintraub, *supra* note 16, at 19 (presenting the perspective of the U.S. Congress that the Mexican government was "dictatorial, corrupt, incompetent, exploitative, and venal").

39. See Bierman & Gely, *supra* note 29, at 533 (indicating how Congress' insistence that each country enact its own national agreement on labor cooperation inspired the creation of the NAALC).

signed it simultaneously.<sup>40</sup>

The NAALC imposes obligations upon member countries to protect worker rights and provides a framework for the resolution of labor rights conflicts between the member countries.<sup>41</sup> As for protecting pregnant women, the NAALC generally requires NAFTA members to cooperate in eliminating employment discrimination, preventing work-related injuries, and establishing minimal employment standards.<sup>42</sup> Under the NAALC, each member country must enforce its own existing<sup>43</sup> domestic labor laws.<sup>44</sup> The NAALC's preamble states that NAFTA nations will promote "in accordance with their respective laws, high-skill, high-productivity economic development in North America by . . . encouraging employers in each country to comply with labor laws and to work in maintaining a progressive, fair, safe and healthy working environment."<sup>45</sup> These provisions are designed to discourage Mexico from "racing to the bottom" and lowering living standards in North America to encourage FDI and trade in Mexico solely because of low labor costs.<sup>46</sup>

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40. The significance of the NAALC has been relatively ignored by the press and academic circles. This may reflect the perception that the NAALC is relatively ineffectual. *See* Bierman & Gely, *supra* note 29, at 533-36 (explaining how the NAALC simply requires that each country pledge to enforce its own domestic labor laws).

41. *See infra* Part IV (discussing the dispute resolution process under the NAALC).

42. *See* NAALC, *supra* note 13, at annex 1 (listing the guiding principles that the members are committed to promote in the area of workers' rights); *see also* Hagen, *supra* note 43, at 923-25 (noting that these principles serve as guidance and not as minimal standards set forth by each party's domestic law).

43. *See* Van Wezel Stone, *supra* note 24, at 1006-08 (explaining that the NAALC only mentions enforcement of existing labor laws, but does not state that laws must be changed or that they must comply with the laws of other NAFTA members).

44. *See* Bierman & Gely, *supra* note 29, at 534-38 (discussing that the NAALC encourages the countries to enforce its domestic laws); *see also* Garvey, *supra* note 43, at 450-51 (discussing the benefits and limitations of NAFTA side agreements). *But see* Laura Ho, Catherine Powell & Leti Volpp, (Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry, 31 HARV. C.R.-C.L. L. REV. 383, 392 (1996) (arguing that "the decline of geographic sovereignty and conceptual boundaries such as the traditional public/private, state/market, political/economic, and national/international dichotomies testifies to the fact that simplistic, nationalistic approaches for securing worker rights are no longer viable").

45. *See* NAALC, *supra* note 13, at preamble (addressing labor opportunities, protections, and rights); Bierman & Gely, *supra* note 29, at 536-37.

46. *See* Bierman & Gely, *supra* note 29, at 536 (discussing the obligations imposed on the government to ensure that employers comply with existing labor laws such as the training of inspectors, the investigation of reported infractions, the maintenance of accurate records, and the requirement of timely regulatory hearings to impose sanctions on violators).

### III. MEXICO'S FAILURE TO ABIDE BY ITS OBLIGATIONS UNDER THE NAALC

#### A. Mexico's Failure to Afford Protection

Under Article 2 of the NAALC, Mexico must enforce its labor laws and regulations.<sup>47</sup> Mexico's labor laws provide many of the same protections for its workers as those of the United States or other developed countries.<sup>48</sup> In fact, Mexico's legal protections against employment discrimination are theoretically among the world's most comprehensive.<sup>49</sup> Mexico's national constitution<sup>50</sup> states that "men and women are equal before the law," and "[e]very person has the right to decide in a free, responsible and informed way on the number and spacing of [her] children."<sup>51</sup> Under Mexico's federal labor law,<sup>52</sup> "[t]here shall not be established distinctions among workers for motives of race, sex, age, religious creed, political doctrine or social condition"<sup>53</sup> so that employers cannot "refus[e] to accept a worker for reason [sic] of age or sex;"<sup>54</sup> "[w]omen enjoy the same rights and have the same obligations as men;"<sup>55</sup> and "[pregnant women] will not perform work that requires considerable force and signifies danger for her health. . . ."<sup>56</sup>

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47. See NAALC, *supra* note 13, at art. 2. Article 2 falls under Part Two of the NAALC. Part Two is titled "Obligations." Article 2 states:

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

48. See Hagen, *supra* note 43, at 923-24 (explaining that Mexico's laws provide arguably more rights to its workers than those afforded by the United States or Canada to their workers).

49. See Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L. J. 269, 272 (1996) (explaining that Mexico originally abandoned the theory of laissez-faire economics in recognition of social inequality during the drafting of its constitution). As a result, Mexico's laws are structured to provide guarantees to the poor and to provide state arbitration in conflicts between workers and employers. *Id.* See also Bierman & Gely, *supra* note 29, at 545 (noting that Mexico's laws detail rights in most employment relationships).

50. See Befort & Cornett, *supra* note 55, at 272-76 (describing the national constitution, or *Constitucion Politica de los Estados Unidos Mexicanos*, as a living document that has been amended hundreds of times since 1917).

51. 56a MEX. CONST. art. IV; see also, HUMAN RIGHTS WATCH, *supra* note 7, at 36-37.

52. See Befort & Cornett, *supra* note 55, at 275 (explaining that the federal labor law, or *Ley Federal de Trabajo* ("L.F.T."), governs private entities and implements the federal constitution).

53. See HUMAN RIGHTS WATCH, *supra* note 7, at 36 (citing L.F.T., art. 3).

54. See HUMAN RIGHTS WATCH, *supra* note 7, at 36 (citing L.F.T., art. 133).

55. See HUMAN RIGHTS WATCH, *supra* note 7, at 36 (citing L.F.T., art. 164).

56. See HUMAN RIGHTS WATCH, *supra* note 7, at 36 (citing L.F.T., art. 170(1)). *But see infra*



Although Mexico's labor laws are comprehensive, they are seldomly enforced.<sup>57</sup> This is ironic because the purpose of Mexico's labor law framework was to give Mexican workers, including pregnant women, equal status with their employers:

[T]he law appears to anticipate problems that may arise through the cultural norm of strict workplace hierarchy. . . . [It] does not purport to eliminate hierarchical norms, it attempts to compensate for potential abuses by establishing a plethora of rights that might not otherwise be granted by powerful employers.<sup>58</sup>

Like U.S. laws, the structure of Mexican labor law developed from its culture, which particularly emphasizes the importance of families.<sup>59</sup> Such laws reflect the country's vision of social justice<sup>60</sup> by attempting to place workers and employers on equal bargaining levels.<sup>61</sup> Nevertheless, Mexican employers continue to pay less than minimum wage, maintain unhealthy and unsafe working conditions, curtail the organization of labor unions, and ignore workers' complaints against them.<sup>62</sup> This is problematic because laws are useless when not enforced.<sup>63</sup> Non-enforcement of labor laws resulted from economic liberalization reforms and the endemic corruption of Mexico's government.<sup>64</sup>

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notes 93-99 and accompanying text (discussing whether protective laws actually help pregnant workers or whether such laws provide justifications for dismissing pregnant workers because of cost factors).

57. HUMAN RIGHTS WATCH, *supra* note 7, at 37-45.

58. Louise D. Williams, *Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising From the North American Free Trade Agreement*, 22 BROOK. J. INT'L L. 361, 369-70 (1996).

59. *Id.* at 369.

60. *Id.* at 370.

61. See APFLEYARD & FIELD, *supra* note 8, at 175 (stating such laws protect workers against discrimination, establish minimal health and safety standards, and give them the right to associate and the right to strike).

62. Crandall, *supra* note 23, at 177.

63. See Elaine Bernard, *Free Trade or Free Corporations?*, in NAFTA NOW!, *supra* note 15, at 67 (stating that without any enforcement, the labor laws mean little).

64. See Garvey, *supra* note 43, at 442 (stating that "[t]he principal complaint about Mexico has been . . . the lack of enforcement of its laws and the related endemic corruption of the legal system"). Poor working environments are an additional problem for pregnant workers. This Comment does not address safety and working conditions in the *maquiladoras*. Safe and healthy working conditions are important not just for pregnant women, but for all workers. See KENNEY, *supra* note 12, at 1 (labeling policies that "exclude all nonsterilized, pre-menopausal women from allegedly hazardous work" as exclusionary); see also 13 INTERNATIONAL LABOUR ORGANIZATION, CONDITIONS OF WORK DIGEST, MATERNITY AND WORK 182-83 (Michele B. Jankanish ed., 1994) [hereinafter MATERNITY AND WORK] (explaining that Mexico's laws prohibit pregnant women from engaging in work that is dangerous, heavy, or exposes them to hazards that adversely affect a woman or her fetus' health); Kate Lebow, *For Women, NAFTA Promises Anything But Freedom and Prosperity*, HOUS. CHRON., Nov. 14, 1993, at 3 (stating that many *maquiladoras* have poor working conditions and that the areas around the plants are often an environmental disaster). These unhealthy environments may account for a disproportionate

According to Human Rights Watch, *maquiladoras* discriminate against pregnant women<sup>65</sup> both during the hiring process<sup>66</sup> and during employment.<sup>67</sup> At the hiring process, many *maquiladora* employers force applicants to undergo pregnancy tests as a precondition for employment.<sup>68</sup> Women are often required to disclose whether they are pregnant on job applications and are often interrogated during job interviews.<sup>69</sup> Various procedures are used to detect pregnancy before offering a job to female applicants.<sup>70</sup> Company staff will ask job applicants whether they are sexually active, whether and what types of contraceptives they use, and about their menstrual cycle.<sup>71</sup> Some of those interviewed said that pregnant women were possibly the only applicants not offered work.<sup>72</sup> If a prospective female applicant's pregnancy is discovered, the company often will not hire her.<sup>73</sup>

Once a worker's pregnancy is discovered, many companies will

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number of women in the *maquiladoras* experiencing miscarriages or giving birth to babies with birth defects. *Id.*

65. The report also discusses violations of international law, which this Comment does not address. See generally HUMAN RIGHTS WATCH, *supra* note 7.

66. See HUMAN RIGHTS WATCH, *supra* note 7, at 2, 49 (noting that, according to Zenith's lawyers, no laws *explicitly* protect pregnant workers from discrimination during the hiring process).

67. See HUMAN RIGHTS WATCH, *supra* note 7, at 26-29 (documenting the mistreatment of pregnant workers); see also Diane Lindquist, *Pregnant Need Not Apply: Maquiladoras Screen Out Mothers-to-Be, Rights Group Asserts*, SAN DIEGO UNION-TRIB., Aug. 18, 1996, at A1 (confirming that pregnancy discrimination practices inundate the *maquiladoras*). But see *id.* (noting that some workers have stated that once they are hired, they will not be fired for becoming pregnant). One worker said that her company gave pregnant women special considerations and removed them from potential harmful areas of the factory to do work elsewhere. *Id.* Another worked for a company for twelve years and had two children during her employment. *Id.*

68. See HUMAN RIGHTS WATCH, *supra* note 7, at 14-15 (explaining that the pregnancy tests, the most common test being urine samples, are conducted by in-house or private health care personnel). In addition to interviewing workers, Human Rights Watch interviewed Dr. Moreno, a former doctor at the Matsushita-Panasonic *maquiladora*. Dr. Adela Moreno confirmed that she was hired to conduct pregnancy tests almost exclusively for discriminatory purposes. *Id.*

69. HUMAN RIGHTS WATCH, *supra* note 7, at 14-15.

70. See HUMAN RIGHTS WATCH, *supra* note 7, at 14-15 (listing such practices as required pregnancy tests as a condition of employment, application or interview questions regarding pregnancy status, pregnancy exams required under the pretext of testing for diabetes or anemia, and questions by employers concerning the applicant's sexual activity, contraception method, and menstrual cycle).

71. HUMAN RIGHTS WATCH, *supra* note 7, at 14-15.

72. HUMAN RIGHTS WATCH, *supra* note 7, at 14-15.

73. See HUMAN RIGHTS WATCH, *supra* note 7, at 2-4, 14-15 (finding that some doctors told the applicants that if they tested positive they would not be hired). At the Zenith plant, applicants were told not to become pregnant if they were hired because they might lose their jobs. *Id.* At General Motors, one supervisor told Human Rights Watch that they are encouraged to avoid hiring pregnant or overweight women because of the company's perception that these women cannot stand for long periods of time. *Id.*

pressure the woman into resigning.<sup>74</sup> Some companies force women to sign probationary contracts that permit the employer to fire them for any reason within one to three months after being hired.<sup>75</sup> Women are also frequently forced to take post-hire pregnancy tests.<sup>76</sup> Other employers use Article 47 of the Mexican labor code,<sup>77</sup> which permits employers and employees to rescind labor contracts within one month after hiring, as a way to fire pregnant workers.<sup>78</sup>

Companies commonly use mental<sup>79</sup> and physical abuse to force pregnant workers to resign.<sup>80</sup> Sometimes pregnant women are assigned more difficult workloads or are forced to stand while working.<sup>81</sup> Other supervisors force pregnant women to work additional uncompensated hours on a moment's notice<sup>82</sup> or to work the night shift.<sup>83</sup> According to Human Rights Watch, *maquiladoras*

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74. See HUMAN RIGHTS WATCH, *supra* note 7, at 22-23 (explaining that such acts are usually conducted by supervisors or in-house medical personnel). Pregnant workers were often the only ones forced to resign even when work was no longer available for other workers. *Id.*

75. See HUMAN RIGHTS WATCH, *supra* note 7, at 13 n.41 (observing that provisional contracts are technically illegal under Mexican law). The main purpose of provisional contracts is to put the worker on notice that she is temporary and may be fired randomly at any moment during the probationary period. *Id.*

76. See HUMAN RIGHTS WATCH, *supra* note 7, at 24 (stating that at a *maquiladora* affiliated with Nashville-based Magnetek, one interviewee was subjected to a pregnancy test three months after she started her job). When the test came back positive, her supervisor terminated her employment. *Id.*

77. L.F.T. art. 47, § 1 (1997).

78. See HUMAN RIGHTS WATCH, *supra* note 7, at 39-40 (citing L.F.T. art. 46). Human Rights Watch vehemently protested the interpretation of this law by the Mexican officials that they interviewed. *Id.* The law provides that a person can only be dismissed with one of the fifteen listed "just causes"; pregnancy is not on the list. See *id.* (citing L.F.T. art. 47).

79. HUMAN RIGHTS WATCH, *supra* note 7, at 28-29. One worker told Human Rights Watch that her employment was terminated after she missed a day of work because of a pregnancy-related condition. *Id.* When she returned to work after being absent one day, her supervisor told her that she was no longer needed in her previous assignment. *Id.* When she approached management for reassignment, they told her that if she did not work for the original supervisor, she would have to resign. *Id.* As a result, the worker felt that she had no choice other than to resign. *Id.*

80. See HUMAN RIGHTS WATCH, *supra* note 7, at 23 (describing the mental and physical abuse as punitive).

81. See HUMAN RIGHTS WATCH, *supra* note 7, at 23, 26-27 (explaining that additional tasks constitute physical abuse because they are deliberately different from the normal workload). Increasing the tasks undoubtedly becomes more painful and difficult as the second and third trimesters approach. Mari-Luz, a former worker at a factory owned by the Los Angeles based company Teledyne, Inc., claimed that after her supervisor learned she was pregnant, he forced her to test much larger and heavier cables than those she normally inspected. *Id.* Her requests to return to her previous tasks were refused. *Id.* See also MATERNITY AND WORK, *supra* note 70, at 182-83 (noting that such physical abuse violates Mexican law).

82. See HUMAN RIGHTS WATCH, *supra* note 7, at 23 (observing that women may lose their jobs unless they work overtime without compensation or prior notice).

83. See HUMAN RIGHTS WATCH, *supra* note 7, at 16 (recounting testimony from a former doctor who witnessed women being forced to work the night shift).

discriminate against pregnant workers<sup>84</sup> because they do not want to pay women maternity benefits,<sup>85</sup> and because they believe that pregnant women are less productive workers.<sup>86</sup> Thus, the *maquiladoras* either explicitly or implicitly attempt to control pregnant workers.<sup>87</sup>

Mexico's Federal Labor Act<sup>88</sup> provides women with six weeks of fully paid maternity leave both before and after the birth of their children.<sup>89</sup> Such benefits can be expensive for *maquiladora* employers; they must be paid to those employees who are eligible, and many of those workers who are eligible are women.<sup>90</sup> Women who worked a minimum of thirty weeks in the year prior to their maternity leave are eligible to receive maternity benefits from the social security system.<sup>91</sup> If female employees do not meet the criteria, then the employers must pay one hundred percent of all benefits.<sup>92</sup>

Under the maternity benefits laws, one company, Zenith, in response to the Human Rights Watch investigation, claimed that "applicants in these markets whose sole interest is gaining maternity benefits"<sup>93</sup> would be too costly to employ and thus the company is

84. See generally HUMAN RIGHTS WATCH, *supra* note 7, at 46-54 (noting that Human Rights Watch sent letters inviting the companies implicated in the investigation to respond to the allegations). Some companies pledged to investigate the allegations while others denied engaging in discriminatory practices. For instance, Sanyo of North America, Carlisle Plastics, and American Zettler, Inc., said their companies never knowingly discriminated. *Id.* Sanyo criticized the one day response time that Human Rights Watch allotted. *Id.* American Zettler felt the "data sampling was flawed and marginal at best." *Id.*

85. See HUMAN RIGHTS WATCH, *supra* note 7, at 49 (regarding maternity benefits, Zenith confirmed in its response to the investigation that it discriminated against pregnant women during the hiring process because of Mexico's maternity benefits laws). Like other employers, Zenith asked whether prospective women employees were pregnant and refused to hire such women if they were ineligible for benefits from the Mexican social security system. *Id.* Employees who lied about whether they were pregnant could be dismissed for misrepresenting a statement in their application. *Id.*

86. See HUMAN RIGHTS WATCH, *supra* note 7, at 27 (noting that a supervisor blamed poor line performance on pregnant women).

87. See HUMAN RIGHTS WATCH, *supra* note 7, at 33 (commenting that, although owners and operators claim that their actions are meant to protect pregnant women, Human Rights Watch interviews showed otherwise).

88. L.F.T., art. 170, § 2 (1997).

89. See MATERNITY AND WORK, *supra* note 70, at 182 (citing to Mexico's Federal Labour Act § 170 (II)).

90. See HUMAN RIGHTS WATCH, *supra* note 7, at 2-3, 49 (noting that "at least half" of the workers are women and hiring pregnant women could be costly if employers comply with federal labor laws).

91. See MATERNITY AND WORK, *supra* note 70, at 182 (citing Mexico's Social Security Act § 110).

92. See MATERNITY AND WORK, *supra* note 70, at 182 (citing Mexico's Federal Labour Act § 170).

93. HUMAN RIGHTS WATCH, *supra* note 7, at 49.

"precluded from unilaterally ending pregnancy screening."<sup>94</sup> In addition, Zenith claimed that the Mexican maternity benefits laws implicitly discriminate against pregnant women in an effort to curb the birth rate.<sup>95</sup> The company also pointed out that its policy of not hiring pregnant women was not explicitly illegal.<sup>96</sup>

The investigation also suggested that supervisors believe that pregnant women lower productivity.<sup>97</sup> For example, one supervisor's boss criticized him for his line's low productivity.<sup>98</sup> The supervisor attributed this to the pregnant worker on his line.<sup>99</sup> The belief that pregnant women reduce productivity often leads to the supervisors using the pregnant workers as a scapegoat to offset their own low productivity.<sup>100</sup>

### *B. Failure To Provide Enforcement and Private Action*

Under Article 3, the NAALC requires effective "appropriate government action"<sup>101</sup> to provide labor protection.<sup>102</sup> Such actions include "the appointment and training of inspectors, the investigation of suspected violations through on-site inspections, the

94. HUMAN RIGHTS WATCH, *supra* note 7, at 49.

95. HUMAN RIGHTS WATCH, *supra* note 7, at 49.

96. HUMAN RIGHTS WATCH, *supra* note 7, at 49.

97. HUMAN RIGHTS WATCH, *supra* note 7, at 27.

98. HUMAN RIGHTS WATCH, *supra* note 7, at 27.

99. HUMAN RIGHTS WATCH, *supra* note 7, at 27.

100. See HUMAN RIGHTS WATCH, *supra* note 7, at 27 (explaining that charting productivity reductions for pregnant women may prove difficult). The production capacities of each individual woman will vary depending on her physical health, the type of duties in her work, the working conditions in the plants, and her stage of pregnancy. *Id.*

101. NAALC, *supra* note 13, art. 3.

102. See NAALC, *supra* note 13. NAALC art. 3 states:

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

- (a) appointing and training inspectors;
- (b) monitoring compliance and investigating suspected violations, including thorough on-site inspections;
- (c) seeking assurances of voluntary compliance;
- (d) requiring record keeping and reporting;
- (e) encouraging the establishment of worker-management committees to address labor regulation of the workplace;
- (f) providing or encouraging mediation, conciliation and arbitration services; or
- (g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

requirement of record keeping and reporting, and the initiation 'in a timely manner' of proceedings to seek appropriate sanctions or remedies for violations of labor law."<sup>103</sup> Each NAFTA member must also ensure that due consideration is given to any request for an investigation of an alleged violation of that country's labor laws.<sup>104</sup>

Article 4 of the NAALC permits a private right of action, although it does not provide any mechanisms to enforce such a right of action.<sup>105</sup> The NAALC requires that "appropriate" access to administrative, quasi-judicial, or labor tribunals is ensured to persons with a legally recognized interest under the country's law.<sup>106</sup> "Such persons have the right to enforce occupational safety and health standards, employment standards, industrial relations laws, and collective agreements."<sup>107</sup> Unfortunately, Mexico's protection against pregnancy discrimination through private rights of action is virtually non-existent.<sup>108</sup>

Furthermore, MNEs in Mexico persistently discriminate against pregnant women partly because of the Mexican government's unwritten policy of discouraging enforcement of its labor laws.<sup>109</sup> Mexican government agencies claim they lack the authority to address employment discrimination issues in the hiring process.<sup>110</sup>

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103. Bierman & Gely, *supra* note 29, at 536-37.

104. See NAALC, *supra* note 13, art. 3 (stating that "[e]ach Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee, or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor laws").

105. See NAALC, *supra* note 13, art. 4; see also Van Wezel Stone, *supra* note 24, at 184 (explaining that "[w]hile the NAFTA Labor Side Agreement sets no substantive employment standards, it does provide procedures to ensure that the signatory states enforce their own labor laws").

106. Bierman & Gely, *supra* note 29, at 537; see Hagen, *supra* note 43, at 925-26 (setting forth government obligations with respect to the labor agreement); see also Juli Stensland, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 159 (1995) (discussing the private rights of actions and the procedural guarantees under the NAALC).

107. NAALC, *supra* note 13, art. 4(2); see also Crandall, *supra* note 23, at 184 (citing NAALC, art. 4).

108. See HUMAN RIGHTS WATCH, *supra* note 7, at 37 (arguing that no domestic enforcement of pregnant workers' rights exists).

109. See HUMAN RIGHTS WATCH, *supra* note 7, at 39 (citing L.F.T., art. 46). Mexican laws are difficult to enforce because it is difficult to prove discrimination. For instance, Mexico's federal labor code provides that employers can fire any worker for "just cause" within thirty days. *Id.* The law even lists which employee actions constitute "just cause." See *id.* at 40 (citing L.F.T., art. 47). Pregnancy is not listed, but it is difficult to prove that one of the fifteen "just causes" listed does not apply as an employer's reason for firing a pregnant worker. *Id.* at 39.

110. See HUMAN RIGHTS WATCH, *supra* note 7, at 37-38 (stating the opinion that, based on Human Rights Watch interviews with government officials, such state mechanisms as the Inspector of Labor, the Office of the Labor Rights Ombudsman, and the Conciliation and Arbitration Board cannot afford protection to pregnant applicants because the pregnant applicants have not established a labor relationship with the discriminating company).

One labor inspector stated:

[O]ne knows that the pregnancy tests are done and from a personal point of view they are completely illegal. But the company won't say that it is testing for pregnancy. So, it is hard to get the company on a violation . . . . Workers will never be able to prove it in a court, even if the question about whether one is pregnant is on the application . . . . It is almost the law. In many cases, the woman who is pregnant does not even bother looking for work. She waits. And this is very hard for a woman who has few resources.<sup>111</sup>

Furthermore, although Mexican laws provide them with the explicit authority to do so, government agencies do not enforce anti-discrimination laws designed to protect women during employment.<sup>112</sup>

The government does not lack complaints of pregnancy discrimination.<sup>113</sup> Activists who work on behalf of pregnant workers have filed complaints with government agencies charged with enforcing human rights.<sup>114</sup> One official told Human Rights Watch that under the law he could investigate complaints about sex discrimination during employment, but that such investigations were futile because the *maquiladoras* wield tremendous social, economic, and political power by employing numerous people.<sup>115</sup>

Furthermore, labor agencies have few of the necessary resources for enforcement.<sup>116</sup> For instance, Human Rights Watch found that government labor agencies lacked sufficient and well-informed inspectors.<sup>117</sup> Some of these agencies did not have telephones or vehicles and lacked both technical and financial support.<sup>118</sup> NAFTA supporters argue that such resources will become more available and effective as economic growth continues.<sup>119</sup> Anti-NAFTA forces argue

111. HUMAN RIGHTS WATCH, *supra* note 7, at 29.

112. See HUMAN RIGHTS WATCH, *supra* note 7, at 37-38 (stating that "[o]fficial mechanisms empowered to enforce prohibitions against post hire discrimination do not consistently perform this function").

113. See HUMAN RIGHTS WATCH, *supra* note 7, at 30, 41 (explaining the government's violation of labor and international laws by allowing employers to require certificates of non-pregnancy at the time of hiring).

114. See HUMAN RIGHTS WATCH, *supra* note 7, at 30 (relating that activists complained to Ombudsman's Office for Human Rights from Baja California about Tijuana *maquiladoras*).

115. See HUMAN RIGHTS WATCH, *supra* note 7, at 39 (discussing how the federal labor code was unsuitable to address the problems pregnant women faced in the labor force).

116. Crandall, *supra* note 23, at 181.

117. HUMAN RIGHTS WATCH, *supra* note 7, at 40-42.

118. HUMAN RIGHTS WATCH, *supra* note 7, at 41.

119. See Crandall, *supra* note 23, at 181 (stating that critics argue that the Mexican government suppresses discontented workers and keeps wages low in order to attract foreign

that "cheap labor and poor enforcement of . . . labor rights have been part of Mexico's comparative advantage and there is no reason to assume that this will change with NAFTA."<sup>120</sup>

Although inspectors have been appointed,<sup>121</sup> other guarantees under the NAALC, such as on-site inspections<sup>122</sup> and sanctions against violators,<sup>123</sup> have not been fulfilled. The NAALC requires that due consideration be given by competent legal authorities to investigate alleged labor violations.<sup>124</sup> While the definition of "due consideration" is vague and open to interpretation, the investigation's findings suggest that not even cursory attention is given to the violations of pregnancy discrimination.<sup>125</sup>

### *C. Article 40: A Means to Avoid Enforcement*

A loophole in the NAALC permits non-compliance with domestic labor law.<sup>126</sup> Article 40 states that a NAFTA member has not failed to comply if government inaction "reflect[s] a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or (b) results from bona fide decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities . . . ."<sup>127</sup>

It is unlikely that the Mexican government would acknowledge publicly that it does not enforce its own labor laws,<sup>128</sup> or that it permits employment discrimination to encourage foreign investment.<sup>129</sup> Such a policy raises a number of questions. One issue

investment).

120. Bernard, *supra* note 69, at 67.

121. See HUMAN RIGHTS WATCH, *supra* note 7, at 38 (discussing the authority and impartiality of the Office of the Inspector of Labor).

122. See NAALC, *supra* note 13, art. 3(1)(b) (stating that "[e]ach party shall promote compliance with and effectively enforce its labor law through . . . monitoring compliance and investigating suspected violations, including thorough on-site inspections . . .").

123. See NAALC, *supra* note 13, art. 3(1)(g) (dictating that a Party initiate "proceedings to seek appropriate sanctions or remedies for violations of its labor law").

124. NAALC, *supra* note 13, art. 3(2).

125. See HUMAN RIGHTS WATCH, *supra* note 7, at 29-30 (noting that the Mexican government is well aware of the pregnancy tests, official government agencies have received complaints from activists, studies have criticized the problems, and an official in charge "of monitoring compliance" with federal labor codes was aware but would not address the problem).

126. See NAALC, *supra* note 13, art. 3(1)(g) (mandating that a Party seek sanctions or remedies for labor law violations, but this is subject to the discretion of the agency provided in Article 40).

127. NAALC, *supra* note 13, art. 40.

128. Cf. HUMAN RIGHTS WATCH, *supra* note 7, at 5-6 (recommending that the government publicly condemn such discrimination).

129. Crandall, *supra* note 23, at 181; see also Williams, *supra* note 64, at 373-75.



is whether an official or agency can enforce pregnancy discrimination laws under an implicit non-enforcement policy.<sup>130</sup> This in turn raises another issue about whether economic considerations have a higher priority than human rights under Mexico's national policies.<sup>131</sup> Successful passage of the NAALC depended on the inclusion of vague exceptions because Mexico wanted to maintain control over its domestic laws.<sup>132</sup> "[E]xternal attempts to alter the conditions for doing business in Mexico were regarded as a threat to the Mexican government's own ambitions for development."<sup>133</sup>

### 1. *Mexico's Economic Dilemma: Protecting the Cash Cow*

By implicitly refusing to enforce anti-discrimination laws, Mexico has demonstrated that it believes that the benefits of FDI outweigh the benefits of enforcement.<sup>134</sup> This may be attributable, in part, to the decreased inflow of foreign economic aid since the Cold War ended. Since then, increasing international trade and foreign investments have become essential for Mexico's national survival:<sup>135</sup>

[U]ndoubtedly, the future of development lies less in the traditional arena of international loans and grants projects, to which wealthier nations have diminished their commitment in recent years, and more in the globalization of trade, through which private corporations channel resources to underdeveloped nations for the unabashed purpose of profit maximization. The pressure on underdeveloped nations to choose between proliferation of foreign industry and virtual international abandonment has never been greater; as a result, considerable incentive has grown for poor countries to surrender their commitment to their own regulatory objectives — including ideals of industrial labor relations — to the anti-regulatory demands of potential foreign investors.<sup>136</sup>

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130. See Williams, *supra* note 64, at 373-75 (explaining that non-enforcement facilitates deal-making and mutual gain for the predominant Mexican political party and labor leaders); see also HUMAN RIGHTS WATCH, *supra* note 7, at 39-41 (stating the view of several Mexican officials that government officials' attempts to enforce labor laws are futile because women's claims are extremely difficult to prove).

131. See HUMAN RIGHTS WATCH, *supra* note 7, at 36, 38, 44 (suggesting that Mexico's failure to prevent or to end discrimination may be due in part to the country's unwillingness to sanction large employers).

132. See Williams, *supra* note 64, at 392 (describing Mexico's uneasiness about outsiders suggesting legal standards of controlling labor law in their country).

133. Williams, *supra* note 64, at 392.

134. See Williams, *supra* note 64, at 373 (explaining that Mexico's interest in foreign investment, including technology sharing and transfer, outweighs the importance of enforcing its labor laws).

135. HUMAN RIGHTS WATCH, *supra* note 7, at 33.

136. Williams, *supra* note 64, at 364-65.

Mexico has not enforced its stringent labor laws because it wants to encourage FDI in Mexico.<sup>137</sup> Indeed, "[i]n order to attract investment and trade, Mexico has . . . adopted strenuously neoliberal, or rationalist, economic policies involving exploitation of labor . . . on an unprecedented scale."<sup>138</sup> *Maquiladoras* are so important to the Mexican economy that enforcing its labor laws may not be a viable option.<sup>139</sup> Additionally, if Mexico enforced its pregnancy discrimination laws, there might be an expectation that other labor laws should be enforced.

Mexico encourages FDI for a number of reasons, including increases in the volume of Mexican exports.<sup>140</sup> Exports in turn generate a source of foreign currency that can be used to pay for economic improvements.<sup>141</sup> Between 1986 and 1992, the value of exports to Mexico from the U.S. rose from \$12.4 billion to \$40.6 billion, a 228% increase.<sup>142</sup> In 1994, trade between the U.S. and Mexico grew at a rate of 20.7%, which equaled over \$100 billion.<sup>143</sup> Mexico exported \$51.6 billion to the United States that same year.<sup>144</sup> Increased exports have improved Mexico's ability to repay billions of dollars of external debt.<sup>145</sup> Mexico can also use the foreign currency for developmental purposes to purchase capital and to make infrastructure improvements.<sup>146</sup>

Furthermore, FDI diversifies the Mexican economy.<sup>147</sup> Mexico's

137. See Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3 KAN. J.L. & PUB. POL'Y 128, 134-35 (1994) (stating that the Mexican government discourages inquiries about health and safety because it fears that the *maquiladora* operators may leave).

138. Shelly Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 864 n.7 (1995).

139. See Crandall, *supra* note 23, at 173-74 (noting that such an argument was presented in a political debate by NAFTA opponents).

140. See APPLEYARD & FIELD, *supra* note 8, at 213 (increasing exports depends on whether "the foreign capital produces goods with export potential").

141. See APPLEYARD & FIELD, *supra* note 8, at 213 (explaining that additional foreign currency can assist in achieving developmental plans). *But see id.* at 214 (arguing that if a country imports more than it exports, the balance of payments for the host country can become unstable).

142. Remi L. Wrona, *NAFTA Dilemma*, in *NAFTA NOW!*, *supra* note 15, at 23.

143. See Claudio Grossman, *The Evolution of Free Trade in the Americas: NAFTA Case Studies*, 11 AM. U. J. INT'L L. & POL'Y 687, 754 (1996) (analyzing the progress of NAFTA in its first year and providing the comments of Raul Urteaga Trani, a member of the Embassy of Mexico's NAFTA office in Washington, D.C.).

144. *Id.*

145. Durand, *supra* note 143, at 131; *see also* APPLEYARD & FIELD, *supra* note 8, at 213; WORLD INFORMATION SERVICES COUNTRY OUTLOOKS, MEXICO (1996).

146. See APPLEYARD & FIELD, *supra* note 8, at 213 (noting that FDI can increase exports and achieve developmental goals).

147. See APPLEYARD & FIELD, *supra* note 8, at 213 (stating that FDI potentially increases exports, wages, employment, and output).

economy is dependent on petroleum exports.<sup>148</sup> One of the main goals of the *maquiladora* program was to reduce dependency on petroleum exports because of the price volatility of oil.<sup>149</sup> FDI theoretically helps increase wages in the long run.<sup>150</sup> In recent years, however, Mexican wages have decreased, not increased.<sup>151</sup> The Mexican government claims that lower wages help level and reduce inflation so that its inflation rate is more similar to that of other NAFTA members.<sup>152</sup> The Mexican government asserts that it will increase wages and release temporary price controls after this goal has been met.<sup>153</sup>

FDI also increases employment.<sup>154</sup> For every one billion dollars in exports, 20,000 jobs are created.<sup>155</sup> This is significant because Mexico's population is growing rapidly<sup>156</sup> and its government wants adequate employment for its people<sup>157</sup> to discourage dependency on already scarce government resources.<sup>158</sup> Finding additional employers and creating more jobs increases the government's tax base.<sup>159</sup> Each year, *maquiladoras* generate an estimated seven billion dollars in both wages and taxes for Mexico.<sup>160</sup>

Additionally, FDI permits companies to import technological know-

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148. See generally APPLEYARD & FIELD, *supra* note 8, at 7 (explaining that many developing countries cannot take advantage of the prosperity of increased international trade because they are dependent on exporting products that have declined in price over the past decade). Such dependency has led to Mexico's current trade and debt problems. *Id.*

149. See Weintraub, *supra* note 16, at 3. For example, crude oil prices in the summer of 1998 had plunged to twelve year lows, forcing Mexico to join other oil producers in cutting back production in the hopes of raising prices. *OPEC to Curb Production: Oil Ministers Hope Pact Boosts Prices Worldwide*, CINCINNATI POST, June 24, 1998, at B8 (reiterating that part of the FDI increase in wages is redistributed from domestic capital profits).

150. See APPLEYARD & FIELD, *supra* note 8, at 213 (reiterating that part of the FDI increase in wages is redistributed from domestic capital profits).

151. See Weintraub, *supra* note 16, at 3 (explaining that wages throughout Mexico fell in recent years from 30% of American wages in 1980 to just 12% of American wages today).

152. Crandall, *supra* note 23, at 181.

153. Crandall, *supra* note 23, at 181.

154. See Wrona, *supra* note 15, at 23 (reiterating that exports create jobs); see also APPLEYARD & FIELD, *supra* note 8, at 213 (describing that FDI may increase employment in developing countries because population pressure causes an excess supply of labor).

155. Wrona, *supra* note 15, at 23.

156. Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 PUGET SOUND L. REV. 555, 562 (1994) (noting that one million new workers are entering the Mexican labor market each year and that the Mexican population is expected to nearly double in the next 35 years).

157. Weintraub, *supra* note 16, at 3.

158. Weintraub, *supra* note 16, at 3.

159. APPLEYARD & FIELD, *supra* note 8, at 213.

160. Lindquist, *supra* note 73, at A1.

how into Mexico.<sup>161</sup> This will improve Mexico's technology base.<sup>162</sup> Technology-based industries in turn help generate high-skill, high paying jobs.<sup>163</sup> Finally, FDI will bring with it experienced management and human resource training skills.<sup>164</sup> Economists believe that such training skills are a scarce, yet essential, developmental resource for developing countries.<sup>165</sup>

The Mexican government's greatest fear is that companies may no longer find it cost-efficient to locate in Mexico if labor costs increase.<sup>166</sup> This would undermine one of the prime incentives to invest in Mexico — cheap labor.<sup>167</sup> Increased labor standards will often lead to increased costs. This could lead to lay-offs of workers in order to reduce costs.<sup>168</sup> Moreover, female workers will probably be the main targets of such lay-offs.<sup>169</sup> The International Labour Organization ("ILO")<sup>170</sup> has acknowledged this possibility:

161. See Crandall, *supra* note 23, at 172-73 (explaining that FDIs increase the growth of the Mexican economy).

162. See Crandall, *supra* note 23, at 172-73 (listing that FDIs will upgrade technology and increase productivity in order to promote economic growth in Mexico).

163. See NAALC, *supra* note 13, preamble (listing NAALC's goals).

164. See APPLEYARD & FIELD, *supra* note 8, at 213 (noting potential benefits of FDI).

165. APPLEYARD & FIELD, *supra* note 8, at 213.

166. This notion is evidenced simply by the way that some free trade activists discuss the enforcement of labor laws. "International businesses make decisions about where to produce based on very minor differences. The difficulty of doing business, created by administrative organizations, is factored in by financial analysts . . . . A process that does not work becomes more expensive and less competitive." James F. Smith, Lance A. Compa, Robert E. Herzstein, Michael J. O'Neill & Jorge F. Perez-Lopez, *The Challenges and Opportunities Under NAFTA Labor Cooperation Agreement*, 3 U.S.-MEX. L.J. 149, 154 (1995).

167. See Weintraub, *supra* note 16, at 3 (outlining objectives considered by Mexico when re-evaluating free trade policy with the United States).

168. See Robert Howse & Michael Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, 16 INT'L REV. L. & ECON. 61, 64, 70 (1996) (discussing the cost consequences involved in enforcing labor standards externally through the use of trade sanctions).

169. See generally CONFRONTING STATE, CAPITAL AND PATRIARCHY: WOMEN ORGANIZING IN THE PROCESS OF INDUSTRIALIZATION 38 (Amrita Chhachhi & Renee Pittin eds., 1996) (stating that measures can be taken that would encourage the recruitment of women "by arguing for maternity and child benefits to be financed by general taxation and not be wholly borne by individual employers").

170. See Stensland, *supra* note 112, at 145-47 (outlining the functions of the ILO, a United Nations agency which was founded in 1919). The ILO specializes in labor and social issues such as the right to work, child labor, wages, sex discrimination, social security, age, and working conditions. *Id.* It sets international labor standards but has no enforcement mechanisms of its own except through public and political pressure. *Id.* Many countries tend to use the ILO conventions as their own without ratifying them as law. *Id.* If an ILO convention is ratified, a country is expected to fully comply. *Id.* All three NAFTA members have ratified some ILO conventions. *Id.* See also Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 665 (1995) (noting that even without an enforcement mechanism, the ILO is one of the most prominent organizations to set standards in labor law).

"[l]egislation, such as maternity protection, which aims to protect women's reproductive and maternal capacity, may be used by employers to justify their perception of women as more expensive labour than men."<sup>171</sup>

As demonstrated by pregnancy discrimination in the *maquiladoras*, the effects of requiring companies to pay for maternity benefits can have economic and social consequences because almost two-thirds of the *maquiladora* workforce are women, many in their reproductive years.<sup>172</sup> As a result, these laws can potentially lead to higher labor costs for *maquiladoras*.<sup>173</sup> Consequently, some companies have taken steps to exclude women from the workforce.<sup>174</sup>

#### *D. Arguments in Favor of Enforcement*

Although Mexico's comparative advantage in labor is a key reason that MNEs are located in Mexico, the notion that MNEs will leave Mexico if labor laws are enforced is dubious.<sup>175</sup> Mexico has a growing consumer market that currently exceeds ninety-four million people.<sup>176</sup> American companies want to locate in Mexico and provide products and services for an increasingly prosperous population.<sup>177</sup> Mexico's economy is growing and consumer demand is increasing.<sup>178</sup>

Although low labor costs can be an important competitive factor, many companies have realized that competition in technology, consumer preferences for products, effective advertisements, and

171. LIN LEAN LIM, MORE AND BETTER JOBS FOR WOMEN: AN ACTION GUIDE 23 (International Labour Office 1996).

172. See Moore, *supra* note 1, at A20 (stating that the *maquiladora* workforce is "dominated by young women in their prime child-bearing years").

173. See HUMAN RIGHTS WATCH, *supra* note 7, at 49 (citing Zenith's claims that, historically, if women are ineligible for maternity benefits from the government, they will seek employment by a company, take advantage of the maternity benefits, and leave).

174. See HUMAN RIGHTS WATCH, *supra* note 7, at 13, 23-27 (describing some of these steps, which include forced resignations, heavier workloads, and provisional contracts). Companies use provisional contracts so that workers believe that they have been hired on a trial basis and therefore have no legal basis to contest a later firing. *Id.* at 13 n.41.

175. Cf. Durand, *supra* note 143, at 134-35 (discussing the numerous benefits to U.S. businesses from the *maquiladora* program).

176. See UNITED STATES CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 4 (1995) (estimating Mexico's population in 1995 to be 93,985,848 with an estimated population growth rate of 1.9%).

177. See INTERNATIONAL LABOUR OFFICE, WORLD LABOUR REPORT 106 (1995). Mexico is considered an upper-middle income nation although poverty is still a major problem. *Id.* Its Gross National Product per capita in 1993 was \$3,750. *Id.* Mexico's rural poverty rate in 1990 was 32%, up from 18% in 1980. *Id.*

178. See WORLD INFORMATION SERVICES COUNTRY OUTLOOKS, *supra* note 151 (explaining that retail sales are up, employment is up, interest rates are low, and wages are showing modest increases in some sectors of the economy). The report cautions, however, that consumer debt is constraining demand. *Id.*

public image<sup>179</sup> can outweigh the concerns over labor costs.<sup>180</sup> Consequently, the importance of low labor costs will vary among companies:

[T]hough certainly some businesses will locate their production facilities in countries with the lowest wage rates in order to lower their production costs, that is by no means a universal operating principle. In fact, one of the key factors in determining the extent to which any trade liberalizing agreement will result in shifts in production — i.e., in job gains and losses — is the extent to which labor costs are central to total production costs in the industries in constituent countries to the agreement.<sup>181</sup>

For example, the automobile industry is labor intensive and needs large numbers of workers, but other expenditures for capital and infrastructure development are also essential.<sup>182</sup> Those non-labor costs may make labor a non-determinative factor in plant location.<sup>183</sup>

Many corporations have located their production facilities in Mexico because they benefit from the government's non-enforcement of its anti-discrimination laws, and they assume that such laws will not be enforced.<sup>184</sup> Indeed, companies have actively recruited female workers who are in their child bearing years while refusing to be responsive to their needs for child care and maternity leave.<sup>185</sup> Because Mexican labor law clearly "intervene[s] on the side of the worker," corporations can argue that "[t]he precise elucidation of expectations within Mexican labor law means that foreign governments and corporations can hardly assert that the agenda of Mexico's worker has never been expressed."<sup>186</sup>

A growing number of Mexican women are primary care providers,

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179. See *infra* notes 318-31 and accompanying text (discussing the impact that public image has had on major corporations that have violated human rights laws).

180. See *International Trade and Social Welfare*, *supra* note 31, at 367-68 (considering what benefits actually determine the terms of competition on the international level).

181. *International Trade and Social Welfare*, *supra* note 31, at 341.

182. See *International Trade and Social Welfare*, *supra* note 31, at 341 (comparing variations in factors considered to determine where to locate production plants for different types of industries).

183. See *International Trade and Social Welfare*, *supra* note 31, at 341 (indicating that when industrial labor costs are low compared to the final product's value and when labor costs are high, but require well-educated and skilled workers, the cost of labor is, for the most part, a non-factor).

184. See Williams, *supra* note 64, at 370 & n.50 (describing some Mexican labor laws which, in effect, go unenforced in favor of the Mexican policy of wanting to attract and maintain foreign investors).

185. See *infra* notes 199-201 and accompanying text (highlighting means used to attract women workers).

186. Williams, *supra* note 64, at 370.

not merely sources of supplemental family income.<sup>187</sup> As a result, women's labor is essential to the health and prosperity of their families and to that of the entire nation. They need job security and safeguards to protect their rights and their family's prosperity during their pregnancies and after childbirth.<sup>188</sup> The difficulty facing women, however, is "a lack of economic bargaining power that forces workers to accept abysmal working conditions."<sup>189</sup>

*Maquiladoras* are dependent on female workers. Collectively, they employ almost 300,000 women—nearly sixty percent of the total number of Mexican workers in such plants.<sup>190</sup> In fact, the most productive workers in the *maquiladoras* are women in their prime reproductive years.<sup>191</sup> MNEs deliberately target these unskilled and semi-skilled workers with the belief that they are more patient, submissive, efficient, easily trained, and require lower wages than men.<sup>192</sup> *Maquiladoras* recruit aggressively for women workers in the slums of Northern Mexico.<sup>193</sup> Moreover, female employee efficiency is a key incentive that countries such as Mexico use to attract FDI.<sup>194</sup> This suggests that corporations have an obligation to the needs of the workers whom they actively recruit.<sup>195</sup>

The underlying reality is that actions taken by employers to force pregnant women from the workplace is actually an attempt to discourage pregnancies altogether.<sup>196</sup> Such actions, however, may be

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187. See Durand, *supra* note 143, at 131 (explaining that employers often view women as secondary sources of income in order to justify firing them during seasonal layoffs).

188. See MATERNITY AND WORK, *supra* note 70, at 23-29 (describing how more and more countries are undertaking measures to prevent and combat pregnancy discrimination in employment).

189. *International Trade and Social Welfare*, *supra* note 31, at 341.

190. Moore, *supra* note 1, at A20.

191. Moore, *supra* note 1, at A20.

192. See LIM, *supra* note 177, at 31 (adding that the adoption of "causal labor strategies" and the active use of labor shedding restricts women's job security); see also Wright, *supra* note 144, at 864 (stating that "[a]lthough women, as a cheap source of labor, may benefit from access to these relocated jobs, this work is highly exploitative and features low wages, poor working conditions, suppression of trade unions, and little opportunity for security or advancement").

193. See Moore, *supra* note 1, at A20 (explaining that signs such as "Female Personnel Wanted" are deliberately posted to lure women out of the slums and into the factories).

194. See generally Moore, *supra* note 1, at A20 (suggesting that the availability of inexpensive female workers is an incentive for foreign corporations to locate business sites in Mexico, in part because many MNEs are located in Mexico and deliberately recruit women as workers).

195. See HUMAN RIGHTS WATCH, *supra* note 7, at 3 (observing that many corporations relocated to Mexico in the 1960s seeking the benefits of lower costs and a large employment pool).

196. See HUMAN RIGHTS WATCH, *supra* note 7, at 49 (noting Zenith's accusation that the Mexican government implicitly condones pregnancy discrimination as a means of lowering the birth rate).

short sighted and ultimately ineffective, especially when *maquiladoras* only offer the option of low compensation and low status jobs as an alternative to having children.<sup>197</sup> Strong evidence shows that birth rates can be reduced by the social and legal advancement of women.<sup>198</sup> Education and economic participation propel such advancements in status.<sup>199</sup> However, women without educational or occupational opportunities will continue to seek social status and security in society through the number of children they bear.<sup>200</sup> "Employment opportunities increase status and necessarily decrease the desire to gain status from having children."<sup>201</sup>

The growing importance of women in the workforce<sup>202</sup> has made pregnancy discrimination an international problem.<sup>203</sup> Accommodation may be the only solution because of the sheer economic dependence the global economy has on the productivity and well being of women workers:

[T]he role of women in the economy can no longer be ignored or neglected. Since the 1980s, women have been providing the bulk of all new labour supply in both industrialized and developing countries. In almost all regions of the world, the female share of the labour force has been rising, during periods of prosperity as well as periods of recession, whereas men's participation has been consistently falling everywhere. By choice or because of economic pressures, more and more women have become fully-committed workers who are economically active throughout their working lives. To take up work, women are also increasingly migrating both within countries and internationally.<sup>204</sup>

The 1995 Fourth World Conference on Women in Beijing, China

197. See Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1, 11-12 (1996) (explaining that offering women low compensation and lower-tier jobs will not discourage them from becoming pregnant).

198. *Id.* (listing key factors that affect reproductive behavior).

199. *Id.*

200. See *id.* at 12 (stating that "[w]ithout significant economic options, women may perceive few alternatives to large families"). "Women must be given real opportunities to participate in the marketplace, own and control property, and make their own decisions about marriage and reproduction." *Id.*

201. Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1, 11-12 (1996).

202. See Diane Elson, *Appraising Recent Developments in the World Market for Nimble Fingers*, in CONFRONTING STATE, CAPITAL AND PATRIARCHY 35, 38 (Amrita Chhachhi & Renene Pittin eds., 1996) (noting that this is sometimes labeled the "feminization" of the workforce).

203. See MATERNITY AND WORK, *supra* note 70, at 7 (stating that an increasing number of countries are introducing maternity protection laws).

204. See LIM, *supra* note 177, at 10 (describing the role of female participation in the labor force).



began with discussions about pregnant women who work.<sup>205</sup> The Beijing Platform for Action<sup>206</sup> emphasized that there must be a solution to the "conflict between productive and reproductive roles."<sup>207</sup> Over sixty million women worldwide are employed in manufacturing jobs and constitute over one-third of the manufacturing workforce.<sup>208</sup> Furthermore, global increases in international trade and capital flows will only increase the employment of women in the future.<sup>209</sup> Trade will increase employment because "trade operates on comparative cost advantage, the relationship between trade expansion and female employment can be seen as a causal one, especially since the employment of women seems universally possible at lower cost than that of male labour."<sup>210</sup> International capital flows will increase employment because companies in export processing zones actively recruit women.<sup>211</sup>

Corporations expanding into international markets cannot ignore the growing global recognition that human rights are inalienable and necessary "simply by virtue of being human."<sup>212</sup> Corporations and NAFTA governments, not Mexican laborers, proffer the argument that workers want to be exploited by MNEs.<sup>213</sup> Employers must recognize that "[t]rade entails not merely the transaction of goods, but also an exchange of cultural and societal norms."<sup>214</sup> Sometimes "[i]nsisting on compliance with minimum standards may have little relation to economic welfare; this is particularly true in the case of universal human rights, including labor rights, where the case for universal recognition of such rights is often premised on a naturalistic conception of human freedom and equality."<sup>215</sup>

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205. See LIM, *supra* note 177, at 1-7, 13 (discussing the general themes of the Conference).

206. See LIM, *supra* note 177, at 1-7, 13 (identifying the Platform's areas of concern).

207. See LIM, *supra* note 177, at 13 (noting that Paragraph 158 of the Beijing Platform addressed the conflicts arising between pregnancy and work). Paragraph 158 states that women are constrained in their "employment opportunities for reasons that include inflexible working conditions and inadequate sharing, by men and by society, of family responsibilities." *Id.*

208. See SHIZUE TOMODA, WOMEN WORKERS IN MANUFACTURING, 1971-1991, at 1 (1995) (examining the employment of women in manufacturing).

209. See LIM, *supra* note 177, at 30 (explaining the positive impact of international trade and international capital flows on increased female employment in developing countries).

210. LIM, *supra* note 177, at 30.

211. See LIM, *supra* note 177, at 30 (noting that globally, women make up to 80% of the workforce in export processing and other special economic zones).

212. Howse & Trebilcock, *supra* note 174, at 64.

213. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 678 (explaining the Levi-Strauss code of conduct).

214. Williams, *supra* note 64, at 386.

215. Howse & Trebilcock, *supra* note 174, at 65.

Unrestrained global trade liberalization cannot circumvent local labor rights.<sup>216</sup> Labor rights are economic rights even though such social policy issues have traditionally been viewed as secondary to trade negotiations.<sup>217</sup> They are, however, increasingly important to such negotiations to safeguard the ability of governments to continue to pursue trade liberalization while simultaneously promoting their citizens' social and economic welfare.<sup>218</sup> Some activists assert that economics, labor rights, social policy, finance, and the environment are inseparable in today's global economy.<sup>219</sup>

#### IV. TESTING THE NAALC'S DISPUTE RESOLUTION SYSTEM

##### A. *The Human Rights Watch Submission: Allegations of Non-Enforcement of Pregnancy Discrimination Laws*

Human rights organizations and labor unions frequently accuse Mexico of not protecting interest groups by file submissions. This Comment recommends that submissions be filed regarding worker rights violations in Mexico to either develop or discredit its enforcement system. On May 15, 1997, Human Rights Watch took the first step in testing the effectiveness of the NAALC dispute resolution system by filing a submission<sup>220</sup> alleging pregnancy

216. See generally Michael Hart, *Coercion or Cooperation: Social Policy and Future Trade Negotiations*, 20 CAN.-U.S. L.J. 351, 351 (1994) (analyzing the goals of globalization, trade, and social issues).

217. *Id.*

218. See *id.* (balancing economic policies with social policies).

219. See generally *International Trade and Social Welfare*, *supra* note 31, at 359 (observing that devaluation of the Mexican peso had an effect on labor rights, economics, and social policy). Lance Compa is a prominent labor rights activist who heads the International Labor Rights Advocates ("Advocates"), a project of the International Labor Rights Education and Research Fund. *Id.* at 358. The Advocates staff, consisting of lawyers, law professors, and law students, research and analyze labor issues. *Id.* At the January 7, 1995, meeting of the Section on International Law of the American Association of Law Schools, Mr. Compa stated:

I don't think that separation can be maintained anymore. For example, take the latest development involving the devaluation of the Mexican peso. Is this just a commercial affair, a technical correction of financial markets? Obviously not. It has profound social and political consequences that will operate directly on labor rights and working conditions in Mexico, where they will have to come up with an "austerity program" that will basically look to solve the problem by taking it out of workers' hides, and in the United States, where the new exchange rate will choke down exports to Mexico and put a lot of workers here out of a job. So, I don't think we can anymore maintain the notion that in this corner we have trade, finance, commercial relations, tariff problems and the like, and in that corner we have labor rights, environmental protection, social justice and other "political" issues, and they don't meet in the center of the ring with a lot of conflict. They do meet. There is conflict. There's no avoiding it. What's needed is developing the right policies to deal with it.

*Id.*

220. See *The Challenges and Opportunities Under NAFTA Labor Cooperation Agreement*, 3 U.S.-

discrimination.<sup>221</sup>

Mexico's failure to protect workers is largely attributable to internal economic pressures, especially the government's policy of promoting FDI through inexpensive labor at the expense of human rights.<sup>222</sup> Because there are few internal incentives to do so, outside pressure from NAFTA members under the NAALC is a necessary step to expose Mexico's nonenforcement and to compel enforcement of its laws.<sup>223</sup>

Whether the Human Rights Watch submission to the NAALC will be successful remains to be seen because the system has not been tested.<sup>224</sup> Nonetheless, as described in the next section, filing a submission under the NAALC may potentially generate cooperation in resolving labor matters. More importantly, it may generate public outrage as a non-legal method to pressure Mexico to protect pregnant workers and to force corporations to comply with labor laws to protect their public image.<sup>225</sup>

The NAALC created a mechanism through which member countries could "monitor and challenge" each other regarding the enforcement of their labor laws.<sup>226</sup> No international authority or tri-national authority enforces the NAALC.<sup>227</sup> The NAALC established a cooperative investigation process between the investigating and accused country to determine whether the latter failed to enforce its domestic labor laws.<sup>228</sup> The NAALC's procedures encourage each country to enforce domestic labor laws by facilitating information

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Mex. L.J. 149, 150-51 (1995) [hereinafter *Challenges and Opportunities*] (explaining that a submission functions much like a complaint filed in court).

221. See HUMAN RIGHTS SUBMISSION, *supra* note 18, at 2 (revealing that the *maquiladoras* required women to take pregnancy tests and denied pregnant women the opportunity to work).

222. See WORLD INFORMATION SERVICES COUNTRY OUTLOOKS, *supra* note 151 (noting that economic liberalization policies have been successful for Mexico). The prospects for increased economic growth, declining inflation, and increased FDI are expected to improve the economy in 1997. *Id.*

223. See Bierman & Gely, *supra* note 29, at 562 (noting that the labor movements in NAFTA signatory countries do not have institutional mechanisms through the NAALC to criticize the lack of enforcement of labor laws in their countries).

224. See Bierman & Gely, *supra* note 29, at 562. At the time this Comment went to publication, the NAO was still investigating the allegations against the Mexican government. The Mexican government filed some comments in response to the Human Rights Watch submission and a hearing has been set. *Id.*

225. Cf. Crandall, *supra* note 23, at 182-83 (noting that promoting public awareness is the goal of the Supplemental Agreement).

226. Williams, *supra* note 64, at 362.

227. See Bierman & Gely, *supra* note 29, at 535-36 (explaining that the NAALC's enforcement is shared multi-laterally).

228. See *International Trade and Social Welfare*, *supra* note 31, at 356 (describing the process of bilateral investigation).

exchanges, cooperation, and collaboration among signatory countries.<sup>229</sup>

The NAALC allows investigations for several general labor law categories.<sup>230</sup> As they pertain to pregnancy discrimination, those labor categories include: (1) establishing minimal employment standards;<sup>231</sup> (2) eliminating employment discrimination;<sup>232</sup> and (3) preventing occupational accidents and diseases.<sup>233</sup> Enforcement is possible through a continuum of remedies ranging from cooperative resolutions to sanctions, and is administered through a three-tiered process.

### *1. First-Tier Enforcement: Commission for Labor Cooperation*

Under the first tier, NAFTA members attempt to resolve labor disputes under the Commission for Labor Cooperation, which consists of a Ministerial Council, Secretariat, and the NAOs.<sup>234</sup> The Ministerial Council consists of three ministers, one from each NAFTA member, and convenes at least once a year.<sup>235</sup> The Ministerial Council's duties include: directing Secretariat activities, facilitating cooperation,<sup>236</sup> sharing information, providing technical assistance programs, and overseeing the implementation of the NAALC.<sup>237</sup> The Secretariat has a small staff to prepare summary reports on labor law

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229. Crandall, *supra* note 23, at 182.

230. See NAALC, *supra* note 13, art. 49 (discussing that for the purpose of the NAALC, labor law is defined under eleven categories).

231. NAALC, *supra* note 13, art. 49. As with all of the standards, this standard is vaguely defined. *Id.* The manner in which it is defined suggests that it pertains to wages, but wages are given only as an example. *Id.*

232. NAALC, *supra* note 13, art. 49.

233. NAALC, *supra* note 13, art. 49. Other labor law matters include: the freedom of association; the right to bargain collectively; the right to strike; prohibition of forced labor; restrictions on labor by children and young people; equal pay for men and women; compensation in cases of work accidents or occupational diseases; and protection of migrant workers. *Id.*

234. See NAALC, *supra* note 13, art. 8 (creating the Commission for Labor Cooperation and establishing its composition); see also Crandall, *supra* note 23, at 183; Hagen, *supra* note 43, at 925-26; Muniz, *supra* note 41, at 391 (describing the first level of enforcement under the NAALC).

235. NAALC, *supra* note 13, art. 9; see also Crandall, *supra* note 23, at 183.

236. The Council would help signatory countries cooperate regarding issues of pregnancy discrimination, including those related to: occupational health, human resource development, labor statistics, work benefits, social programs for workers and their families, methods to improve productivity, appropriate employment standards and their implementation, ways to promote the equality of men and women in the workplace, and technical assistance. NAALC, *supra* note 13, art. 11.

237. See NAALC, *supra* note 13, art. 10 (describing council functions); see also Bierman & Gely, *supra* note 29, at 538 (noting that the purpose of the Commission is to enforce the Labor Agreement); Crandall, *supra* note 23, at 183 (explaining the structure of the Commission for Labor Cooperation).

procedures, labor law enforcement, economic and labor market conditions, and human resource and labor development issues.<sup>238</sup> The Secretariat can also propose solutions to arising issues.<sup>239</sup>

In addition, each NAFTA member has a NAO to investigate allegations of labor law violations perpetrated by another NAFTA party.<sup>240</sup> For example, if a private party files a submission<sup>241</sup> with the NAO alleging that the Mexican government has not adequately protected pregnant workers, then the NAO has the discretion to review such charges.<sup>242</sup> The NAO also serves as a point of contact for the private party's respective government officials, the Secretariat, and other NAOs.<sup>243</sup> Upon request, NAOs submit appropriate information to the Secretariat, other NAOs, or the Evaluation Committee of Experts ("ECE").<sup>244</sup>

A submission documenting workers' rights violations should state that such actions are inconsistent with Mexico's obligations under the NAALC.<sup>245</sup> It should also report the extent of harm to the workers as a result of the actions,<sup>246</sup> whether the violations are patterns of non-enforcement of labor law by Mexico;<sup>247</sup> and whether relief has been,

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238. See NAALC, *supra* note 13, arts. 13-14 (describing the duties of the Secretariat); see also Bierman & Gely, *supra* note 29, at 538 (explaining the structure of the Secretariat); McGuinness, *supra* note 17, at 583 (summarizing the responsibilities of the Secretariat).

239. See NAALC, *supra* note 13, art. 14 (listing the reports and studies required by the Secretariat); see also Crandall, *supra* note 23, at 183 (noting that a study done by the Secretariat may include proposals on that matter).

240. See NAALC, *supra* note 13, arts. 15-16 (setting forth the NAO structure and functions); see also Bierman & Gely, *supra* note 29, at 539; Crandall, *supra* note 23, at 184 (describing the structure of the NAO).

241. Citizens can file submissions under the NAALC. See Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 309 (1995) (explaining the origin of citizen submissions which permit citizens to submit complaints concerning the failure of a party to enforce labor or environmental laws).

242. NAALC, *supra* note 13, art. 16(3).

243. NAALC, *supra* note 13, art. 16(1); see also Crandall, *supra* note 23, at 184.

244. See *infra* notes 270-73 and accompanying text (explaining the establishment of ECE and its role); see also NAALC, *supra* note 13, art. 16 (explaining that the NAO must provide public information requested by the ECE); Crandall, *supra* note 23, at 184 (setting forth that NAO is obligated to provide the ECE with publicly available information).

245. See Bierman & Gely, *supra* note 29, at 539 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. 16,661 (1994), which states that the submission should describe "the extent the matters complained of are inconsistent with that party's obligations under the NAALC . . .").

246. See Bierman & Gely, *supra* note 29, at 540 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. 16,661 (1994), which requires that the submission state "to what extent there has been harm to the submitter or other persons").

247. See Bierman & Gely, *supra* note 29, at 539-40 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. 16,661 (1994), which states that "persons filing such submissions must also address whether 'the matters complained of appear to demonstrate a pattern of non-enforcement of labor law by another Party'").

or is being, sought in another forum (i.e., in Mexican courts or perhaps by Mexican officials).<sup>248</sup>

The Human Rights Watch submission, for instance, alleged that Mexico failed to meet its obligations under the NAALC to encourage *maquiladoras* to comply with sex discrimination laws that protect pregnant workers.<sup>249</sup> Furthermore, the submission alleged that workers have been terminated, forced out of employment, and subjected to dangerous work environments that create health and safety problems for both the mother and the fetus.<sup>250</sup> Non-enforcement is commonplace, allowing discrimination to continue unabated.<sup>251</sup> This occurs in part because the government's response has been both apathetic and ineffective.<sup>252</sup>

The NAO must either accept or deny a submission within sixty days of filing.<sup>253</sup> If the submission is accepted for review, a public hearing must take place and a public report with the NAO's findings and recommendations must be issued.<sup>254</sup> The process takes about six months.<sup>255</sup>

If the NAO finds in favor of the complainants, it will consult with the accused country's NAO.<sup>256</sup> If the matter remains unresolved, a party may request a ministerial meeting.<sup>257</sup> If these meetings fail to

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248. See Bierman & Gely, *supra* note 29, at 539-40 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. 16,661 (1994)).

249. See HUMAN RIGHTS WATCH SUBMISSION, *supra* note 18, at 8-9 (explaining how the Mexican government actions are inconsistent under Part II of the NAALC); see generally Bierman & Gely, *supra* note 29, at 534-36 (noting that the preamble states that NAFTA nations will promote "in accordance with their respective laws, high-skill, high-productivity economic development in North America by: . . . encouraging employers in each country to comply with labor laws and to work in maintaining a progressive, fair, safe and healthy working environment") (quoting North American Agreement on Labor Cooperation, *opened for signature* Sept. 8, 1993, 32 I.L.M. 1499).

250. See HUMAN RIGHTS SUBMISSION, *supra* note 18, at 26-27 (confirming that pregnancy discrimination is prevalent).

251. See HUMAN RIGHTS SUBMISSION, *supra* note 18, at 8 (describing the Mexican government's failure to meet obligations under the NAALC).

252. See Human Rights Submission, *supra* note 18, at 29-30 (recognizing that Mexican labor laws do not prohibit pregnancy testing).

253. Bierman & Gely, *supra* note 29, at 540.

254. See Bierman & Gely, *supra* note 29, at 540 (explaining the procedures under 59 Fed. Reg. 16,661-62 (1994)). It is important to determine whether the NAO should make independent determinations of the meaning of its findings or whether it should leave such findings to be determined by the local authorities in Mexico. Although the NAO dismissed the submissions in the Honeywell and GE cases, the NAO criticized Sony's practices in another report after it determined that Sony was violating Mexican laws and that the Mexican government was not enforcing those laws. Some experts believe that without independent determination, Mexico's laws will continue to go unenforced. *Id.* at 557-58, 567-68.

255. Bierman & Gely, *supra* note 29, at 540.

256. Bierman & Gely, *supra* note 29, at 540.

257. Bierman & Gely, *supra* note 29, at 540.

resolve the issue, then the consulting party may request that the dispute resolution advance to the second tier.<sup>258</sup> Not all labor disputes advance to the second tier.<sup>259</sup> For instance, disputes over the rights to associate, to organize, or to bargain collectively cannot advance past the first tier.<sup>260</sup> Pregnancy discrimination disputes, however, may proceed to the second tier.<sup>261</sup>

At the time this Comment was written, the NAO determined that the Human Rights Watch allegations had merit. On January 12, 1998, the NAO issued a report. The report recommended that "the Secretary of Labor consult with the Secretary of Labor and Social Welfare of Mexico for the purpose of ascertaining the extent of the protections against pregnancy-based gender discrimination afforded by Mexico's laws and their effective enforcement by the appropriate industries."<sup>262</sup>

## 2. *Second-Tier Enforcement*

If first-tier ministerial meetings fail, a party<sup>263</sup> may request that an independent ECE with labor experts be established.<sup>264</sup> The ECE then issues its own draft report to the Ministerial Council, based on information provided by the NAOs, the Secretariat, special interest groups, institutions with expertise on the topic at issue, and the public.<sup>265</sup> Each party has an opportunity to respond to the draft and

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258. See NAALC, *supra* note 13, art. 23.

259. See NAALC, *supra* note 13, art. 23(3) (stating that no ECE may convene if the matter is not trade-related nor covered by mutually recognized labor laws); see also Crandall, *supra* note 23, at 186 (discussing types of claims that the ECE will not review); Hagen, *supra* note 43, at 927-30 (discussing types of claims that the ECE will not review).

260. See NAALC, *supra* note 13, art. 23(2) (requiring that the ECE only evaluate issues of health and safety and other technical labor standards); see also *id.* art. 49(1)(b) (excluding these labor categories from the definition of technical labor standards); Muniz, *supra* note 41, at 392 (stating that leaving out these particular labor rights severely impaired the ability of workers to exercise these rights because the Mexican government encourages lower wages to entice U.S. investment).

261. See NAALC, *supra* note 13, art. 23(2) (stating that the ECE can consider health and safety issues and technical labor standards). Technical labor standards as they apply to pregnancy discrimination include minimum employment standards and elimination of employment discrimination. *Id.* art. 49.

262. Public Report of Review of NAO Submission, No. 9701, Jan. 12, 1998, at 46.

263. NAO review provides many entities a public forum in which to file a complaint against a NAFTA member, although the Council of Ministers is authorized to initiate evaluation and dispute-resolution procedures against member countries. McGuinness, *supra* note 17, at 584.

264. See NAALC, *supra* note 13, arts. 23-24 (explaining the ECE's Rules of Procedure); Muniz, *supra* note 41, at 391-92; Hagen, *supra* note 43, at 927-28 (discussing conditions under which an ECE is established); Stensland, *supra* note 112, at 160-61 (stating that the ECE's analysis should be non-adversarial).

265. See NAALC, *supra* note 13, art. 24(1)(e) (explaining that the Rules of Procedures for ECE's include allowing an ECE to prepare its own report).

to provide a written submission regarding their positions.<sup>266</sup> The ECE then issues its final report with recommendations to the Council.<sup>267</sup>

If the ministers fail to reach a resolution, an arbitral panel may be appointed with approval of two-thirds of the Ministerial Council.<sup>268</sup> This is the third tier.<sup>269</sup> If the NAALC is broadly interpreted, submissions based on pregnancy discrimination could reach this level.<sup>270</sup> Even if pregnancy discrimination issues were to advance, their review may be limited to instances where pregnant workers are forced to take on more strenuous work or are not given adequate protection from dangerous chemicals.<sup>271</sup>

### 3. *Third-Tier Enforcement*

Only labor issues regarding child labor, occupational safety and health, and minimum wage standards will progress to the third tier.<sup>272</sup> These issues must be "based on mutually recognized labor laws,"<sup>273</sup> "be trade related,"<sup>274</sup> and involve "persistent patterns of failure to enforce."<sup>275</sup> A five-member arbitration panel will review each matter.<sup>276</sup>

Regarding pregnancy discrimination, the panel would issue an initial report and if it determines that Mexico has not enforced its occupational safety and health laws, it will issue a resolution and

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266. See NAALC, *supra* note 13, art. 24(1)(f) (indicating that each Party must have a reasonable opportunity to review and make written comments on information received by the ECE).

267. See NAALC, *supra* note 13, art. 26(1) (setting forth that the final report must be submitted to the Council within 60 days after the draft presentation, unless otherwise determined by the Council).

268. See NAALC, *supra* note 13, art. 29(1) (describing the factors that constitute a request for an arbitral panel); see also Hagen, *supra* note 43, at 929 (examining circumstances when the Council would try to resolve issues).

269. See Muniz, *supra* note 41, at 391 (describing the three tiers of enforcement).

270. See *Challenges and Opportunities*, *supra* note 226, at 152 (noting that, to date, the NAOs have taken a moderate approach). Some business advocates claim that "the NAO should not accept submissions until domestic procedures have been exhausted," but labor advocates claim that issues regarding patterns of non-enforcement only arise in the NAALC at the second and third tiers. *Id.*

271. See HUMAN RIGHTS WATCH, *supra* note 7, at 13, 23-24 (discussing how such techniques are used to force pregnant workers to quit their jobs and how many workers claimed they were rarely given protective gear for hazardous work activities).

272. See Muniz, *supra* note 41, at 391 (noting that additional democratic freedoms such as the rights of association, organizing, and bargaining are excluded).

273. See NAALC, *supra* note 13, art. 29(1) (defining conditions that require an arbitral panel); see also Hagen, *supra* note 43, at 929-30 (discussing the role of an arbitral panel).

274. NAALC, *supra* note 13, art. 29(1).

275. NAALC, *supra* note 13, art. 29(1).

276. NAALC, *supra* note 13, art. 32.



action plan to remedy the problem.<sup>277</sup> After feedback from the disputing parties,<sup>278</sup> the dispute settlement panels may then present a final report with recommendations.<sup>279</sup> If the parties fail to abide by the recommendations or fail to reach a resolution and an effective enforcement plan of action, the panel may be reconvened at this stage.<sup>280</sup> The panel may then enforce the recommendations with fines, sanctions, or even punitive measures.<sup>281</sup>

The NAALC's complaint procedure is complex, confusing, and elaborate.<sup>282</sup> Critics of the procedure consider it an ineffective enforcement mechanism that has rarely been utilized.<sup>283</sup> For instance, NAFTA members may avoid accountability through several exceptions, under the NAALC.<sup>284</sup> If their actions are "a reasonable exercise of . . . discretion" regarding law enforcement and allocation of resources to "higher priorities," the accused government may evade enforcement of its labor laws.<sup>285</sup> As this provision provides little guidance, governments interpret it broadly.<sup>286</sup> Furthermore, even a substantiated claim can be denied dispute resolution if it does "not constitute a failure of another Party to comply with its obligations"<sup>287</sup> under the NAALC.<sup>288</sup>

According to critics, the NAALC's dispute resolution process takes

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277. NAALC, *supra* note 13, art. 36(2).

278. *See* NAALC, *supra* note 13, art. 36(4) (explaining that a disputing party has 30 days to submit written comments).

279. *See* NAALC, *supra* note 13, art. 37 (describing requirements of the final report); Stensland, *supra* note 112, at 160-61.

280. *See* Stensland, *supra* note 112, at 161 (defining the panel's power to impose a fine).

281. *See* NAALC, *supra* note 13, arts. 39(4)(b), 39(5)(b), 41(1) (asserting that the panel's monetary enforcement assessments must be in accordance with Annex 39 and Annex 41A); *see also* Hagen, *supra* note 43, at 930 (noting that the imposition of a maximum fine of \$20 million the first year is allowable to the extent that efforts to invoke a "mutually satisfactory action plan" have been exhausted). In subsequent years, fines of .007% may be placed on commerce between parties. *Id.* *See also* Stensland, *supra* note 112, at 161 (suggesting that punitive measures should only be a last resort solution).

282. *See* Bierman & Gely, *supra* note 29, at 533 (explaining the limitations on the ability to effectively enforce labor laws through NAFTA); Crandall, *supra* note 23, at 188.

283. *See* Bierman & Gely, *supra* note 29, at 569 (concluding in part that the NAALC has inadequately addressed lax enforcement of Mexican labor laws); *see also* Crandall, *supra* note 23, at 188-89 (noting that the process is lengthy and has several broad exceptions).

284. Garvey, *supra* note 43, at 442.

285. NAALC, *supra* note 13, art. 49(1); *see also* Garvey, *supra* note 43, at 442-43.

286. *See* Garvey, *supra* note 43, at 442-43 (arguing that the terms within this provision of the side agreement are undefined and thus leave the door open for varying interpretations).

287. *See* Bierman & Gely, *supra* note 29, at 540 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. at 16,661-62 (1994)).

288. *See* Bierman & Gely, *supra* note 29, at 540 (citing Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, 59 Fed. Reg. at 16,661-62 (1994)).

too long to resolve an issue.<sup>289</sup> A third-tier enforcement takes a minimum of 1,225 days from the initiation of the submission to the issuance of sanctions for noncompliance.<sup>290</sup> Moreover, a violating NAFTA member can delay the NAALC dispute resolution process at almost every stage.<sup>291</sup> Such tactics undermine the likelihood and timeliness of resolving disputes.<sup>292</sup>

Only governments can request that an issue advance to the next tier in the dispute resolution process.<sup>293</sup> Aggrieved parties have no such right.<sup>294</sup> The NAALC does not provide timetables or guidelines to regulate cooperative activities, such as what to do if an accused party does not cooperate.<sup>295</sup> A lack of such regulatory mechanisms limits the capacity to enforce labor laws.<sup>296</sup> Thus, some critics claim the NAALC is ineffective.<sup>297</sup> It is a quasi-administrative agreement with standards that NAFTA's members either ignore or use as suggested guidelines instead of mandatory standards.<sup>298</sup> As a result, both NAFTA and the NAALC fail to protect against workers' rights abuses.<sup>299</sup>

Additionally, the use and effectiveness of trade sanctions have been the subject of debate, especially among the United States and its

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289. See generally Crandall, *supra* note 23, at 188 (describing, in general, the complaint process). "[T]he claim must proceed through NAO and ministerial consultations, an ECE assessment, party consultations, a special session of the council, and an arbitral panel determination as to the existence of a persistent pattern of failure to enforce the relevant labor standards." *Id.* Some critics argue that "[t]his lengthy and bureaucratic process ensures that sanctions will rarely . . . be imposed." *Id.*

290. Garvey, *supra* note 43, at 442.

291. See Garvey, *supra* note 43, at 442-43 (acknowledging that the violator has "significant control over the process by engaging political modalities of negotiation and conciliation well before any sanction is possible").

292. See Garvey, *supra* note 43, at 442 (recognizing doubts of enforcement).

293. See Crandall, *supra* note 23, at 185 n.170 (explaining that only a government can request that a matter proceed).

294. See Crandall, *supra* note 23, at 185 (discussing that only governments have the right to determine labor law violations).

295. See Crandall, *supra* note 23, at 184 (describing the NAO and its role in the dispute resolution process).

296. Crandall, *supra* note 23, at 184.

297. See Bierman & Gely, *supra* note 29, at 561 (noting the limitations of the NAALC). The NAALC is not binding legislation under federal law. *Id.* Rather, it exists as a mutual understanding among NAFTA members with respect to labor rights. *Id.*

298. See Bierman & Gely, *supra* note 29, at 533 (observing that the NAALC has been virtually ignored and/or overshadowed by NAFTA).

299. See Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 77-78 (1994) (citing Gus Tyler, *The Myth of Free Trade: Is it Part of the "Moral Law?"* DISSENT, Spring 1988, at 217-18) (discussing that the absence of government control over global corporate migration means control is left to these corporations whose main concern is the maximization of profit and not social policy).

trading partners.<sup>300</sup> Although the United States has threatened the use of sanctions in many trade disputes,<sup>301</sup> such sanctions tend to be a measure of last resort.<sup>302</sup> Some trade experts argue that sanctions, fines, or the suspension of trade concessions will only hamper free trade.<sup>303</sup> Indeed, the use of sanctions resulting from submissions filed in the United States could lead to increased tensions with Mexico. Sanctions could nullify improved political ties with Mexico, which was one of the main reasons the United States entered into NAFTA.<sup>304</sup>

Finally, sanctions may be ineffective.<sup>305</sup> In the context of U.S. imposed trade sanctions, one study concluded that out of 115 uses of economic sanctions, there was a thirty-four percent success rate in achieving the desired results.<sup>306</sup> However, some labor experts believe that trade sanctions may be effective if measured and administered with caution.<sup>307</sup> Nevertheless, trade sanctions are a short-term solution. To facilitate long term solutions, countries must reach a consensus whether to enforce certain fundamental norms, such as basic fair labor standards. Trade sanctions, however, should be imposed only as a last resort.<sup>308</sup>

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300. See generally LAURA D'ANDREA TYSON, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES 260 (1992) (illustrating that U.S. diplomacy with Japan with respect to trade is strategically better served by "threat of retaliation over actual retaliation").

301. See generally *id.* at 259-60 (describing the U.S. use of threats in the context of the Motorola and Cray cases and Airbus subsidies).

302. See Crandall, *supra* note 23, at 182 (remarking that the NAALC was enacted under concerns over unenforcement of labor laws by the Mexican government).

303. See *International Trade and Social Welfare*, *supra* note 31, at 360 (discussing that trade sanctions are a last resort).

304. See Weintraub, *supra* note 16, at 6 (asserting that of all the U.S. objectives, strengthening political ties with Mexico may be the most significant). The implementation of U.S. imposed sanctions frustrates that objective and causes negative repercussions in other sectors of diplomatic relations between the U.S. and Mexico—such as battling the drug trade. *Id.*

305. See generally Howse & Trebilcock, *supra* note 174, at 64 (explaining that concerns for employment, environmental rights, and human rights differ in each country, and sanctions may be ineffective because each country has different standards regarding the quality of life).

306. See Howse & Trebilcock, *supra* note 174, at 70 (recognizing a study predicting the effectiveness of sanctions).

307. See *International Trade and Social Welfare*, *supra* note 31, at 356-57 (setting forth questions that need to be considered in order for a system that uses trade sanctions to enforce achievement of social objectives). Four questions must be addressed before confirming that trade sanctions are appropriate to achieve social objectives: (1) whether it is appropriate to use trade as a lever to achieve unrelated objectives; (2) how to define and who defines such social standards and objectives; (3) how to decide and who decides that a country has failed to meet these standards and objectives; and (4) what trade sanctions are appropriate, as well as non-sanctionable alternatives. *Id.*

308. See *International Trade and Social Welfare*, *supra* note 31, at 360 (arguing that trade sanctions get concrete results, but should be of last resort).

### B. Effectiveness of Public Awareness

Approval of NAFTA depended largely on reassurances that labor standards and other quality of life concerns would not be ignored.<sup>309</sup> NAFTA's long-term survival also depends on this same issue.<sup>310</sup> At the same time, investment must be predictable and reliable for MNEs.<sup>311</sup> There is a delicate balance between protecting workers and stimulating investment.<sup>312</sup>

In addition to governmental pressure in cooperative consultations, one of the major strengths in the dispute resolution process is public awareness and participation.<sup>313</sup> Public meetings are part of the dispute resolution procedure.<sup>314</sup> Members of the public, including individuals and non-governmental organizations, have the opportunity to voice their opinions on the matter.<sup>315</sup> Such pressure will be placed not only on Mexico, but also on other NAFTA members.<sup>316</sup> In this context, the public exerts considerable pressure.<sup>317</sup> Even if the NAALC does not provide adequate enforcement of Mexican labor law, it has the potential to considerably influence labor protection trends.<sup>318</sup> The NAALC should be seen as an initial attempt to improve workers' rights in NAFTA nations.<sup>319</sup>

309. See Garvey, *supra* note 43, at 445 (discussing whether NAFTA side agreements will encourage investment and trade without negatively affecting quality of life); see also Crandall, *supra* note 23, at 185 (stating that in order for sanctions to be a significant deterrent, the governments of each signatory country must seriously enforce the Supplemental Agreement and investigate labor violations).

310. See Garvey, *supra* note 43, at 445 (noting that NAFTA's long-term viability is dependent on a "fair" definition of environment, health, and labor standards and violations).

311. Garvey, *supra* note 43, at 445.

312. See Garvey, *supra* note 43, at 445 (observing that NAFTA is an agreement mixed of trade and social values that presents a delicate balance).

313. See Bierman & Gely, *supra* note 29, at 557-61 (analyzing the NAO's decision-making process after the Teamster's Union and other unions blasted it for failing to protect workers' rights).

314. See Garvey, *supra* note 43, at 449 (analyzing the openness of NAFTA's dispute resolution and comparing it to the GATT agreement where decisionmaking takes place under an air of privacy).

315. See Garvey, *supra* note 43, at 449 (remarking on the opportunities for public input).

316. See Bierman & Gely, *supra* note 29, at 562-63 (noting that the NAALC serves as a tool for the labor movement to criticize its own government's labor rights, which might serve as a stepping stone for developing/modifying those rights).

317. See Garvey, *supra* note 43, at 449 (commenting that the openness of the process gives NAO's a vehicle for applying public pressure on a government).

318. See Crandall, *supra* note 23, at 167-68 (explaining that the NAALC influences labor protection trends by representing a compromise between sovereign nations).

319. See Crandall, *supra* note 23, at 167-68 (recognizing that the NAALC should not be the only attempt at improving workers' rights in NAFTA nations).

Increased public pressure on corporations might also help improve the way companies treat their employees.<sup>320</sup> No company wants to be associated with the use of child labor or the mistreatment of its workers.<sup>321</sup> For instance, Levi-Strauss and Reebok have both recently been targeted as labor law violators in the media.<sup>322</sup> In response, Levi-Strauss and Reebok changed their employment practices because they are dependent on their images.<sup>323</sup>

Levi-Strauss and Reebok have also used aggressive practices to enforce their policies with their subcontractors.<sup>324</sup> In many cases, subcontractors have lost Levi-Strauss and Reebok contracts because they treated their workers poorly.<sup>325</sup> Other subcontractors who were under consideration for contracts quickly complied with the companies' new employment standards in order to either win or retain such contracts.<sup>326</sup>

## V. CONCLUSION

The Human Rights Watch submission will provide the means to scrutinize the NAALC's effectiveness. Regardless of whether this submission progresses beyond the first tier, future filing of submissions with the NAO office alleging workers' rights violations will help to refine the NAALC's vague procedures. As more cases are heard, more NAO decisions will influence new cases, and more dialogue about workers' rights will develop among countries. The NAALC's dispute resolution system will either succeed or will prove to be an utter failure.

Unfortunately, Congress is spearheading a potential barrier that

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320. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674 (arguing that increased probability of negative exposure leads to changes in corporate behaviors).

321. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674-84 (noting the impact of the pressure on companies associated with the use of child labor or the mistreatment of its workers).

322. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 677 (referring to "an embarrassing media expose of abusive labor conditions in factories in Saipan . . . that supplied Levi-Strauss").

323. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674-84 (stating that "[m]any companies have chosen a pro-active route and have begun to fashion their own . . . codes of conduct for human and labor rights").

324. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674-79, 682 (noting the multi-tiered process of monitoring labor conditions of subcontractors).

325. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674-79, 682 (describing how Levi-Strauss and Reebok enforce the labor rights code).

326. See Compa & Hinchliffe-Darricarrere, *supra* note 176, at 674-79, 682 (proving that Levi-Strauss' and Reebok's enforcement methods are effective); see also *International Trade and Social Welfare*, *supra* note 31, at 362 (concluding that a possible motivation for Levi-Strauss' and Reebok's implementation of such strict employment standards was to please their customers).

will deny further links between workers' rights and trade.<sup>327</sup> Some members in Congress have taken the position that in exchange for new executive branch fast-track negotiating authority, all efforts to include labor rights, environmental protections, or other social standards in newly negotiated trade agreements must be excluded.<sup>328</sup> If this occurs, pregnancy discrimination and workers' rights violations may continue in new member nations.<sup>329</sup>

Given the turbulent history of both NAFTA and the NAALC, however, future trade agreements will undoubtedly be subject to strict public scrutiny.<sup>330</sup> The shortcomings of these agreements will provide lessons for free trade promoters and human rights activists.<sup>331</sup> Consequently, opponents to such agreements will be better prepared to accept nothing less than an enforceable agreement<sup>332</sup> because of the increasing number of people affected and the number of promises broken.<sup>333</sup>

It is important to end pregnancy discrimination and other labor violations before more countries become NAFTA signatories.<sup>334</sup> For the time being, and until a more effective enforcement mechanism is developed, NAFTA should require new members to become NAALC signatories to ensure that there are remedies for human rights violations among NAFTA member countries.<sup>335</sup> Furthermore, the U.S. and Canada should work to add more "teeth" to the NAALC, or dispose of the agreement altogether. Standing behind an agreement that is, in reality, a farce only fuels the fire of protectionists opposed to free trade.

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327. See *International Trade and Social Welfare*, *supra* note 31, at 363 (recognizing the new developments on workers' rights and international trade).

328. *International Trade and Social Welfare*, *supra* note 31, at 363.

329. See *International Trade and Social Welfare*, *supra* note 31, at 362-63 (noting that Chile was prepared to join NAFTA and agree to certain human rights and labor protections, but Congress' policy of "de-linkage" could affect membership for Chile).

330. See Garvey, *supra* note 43, at 452 (noting that the NAALC is significant in establishing future trade relations between economically developed and developing countries partly because NAFTA and its side agreements regarding labor and environmental issues have sensitized the public's attention to issues that directly impact the quality of life).

331. See Garvey, *supra* note 43, at 452 (arguing that "media scrutiny" trade agreements will force nations to address "environmental, labor, and health regulation").

332. See Garvey, *supra* note 43, at 451 (arguing that enforcement of a country's national law will lead to greater protections).

333. See *International Trade and Social Welfare*, *supra* note 31, at 338-39 (noting that "too many people are affected" by trade and employment issues).

334. See Housman, *supra* note 247, at 328-29 (discussing three possible approaches for new accession to NAFTA). These approaches are: (1) No Labor Criteria; (2) All or Nothing; and (3) Tiered Approach (phase in). *Id.*

335. See *International Trade and Social Welfare*, *supra* note 31, at 363 (noting that the first test case will probably be Chile because it is likely to become NAFTA's next member).