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## The North American Agreement of Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras

Nicole L. Grimm

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# The North American Agreement of Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras

## **Keywords**

Labor Cooperation, Women Working, Female Workers, Mexican Maquiladoras, NAFTA, NAALC

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# THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION AND ITS EFFECTS ON WOMEN WORKING IN MEXICAN MAQUILADORAS

NICOLE L. GRIMM\*

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## INTRODUCTION

Political leaders hailed the North American Free Trade Agreement<sup>1</sup> ("the NAFTA") as a breakthrough trade pact when it became operative on January 1, 1994.<sup>2</sup> That the NAFTA was viewed in this light was due in large part to the existence of labor<sup>3</sup> and environmental side agreements,<sup>4</sup> in addition to the NAFTA's actual trade provisions.<sup>5</sup> The trade agreement created the world's largest continental free trade zone,<sup>6</sup> stretching from the Arctic Circle to the Yucatan Peninsula.<sup>7</sup> The NAFTA free trade zone encompasses a population of 370 million people<sup>8</sup> and a production output of 6.5 trillion U.S. dollars.<sup>9</sup>

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1. North American Free Trade Agreement Implementation Act ("NAFTA"), Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C. (1994)). President Bush signed the final NAFTA treaty on December 17, 1992. See Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 403 n.2 (1995). The U.S. House of Representatives ratified the NAFTA implementing legislation on November 17, 1993, and the Senate ratified it on November 20, 1993. See Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 128 (1993) (describing the passage of Pub. L. No. 103-182, 107 Stat. 2057 (1993)); Murphy, *supra*, at 403 n.2. President Clinton signed the legislation on December 8, 1993. See Compa, *supra*, at 128.

2. See Murphy, *supra* note 1, at 404 (providing background information about the NAFTA); *infra* note 5 (providing President Clinton's characterization of the pact).

3. See North American Agreement on Labor Cooperation, *opened for signature* Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

4. See North American Agreement on Environment Cooperation, 32 I.L.M. 1980 (1993). The NAFTA labor and environmental side agreements are two "companion" treaties that Mexico, Canada and the United States negotiated as supplementary parts of the NAFTA "package." See Murphy, *supra* note 1, at 403. The side agreements came into effect on the same date as the NAFTA and concern labor and environmental problems that result from economic activity taking place inside of the NAFTA free trade zone. See *id.* at 405-06.

5. See Murphy, *supra* note 1, at 405-06 (citing President Clinton's description of the NAFTA as "historic" because it included the North American Agreement on Labor Competition); see also David L. Gregory, *The Right to Unionize in the United States, Canada, and Mexico: A Comparative Assessment*, 10 HOFSTRA LAB. L.J. 537, 539 (1993) (noting President Clinton's support of the NAFTA before ratification).

Previous U.S. trade legislation has included provisions concerning respect for workers' rights in other countries. See, e.g., International Trade and Investment Act, 19 U.S.C. § 2411 (1994); Generalized System of Preferences Renewal Act of 1984, 19 U.S.C. §§ 2461-2465 (1994); Caribbean Basin Economic Recovery Expansion Act of 1990, 19 U.S.C. §§ 2701-2706 (1994); Customs and Trade Act of 1990, 22 U.S.C. § 2191 (1994); Compa, *supra* note 1, at 138-44 (describing the use of the Generalized System of Preferences Renewal Act's labor rights protection provisions against Guatemala in 1992 and 1993 by the United States); Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173, 180 (1992) (characterizing the fear of low wages in foreign countries as motivation for including internationally-acknowledged workers' rights in U.S. trade legislation). The NAFTA, however, is the first multilateral trade agreement to which the United States has been a party that makes trade explicitly conditioned on workers' rights in other countries. See Murphy, *supra* note 1, at 406.

6. See Murphy, *supra* note 1, at 404 (providing logistical information about the scope of the NAFTA).

7. See *id.*

8. See *id.*

9. See *id.*

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The North American Agreement on Labor Cooperation ("the NAALC") is the labor side agreement in the NAFTA package.<sup>10</sup> After the three nations finished negotiating the NAFTA in 1992, labor groups and U.S. politicians feared that the NAFTA would result in hardships for U.S. workers in industries affected by the expanded movement of goods and capital across international borders.<sup>11</sup> As a result, they pushed the signatories to develop the NAALC as a supplement to the NAFTA in order to link expanded free trade with the protection of labor rights.<sup>12</sup> As a result of public concern and pressure by the U.S. government,<sup>13</sup> representatives of the three member nations negotiated the NAALC in the first half of 1993,<sup>14</sup> presented the final document for signatures in September 1993,<sup>15</sup> and included it in the final NAFTA package that went into force on January 1, 1994.<sup>16</sup>

The NAALC is important because it is the first international trade agreement in which the United States has included labor protections.<sup>17</sup> The Canadian, Mexican, and U.S. trade negotiators and policy makers who created the NAFTA and the NAALC, however,

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10. See NAALC, *supra* note 3, Preamble, pt. 1.

11. See Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, KAN. J.L. & PUB. POL'Y, Spring 1994, at 128, 128 (characterizing NAFTA opponents in the United States as afraid that U.S. corporations would cause U.S. workers to lose jobs by moving production facilities to Mexico); Robert E. Herzstein, *The Labor Cooperation Agreement Among Mexico, Canada, and the United States: Its Negotiation and Prospects*, 3 U.S.-MEX. L.J. 121, 125 (1995) (describing U.S. labor's opposition to the NAFTA); Murphy, *supra* note 1, at 404-05 (stating that U.S. opponents' concerns included potential downward pressures on U.S. wages and workplace safety standards).

12. See Murphy, *supra* note 1, at 405-06 (describing U.S. efforts to condition expanded trade on the inclusion of workers' rights); cf. Herzstein, *supra* note 11, at 125 (stating that U.S. labor unions opposed the NAFTA throughout its debate and passage because they were dissatisfied with the NAALC).

13. See Herzstein, *supra* note 11, at 122-23 (describing the congressional Democratic pressure on President Bush to develop clear labor protections when Bush sought fast track authority for the NAFTA in 1991); Murphy, *supra* note 1, at 405 (describing pro-NAALC pressure by U.S. labor, members of Congress, and President Clinton).

14. See Herzstein, *supra* note 11, at 125 (describing newly-elected President Clinton's efforts to fulfill campaign promises to alleviate the NAFTA's effects on U.S. workers); Murphy, *supra* note 1, at 405 (describing the influence of various parties on the final side agreement regarding labor).

15. See Herzstein, *supra* note 11, at 125 (describing the passage of the NAALC).

16. See *id.* at 122-25 (explaining the history of the NAALC).

17. See *id.* at 121 (characterizing the NAALC as the first binding international instrument in which international labor and trade agreements have been both politically and legally connected); Murphy, *supra* note 1, at 406 (claiming that no previous U.S. trade agreement has specifically conditioned expanded trade with protection of labor rights).

The concept of linking expanded international trade to the protection and recognition of workers' rights is an idea that has been gaining acceptance throughout the world for some time. See Compa, *supra* note 1, at 117 (highlighting the growing influence of labor rights groups on the discourse of international trade); Herzstein, *supra* note 11, at 122 (describing discussions about trade's effects on workers during General Agreement on Tariffs and Trade ("GATT") negotiations since World War II).

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did not design the agreement with adequate consideration for the needs of many workers who are affected by the increased flow of international trade created by the agreement.<sup>18</sup>

One such group, that may benefit somewhat from the NAALC but whose needs were not fully addressed by the agreement, is composed of women who work in Mexican maquiladora<sup>19</sup> factories.<sup>20</sup> The term maquiladora generally refers to large foreign-owned factories in Mexico where workers perform assembly work on components imported from other countries.<sup>21</sup> The finished products are generally shipped back to the components' nation of origin for sale.<sup>22</sup> The benefit of maquiladora assembly is that it allows producers to take advantage of low-cost Mexican labor.<sup>23</sup> Maquiladoras first developed as a result of the bilateral United States-Mexican Border Industrialization Program of 1964 ("the BIP"), the goal of which was to develop industry and promote employment along the border.<sup>24</sup> The BIP agreement established favorable trade conditions for U.S. companies that built and operated assembly and finishing factories in Northern Mexico,<sup>25</sup> and led to a proliferation of U.S.-controlled industrial enterprises along the border and throughout Mexico.<sup>26</sup>

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18. See David Bacon, *Laboring to Cross the NAFTA Divide*, THE NATION, Nov. 13, 1995, at 573 (contending that NAFTA negotiators failed to consider adequately the interests of workers).

19. See Durand, *supra* note 11, at 128-29 (explaining that the term "maquilar" is a Spanish verb that means "to perform a task for another").

20. No single perspective accurately or comprehensively represents the views of all female workers, or even a single group of female workers. See CYNTHIA ENLOE, BANANAS, BEACHES, AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS 199 (1989). There are, however, certain experiences that women tend to have in common, despite differences in nationality and culture. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 616 (1991) (articulating the need to include women's distinctive "experiences" in international law). These common experiences revolve around women's unique, socially constructed responsibility for bearing and rearing children, providing meals for the members of the family, and maintaining the living conditions and health of the household. See *id.* at 626.

21. See Durand, *supra* note 11, at 128 (discussing the Mexican maquiladora industry).

22. See *id.* at 129.

23. See *id.*

24. See JOSEPH GRUNWALD & KENNETH FLAMM, THE GLOBAL FACTORY: FOREIGN ASSEMBLY IN INTERNATIONAL TRADE 138 (1985) (describing the establishment and growth of maquiladora operations in Mexico); Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 228-30 (1990) (recounting the history of Border Industrialization Program of 1964); see also Durand, *supra* note 11, at 129 (claiming that Mexico's incentives for establishing maquiladoras were increased employment, higher incomes, improved standards of living, and greater labor skills through the use of new technology).

25. See GRUNWALD & FLAMM, *supra* note 24, at 138. The original plan created a twenty kilometer strip along the border between El Paso, Texas and Ciudad Juárez, Mexico that eliminated tariffs on the import and export of industrial machinery and components. See *id.* Industrial corporations shipped their already fabricated products to maquiladora factories in the duty-free zone for assembly by Mexican workers, and re-imported them to the United States. See *id.*

26. See *id.* Initially, maquiladora products had to be re-exported to the United States, but Mexican legislation later permitted their distribution in Mexico. See *id.* Corporations have also been permitted to build maquiladora factories throughout Mexico, not just in the Ciudad

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Today, hundreds of maquiladoras exist throughout Mexico<sup>27</sup> and employ approximately one million workers.<sup>28</sup> Women comprise a significant percentage of maquiladora workers.<sup>29</sup> Maquiladora working conditions merit concern because maquiladora workers, including women, often receive very low wages,<sup>30</sup> work in unsafe conditions,<sup>31</sup> and are either not represented by unions<sup>32</sup> or are represented by ineffective unions that do little to promote the welfare of their constituents.<sup>33</sup> These workers have had some success in

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Juárez area. *See id.*; Durand, *supra* note 11, at 129. In 1972, Mexico decided to permit maquiladoras everywhere except Mexico City. *See* Durand, *supra* note 11, at 129. Ciudad Juárez, across the border from El Paso, Texas, and Tijuana, across the border from San Diego, California, currently have the highest numbers of maquiladoras. *See id.* The Mexican government has also relaxed its majority native ownership requirements for maquiladoras and now permits 100% foreign ownership in all but the apparel and textile sectors. *See* Peters, *supra* note 24, at 229.

27. *See* Robert Collier, *NAFTA Labor Problems Haunt New Trade Debate*, S.F. CHRON., Sept. 10, 1997, at A1; *see also* Peters, *supra* note 24, at 227 (stating that maquiladoras are Mexico's second largest source of foreign currency, behind oil, and they earn two billion U.S. dollars per year).

28. *See* Peters, *supra* note 24, at 233-34 (stating that about one million workers were employed in 1995, which was three times the level of maquiladora employment that existed in 1985).

29. *See* Durand, *supra* note 11, at 131 (reporting that in some areas as many as three-quarters of maquiladora employees are female).

30. *See id.*; Dianne Solis, *Reorganizing Mexico: As Mexico Struggles, New Unions Strike Back*, WALL ST. J., Apr. 4, 1996, at A9 (reporting that average wage increases in 1996 were 19%, in comparison with a 27% to 30% rate of inflation). Most maquiladora workers receive the Mexican minimum wage, which has not kept pace with inflation since 1977. *See* Durand, *supra* note 11, at 131.

31. *See* Durand, *supra* note 11, at 131 (reporting findings by the U.S. government that several U.S.-owned maquiladoras lacked adequate safety training programs and corporate safety policies).

32. *See id.* at 130 (estimating that only 36% of Mexican workers are unionized).

33. In general, few maquiladora workers are unionized, and the unions that do exist are not effective advocates for their members. *See* Peters, *supra* note 24, at 240. Article 123 of the Mexican Constitution gives workers the right to form labor organizations and guarantees basic labor rights, including maximum hours per work week, maternity leave provisions, minimum wage levels, safe working conditions, profit sharing by companies with their employees, the right to strike, and equal pay without regard to sex. *See* CONSTITUTION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, tit. VII, art. 123, pt. A, *cited in* Gregory, *supra* note 5, at 552-53. The right to job security is also codified in Mexican law. *See id.* pt. B, ch. IX, *cited in* Gregory, *supra* note 5, at 553.

Despite the appearance of strong legal protections, however, workers' rights are undermined by the structure of the Mexican labor movement, which is dominated by the Mexican Workers Federation (known by its Spanish initials, "CTM"). *See* Gregory, *supra* note 5, 552-53 (stating that the CTM accounts for 70% of organized employees in Mexico). The CTM has close ties with the ruling Institutional Revolutionary Party (known by its Spanish initials, "PRI") which has caused the CTM to sacrifice workers' concerns to the economic interests of political elites. *See* Manuel Fuentes Muniz, *The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 379-80 (1995). The PRI has pursued a policy of non-enforcement of labor laws in order to make Mexican labor cheaper and more attractive to foreign investors, and the CTM has not opposed this tactic. *See id.* at 380-81 (describing the labor practices of multinational corporations that violate Mexican law and the unwillingness of Mexican authorities and the CTM to condemn such behavior); Peters, *supra* note 24, at 227 (claiming that the Mexican government has adopted a "hands off" approach to labor regulation of maquiladoras). The U.S. government has reported that Mexican governmental actions have

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attracting attention to their problems, and several Mexican and U.S. groups now advocate on their behalf.<sup>34</sup> Female maquiladora workers' efforts to improve factory work, however, are hampered by their economic needs and the lack of other job opportunities, which force the women to accept poor maquiladora working conditions.<sup>35</sup> As such, although this particular group of women possesses its own unique characteristics and problems, it also shares many concerns with women around the world, including gender-based discrimination and the perpetuation of inequality in international agreements.

This Comment will examine how the NAFTA and the NAALC's negotiation process excluded the needs and concerns of female Mexican maquiladora workers<sup>36</sup> and will discuss the negative effects that the NAFTA and the NAALC have had on Mexican female maquiladora workers. Part I will discuss how the NAFTA and NAALC negotiation process, especially U.S. congressional activity, excluded the concerns of female maquiladora workers. Part II addresses the specific provisions of the NAFTA and the NAALC that exclude or detrimentally affect these laborers. Part III examines how the agreements have tangibly affected women working in maquiladora factories and surveys relevant cases that unions and human rights

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weakened the power of workers, and that the CTM is too closely tied to existing political institutions to lobby effectively on behalf of labor interests. *See* Muniz, *supra*, at 385.

Mexican labor authorities are especially notorious for not enforcing labor standards in maquiladoras. *See* Peters, *supra* note 24, at 236-43. Particular issues of non-enforcement include violations of reasonable cause requirements for employee dismissals and violations of profit-sharing laws. *See id.* at 236-39. Maquiladora managers are also known for employing aggressive anti-union tactics. *See* Muniz, *supra*, at 388. Some maquiladora managers establish "ghost" or "blank" unions, which do nothing to further workers' interests and which pre-empt the formation of legitimate, pro-worker unions. *See id.* Employees who attempt to organize independent unions face dismissal and blacklisting by maquiladora managers, who view them as potential troublemakers. *See id.* at 389; Solis, *supra* note 30, at A9 (noting that employers dislike independent unions because they are more willing to strike).

34. *See* HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR 58 (1996) [hereinafter HUMAN RIGHTS WATCH, NO GUARANTEES] (acknowledging the work on behalf of maquiladora workers by American women's and labor rights groups like Human Rights Watch and the American Friends Service Committee, and Mexican women's and labor rights groups like the Comité de Obreras Fronterizas, the Casa de la Mujer Grupo Factor X, and the Casa de la Mujer y Lugar de la Tijuana).

35. *See id.* at 2 (outlining the paucity of employment opportunity alternatives available to maquiladora workers).

36. *See* Ann K. Nauman and Mireille Hutchison, *The Integration of Women Into the Mexican Labor Force Since NAFTA*, 40 AM. BEHAV. SCIENTIST 950, 951 (1997) (reporting that NAFTA negotiators did not treat sex equality as a priority).

Men have traditionally dominated the creation of international law. *See* ENLOE, *supra* note 20, at 114-15, 120-23 (discussing the male-dominated atmospheres of U.S. and British foreign service corps. and the World Bank); FILOMINA C. STEADY & REMIE TOURÉ, WOMEN AND THE UNITED NATIONS 5 (1995) (describing the slow pace of women's advancement in senior, policy-making positions of the United Nations).



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groups have brought before NAALC enforcement bodies. Finally, Part IV offers recommendations for making the NAFTA and the NAALC more responsive to the concerns and needs of female maquiladora workers.

#### I. EXCLUSION OF WOMEN FROM NAFTA AND NAALC NEGOTIATIONS

Two factors combined to exclude the interests of female maquiladora workers from the negotiation process and final provisions of the NAFTA and the NAALC. First, social and cultural pressures traditionally have marginalized women and their concerns from international law instruments, such as the NAFTA and the NAALC.<sup>37</sup> Second, the signatory governments negotiated the NAALC and the NAFTA under circumstances<sup>38</sup> that failed to provide adequate opportunities for influence from groups that were aware of, and concerned about, the agreement's potential effect on female maquiladora workers.<sup>39</sup>

##### A. *The Effects of the Public-Private Dichotomy on Negotiations*

One of the primary reasons that Mexican women, including maquiladora workers, did not have meaningful representation during the formation of the NAFTA and the NAALC is the "public-private" dichotomy that exists between men's and women's gender-defined roles in Mexican culture.<sup>40</sup> Mexican culture assigns women as a

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37. See, e.g., ENLOE, *supra* note 20, at 4 (describing the traditional characterization of international law as a "masculine" area); NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 2-3 (1983) (noting the states' reluctance to include "women's" issues in international legal instruments); STEADY & TOURE, *supra* note 36, at 76-77 (suggesting that U.N. institutions should find ways to make women's informal economic activities more widely recognized); Charlesworth, *supra* note 20, at 622 (criticizing women's absence from international organizations and governmental bodies that create international law); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293, 295 (1993) (characterizing women as invisible in international law because they fall under the jurisdiction of national sovereignty and thus are not viewed as appropriate subjects for international regulation); Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 875 (1995) (explaining that international law excludes women's concerns because of beliefs about women's proper role in society).

38. See Herzstein, *supra* note 11, at 125 (stating that the NAALC was negotiated and presented for signatures in a matter of months).

39. See Kenneth W. Abbott, *"Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 983-85 (1996) (describing the limiting effect that fast track procedures had on public debate).

40. See Catherine T. Barbieri, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile*, 17 COMP. LAB. L.J. 526, 527 (1996) (reviewing the public-private division of labor that exists throughout Latin America). Activities that women perform in the public sphere, such as paid labor, community activism and political participation, are largely ignored because of the perception that women only work at home. See *id.* at 527; Knop, *supra* note 37, at 329-30 (discussing the separation between the "public world

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group to the “private” realms of home, domestic life and child-rearing,<sup>41</sup> and characterizes men as actors who control the “public” areas of government and economic activity, and provide financial support for their wives and children.<sup>42</sup> Mexican men tend to function in the highly visible world of business and economic activity and receive monetary compensation for these activities,<sup>43</sup> enabling them to attract public recognition both for issues that affect them and for the fruits of their labor.<sup>44</sup> Mexican women, on the other hand, are expected to assume primary responsibility for childrearing and other work that takes place in the home, where they receive less acknowledgment of their work<sup>45</sup> and receive no financial compensation for their household-related labor.<sup>46</sup> This perception of

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of work and commerce” and the “private world of home and family”); Wright, *supra* note 37, at 861-62 (describing studies that show the impact of gender on labor roles throughout the world, in which women have responsibility for domestic tasks). Although variations exist regarding women’s responsibility for economic production, their economic activities do not necessarily decrease domestic responsibilities. See Wright, *supra* note 37, at 861-62. See generally RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 10 (Dorinda G. Dallmeyer ed., 1993) [hereinafter Dallmeyer] (explaining how international law is shaped by the public-private dichotomy, which results in the exclusion of women and family-related issues from international legal instruments).

41. See WOMEN, FEMINISM, AND DEVELOPMENT 331 (Huguette Dagenais et al. eds., 1994) [hereinafter Dagenais] (explaining the traditional Latin American expectation that a woman will move directly from her parents’ house to her husband’s house, where she will begin her career as wife and mother); see also Charlesworth, *supra* note 20, at 626 (claiming that the identification of women as private sphere actors is “universal”).

42. See GEOGRAPHY OF GENDER IN THE THIRD WORLD 277 (Janet Henshall Momsen et al. eds. 1987) [hereinafter GEOGRAPHY OF GENDER]. The Mexican labor market is structured in favor of men because of cultural assumptions that men are responsible for supporting women and children. See *id.* Working men are not always reliable supporters, however, because they sometimes choose to spend their income on themselves instead of supporting their families. See *id.* at 288.

43. See *id.* (asserting that men’s power is founded on their economic supremacy); Wright, *supra* note 37, at 862 (theorizing that men generally can pass freely between private and public worlds, but women are confined to the private sphere). Throughout the world, men historically have had the time to work outside the home and earn money because women have relieved them of the burden of domestic-sphere work. See STEADY & TOURÉ, *supra* note 36, at 77 (noting that women make economically valuable contributions through unpaid domestic sphere labor).

44. See, e.g., Abbott, *supra* note 39, at 983-85 (characterizing “public” issues as more likely to be included in treaties, legislation, and other national and international law instruments); Charlesworth, *supra* note 20, at 626 (claiming that more importance is given to men’s public sphere work than is given to women’s private sphere activities); M. Patricia Fernandez Kelly, *Underclass and Immigrant Women as Economic Actors: Rethinking Citizenship in a Changing Global Economy*, 9 AM. U. J. INT’L L. & POL’Y 151, 164-65 (1993) (describing men’s status as tied to their public sphere economic and political activity); Wright, *supra* note 37, at 868 (stating that public sphere work, generally performed by men, has become “privileged” in economic analyses).

45. See, e.g., Abbott, *supra* note 39, at 984 (claiming that private sphere issues are either overlooked or de-emphasized in national and international legal regimes); Charlesworth, *supra* note 20, at 626 (explaining that “women’s” work in the private realm is valued less than “men’s” work in public realm); Wright, *supra* note 37, at 868-69 (describing feminist efforts to gain recognition for value of women’s work).

46. See Abbott, *supra* note 39, at 985 (stating that women perform unpaid labor at home and in their communities); see also ENLOE, *supra* note 20, at 72 (describing the dependence of U.S. military bases on the unpaid household labor of male soldiers’ wives).

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the separate roles of women and men persists despite the fact that, in some sectors of Mexico, more than half the women are single and do not have access to traditional heterosexual relationships in which men financially support women who stay at home.<sup>47</sup>

The expectation that women will remain in the home has limited Mexican women's ability to participate in national and international decision-making processes in several ways.<sup>48</sup> First, Mexican culture pressures women to refrain from working in the public sphere by dictating that women's proper area of activity is at home, not in public.<sup>49</sup> Second, logistical constraints reinforce the pressure to stay at home because, historically, Mexican women's domestic sphere responsibilities have consumed their time and made it difficult for them to engage in independent economic activity.<sup>50</sup> Third, Mexican women who want or need to work have frequently had more difficulty than men in finding employment in the "public" sphere.<sup>51</sup> The jobs that Mexican women are able to obtain are often low-wage<sup>52</sup> and exist in areas of economic activity that draw little public recognition.<sup>53</sup> This combination of social and economic pressures has operated to discourage many Mexican housewives from entering the public

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47. See AUGUSTA DWYER, *ON THE LINE: LIFE ON THE U.S.-MEXICAN BORDER* 28 (1994) (discussing the time and economic pressures in the lives of maquiladora workers); Durand, *supra* note 11, at 131 (estimating that between 69% and 81% of female maquiladora workers are unmarried).

48. See Wright, *supra* note 37, at 862 (finding that public-private structures throughout the world present difficulties for women who try to enter the public sphere).

49. See GEOGRAPHY OF GENDER, *supra* note 42, at 288 (explaining that many Mexican husbands do not permit their wives to work outside of the home or otherwise participate in public sphere activities); Dagenais, *supra* note 41, at 331 (stating that, according to the Mexican ideal of womanhood, proper women are housewives and mothers).

50. See GEOGRAPHY OF GENDER, *supra* note 42, at 290 (characterizing housework responsibilities as a major obstacle to women's ability to engage in paid employment); Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1034 (1995) (describing women's domestic chores as an impediment to participation in "more productive" activities). Because of men's greater access to paid labor and women's time-consuming responsibilities at home, women historically have been financially dependent on men. See Wright, *supra* note 37, at 867.

51. See GEOGRAPHY OF GENDER, *supra* note 42, at 277. Mexican employers are sometimes more inclined to choose a man over a woman because of the perception that men are the primary income-earners for families, and therefore are in more urgent need of paying jobs. See *id.* This assumption, however, conflicts with the reality that a substantial number of Mexican households depend entirely on women for financial support. See RACHEL KAMEL, *THE GLOBAL FACTORY: ANALYSIS AND ACTION FOR A NEW ECONOMIC ERA* 11 (1990) (describing Mexican women who are sole income-earners in the family); cf. LOURDES BENERÍA & MARTHA ROLDÁN, *THE CROSSROADS OF CLASS & GENDER: INDUSTRIAL HOUSEWORK, SUBCONTRACTING, AND HOUSEHOLD DYNAMICS IN MEXICO CITY* 49 (1987) (quoting a female executive who said that, in recent years, "the taboo of not employing married women has practically disappeared").

52. See Barbieri, *supra* note 40, at 46 (noting that Mexican women who work outside home tend to cluster in low paid positions).

53. See Abbott, *supra* note 39, at 985 (characterizing women's private sphere work as lower status work that receives little formal acknowledgment).

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sphere altogether. Female workers are generally confined to low visibility jobs that offer few opportunities for articulating women's concerns in a male-dominated public forum such as international law.<sup>54</sup>

The public-private dichotomy and the gender-based discrimination that accompanies it also present hardships for Mexican women who have been able to gain visible, prestigious employment and discourages them from using their positions to address the concerns of women.<sup>55</sup> High-ranking women may receive opprobrium for violating cultural norms governing the proper scope of women's activities.<sup>56</sup> Male co-workers and superiors, believing that women do not belong in the workplace, may impede women's opportunities for professional advancement by discounting their opinions,<sup>57</sup> engaging in sexual harassment,<sup>58</sup> or questioning their competence.<sup>59</sup> Women may also feel compelled to conform to male-defined norms, leaving unchallenged the traditional male-defined priorities of the organization in order to gain acceptance from their largely male peers.<sup>60</sup> These barriers have contributed to minimizing the number

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54. See Kelly, *supra* note 44, at 164-65 (characterizing women as excluded from civil society because they historically have not been economically or politically visible).

55. See Laurens Grant, *Machismo in Mexico: How a Hostile Workplace Ruins Many Women's Careers*, FORT WORTH STAR-TELEGRAM, July 9, 1995, at B1 (reporting that many Mexican female executives feel that the corporate environment is hostile toward women and their concerns).

Women in professional positions in international organizations, such as the United Nations, frequently face the same difficulties as Mexican women operating at high-ranking national levels regarding conflicts between their professional responsibilities and their expected role in the home. See STEADY & TOURÉ, *supra* note 36, at 54 (describing the need to make working conditions in the U.N. system more responsive to the needs of workers with families); Knop, *supra* note 37, at 304-05 (pointing out that women who are diplomats may be constricted in their choice of assignments due to the resistance of extremely patriarchal societies that do not accept women working at official, high-ranking levels).

56. See Dagenais, *supra* note 41, at 331 (stating that Mexican women who work for money are often subject to accusations of being promiscuous); Grant, *supra* note 55, at B1 (reporting that a female executive attributed the lack of women in high positions to cultural disapproval of women with careers). In other countries, too, women may not be hired as readily for high level jobs because of a perception that women are tied to their family responsibilities and will be less capable in their professional duties than men. See ENLOE, *supra* note 20, at 114-20 (describing the rationale for the pre-1971 U.S. policy of not hiring married women for diplomatic positions).

57. See Knop, *supra* note 37, at 305 (noting that negotiating styles of female diplomats may be different from traditional styles of male diplomats, and may cause women's proposals to receive less consideration).

58. See Grant, *supra* note 55, at B1 (describing Mexican female professionals' experiences of sexual harassment and characterizing Mexican corporate culture as "laden" with sexual harassment against female managers).

59. See *id.* (citing the experience of female professionals in Mexico who complained about discriminatory working conditions and subsequently were dismissed by their companies on the grounds of poor performance).

60. See ENLOE, *supra* note 20, at 6-7 (giving examples of women who have gained major international roles and have adopted "masculinized" political behavior).

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of women in the Mexican government<sup>61</sup> and may have resulted in fewer situations in which women have had the opportunity to participate in international negotiations undertaken by the Mexican government, such as those for the NAFTA and the NAALC.<sup>62</sup> The absence of potential advocates for women permits national representatives to pay less attention to the needs and concerns of women when they create international law and policy.<sup>63</sup>

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61. See INSTITUTO DE LA MUJER ET AL., *LATIN AMERICAN WOMEN* 162-64 (1995) (reporting that women's participation in the Mexican government comprised 11.8% of the Senate and 13.8% of the Chamber of Deputies in 1994, and 17.6% of the cabinet positions in 1995).

62. See Knop, *supra* note 37, at 303 (noting women's low participation in international negotiations by national governments). Another way women are excluded from the procedures that create international law and policy is through flaws in the attitudes and hiring procedures of international bodies, such as the United Nations, which perpetuate the invisibility of women in decision-making processes. See Dallmeyer, *supra* note 40, at 6 (characterizing U.N. hiring policies toward women as "appalling"); ENLOE, *supra* note 20, at 120 (pointing out the lack of women in senior decision-making positions at the World Bank and the International American Development Bank); STEADY & TOURÉ, *supra* note 36, at 137 (questioning why U.N. hiring goals for women in upper level positions have been ineffective even though Article 8 of U.N. Charter mandates equal treatment in the hiring and promoting of men and women). One reason for the exclusion of women from positions in international organizations may be due to the organizations' memberships. See Charlesworth, *supra* note 20, at 622 (characterizing international organizations as "extensions" of member nations). Because the memberships of these organizations are composed of sovereign nations, the attitudes toward women that are embedded in their hiring and employment processes tend to reflect the attitudes of their member states. See *id.*

Under one theory of employment selection and discrimination, the fact that few women number among the international representatives of their countries does not constitute "underrepresentation" as long as procedural equal employment opportunity exists. See Knop, *supra* note 37, at 303. If women are not present in national diplomatic delegations under these conditions, it is considered to be a result of self-selection and free choice. See *id.* (describing argument of "[c]lassical liberal theorists"). Feminists counter this argument by pointing to subjective factors that inhibit the desire of women to work in male-dominated fields, such as international law, where male-defined norms of behavior govern individual and institutional conduct. See *id.* at 304.

63. See Charlesworth, *supra* note 20, at 625 (characterizing "all" important international law institutions as male-dominated and discussing results of women's absence from such institutions).

When women are not represented in the leadership of international organizations for the reasons previously discussed, the priorities, activities, and policies of these groups are less likely to include women's needs and concerns. See, e.g., *id.* (explaining that when men control the creation of international law, they do not prioritize issues particular to women, such as domestic and sexual violence, because men do not see these problems as universal human concerns that merit regulation under international law); Karen L. Engle, *Views From the Margins: A Response to David Kennedy*, 1994 UTAH L. REV. 105, 116 (1994) (examining the argument that international law fails to protect women by not directly addressing their concerns); Wright, *supra* note 37, at 872 (characterizing the feminist perspective on international law as an approach that incorporates women's concerns into public sphere discourse); see also STEADY & TOURÉ, *supra* note 36, at 4 (highlighting the potential of female managers to raise awareness about gender issues throughout the U.N. system).

One of the negative consequences of international decision-making processes that exclude women is that when primarily male negotiation teams or policy-making groups use the concepts of "human" and "person," they tend to assume that the individual being described is male. See Charlesworth, *supra* note 20, at 637 (showing how the use of "his rights" or "rights of man" language in international law ignores women's experiences); Wright, *supra* note 37, at 873 (criticizing language in the International Covenant on Economic, Social and Cultural Rights

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### B. *The Effects of Legislative Procedures on Negotiations*

Another reason that the NAFTA and the NAALC did not adequately include the concerns of female maquiladora workers was due to the problems inherent in the negotiation process. First, the parties to the NAALC drafted and enacted it in a short period of time, about six months,<sup>64</sup> which raises questions about the quality and quantity of governmental and public debate that accompanied its negotiations. Had the NAALC negotiators extended the drafting process over a longer period, women and labor activists from the U.S. and Mexico may have had a better opportunity to articulate their concerns and advocate on behalf of maquiladora workers.

Second, the Bush and Clinton administrations enjoyed what is known as “fast track” negotiating authority,<sup>65</sup> through which the U.S.

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that excludes women’s concerns).

Another argument for the inclusion of women in international law negotiations posits that women may not necessarily make better or different decisions than the men who historically have occupied the primary positions in international decision-making, but women should be in a position to make and affect decisions that will ultimately affect women. *See* Knop, *supra* note 37, at 306-07 (describing the theory known as the “collective autonomy” response). The results of not having adequate female representation in national delegations and international organizations can be seen in the body of international law and policy that currently exists. *See* Wright, *supra* note 37, at 881. An example of the ways in which women’s concerns are overlooked in international decision-making can be found in the economic development strategies for poor countries that international organizations have promoted during the past four decades, which frequently have excluded the perspective of women. *See id.* (asserting that the policies of the World Bank and International Monetary Fund (“IMF”) historically have not acknowledged that women play a role in the economic development processes of poor and nonindustrialized countries). Because the contributions that women make to the family occur primarily in the “invisible” private sphere, development policy-makers frequently assume that women will be able to continue their private sphere activities at unchanged levels no matter what economic obstacles they face, because these policy-makers do not recognize the effort required for women to make these contributions. *See id.* at 881-82 (reporting World Bank and IMF assumptions that poor women will somehow be able to compensate for social service cutbacks in food assistance and medical care); *see also* STEADY & TOURÉ, *supra* note 36, at 77 (suggesting that the International Labor Organization should change its current policies and begin to account for women’s unpaid domestic sphere labor when it compiles national economic data). As a result, the burdens of economic development policies such as the IMF “structural adjustment programs,” which cut social services like medical care and increase the prices of essential items, tend to fall heaviest on women, who then have fewer resources to meet unchanged demands. *See* Abbott, *supra* note 39, at 985 (describing unemployment and environmental degradation as structural adjustment results that cause problems for women); Wright, *supra* note 37, at 882 (describing the effect of reduced social services on women).

64. *See* Herzstein, *supra* note 11, at 125. The impetus for creating the NAALC came from President Clinton’s 1992 presidential campaign, during which he supported the idea of hemispheric free trade as long as the agreement protected workers and the environment. *See id.* at 124-25. Clinton took office in January 1993, NAALC negotiations began late in the spring of 1993, and the parties signed the final package, including the NAFTA and the NAALC, in September 1993. *See id.* at 125.

65. *See id.* at 122 (describing President Bush’s efforts in 1991 to renew fast track authority for the NAFTA). President Bush was permitted to make a request to extend fast track authority under the original fast track enabling legislation. *See id.* (citing Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1989)).

Canada and Mexico had different approaches to domestic approval of the NAFTA. The

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Congress agrees to vote up or down on international trade agreements that the executive branch negotiates, without amendment. It is a grant of power that Congress gives to the executive for limited periods of time in return for notice requirements to affected congressional committees.<sup>66</sup> Congress granted the fast track power under which NAFTA and NAALC negotiations proceeded in 1988, and President Bush renewed this power in 1991.<sup>67</sup> Thus, Congress limited itself to approval or disapproval of the entire NAFTA accord, including the NAALC.<sup>68</sup>

Congress renewed fast track authority for the NAFTA in 1991 because it enabled the executive branch to assure Canada and Mexico that Congress would not alter the terms for the NAFTA that the three nations had negotiated.<sup>69</sup> Congressional approval of the 1991 renewal for the NAFTA was conditioned, however, on Bush's commitment to provide some type of labor protection in the resulting free trade agreement.<sup>70</sup> Many felt that the NAFTA that Bush presented in 1992 did not meet these requirements, which led to vocal opposition against the agreement in Congress and during the

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agreement passed in Mexico under constrained terms of legislative consideration that were similar to U.S. fast track. See *Fast Track Authority and North American Free Trade Agreement: Hearings Before the Subcomm. on Econ. Dev. of the House Comm. on Pub. Works and Transp.*, 102d Cong. 37 (1991) (statement of Rep. Kaptur) (arguing against the passage of the NAFTA because the Mexican legislature was not permitted to discuss or consider a proposed treaty). Canada's trade negotiators, working within the Canadian federal system, worked with the provinces during the NAFTA (including the NAALC) negotiations because many of the agreement's provisions must be implemented directly by provincial governments. See Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN.-U.S. L.J. 441, 483 (1997) (discussing Canadian negotiating procedures). One negotiator, representing the federal government and working with provincial governors, represented Canada during the trilateral negotiations. See *id.* at 483-84.

66. See Melissa Ann Miller, *Will the Circle be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153, 160 (1996) (describing the fast track process). Fast track authority expired in 1993 and has not been renewed as of this writing. See Charles Tiefer, *"Alongside" the Fast Track: Environmental and Labor Issues in the FTAA*, 7 MINN. J. GLOBAL TRADE 329, 329 (1998) (discussing the Clinton Administration's failure to achieve fast track renewal legislation in Congress after expiration).

67. See Miller, *supra* note 66, at 161-62 (recounting congressional debate over fast track renewal in 1991).

68. See 19 U.S.C. § 2191(d)-(e) (1994) (preventing Congress from amending fast track legislation and prescribing time limits on floor consideration of such legislation); see also Kristen R. Loecke, *The National Environmental Policy Act of 1969 and Its Implications for NAFTA*: Public Citizen v. United States Trade Representative, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), 23 GA. J. INT'L & COMP. L. 603, 613-14 (1993) (stating that fast track allows the President to write legislation and requires Congress to vote on submitted legislation within sixty days).

69. See Abbott, *supra* note 39, at 993-94 (suggesting that fast track was developed to give the executive branch unilateral authority in trade negotiations and to inspire confidence in trade partners).

70. See Miller, *supra* note 66, at 164 (describing the Gephardt-Rostenkowski Resolution, which required the executive branch to achieve certain objectives during NAFTA negotiations including the establishment of assistance programs for dislocated workers).

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1992 presidential election.<sup>71</sup> During the campaign, then-governor Clinton pledged to negotiate a supplemental labor accord that would address the concerns of workers' rights advocates who felt that the NAFTA did not address their concerns.<sup>72</sup> This led to the NAALC's negotiation after Clinton took office and its inclusion in the final NAFTA agreement that Congress approved in late 1993.<sup>73</sup> During the negotiation of the NAALC, several members of Congress advocated on behalf of workers, including female Mexican maquiladora workers, contending that the trade agreement did not contain adequate worker protections.<sup>74</sup> Although the final NAFTA package included the NAALC, the purpose of which was to protect workers' rights,<sup>75</sup> fast track may have hindered proponents' ability to influence the final provisions of either the NAFTA or the NAALC, and to make them more responsive to workers' concerns.<sup>76</sup> Despite the efforts of NAFTA opponents to defeat it, the agreement, including the NAALC, ultimately was approved as proposed.<sup>77</sup>

## II. PROVISIONS OF THE NAFTA AND THE NAALC THAT EXCLUDE FEMALE WORKERS

### A. *The NAFTA*

The final NAFTA and NAALC agreements fail to protect female Mexican maquiladora workers in several ways. A major flaw of the NAFTA is its failure to recognize women's labor within the domestic sphere as a commodity that contributes to international trade.<sup>78</sup>

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71. See *id.* at 165 (describing the U.S. reaction to the NAFTA).

72. See *id.*

73. See Herzstein, *supra* note 11, at 125 n.29 (discussing the negotiations that led to the approval of the NAFTA package).

74. See, e.g., 139 CONG. REC. S16,602, S16,607 (daily ed. Nov. 20, 1993) (statement of Sen. Riegle) (highlighting the concerns for laborers in Mexico and United States under the NAFTA); *id.* at S16,692 (daily ed. Nov. 20, 1993) (statement of Sen. Glenn) (discussing the possible negative effects on U.S. and Mexican workers resulting from passage of the NAFTA); *Field Hearings on H.R. 3878, the American Jobs Protection Act, and on the Mexico Free Trade Agreement and its Impact on American Jobs and the American Workplace: Hearings Before the House Comm. on Education and Labor*, 102d Cong. 195 (1992) (statement of Sen. Metzenbaum) (criticizing the living conditions of Mexican workers who live near U.S. maquiladoras); Abbott, *supra* note 39, at 993-94 (highlighting Rep. Marcy Kaptur's concern for Mexican maquiladora workers).

75. See NAALC, *supra* note 3, Preamble (outlining the agreement's guiding principles).

76. See *Economic Impact of the Mexico Free Trade Agreement: Hearings Before the Task Force on Econ. Pol'y, Projections, and Revenues of the House Budget Comm.*, 102d Cong. 38 (1991) (statement of Rev. Blake, United Methodist Church and Interfaith Impact for Justice and Peace) (opposing fast track authority because it curtails full public participation in legislative process); Abbott, *supra* note 39, at 996 (arguing that fast track procedures reduce abilities of nongovernmental actors to affect proposed legislation).

77. See NAFTA, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

78. See Barbieri, *supra* note 40, at 526 (criticizing the NAFTA and the NAALC for not



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Every society requires individuals who care for children and maintain home life,<sup>79</sup> and in most cultures women provide the majority of this labor, without remuneration.<sup>80</sup> Their unpaid domestic labor frees capital that would otherwise be invested in the national and international economies.<sup>81</sup> Despite the economic importance of housework, its value is unrecognized in the NAFTA, which does not regulate, influence pertinent policies, or otherwise attribute any significance to housework or childcare.<sup>82</sup> The absence of any such regulation or policy reflects the attitude that domestic sphere labor, or “women’s work,” is a “natural” function of women that does not merit or require official recognition in international agreements.<sup>83</sup>

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protecting informal and domestic sphere workers); *see also* Charlesworth, *supra* note 20, at 641 (citing a 1967 report that women provide up to 80% of food production in developing countries); Wright, *supra* note 37, at 861 (claiming that women perform a large percentage of the world’s work in exchange for a small percentage of world’s resources).

79. *See* Wright, *supra* note 37, at 861-62 (describing the “private sphere” occupied by women).

80. *See* STEADY & TOURÉ, *supra* note 36, at 77-78 (recognizing that the contributions women make to national economic activity are often invisible because they take place in the home); *see also* Barbieri, *supra* note 40, at 562 (reporting the need to decrease private sphere burdens on women by increasing men’s participation in domestic labor).

81. *See* Wright, *supra* note 37, at 861-62 (finding that, on average, women work longer hours than men for much less compensation).

82. *See* NAFTA, chs. 6, 7, 13, 14, 17, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C. (1994)) (describing the goods and services covered by the NAFTA including petrochemicals, intellectual property, telecommunications, agriculture and financial services); *cf.* George P. Choundas, *Neither Equal nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of its Gender-Based Victims*, 44 EMORY L.J. 1069, 1108-09 (1995) (recounting the concept of “negative liberty,” which emphasizes the need to protect individual freedom against the meddling of government intervention and regulation).

83. *See* HEVENER, *supra* note 37, at 2-3 (stating that nations historically have been unwilling to recognize issues regarding women as subjects under international law jurisdiction). The actors who make international law frequently view issues associated with women and the domestic sphere, such as food production, child care, relationships between family members, and spousal violence, as activities between individuals that do not involve direct state action. *See* Dallmeyer, *supra* note 40, at 159. Reflecting the public-private dichotomy as it exists in Mexico and other societies, international decision-makers presume that international law governs the behavior of states toward other nations and toward their own citizens. *See id.* International law, under this analysis, has no jurisdiction over the direct actions of private individuals. *See* Knop, *supra* note 37, at 330. Because private individuals perpetrate much of the violence and discrimination against women, this paradigm significantly excludes women from the protection of international law. *See* Dallmeyer, *supra* note 40, at 159.

International trade organizations often exclude women from their agreements. One reason is that the International Labor Organization (“ILO”) has frequently failed to acknowledge the specific concerns of women in its workers’ rights conventions and agreements. *See* Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT’L L. 156, 162 (1992). It is crucial for women to have their concerns articulated by the ILO because national and international trade provisions frequently adopt ILO standards when they choose language for workers’ rights provisions. *See id.* at 158 (describing U.S. trade law provisions that refer to ILO definitions as prevailing workers’ rights standards). When the ILO excludes women from its list of priorities or does not treat their needs as legitimate subjects of international law, the rest of the world frequently follows suit. *See id.* at 161. The ILO also functions as a moral force on behalf of workers’ rights; therefore, if the ILO does not articulate that women and their concerns are priorities, international trade actors will have little incentive

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### B. *The NAALC*

Although the NAFTA primarily addresses the exchange of goods and services,<sup>84</sup> the NAALC's express purpose is to safeguard workers' rights in Mexico, Canada and the United States.<sup>85</sup> In addition to the lack of concern for women's issues displayed during the NAALC's development process, the NAALC's substantive provisions and grievance procedures also hamper female workers' ability to gain adequate redress for their concerns.

#### 1. *Description of the NAALC's substance and procedures*

The NAALC operates by defining eleven internationally-recognized workers' rights as areas of concern that signatory nations must address.<sup>86</sup> These rights include the freedom of association, the right to bargain collectively, the right to strike, the right to be free from forced labor, the prohibition of child labor, minimum employment standards such as minimum wages, the prohibition of employment discrimination, equal pay regardless of sex, the prevention of occupational hazards, and the right to compensation in the case of workplace-related injuries.<sup>87</sup> The agreement, however, only binds the three signatory nations to respect labor rights<sup>88</sup> and, because it only places obligations on the signatories, does not directly affect the actions of private entities such as corporations.<sup>89</sup> It instead relies on each of the signatories to ensure that private parties within each party's borders comply with labor laws.<sup>90</sup> The NAALC establishes two methods for ensuring labor rights. First, each signatory nation pledges to maintain "high labor standards" and to protect the eleven enumerated rights by ensuring that national legislation regulates domestic working conditions and that this legislation is actually

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to do so. *See id.*

84. *See* NAFTA, art. 102, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C. (1994)) (outlining the NAFTA's objective to promote trade in goods and services).

85. *See* NAALC, *supra* note 3, Preamble (affirming the parties' obligations to promote increased employment, higher living standards, and respect for labor laws in their countries).

86. *See id.* Annex 1 (enumerating protected rights).

The NAALC's administrative organization is the Commission for Labor Cooperation, which is composed of a Ministerial Council and a Secretariat. *See* Murphy, *supra* note 1, at 409. The Ministerial Council consists of the cabinet members for labor from each signatory nation and serves as the governing body, and the Secretariat is a bureaucratic organization that handles day-to-day affairs. *See id.*

87. *See* NAALC, *supra* note 3, Annex 1(1)-(10).

88. *See* Herzstein, *supra* note 11, at 125.

89. *See id.*

90. *See* NAALC, *supra* note 3, art. 2 (requiring parties to guarantee that their domestic labor laws ensure high standards).

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enforced.<sup>91</sup> Second, the NAALC establishes consultation and enforcement procedures through which the signatory countries can ensure that their partners respect the enumerated rights.<sup>92</sup>

The NAALC's enforcement mechanisms operate primarily through the actions of National Administrative Offices ("NAOs").<sup>93</sup> Each signatory nation is obliged to establish its own NAO, which is the primary body that enforces the NAALC within that nation.<sup>94</sup> One way that NAOs operate is by requesting that another NAO engage in Cooperative Consultations, which are educational exchanges between two signatory nations that concern either national labor law provisions, labor law administration or labor market conditions in one of the countries.<sup>95</sup> NAOs also operate by investigating alleged violations of any of the eleven enforceable labor rights in other signatory nations, either on the NAO's own initiative or in response to petitions filed by outside organizations such as labor unions or human rights groups.<sup>96</sup>

After an NAO accepts a petition from an outside group alleging labor violations<sup>97</sup> or initiates proceedings at its own behest, the NAO investigates the allegations through public hearings and consultations with the NAO of the country in which the alleged violation occurred.<sup>98</sup> If the investigation process demonstrates to the NAO that the other signatory nation violated NAALC-protected labor rights, the NAO can impose or recommend a course of corrective action.<sup>99</sup> The first level of corrective action involves Ministerial Consultations, which may be utilized for violations of any of the eleven rights

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91. *See id.* arts. 2-3 (laying out obligations of the parties).

92. *See id.* arts. 20-41 (describing NAALC enforcement procedures).

93. *See* Herzstein, *supra* note 11, at 126 (describing the role of NAOs).

94. *See* NAALC, *supra* note 3, art. 15 (requiring the establishment of a federal-level NAO in each signatory); Herzstein, *supra* note 11, at 127 (describing the role of an NAO). The United States established its NAO in December, 1993. *See* North American Agreement on Labor Cooperation; Establishment of National Administrative Office, 58 Fed. Reg. 69410 (1993) (announcing creation of U.S. NAO).

95. *See* NAALC, *supra* note 3, art. 21; Herzstein, *supra* note 11, at 127 (describing the cooperative consultation process).

96. *See* Herzstein, *supra* note 11, at 126-28 (describing the procedures that are triggered by complaints alleging specific violations of labor issues protected under the NAALC); Muniz, *supra* note 33, at 392 (stating that NAOs may initiate investigations upon their own initiative).

97. *See* Murphy, *supra* note 1, at 410-11 (explaining that each NAO has broad discretion to define its criteria for accepting or rejecting outside complaints and stating that the NAALC gives NAOs jurisdiction to deal with any issue concerning "labor" law (citing Article 49 of the NAALC)).

98. *See id.* at 411 (finding that NAOs investigate complaints according to nationally-determined procedures).

99. *See* Herzstein, *supra* note 11, at 126-30 (describing measures that NAOs can employ to encourage observance of labor rights by other NAFTA parties).

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included under the NAALC.<sup>100</sup> Despite the fact that all eleven rights are listed together in Annex 1, without any apparent distinction made among them, consultations are the only corrective action available for violations of three NAALC rights: freedom of association, the right to collective bargaining, and the right to strike.<sup>101</sup> Once Ministerial Consultations are exhausted, petitions regarding these three issues have no additional recourse under NAALC procedures.<sup>102</sup> If a Ministerial Consultation does not resolve an issue concerning a subject that is eligible for further action, an NAO's next step is to request an Evaluation Committee of Experts ("ECE"), which is available for the remaining eight rights.<sup>103</sup> The ECE procedure is the highest corrective action available under the NAALC for five of the eight ECE-eligible rights.<sup>104</sup> If, however, the matter concerns health and safety issues, child labor, or minimum wage violations and the ECE process fails to produce results, the dispute can go to mediation by the Council of Ministers<sup>105</sup> and, if the Council of Ministers process is not successful, to an arbitration panel.<sup>106</sup> If the arbitration panel determines that a nation has violated one of the three rights listed above through a "persistent pattern of failure" to enforce relevant labor laws, the panel will recommend an "action plan" that may include sanctions, which are effectuated through increasing trade

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100. See NAALC, *supra* note 3, art. 22; Muniz, *supra* note 33, at 391 (stating that the U.S. Secretary of Labor, the Mexican Secretary of Labor and Social Welfare, and the Canadian Minister of Human Resources Development head Ministerial Consultation matters and also perform other oversight tasks under the NAALC's procedures).

101. See NAALC, *supra* note 3, art. 23(3)(a) (defining Evaluation Committee of Experts ("ECEs"), the next level of enforcement, as available only to "trade-related" disputes); Herzstein, *supra* note 11, at 128 (clarifying the eight trade-related matters that may advance to ECE proceedings).

102. See NAALC, *supra* note 3, art. 23(3)(a).

103. See *id.* art. 23 (establishing procedures for ECEs); Herzstein, *supra* note 11, at 126, 128 (stating that ECEs are made up of neutral parties from all three signatory nations). ECEs may be utilized in cases concerning forced labor, child labor, minimum employment standards, employment discrimination, equal pay for men and women, occupational safety and health, worker's compensation, and protection of migrant workers. See Herzstein, *supra* note 11, at 127-29. ECEs are not available in cases involving freedom of association, collective bargaining, or the right to strike. See *id.* Matters that ECEs review must involve trade issues and must be addressed by "mutually-recognized" labor laws in the two disagreeing signatory nations. See *id.* at 129. Both Ministerial Consultations and ECEs are intended to consist of non-adversarial, cooperative activity between signatory nations. See *id.*

104. See NAALC, *supra* note 3, art. 27(1) (defining the next level of enforcement procedures as restricted to matters involving health and safety issues, child labor, or minimum wage violations).

105. See *id.* art. 28; Herzstein, *supra* note 11, at 128-29.

106. See NAALC, *supra* note 3, art. 29; Murphy, *supra* note 1, at 412 (stating that arbitration panels are composed of five experts selected from the Commission for Labor Cooperation roster). The NAALC establishes rules for Arbitration Panel procedures and conduct. See NAALC, *supra* note 3, arts. 30-39.

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tariffs against the offending nation.<sup>107</sup> Only arbitral panels may impose sanctions.<sup>108</sup> Panels may also impose non-monetary penalties, which the NAALC leaves open to the suggestions of panels and disputing parties.<sup>109</sup>

*2. Substantive provisions of the NAALC that detrimentally affect female maquiladora workers*

The NAALC's substantive provisions detrimentally affect female Mexican maquiladora workers by failing to establish as protected workers' rights many issues that especially affect women. In fact, several concerns that affect female workers in particular are completely omitted from the NAALC. For example, the agreement fails to include as an enumerated right parental leave for both mothers and fathers for family emergencies and childbirth,<sup>110</sup> access to affordable childcare,<sup>111</sup> and assurance of fair representation and treatment of women in unions.<sup>112</sup> Although most working women view some or all of these provisions as essential to their ability to work outside the home,<sup>113</sup> the absence of these issues in the NAALC indicates that negotiators did not regard these women's concerns as important.<sup>114</sup> The NAALC also does not explicitly prohibit sexual harassment.<sup>115</sup>

The NAALC specifically addresses women's issues in two of the eleven enumerated rights: first, it mandates equal pay for equal work regardless of gender,<sup>116</sup> and second, it prohibits employment discrimination based on sex.<sup>117</sup> The only remedies available for violations of these two rights, however, are Ministerial Consultations

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107. See NAALC, *supra* note 3, art. 39(1), (4). Sanctions may only be used in cases involving occupational safety and health, child labor, and minimum wage, and only when the offending trade partner has displayed a persistent pattern of misconduct, failed to implement a committee-designed action plan, and refused to pay a penalty. See *id.* art. 39; see also Muniz, *supra* note 33, at 391 (criticizing the NAALC for not applying sanctions to violations of seven other labor rights). Sanctions of up to \$20,000,000 consist of either fines or enactment of pre-NAFTA trade tariffs. See *id.* at 392-93.

108. See NAALC, *supra* note 3, art. 39(4)(b) (outlining the decision-making process associated with implementing sanctions).

109. See *id.* art. 39(4)(a) (stating that panels may adopt action plans that parties propose if they are capable of addressing non-enforcement problems).

110. See *id.* Annex 1 (explaining the principles that the NAALC promotes).

111. See *id.*

112. See *id.*

113. See ENLOE, *supra* note 20, at 178 (describing the various tactics that working women use to provide supervision for their children).

114. See Barbieri, *supra* note 40, at 555 (relating the efforts by labor activists to create more gender awareness in the NAALC).

115. See NAALC, *supra* note 3, Annex 1 (listing the rights protected by the agreement).

116. See *id.*

117. See *id.*

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and ECE enforcement, but not sanctions.<sup>118</sup> This enforcement scheme suggests that the signatory nations to the NAALC do not view prevention of sex discrimination as a top priority.

A final problem with the substantive provisions of the NAALC is that they do not establish uniform standards of treatment for workers across all three nations.<sup>119</sup> Rather, the eleven enumerated rights establish labor protections that the national laws of each signatory must include to some extent and which the signatories must “effectively” enforce.<sup>120</sup> As noted, the NAALC is unusual among international labor protection agreements because the threat of monetary sanctions against parties that are persistent violators of certain labor rights gives it more enforcement power.<sup>121</sup> The specific level and quality of workers’ rights within each country, however, is dependent on the individual country’s national laws.<sup>122</sup>

This approach is problematic for Mexican women because, although Mexican law nominally guarantees equality of treatment between the sexes,<sup>123</sup> Mexican law does not adequately address either

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118. See *supra* notes 97-109 and accompanying text (describing the types of sanctions applicable to violations of the rights protected by the NAALC); HUMAN RIGHTS WATCH, WOMEN’S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS 281 (1995) (noting the lack of more serious enforcement mechanisms for gender issues under the NAALC); see also Herzstein, *supra* note 11, at 128.

119. See, e.g., Compa, *supra* note 1, at 134 (describing the NAALC’s reliance on national legislation as an attempt to protect national sovereignty, tempered by international oversight); Herzstein, *supra* note 11, at 125-26 (stating that the NAALC does not require signatories to adhere to identical labor standards); Muniz, *supra* note 33, at 393 (characterizing the NAALC’s labor standards as contingent on national legislation, not “tri-national” principles).

120. See Murphy, *supra* note 1, at 408 (suggesting that “effective” enforcement of national labor laws includes effective inspection and monitoring programs and noting that the NAALC operates by placing moral pressure on signatory nations to comply with the spirit of worker protections).

121. See NAALC, *supra* note 3, art. 39 (explaining sanction procedures).

122. See Murphy, *supra* note 1, at 407-08 (stating that the NAFTA does not force signatory parties to establish identical labor standards).

123. See CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS tit. I, art. 4 (Mex.), cited in Antoinette Sedillo Lopez, *Two Legal Constructs of Motherhood: “Protective” Legislation in Mexico and the United States*, 1 S. CAL. REV. L. & WOMEN’S STUD. 239, 243 (1992) (stating that Article 4 of Mexican Constitution requires that women and men receive equal treatment under law).

In addition to its national equality laws, Mexico is also party to several international agreements that condemn sex discrimination. See *Submission Concerning Pregnancy-Based Sex Discrimination in Mexico’s Maquiladora Sector to the United States National Administrative Office* 7, 20-21 (May 15, 1997) (renamed U.S. National Administrative Office, *Public Communication #9701*) [hereinafter *Public Communication #9701*] (submitted by Human Rights Watch Women’s Rights Project, Human Rights Watch/Americas, International Labor Rights Fund, and Asociación Nacional de Abogados Democráticos). These include the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and ILO Convention 111 on Discrimination in Respect of Employment and Occupation. See *id.* at 22-24. The Mexican Constitution defines international treaties that Mexico has ratified as part of national law, so the provisions of these treaties are considered national legislation under the NAALC. See *id.* at 20-21.

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gender discrimination or many other aspects of women's experiences.<sup>124</sup> For example, Mexican legislation fails to address issues related to home-based production work or work done in the informal sphere,<sup>125</sup> which are prominent areas of women's employment in Mexico.<sup>126</sup> Mexican law also does not adequately address sexual harassment in the workplace.<sup>127</sup>

Furthermore, some Mexican laws are detrimental because they treat women in a paternalistic, protective manner<sup>128</sup> or base legal

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124. See Lopez, *supra* note 123, at 240 (describing the fact that, although Mexican law ostensibly treats women as equals, it is administered according to social constructs that treat women only as wives and mothers and fails to incorporate fully the entire range of women's experiences). International law excludes women from participation and representation in its negotiations through the same public-private dichotomy that operates on the national level. See Knop, *supra* note 37, at 330 (arguing that international law assigns private sphere concerns to regulation of national governments instead of dealing with them through international law instruments). This perspective parallels national governments' assignment of women's private sphere concerns to informal family structures, rather than addressing them through formal legal mechanisms. See *id.*

125. See Barbieri, *supra* note 40, at 527, 559 (finding that Mexican labor laws do not protect women who work at home); *infra* notes 196-213 (explaining informal sphere).

126. See Barbieri, *supra* note 40, at 529 (reporting that informal sector is an important source of employment for Latin American women).

127. See Código Penal Para el Distrito Federal [Penal Code for the Federal District] arts. 259-62 (Porrora ed., 1995), cited in Gaby Ore-Aguilar, *Sexual Harassment and Human Rights in Latin America*, 66 *FORDAM L. REV.* 631, 634-35 n.27-30 (1997) (detailing Mexican criminal laws that forbid sexual harassment as a "crime against liberty and normal psychosexual development"). The law threatens the perpetrator with punishment only when the victim can show harm as a result of the harassment. See *id.*; Susan Kostal, *A Sexual Harassment Lawsuit Tests the Reach of American Labor Law Under the U.S.-Mexican Trade Pact*, *CALIFORNIA LAW.*, Aug. 1995, at 41 (explaining that Mexican law provides no civil recourse for, and only ineffective criminal prohibitions against, workplace sexual harassment).

128. See Durand, *supra* note 11, at 130 (citing Mexican labor law that prohibits maquiladora management from using most female employees, but permits the employment of male employees, in dangerous work); Lopez, *supra* note 123, at 247 (analyzing Mexican legislation that concerns women as a reflection of the social construct that views the husband as the family head and the wife as his dependent).

International law that regulates women is, like national legislation, frequently based on assumptions about women's limited capabilities and their primary role as caretakers of the family and home. See HEVENER, *supra* note 37, at 4, 6 (describing international law as "protective" of women in their roles as wives and mothers and stating that such laws communicate messages about women's status as an inferior group). Under this paradigm, international law adopts stereotypical national and cultural views that women's primary role should be that of mother. See *id.* at 6-7.

Even the Convention on the Elimination of Discrimination against Women ("CEDAW"), whose entire purpose is to support equality for women and nondiscrimination based on sex, G.A. Res. 34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981), may create problems by "ghettoizing" women's concerns in a specific document. See Dallmeyer, *supra* note 40, at 6-7. CEDAW is a significant achievement for women in many ways because it is an important international instrument that focuses exclusively on women's concerns, ensuring that they are not overshadowed by other topics within the agreement. See Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 *UCLA WOMEN'S L.J.* 255, 281 (1994) (discussing the potentially positive aspects of CEDAW that may help to promote women's rights more effectively). The existence of a special "women's" international legal instrument, however, may cause problems for women by providing justification for not including women's specific concerns in other pieces of international law, under the theory that

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consideration for women solely on their roles as mothers.<sup>129</sup> Instead of promoting gender equity, these laws reinforce traditional ideas about women's proper role as homemakers and mothers who should not work in the public sphere.<sup>130</sup> For example, the Mexican federal

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women's issues have already been codified and need no further attention. *See* Dallmeyer, *supra* note 40, at 6. The implementation and enforcement mechanisms embodied in this convention also tend to be weak, which prevents effective enforcement of the rights codified therein. *See* Charlesworth, *supra* note 20, at 632-33 (criticizing CEDAW's implementation mechanism as weaker than those of other international human rights documents because its liberal reservations policy allows states to ratify the treaty selectively).

It should be noted, however, that some pieces of international law have addressed this problem by incorporating women's concerns into their provisions, calling for corrective measures to remedy sex discrimination, and stressing gender equality within the context of broader issues. *See* HEVENER, *supra* note 37, at 12-13 (describing conventions that seek to create an atmosphere in which both women and men have full opportunity to participate in all areas of society). Examples of non-discriminatory conventions include: The Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716 (1967); the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); the Convention on the Political Rights of Women, 193 U.N.T.S. 135 (1952); the Convention Concerning Discrimination in Respect of Employment and Occupation, *in* 1 INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL CONVENTIONS AND RECOMMENDATIONS 1919-1991, 702 (1992); and the Charter of the United Nations, 59 Stat. 1031 (1945). The inclusion of women's perspectives into these international agreements is a positive sign that gender-based perspectives have gained more recognition within international law. *See* Charlesworth, *supra* note 20, at 614 (describing the insertion of women's views into international agreements). The preceding agreements that include women's perspectives, however, all concern the area of human rights, which specifically deals with the rights of individuals. *See id.* Other areas of international law, such as those that deal with sovereignty, the duties of states, the use of force and territorial rights, continue to be unresponsive to suggestions that they should acknowledge their effects on individuals, including women. *See id.*

129. *See* Lopez, *supra* note 123, at 240 (characterizing some Mexican legislation as an effort to bolster women's traditional role as mothers).

Another example of protective, stereotypical laws exists in the United States, where some employers have tried to use workplace "fetal protection policies" to exclude fertile women from certain jobs involving hazardous conditions. *See id.* at 250-53. These company rules purport to ensure that the fetuses of pregnant women are not exposed to harmful substances during the course of the woman's employment. *See id.* at 250. Employers, however, have used these protection policies discriminatorily against women by exclusively targeting female employees, despite the proven health effects that workplace chemicals can have on the male reproductive system and resulting detriments to fetal health. *See id.* For example, employers have used these regulations to discriminate against women when hiring for "dangerous" positions by excluding women altogether, and to fire women currently working in those positions and replace them with male workers. *See id.* at 251. Like the Mexican maternity leave laws, these regulations have a doubly negative effect for women because they reinforce the assumption that all women who could become pregnant will or wish to become pregnant, thus making it more difficult for women to find employment. *See id.* at 247, 251-52. Although the mentality of these regulations may still exist in unofficial hiring and employment policies of U.S. employers, the Supreme Court ruled that explicit fetal protection policies illegally discriminate against women under Title VII. *See id.* (citing *International Union v. Johnson Controls*, 499 U.S. 187 (1991)).

130. *See* Ley Federal de Trabajo, tit. V, art. 170, paras. III-VII, *cited in* Lopez, *supra* note 123, at 240 (describing Mexican labor laws that assume women will choose the traditional role of wife and mother by regulating women's employment based on potential dangers to unborn children).



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labor code mandates a generous maternity policy for female employees, including full pay for six weeks before and after the birth and payment of fifty percent of the employee's wages for two months after the birth of a child, which employers must partially subsidize.<sup>131</sup> New mothers also have the option of taking up to one year of unpaid leave after the birth and are assured of their previous employment positions upon their return to work.<sup>132</sup> In many ways, these seem to be progressive labor laws.<sup>133</sup> By making parental leave exclusively available to women and not to men, however, the laws lend official support to the idea that only men should work outside the home and that women's primary responsibility is to become mothers and stay at home with their children.<sup>134</sup>

Mexican maternity leave provisions also negatively affect female job applicants. Although Mexican law forbids workplace discrimination against female employees who are pregnant,<sup>135</sup> it does not require employers to treat a female job applicant equally in hiring decisions if the employer fears that she will become pregnant and require subsidized maternity leave.<sup>136</sup> In order to ensure that female job applicants are not pregnant when they hire them, some maquiladora

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131. See CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, tit. VII, art. 123, *cited in* Lopez, *supra* note 123, at 246-47.

Although Mexican law mandates that employers provide pregnant employees with benefits, these laws are rarely enforced in the maquiladora sector. See *Public Communication #9701*, *supra* note 123, at 27-29 (highlighting difficulties that pregnant maquiladora workers face). Pregnant women working in maquiladoras are routinely either fired outright or are demoted and denied health and leave benefits in order to pressure them to resign, so that maquiladora owners can avoid paying the costs of maternity leave. See *id.*

U.S. and Canadian leave laws, in contrast to Mexican laws, encourage both parents to participate in childrearing by making parental leave available to both fathers and mothers. See Family and Medical Leave Act, 29 U.S.C. § 2611(2) (1995) (defining "eligible employee" as any employee who meets certain length of work requirements); *id.* § 2612(a) (entitling eligible employees in the United States to family-related leave from work for reasons that include the birth, adoption, or illness of a child); An Act to Amend the Unemployment Insurance Act, S.C. 1990, c. 40, §§ 9, 14, *cited in* Susan B. Boyd, *Can Law Challenge the Public/Private Divide? Women, Work, and Family*, 15 WINDSOR Y.B. ACCESS TO JUSTICE 161, 170 n.50 (1996) (making Canadian parental leave provisions available to both men and women).

132. See CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, tit. VII, art. 123, *cited in* Lopez, *supra* note 123, at 246 (describing the Mexican maternity leave law).

133. See Lopez, *supra* note 123, at 247 (describing the positive reactions by Mexicans to national maternity leave laws).

134. See *id.* (explaining that not all Mexican female workers want to have children and that not all those with children wish to utilize maternity leave procedures).

135. See *id.* at 245-46 (reporting that equal wages are required for equal work under the Mexican constitution and labor laws).

136. See *id.* at 244, 247 (stating that no laws forbid hiring discrimination against working women). Maternity leave provisions are costly to employers in direct outlays and lost productivity. See *id.* at 245-46 (explaining that employers must subsidize part of the wages that women receive during maternity leave and must hire and train temporary workers to fill the new mothers' positions temporarily).

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operators require women to provide negative pregnancy tests,<sup>137</sup> describe their menstrual cycles<sup>138</sup> and undergo physical examinations.<sup>139</sup> This type of pregnancy-based discrimination violates the International Covenant on Civil and Political Rights, the Convention to Eliminate All Forms of Discrimination Against Women, the American Convention on Human Rights, and the International Labor Organization's Convention 111, which are all international treaties that Mexico has ratified to prohibit sex discrimination.<sup>140</sup> By permitting hiring discrimination on the basis of potential pregnancy, Mexican labor laws further contribute to an atmosphere that discourages women from working outside the home, and instead promotes the traditional gender roles of wife and mother.<sup>141</sup>

### III. THE EFFECTS OF THE NAFTA AND THE NAALC ON FEMALE MAQUILADORA WORKERS

Although the NAFTA and the NAALC are now five years old, their effects on female workers in Mexican maquiladoras is still materializing. On one hand, the experiences of women who work in maquiladoras have changed little since 1994 because the Border Industrialization Program of 1964 and successive programs, all with terms of trade similar to the NAFTA's, have been in place for many years and have contributed to the establishment of employment patterns and labor conditions in maquiladoras throughout Mexico.<sup>142</sup> The NAFTA's reduction of trade barriers, therefore, has had a less dramatic impact on the wages and working conditions of the maquiladora sector than in other areas that the agreement has

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137. See U.S. National Administrative Office, *Public Report of Review of NAO Submission No. #9701*, at 36-38 (Bureau of International Labor Affairs, U.S. Dept. of Labor, Jan. 12, 1998) [hereinafter *Public Report #9701*] (on file with *American University Law Review*) (describing procedures that female job applicants must undergo before becoming eligible for employment in some maquiladoras).

138. See *id.*

139. See *id.*

140. See HUMAN RIGHTS WATCH, NO GUARANTEES, *supra* note 34, at 30-31 (outlining the international legal sources of protection for female maquiladora workers).

141. See Lopez, *supra* note 123, at 247-48 (finding that, by imposing costs on employers, Mexican maternity leave laws discourage employers from hiring women who may become pregnant and thus encourage a traditional family structure in which women stay at home).

142. See Peters, *supra* note 24, at 229-30 (describing the establishment of BIP and successive modifications by Mexican and U.S. governments); Durand, *supra* note 11, at 128 (arguing that maquiladoras were in operation for over thirty years prior to passage of the NAFTA and did not experience many changes as a result of the trade agreement); Gregory, *supra* note 5, at 538-39 (claiming that the NAFTA will encourage the well-established trend toward increased international trade that began in 1970s).

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affected.<sup>143</sup> On the other hand, the economic growth in Mexico that has resulted from the expansion of international trade under the NAFTA<sup>144</sup> has affected female workers in one important way because of the continually rising number of women that are now working in maquiladoras.<sup>145</sup> Although the NAFTA may not have significantly affected the immediate conditions confronting women beyond providing increased maquiladora employment opportunities, the impressive number of women who work in factories stand to be affected by the NAALC.<sup>146</sup> Although only the equal pay for equal work and employment discrimination provisions explicitly mention women,<sup>147</sup> the NAALC offers women a new avenue for airing grievances and gaining relief from abusive employer or governmental practices in the workplace.<sup>148</sup> But because it neither recognizes many women's concerns nor enforces relevant provisions with sanctions,<sup>149</sup> the NAALC does not go far enough.

#### A. *Women in Maquiladoras Since the NAFTA's Passage*

Many Mexican women have had the opportunity<sup>150</sup> to work outside the home and to earn income due to the maquiladoras that have proliferated under the NAFTA.<sup>151</sup> The ability to earn money and

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143. See Durand, *supra* note 11, at 128.

144. See ECONOMIC POLICY INSTITUTE ET AL, STUDY ON THE OPERATION AND EFFECTS OF THE NAFTA 26 (1997) (attributing Mexico's fast recovery from the 1994 currency devaluation and increased levels of economic growth to the expanded NAFTA-linked international trade).

145. See Barbieri, *supra* note 40, at 559 (stating that the employment of women will rise in Mexican maquiladora and tourism sectors, which have expanded under the NAFTA).

146. See Travis, *supra* note 5, at 192-93 (speculating that gender-neutral workers' rights protections in the NAALC offer potential avenues of recourse to female workers in maquiladoras).

147. See NAALC, *supra* note 3, Annex 1.

148. See Travis, *supra* note 5, at 192-93.

149. See *supra* notes 105-08 and accompanying text (describing which NAALC provisions are enforceable through sanctions).

150. See Durand, *supra* note 11, at 131 (estimating that 75% of maquiladora workers are women).

151. See KAMEL, *supra* note 51, at 11 (emphasizing that many women are the sole income earner in their families and maquiladora work is a ready source of employment); WOMEN ON THE U.S.-MEXICAN BORDER: RESPONSES TO CHANGE 78 (Vicki L. Ruiz et al. eds., 1987) [hereinafter RESPONSES TO CHANGE] (noting that factory work integrates women into formal economic structures and teaches them skills).

Despite the argument that employment provides women with useful skills, one criticism of maquiladora production methods is that they employ "deskilling" techniques. See GRUNWALD & FLAMM, *supra* note 24, at 169. This method breaks down complicated tasks into their simplest procedural components which require very few skills beyond those like sewing, which workers often already possess as the result of having learned them at home. See *id.* Because they typically perform the least technical tasks that require the least amount of training, workers do not gain useful skills that they can later use to enhance their value in the labor market. See *id.* Women are frequently not even trained in additional skills that would make them more productive, such as how to fix machinery. See BENERÍA & ROLDÁN, *supra* note 51, at 48 (describing managers' unwillingness to teach women technical skills that would enable them to

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support themselves is empowering for women because it frees them from their traditional financial dependence on men.<sup>152</sup> Remunerated employment is necessary for women, especially single mothers, whose families require their financial contribution.<sup>153</sup> Paid jobs also allow women to escape from the most extreme conditions of poverty.<sup>154</sup> Finally, the fact that large numbers of women work in the paid, “public sphere” maquiladora sector promotes social recognition of women as economic actors<sup>155</sup> and increases women’s confidence in their ability to act in the public sphere.<sup>156</sup>

Despite these positive gains, the experience of women working in Mexican maquiladora factories has been problematic, both before and since the NAFTA’s passage, especially because these problems now affect more women than ever before due to the expansion of maquiladoras.<sup>157</sup> First, maquiladora work in Mexico continues to reflect the societal norms of patriarchy and male control over women that exist in Mexican culture.<sup>158</sup> This is evident in the gendered

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perform simple repairs on assembly line machinery because they prefer to keep female workers unskilled and concentrate technical knowledge in the hands of higher-ranking male employees).

152. See, e.g., BENERÍA & ROLDÁN, *supra* note 51, at 148 (relating Mexican female workers’ views about having their own money and the independence that money gives them from their husbands); GRUNWALD, *supra* note 24, at 167 (noting that women whose first jobs are in maquiladoras value the independence they gain); RESPONSES TO CHANGE, *supra* note 151, at 78 (explaining that maquiladora employment provides alternatives to early marriage and motherhood); Peters, *supra* note 24, at 243 (explaining that many Mexican women have always worked out of economic necessity, but maquiladoras have provided employment opportunities that do not usually exist for women in formal employment sectors).

153. See GEOGRAPHY OF GENDER, *supra* note 42, at 291 (highlighting that, in Mexico, single mothers of small children have a special need to work to provide for their families because their children are not old enough to work and supplement family income).

154. See GRUNWALD & FLAMM, *supra* note 24, at 167 (noting that some female maquiladora workers have gained higher standards of living for themselves and their families).

155. See Kelly, *supra* note 44, at 164-65 (describing the growing social acceptance of women as economic producers who act in public sphere).

156. See RESPONSES TO CHANGE, *supra* note 151, at 78 (hypothesizing that public sphere employment bolsters women’s self-esteem and increases awareness of “personal autonomy”).

157. See Durand, *supra* note 11, at 131 (noting the increasing number of female maquiladora workers).

158. See, e.g., BENERÍA & ROLDÁN, *supra* note 51, at 52 (quoting a maquiladora executive who stated that women are assumed to be psychologically dependent and that women know that they are unfit for workplace advancement); Dagenais, *supra* note 41, at 331 (explaining that the atmosphere of maquiladoras is designed to exploit women’s fears about being seen as promiscuous by people who do not approve of female employment); KAMEL, *supra* note 51, at 41 (describing one factory’s strategy of controlling female workers by hanging lollipops over workers’ heads. The lollipop’s color indicated the quality of each worker’s output: “green for good, blue for poor, orange for very poor”); RESPONSES TO CHANGE, *supra* note 151, at 78-80 (claiming that factories operated by transnational corporations aggressively exploit women’s vulnerable economic and social position by emphasizing stereotypical feminine traits such as domesticity and physical attractiveness through company activities like cooking classes and beauty pageants); Heidi Tinsman, *Behind the Sexual Division of Labor: Connecting Sex to Capitalist Production*, 17 YALE J. INT’L L. 241, 247 (1992) (arguing that the “social reality of male sexual dominance” controls gendered division of labor in the economic marketplace).

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division of labor that exists in Mexican factories,<sup>159</sup> where men occupy the majority of supervisory and leadership positions,<sup>160</sup> and women generally work in jobs that receive lower wages,<sup>161</sup> engender less respect,<sup>162</sup> and exist in poorer working conditions.<sup>163</sup> Additionally, factory employers may justify not hiring women for higher paid management or technical positions because they assume that women are secondary earners whose wages merely supplement those of a male member of the household.<sup>164</sup> Sexual harassment, consisting of offensive or sexually coercive behavior by male supervisors toward female employees,<sup>165</sup> is also a frequent problem in maquiladoras.<sup>166</sup>

Researchers have studied the exploitation of gender roles in maquiladoras along the Mexico-U.S. border. *See* KAMEL, *supra* note 51, at 11. In some maquiladora factories, small numbers of male workers were placed on formerly all-women production lines in order to pressure the female workers to behave more submissively. *See id.* Maquiladora managers apparently believed that, in order to quell female workers' complaints, they could employ pre-existing social pressures that encourage women to defer to men. *See id.* It is not clear if this tactic has succeeded. *See id.*

159. *See* KAMEL, *supra* note 51, at 41 (explaining that male dominance of maquiladora management structures impedes female workers' opportunities for advancement); *see also* GEOGRAPHY OF GENDER, *supra* note 42, at 80 (describing the gendered division of labor in the Colombian cut-flower industry where men occupy most management and maintenance positions, and women most frequently work in areas "directly related to the flower").

160. *See, e.g.,* Dagenais, *supra* note 41, at 331 (describing how maquiladora positions are filled according to race and sex, with Anglo males universally in higher status positions and Mexican women universally in lower status positions); KAMEL, *supra* note 51, at 41 (explaining that when maquiladora factories need technical workers, recruiters seek male personnel from outside the factory rather than training female production line workers for advancement); RESPONSES TO CHANGE, *supra* note 151, at 139-40 (noting that although the majority of first-line supervisors are males who have been promoted from technical positions within a company or recruited from outside the company, women rarely attain positions at this rank or higher ranks). Another aspect of the "deskilling" strategy in maquiladoras, *see supra* note 151, is that women are not generally promoted to higher positions where they can learn skills like management techniques. *See* GRUNWALD & FLAMM, *supra* note 24, at 169.

161. *See* BENERÍA & ROLDÁN, *supra* note 51, at 46 (finding that women may receive lower pay than men for identical maquiladora work and that women are concentrated in the lowest-paid factory positions); ENLOE, *supra* note 20, at 162 (describing the method for lowering women's wages in comparison to men's wages by defining certain tasks, namely sewing, as unskilled, paying workers in those positions less, and assigning women to those positions).

162. *See* Dagenais, *supra* note 41, at 331 (finding that the maquiladora workplace is structured so women fill those positions with the least amount of authority and influence).

163. *See* BENERÍA & ROLDÁN, *supra* note 51, at 44 (reporting that female maquiladora workers typically perform tasks that take place in physically confining and crowded areas and that male workers tend to work on projects in more spacious and less cramped conditions).

164. *See id.* at 52 (quoting a maquiladora executive who claimed that women in his factory are paid less because women's wages are used for individual expenses, whereas men are required to spend their wages on family expenses); KAMEL, *supra* note 51, at 11. This "corporate mythology" works to keep women in lower paid, lower status positions despite the fact that women are frequently the only income earner in their households. *See id.* Further, the wages of maquiladora production line workers, the majority of whom are women, do not always cover the costs of supporting a family. *See id.* at 41.

165. *See* 29 C.F.R. § 1604.11 (1998) (describing the U.S. Equal Opportunity Commission's ("EEOC") guidelines regarding sexual harassment under Title VII). The EEOC has promulgated one definition of sexual harassment. *See id.* This includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* These conditions constitute actionable sexual harassment when the behavior is an implicit

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Despite Mexican society's traditional aversion to hiring women for paid labor, many maquiladora owners prefer female workers for assembly-line work.<sup>167</sup> Although Mexican women benefit from the increased employment opportunities that this preference creates,<sup>168</sup> maquiladora managers nonetheless reinforce harmful social and cultural stereotypes when they select women for certain tasks based on assumptions about the existence of particular skills or behaviors.<sup>169</sup> For instance, managers assume that women possess greater manual dexterity than men because they have smaller hands and "naturally" perform intricate activities like sewing at home.<sup>170</sup> Maquiladora factories frequently employ women for work on small or delicate assembly tasks, especially in electronics and sewing,<sup>171</sup> because

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or explicit "term or condition" of a person's work, is used as a "basis for employment decisions" that affect the person, unreasonably interferes with the person's work, or creates an "intimidating, hostile, or offensive working environment." *Id.*

166. See, e.g., Dagenais, *supra* note 41, at 331 (stating that maquiladora supervisors attempt to control female workers with gender related pressures that include sexual harassment); RESPONSES TO CHANGE, *supra* note 151, at 110 (explaining that male maquiladora supervisors assume power over young female employees in ways that parallel the traditional authority of fathers, but supervisors may use their "paternal" authority to gain sexual access to female workers); Nauman & Hutchison, *supra* note 36, at 953 (finding that one egregious form of sexual harassment occurs when male supervisors rape female maquiladora workers).

167. See BENERÍA & ROLDÁN, *supra* note 51, at 43-44 (noting the growing levels of female employment in production facilities of all sizes); RESPONSES TO CHANGE, *supra* note 151, at 108 (citing statistics that indicate that female employees result in higher profits for maquiladoras); see also Donald D. Stull, *Of Meat and (Wo)Men: Meatpacking's Consequences for Communities*, 3-SPG KAN. J.L. & PUB. POL'Y 112, 114 (1994) (reporting that U.S. meatpacking factories prefer women because managers report that they are more in need of employment and consequently willing to accept lower wages); Travis, *supra* note 5, at 190-91 (estimating that more than 2.25 million women work in export-processing zones throughout the world in maquiladora-like factories and that women represent a large percentage of all such workers).

168. See *supra* text accompanying notes 150-56 (outlining the benefits of maquiladora employment for women).

169. See BENERÍA & ROLDÁN, *supra* note 51, at 45 (citing feminist observations that women's paid work in factories typically centers around tasks similar to those that women perform as part of household or childcare duties); KAMEL, *supra* note 51, at 11-12 (emphasizing that typical factory tasks for women, such as sewing, are undervalued and defined as low-skill jobs, regardless of the dexterity and knowledge actually required, because the skills are learned at home).

Maquiladora managers in Mexico also hire female workers because they know that government and union leaders pay more attention to the working conditions of male workers. See Peters, *supra* note 24, at 244. By using primarily female workers, whose concerns are often not seen as priorities by labor advocates, factories can pay lower wages and provide poorer working conditions because they are unlikely to be pressured to improve their treatment of workers. See *id.*

170. See GRUNWALD & FLAMM, *supra* note 24, at 167 (citing maquiladora managers who prefer women for intricate electronic circuitry work); KAMEL, *supra* note 51, at 11 (stating that managers view women as "innately suited" for delicate assembly work in electronics and garments).

171. See GRUNWALD & FLAMM, *supra* note 24, at 168 (noting that, throughout the world, women's familiarity with dexterous work like sewing is the result of socialization processes at home, and that dexterous skills acquired at home serve as an effective foundation for learning intricate electronic and garment assembly skills).

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supervisors assume that women will do more accurate work and cause less harm to the product than men.<sup>172</sup> Studies show, however, that men working in delicate assembly tasks are as efficient as women,<sup>173</sup> which indicates that managers' preference for women is based on traditional stereotypes about women.<sup>174</sup>

Another gender characteristic that encourages factory decision-makers to choose women for maquiladora work is the perception, reinforced by experience,<sup>175</sup> that women are more docile than male workers<sup>176</sup> and are less prone to engage in union organizing.<sup>177</sup> Managers value compliant workers who do not complain about poor working conditions<sup>178</sup> because their silence saves factory authorities from having to deal with troublesome, pro-union employees who demand higher wages<sup>179</sup> and expensive improvements in the areas of safety and health.<sup>180</sup>

The perception that women complain less and are involved in fewer union activities actually has some basis in fact, although it is not caused by any inherent sex characteristic.<sup>181</sup> The first reason for this

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172. See *id.* at 167 (noting that maquiladora managers frequently mention women's dexterity as an explanation for why they prefer female assembly workers).

173. See *id.* (citing reports by factory supervisors in Mexico).

174. See BENERÍA & ROLDÁN, *supra* note 51, at 50 (noting that not all women possess gender-associated skills like sewing).

175. See *id.* (describing socialization processes that encourage woman to be submissive).

176. See GRUNWALD & FLAMM, *supra* note 24, at 167 (relating maquiladora managers' beliefs that women are more accustomed to "routine" tasks and therefore more patient with them); KAMEL, *supra* note 51, at 11 (explaining that women are perceived as more capable of enduring boring and "monotonous" maquiladora assembly tasks); *cf.* RESPONSES TO CHANGE, *supra* note 151, at 124-25 (cautioning that generalizations about female maquiladora workers' docility do not sufficiently account for women's efforts to resist corporate exploitation and organize for better working conditions).

177. See KAMEL, *supra* note 51, at 11 (stating that maquiladora managers believe that women are less prone to rebellion and labor activism than men); *cf.* RESPONSES TO CHANGE, *supra* note 151, at 124-25 (pointing out that women have taken action to organize on behalf of labor rights in maquiladoras, contrary to maquiladora managers' assumptions about female workers' passivity).

178. See KAMEL, *supra* note 51, at 41 ("We like to hire girls who don't have too much experience because they aren't spoiled. . . . Then you can trust they won't fly off the handle, making unrealistic demands or joining unions.") (quoting maquiladora supervisor in Ciudad Juárez, Mexico). Factory managers and the Mexican government oppose union organizing by both female and male maquiladora workers because it raises labor costs and is seen as a hindrance to foreign investment. See Peters, *supra* note 24, at 247 (characterizing foreign corporations' opposition to union activities in Mexico as well-organized and effective).

179. See KAMEL, *supra* note 51, at 41; see also GEOGRAPHY OF GENDER, *supra* note 42, at 305 (indicating that, in Brazil, substituting male factory workers with women enabled employers to lower labor costs).

180. See BENERÍA & ROLDÁN, *supra* note 51, at 49 (describing employers who prefer female employees because they make fewer complaints about their working environment).

181. See, e.g., *id.* at 50 (describing the characteristic of submissiveness, as associated with women, as result of gendered socialization processes); GRUNWALD & FLAMM, *supra* note 24, at 168 (theorizing that men are culturally encouraged to be impatient with intricate, repetitious tasks); KAMEL, *supra* note 51, at 11 (describing docility as a survival mechanism employed by

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is that Mexican women who are able to obtain employment outside the private sphere frequently do not engage in union activity<sup>182</sup> because they must still perform their duties at home.<sup>183</sup> After performing this “double shift” of housework and paid labor, women, including female maquiladora workers, have little time or energy to participate in extraneous activities and, therefore, often decline union participation and the benefits therein.<sup>184</sup> Second, Mexican women may be less inclined to participate in organized labor movements because of the risks involved for the well-being of their families, especially their children.<sup>185</sup> Women who are the primary income-earners for their households, such as single mothers and women whose husbands do not contribute financially to the family, often feel that they cannot afford to anger their employers and risk losing their jobs by joining a union.<sup>186</sup> Although women may actually be less vocal about maquiladora conditions in practice<sup>187</sup> and factory preferences for women create more opportunities for women in certain types of work,<sup>188</sup> managers’ reliance on “docile” stereotypes hurts women because it provides justification for managerial decisions that place women in menial, unpleasant, low-paid work.<sup>189</sup>

The increasing rate of employment of large numbers of women in maquiladoras, under the NAFTA<sup>190</sup> has also raised concerns outside the factory walls. For example, increased female employment in the expanded maquiladora sector has caused disproportionately high rates of birth defects, such as anencephaly,<sup>191</sup> in children born to female maquiladora workers.<sup>192</sup> Medical and environmental

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women to avoid conflict with male supervisors, which women discard when they are no longer at work).

182. See Durand, *supra* note 11, at 131 (reporting that few Mexican female workers are unionized).

183. See RESPONSES TO CHANGE, *supra* note 151, at 84 (noting that female maquiladora workers must perform both factory duties and household-related work).

184. See *id.* (commenting on the double workday of many female maquiladora workers and its fatiguing effects).

185. See KAMEL, *supra* note 51, at 11 (stating that Mexican families are often dependent on women’s income for survival).

186. See Cynthia Enloe, *The Globetrotting Sneaker*, MS., Mar./Apr. 1995, at 13.

187. See Nauman & Hutchison, *supra* note 36, at 953 (reporting that female maquiladora workers fear that they will lose their jobs if they “rock[] the boat” by complaining about workplace conditions).

188. See RESPONSES TO CHANGE, *supra* note 151, at 108 (discussing preference for female workers).

189. See Dagenais, *supra* note 41, at 331 (discussing the generally low status of women’s maquiladora jobs).

190. See Barbieri, *supra* note 40, at 559 (stating that women’s maquiladora employment will rise under the NAFTA).

191. See DWYER, *supra* note 47, at 52-53 (describing anencephaly as a fatal neural tube disorder in which the fetal brain either develops only partially or does not develop at all).

192. See, e.g., *id.* at 53 (citing medical findings showing that anencephaly rates in



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authorities attribute these high rates of birth defects to two causes: (1) maquiladora factories have introduced industrial pollutants into the air, water, and soil of the communities where they are located,<sup>193</sup> and (2) maquiladora work frequently exposes female workers to potentially harmful chemicals.<sup>194</sup> This contact frequently occurs when women handle chemicals without adequate safety training or health protections, such as gloves, goggles or proper ventilation.<sup>195</sup>

The growing prominence of informal, in-home production is another social issue that may be associated with women and increased maquiladora employment under the NAFTA.<sup>196</sup> Increased industrial production in Mexico under the NAFTA may cause a corresponding growth in this area of activity because factory producers often subcontract out low technology, labor-intensive segments of their production and assembly processes to informal producers.<sup>197</sup> They do so in an effort to lower costs and raise profits.<sup>198</sup> Informal production

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Brownsville, Texas are three to five times higher than the national average); Bacon, *supra* note 18, at 573 (reporting that six anencephalic children were born in 1993 and thirteen were born in 1994 in a maquiladora community near Tijuana); Juanita Darling, *Environment, A River of Doubt: The Rio Grande's Pollution is Part of the Debate*, L.A., Aug. 31, 1993, at 2 (describing a Texas lawsuit which families of children with birth defects brought against maquiladora factories in Matamoros, Mexico).

One famous incident regarding maquiladora-related birth defects concerned a Mallory Capacitors maquiladora in Matamoros, Mexico. See DWYER, *supra* note 47, at 66-68; Durand, *supra* note 11, at 131. Factory managers required pregnant women to put their hands into containers of highly toxic PCB chemicals and provided only rubber gloves for protection. See *id.* at 66-68. About 100 children born from these women throughout the 1970s and 1980s displayed similar unique characteristics: broad noses, thin lips, webbed digits, and mental handicaps ranging from mild to severe. See DWYER, *supra* note 47, at 66. Doctors investigating the cluster of birth defects found that the single unifying factor among the children was their mothers' employment at Mallory. See *id.* The case today is referred to as the "Mallory Children." See *id.*

193. See DWYER, *supra* note 47, at 53 (citing the medical opinion that high anencephaly rates along the Texas-Mexican border were due to environmental factors because most mothers did not display other risk factors); Loecke, *supra* note 68, at 605 (blaming maquiladora pollution for birth defects in Mexican-U.S. border area); see also Durand, *supra* note 11, at 131 (noting that one chemical leak from a maquiladora forced community residents to destroy possessions and livestock).

194. See Durand, *supra* note 11, at 131 (reporting the exposure of pregnant women to PCB chemicals while they worked in maquiladora factories).

195. See *id.* (reporting that Mallory Capacitors workers had only rubber gloves for protection while placing their hands in vats of PCB chemicals).

196. See Kelly, *supra* note 44, at 162-63 (describing patterns of in-home production, often referred to as the "informal sphere," that maquiladoras producing electronics in Southern California use). The informal assembly sector usually consists of small scale, unregulated, labor intensive activities that take place in workers' homes or in small workshops. See GEOGRAPHY OF GENDER, *supra* note 42, at 282. Generally, informal sector workers receive assignments and materials directly from a factory or from an intermediate "jobber." See BENERÍA & ROLDÁN, *supra* note 51, at 59; see also KAMEL, *supra* note 51, at 17 (characterizing the informal industry as way for producers, especially in garment industry, to avoid labor standards).

197. See BENERÍA & ROLDÁN, *supra* note 51, at 59 (characterizing the nature of typical informal sector work).

198. See *id.* at 64-65; Kelly, *supra* note 44, at 163 (reporting that the benefits of informal

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is cheaper due to lower overhead costs<sup>199</sup> and less government regulation of informal facilities.<sup>200</sup> The fact that informal sector workers are generally quite poor and therefore, willing to accept very low wages<sup>201</sup> and poor working conditions is another reason for lower costs in this sector.<sup>202</sup>

The informal sector has historically been an important source of paid employment for Mexican women,<sup>203</sup> and women continue to play a prominent role in this sector despite high levels of female employment in maquiladoras.<sup>204</sup> Informal work offers several benefits to women. First, because maquiladora managers consider older women and women with children to be less desirable workers, such women often work informally because they typically have fewer factory job opportunities.<sup>205</sup> Informal work is therefore, an important area of employment for these groups of women.<sup>206</sup> Second, working informally at home provides women with more flexibility by enabling them to engage in paid activities and while simultaneously caring for their children.<sup>207</sup> This reduces childcare problems and allows women to spend more time with their children.<sup>208</sup> Although it allows women to earn needed income,<sup>209</sup> informal sector employment in individual homes or in small microproduction facilities with few other workers is problematic because, as discussed, labor practices become more

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production to manufacturers include lower costs and increased flexibility to market demands).

199. See BENERÍA & ROLDÁN, *supra* note 51, at 59 (stating that twenty-five percent of tasks performed in informal sector require no tools, and most other tasks require only very simple devices like knives).

200. See KAMEL, *supra* note 51, at 17 (describing informal production facilities as unregulated alternatives to formal sector factories, which are susceptible to government monitoring).

201. See BENERÍA & ROLDÁN, *supra* note 51, at 62 (finding that informal workers received wages that varied over a wide range and generally were far below Mexican minimum wages).

202. See *id.* at 61 (stating that informal workers must often transport materials themselves to their homes, despite not having private transportation). Managers also use arbitrary standards for determining quality of finished work and assess penalties for damaged materials. See *id.*

203. See *id.* at 65 (stating that the majority of informal workers are female); Barbieri, *supra* note 40, at 559 (reporting that Mexican women make up a large percentage of the informal sector workers).

204. See Barbieri, *supra* note 40, at 559 (citing areas of informal work that have expanded due to increased industrial investment in Mexico).

205. See RESPONSES TO CHANGE, *supra* note 151, at 84 (citing maquiladora managers who prefer young, childless female employees because they are unfamiliar with labor unions and are more productive because they have fewer family responsibilities).

206. See *id.*

207. See BENERÍA & ROLDÁN, *supra* note 51, at 150; Barbieri, *supra* note 40, at 529 (reporting that informal sector work allows women to arrange their work schedule in response to childcare demands).

208. See Barbieri, *supra* note 40, at 529.

209. See BENERÍA & ROLDÁN, *supra* note 51, at 150 (discussing female informal workers' need for the income they generate).

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difficult to monitor.<sup>210</sup> This frequently results in unreasonably long hours, unsafe conditions, and substandard pay.<sup>211</sup> This type of work also physically isolates women from other workers<sup>212</sup> and creates difficulties for women who wish to improve their working conditions by participating in organized labor activities.<sup>213</sup>

## *B. U.S. National Administrative Office Cases*

### *1. Gender-neutral cases*

As of this writing, labor unions and human rights groups have filed several petitions concerning labor practices in Mexican maquiladoras with the U.S. NAO,<sup>214</sup> of which five decisions have been issued.<sup>215</sup> None of the NAOs has initiated proceedings on its own initiative;<sup>216</sup> all the proceedings have begun at the initiative of outside party

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210. See *id.* (stating that women who work in the informal sector are vulnerable to exploitation because formal sector protections are not available to them).

211. See *id.* at 54 (identifying informal production conditions as “precarious” and stating that informal sector wages can drop far below minimum legal levels).

212. See *id.* (finding that female informal workers who work at home lack political clout because they are isolated from each other and thus are unable to form organizations to lobby on their own behalf).

213. See Barbieri, *supra* note 40, at 529 (characterizing informal workers as lacking formal workplace protections, including labor union representation). Labor unions often restrict membership to workers in certain sectors of the economy, and informal and domestic sphere labor is often not included. See *id.* at 538. Because informal sphere workers are primarily women, these policies disproportionately exclude women. See *id.*

214. See, e.g., U.S. National Administrative Office, *Report on Ministerial Consultations on Submission #94003 Under the North American Agreement on Labor Cooperation*, at 1 (Bureau of International Labor Affairs, U.S. Dept. of Labor, June 4, 1996) [hereinafter *Ministerial Consultations #94003*] (providing the results of Ministerial Consultations with Mexico) (on file with the *American University Law Review*); *Public Communication #9701*, *supra* note 123, at 4; Lance Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 174 (1995) (analyzing the first U.S. NAO submissions).

215. See U.S. National Administrative Office, *Public Report of Review, NAO Submission #94001 and NAO Submission #94002* at 30-31 (Bureau of International Labor Affairs, U.S. Dept. of Labor, Oct. 12, 1994) [hereinafter *Public Report #94001 and #94002*] (reporting NAO findings); U.S. National Administrative Office, *Public Report of Review, NAO Submission #94003*, at 24-31 (Bureau of International Labor Affairs, U.S. Dept. of Labor, April 11, 1995) [hereinafter *Public Report #94003*] (reporting NAO findings); *Public Report #9701*, *supra* note 137, at 43-46 (reporting NAO findings); U.S. National Administrative Office, *Public Report of Review, NAO Submission #9702*, at 20-22 (Bureau of International Labor Affairs, U.S. Dept. of Labor, April 28, 1998) [hereinafter *Public Report #9702*] (reporting NAO findings); U.S. National Administrative Office, *Public Report of Review, NAO Submission #9702-Part II: Safety and Health Addendum*, at 20-22 (Bureau of International Labor Affairs, U.S. Dept. of Labor, August 11, 1998) [hereinafter *Public Report #9702(II)*] (reporting NAO findings); U.S. National Administrative Office, *Public Report of Review, NAO Submission #9703*, at 71-72 (Bureau of International Labor Affairs, U.S. Dept. of Labor, July 31, 1998, revised August 21, 1998) [hereinafter *Public Report #9703*] (reporting NAO findings) (on file with *American University Law Review*).

216. See U.S. National Advisory Committee, *Report of the United States National Advisory Committee Reviewing the First Four Years of Operation of the North American Agreement on Labor Cooperation* 27 (April 15, 1998) [hereinafter U.S. National Advisory Committee] (on file with the *American University Law Review*) (evaluating the NAALC’s operation and effectiveness).

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submissions. Although only one of the completed cases addressed a topic specifically related to women, the others are relevant to the NAALC's effect on female workers because the decisions affect the large number of women working in maquiladora factories, including their ability to participate in and benefit from union membership<sup>217</sup> as well as gain adequate health and safety protection in the workplace.<sup>218</sup> The gender neutral maquiladora cases that the U.S. NAO has decided are also noteworthy because they demonstrate the NAO's growing level of knowledge and concern about union conditions in Mexico.<sup>219</sup> A maquiladora-related petition that concerned pregnancy discrimination is the only petition to address explicitly an issue concerning female workers.<sup>220</sup>

A number of the maquiladora-related petitions examined alleged violations of maquiladora workers' freedom of association by Mexican affiliates of U.S. companies.<sup>221</sup> The first case decided by the U.S. NAO involved workers in maquiladoras that make parts for General Electric ("GE") and Honeywell corporations.<sup>222</sup> According to the petitions filed by U.S. labor unions with the U.S. NAO,<sup>223</sup> maquiladora management illegally fired workers for attempting to organize and join independent factory unions.<sup>224</sup> The U.S. NAO found that factory operators had offered severance pay to the dismissed workers in accordance with Mexican labor law,<sup>225</sup> and concluded that the workers' acceptance of the pay precluded a finding that Mexico had

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217. See *Public Report #94001 and #94002*, *supra* note 215, at 9-13 (discussing alleged abuses against the right to organize collectively); *Public Report #94003*, *supra* note 215, at 3; *Public Report #9702*, *supra* note 215, at 20-22.

218. See *Public Report #9702(II)*, *supra* note 215, at 42-43 (questioning whether Mexican workplace health and safety inspection procedures adequately protected workers in a Han Young assembly plant).

219. See *Public Report #9702*, *supra* note 215, at 16 (referring to the U.S. NAO's decision in its Public Report on Submission #94003). This trend was demonstrated in a recent case, concerning alleged freedom of association violations in a Hyundai supplier's maquiladora, where the U.S. NAO made detailed reference to the fact that a previous submission had complained of a similar union organizing obstacles. See *id.* (recounting past complaints about CAB procedures that the NAO had reviewed).

220. See *Public Communication #9701*, *supra* note 123, at 4.

221. See, e.g., *Public Report #94001 and #94002*, *supra* note 215, at 9-13 (discussing freedom of association rights in Honeywell and General Electric maquiladoras); *Public Report #94003*, *supra* note 215, at 3 (regarding Sony maquiladora); *Public Report #9703*, *supra* note 215, at 2 (involving Echlin affiliate maquiladora).

222. See Murphy, *supra* note 1, at 415 (describing the first complaints registered under NAALC grievance procedures, which complainants filed on February 14, 1994).

223. See NAFTA'S FIRST YEAR: LESSONS FOR THE HEMISPHERE 15 (Sarah Anderson & John Cavanagh eds., 1994) [hereinafter NAFTA FIRST YEAR] (stating that Teamsters filed against Honeywell's plant and United Electrical, Radio, and Machine Workers of America filed against General Electric's ("GE") plant).

224. See Compa, *supra* note 214, at 165-66.

225. See NAFTA'S FIRST YEAR, *supra* note 223, at 18 (describing the U.S. NAO's reasoning in the GE/Honeywell case).

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failed to enforce its labor laws in violation of the NAALC.<sup>226</sup> Despite a finding of facial compliance with Mexican labor law, the U.S. NAO nonetheless found that Mexican labor authorities had employed questionable labor practices.<sup>227</sup> This was especially true in the state-dominated makeup of Mexico's labor tribunals, the Arbitration and Conciliation Boards ("CABs"),<sup>228</sup> and procedural barriers that make it difficult to establish independent unions.<sup>229</sup> In order to address these and related issues, the U.S. NAO suggested informal, bilateral educational programs that would highlight the importance of freedom of association rights.<sup>230</sup> Despite its findings of possible irregularities, the NAO refrained from making a formal finding that Mexican authorities had failed to enforce their labor laws and also declined to request further action, such as Ministerial Consultations.<sup>231</sup> Labor advocates viewed this outcome as unsatisfactory, believing that the U.S. NAO did not critically examine either the legality of the dismissals or the role of the Mexican government in suppressing workers' right to freedom of association.<sup>232</sup>

The second U.S. NAO decision concerned workers' freedom of association rights in a maquiladora owned by a U.S. Sony affiliate.<sup>233</sup> The labor unions and human rights groups that filed the petition<sup>234</sup>

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226. See Murphy, *supra* note 1, at 416-17 (noting that the U.S. NAO did not address whether GE or Honeywell violated Mexican law because the focus of NAO inquiries is on the behavior of the signatory government).

227. See Compa, *supra* note 214, at 175-76 (citing U.S. National Administrative Office, *Public Report of Review, NAO Submission #94001 and NAO Submission #94002*, at 29 (Bureau of International Labor Affairs, U.S. Dept. of Labor, Oct. 12, 1994)).

228. See *id.* (quoting the U.S. NAO); see also Murphy, *supra* note 1, at 417 (describing criticisms of the U.S. NAO's assessment of the Mexican government's preferential treatment of official unions). CABs are Mexican labor tribunals that handle allegations of labor violations. See Compa, *supra* note 214, at 172.

229. See Murphy, *supra* note 1, at 417 (relating the U.S. NAO's description of barriers to recognition by independent unions and harassment of union organizers). To function officially and obtain the power to sign and enforce contracts, all Mexican unions must apply to and register with the Mexican Labor Secretariat. See Muniz, *supra* note 33, at 386. Mexican labor officials routinely deny independent unions' efforts to register solely on the basis of management objections, without proper investigation, or on the basis of petty mistakes in written application materials. See *id.* at 386 (describing the rejection of an independent union's attempt to register because of a misplaced comma in the registration document).

230. See Compa, *supra* note 214, at 176 (describing the outcome of the GE/Honeywell case).

231. See JEROME LEVINSON, *NAFTA'S LABOR SIDE AGREEMENT: LESSONS FROM THE FIRST THREE YEARS* 18 (1996) (discussing the shortcomings of the NAO's decision).

232. See *NAFTA'S FIRST YEAR*, *supra* note 223, at 17 (criticizing the U.S. NAO's finding that, because dismissed workers had unimpeded access to Mexican legal remedies, there was no violation of their rights).

233. See LEVINSON, *supra* note 231, at 1 (describing the background of the Sony case).

234. See *Ministerial Consultations #94003*, *supra* note 214, at 1 (listing the filing parties as the International Labor Rights Education and Research Fund, the Asociación Nacional de Abogados Democráticos, the Coalition for Justice in the Maquiladoras, and the American Friends Service Committee).

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alleged, as in the General Electric/Honeywell case, that maquiladora officials fired and intimidated employees attempting to organize an independent union.<sup>235</sup> The petitioners alleged that plant officials interfered with a union election<sup>236</sup> and enlisted the help of Mexican police forces to suppress violently a work stoppage and employee demonstration.<sup>237</sup> Unlike its findings in the GE/Honeywell case, the U.S. NAO in this instance found that independent union organizers faced procedural problems that were serious and significant enough to warrant Ministerial Consultations.<sup>238</sup> The U.S. NAO also expressed concern about the allegations of violent conduct by Mexican police authorities.<sup>239</sup> The Mexican government agreed to the U.S. NAO's suggestion of Ministerial Consultations, which were then completed in May 1996.<sup>240</sup>

In March 1996, U.S. Secretary of Labor Robert Reich, in response to communications from the original submitters, directed the U.S. NAO to continue to observe union registration activities in Mexico even after the publication of Ministerial Consultation results.<sup>241</sup> The U.S. NAO released a follow-up report in response to this request in December 1996, which included information about recent Mexican Supreme Court cases and labor legislation.<sup>242</sup>

Another maquiladora case, although not specifically involving women, also concerned the suppression of independent union organizing efforts in a maquiladora. This petition grew out of activities in a Han Young car chassis assembly.<sup>243</sup> Workers in the plant attempted to organize an independent union, which they hoped would represent them more effectively than had the government-

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235. See *id.* at 4-5 (finding that maquiladora management intimidated employee leaders through demotions, threats of dismissal, and outright dismissal).

236. See *id.* at 5 (reporting that some employees did not receive notice of the election and that voting was not conducted by secret ballot).

237. See *id.* (reporting that police actions injured several workers); Eyal Press, *Mexico's Unionization Struggle*, CHRISTIAN SCIENCE MONITOR, Aug. 29, 1995, at 18 (finding that the majority of the injured workers were women and that police used fire hoses and riot gear against them).

238. See U.S. National Administrative Office, *Follow-Up Report, Submission No. #94003*, at 2 (Bureau of International Labor Affairs, U.S. Dept. of Labor, Dec. 4, 1996) [hereinafter *Follow-Up #94003*] (summarizing the U.S. NAO's recommendations) (on file with *American University Law Review*).

239. See *Public Report #94003*, *supra* note 215, at 29 (describing local news reports that supported the employees' allegations of police violence).

240. See *Follow-Up #94003*, *supra* note 238, at 2-3 (describing the completion of the Ministerial Consultation implementation agreement and publication of connected documents on May 10, 1996).

241. See *id.* at 3.

242. See *id.*

243. See *Public Report #9702*, *supra* note 215, at 3 (discussing the factual background of the submission). Han Young is a supplier for Hyundai Corporation. See *id.*

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affiliated union which formally represented the plant.<sup>244</sup> The independent union registered with the proper Mexican authorities and won plant representation elections that established its membership base at the factory.<sup>245</sup> The local CAB labor tribunal nullified the independent union's election victory on technical grounds, but the Mexican government intervened and convinced the factory and union representatives to hold a new representation election, which the independent union also won.<sup>246</sup> The U.S. NAO submission alleged that factory management was unwilling to negotiate with the new union and continued to harass union workers, and that the CAB had violated procedural guarantees.<sup>247</sup>

The U.S. NAO found that the CAB's post-election hearing procedures were transparent and thus did not violate NAALC requirements for procedural access.<sup>248</sup> The NAO also found, however, that the laws regulating union representation elections were inconsistent with the NAALC because they permitted CABs to apply arbitrary and vague standards to unions applying for registration.<sup>249</sup> In arriving at this conclusion, the NAO specifically referred to its findings in the Sony case regarding procedural obstacles to union organization in Mexico,<sup>250</sup> which may indicate the development of U.S. NAO jurisprudence. Finally, the NAO acknowledged programs that the Mexican government has undertaken in apparent recognition of the shortcomings that exist in CAB procedures.<sup>251</sup> The NAO recommended holding Ministerial Consultations to explore options for making CAB procedures more regular and objective.<sup>252</sup>

The U.S. NAO released additional Han Young findings in a separate decision, which was the first U.S. NAO report to address health and safety issues.<sup>253</sup> The facts of these allegations grew out of

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244. *See id.* at 4-5 (referring to a PRI-affiliated union that purportedly represented Han Young workers).

245. *See id.* at 6-8 (reporting that organizers complied with the complicated registration and certification process required for establishing new unions).

246. *See id.* at 8-9 (reporting actions by the CABs).

247. *See id.* at 10.

248. *See id.* at 46.

249. *See id.* at 46-47.

250. *See id.* at 33-36 (referring to the Sony decision's findings, including the difficulty of gaining certification for independent unions, the pro-government membership of many CABs, and the inconsistent application of Mexican labor laws by CABs).

251. *See id.* at 47 (mentioning activities by the Mexican federal government, including recommendations for improving the operation of local-level CABs, such as the one at issue in the Han Young case).

252. *See id.* at 21.

253. *See Public Report #9702(II)*, *supra* note 215, at 1 (explaining that the U.S. NAO released two separate decisions because it received an addendum to the Han Young original submission several months after the original filing).

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events in the same Han Young factory and focused on harmful work conditions<sup>254</sup> and the lack of safety procedures and devices.<sup>255</sup> The report also described Mexican workplace safety and health inspections, reporting that Mexican authorities had inspected and fined the Han Young factory several times for unsafe working conditions.<sup>256</sup> The U.S. NAO's decision focused on the efficacy of the Mexican government's actions, finding that Mexico had taken steps to improve work conditions throughout the country by passing new laws.<sup>257</sup> The NAO found, however, that although several inspection reports of the Han Young plant were substantially in compliance with Mexican labor laws and had detected many of the serious problems in the plant of which workers had complained, other reports did not adequately note the existence of safety hazards in the plant.<sup>258</sup> In addition, despite evidence of inspections and the imposition of fines, it was unclear whether Mexican authorities had enforced the fines. The NAO also noted that the factory failed to correct many serious problems even after fines had been levied.<sup>259</sup> According to the NAO, these unsatisfactory results indicated that Mexican inspection and enforcement procedures lacked effective deterrent value.<sup>260</sup> As a result, the U.S. NAO found that Ministerial Consultations, discussing the final resolution of health and safety claims against the Han Young plant and examining ongoing Mexican governmental efforts to ensure the effectiveness of workplace health and safety laws, would enhance efforts to implement the NAALC.<sup>261</sup>

The most recent U.S. NAO decision as of this writing resulted from events that occurred at an Echlin subsidiary maquiladora.<sup>262</sup> The report noted that, similar to the Han Young case, workers at the plant petitioned for a representation election in an attempt to supplant a

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254. *See id.* at 2-4, 26-32 (citing workers' allegations that they suffered from respiratory and hearing problems, broken bones from falling equipment that was not properly secured, and burns).

255. *See id.* at 2-4, 29-33 (reporting workers' testimony regarding the lack of safety equipment for welders, which resulted in frequent burns, and insufficient ventilation equipment).

256. *See id.* at 31-40 (describing questionable inspection procedures such as giving advance notice before government inspections).

257. *See id.* at 42 (referring to the April 1997 passage of the Federal Regulation on Safety, Health, and the Workplace).

258. *See id.* at 38.

259. *See id.* at 42 (reporting that Mexican authorities had levied \$9400 in penalties against Han Young but that it was unclear if the original fines were collected).

260. *See id.* (indicating the importance of fine enforcement against factories that violate labor standards in order to regulate workplace conditions effectively).

261. *See id.* at 43 (describing proposed objectives of Ministerial Consultations).

262. *See Public Report #9703, supra* note 215, at 2 (noting that Echlin is a U.S. corporation that makes and sells automobile components).



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government-affiliated union with an independent union.<sup>263</sup> Their efforts met with management-sponsored intimidation<sup>264</sup> and CAB procedural impediments,<sup>265</sup> which may have contributed to the independent union's defeat in the representation election.<sup>266</sup> In addition, plant management dismissed fifty workers for their support of the new union before the election,<sup>267</sup> and several workers who attempted to distribute information outside another Echlin subsidiary plant after the representation election were physically attacked.<sup>268</sup> Additional problems that the report addressed were dangerous workplace conditions, including improper exposure to asbestos, and the effectiveness of Mexican workplace safety and health inspections, which had resulted in only approximately \$200 in fines for consistent and serious health and safety violations.<sup>269</sup> The U.S. NAO found that the Mexican authorities had not acted in a manner consistent with the NAALC requirement to protect workers' right to freedom of association or to ensure that the Echlin subsidiary complied with health and safety laws.<sup>270</sup> It based this decision on the questionable decisions of the CAB, which included the failure to censure improper management conduct, the failure of Mexican authorities to intervene on behalf of the workers who were attacked

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263. *See id.* at 4 (noting that workers were aware that a PRI-affiliated union existed but did not possess information about the collective bargaining agreement).

264. *See id.* at 5-7 (reporting that about 170 "armed thugs" appeared at the factory on the day of the representation election for the new union and that workers were forced to use open ballots, which allowed management personnel to observe and record how they voted).

265. *See id.* (discussing the CAB's decision to postpone the scheduled election date by more than a week and its subsequent failure to inform representatives of the independent union about the rescheduled date). The CAB in question also did not notify union representatives about a hearing it held to review the election outcome and examine claims of improper management activities. *See id.*

266. *See id.* at 6 (highlighting that the final election tally was 179 for the PRI-affiliated union and 29 for the independent union).

267. *See id.* (noting that twenty-two workers sought reinstatement from a federal CAB and the rest chose to accept the company's offer of severance pay). Management dismissed the workers based on an "exclusion clause" in their contracts, which allowed the official union at the factory, affiliated with the PRI, to expel workers from the union, and thus, from their jobs, for violating union by-laws. *See id.* at 43. The Mexican Supreme Court has held that a union's invocation of the exclusion clause based on the way a member votes in a representation election, may be considered an impermissible "reprisal" against the worker's exercise of a constitutional right. *See id.* at 44 (citing *Amparo Indirecto 2609/87, Sindicato Nacional Independiente de Trabajadores de la Industria Automotriz, Similares, y Conexos*, 15 agosto de 1988, *Semanario Judicial de la Federación*, Octava Época, Tomo II, Primera Parte, julio-diciembre de 1988, at 277). This decision is not binding, but the U.S. NAO treated it as instructive about what may qualify as an inappropriate use of the exclusion clause. *See id.*

268. *See id.* at 46-47 (characterizing the violence at the other plant as an "ancillary, but relevant, issue" because of its implications that government authorities may fail to ensure workers' right to engage in lawful public informational activities).

269. *See id.* at 4 (alleging that workers were required to work with toxic substances without proper protection and in poorly ventilated areas).

270. *See id.* at 71.

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while distributing information, and the imposition of minimal fines for health and safety violations.<sup>271</sup> As a result, the NAO recommended Ministerial Consultations to examine: management activity during the election, the dismissal of the fifty workers, methods of redress for complaints against CABs, health and safety issues in the plant, and the effectiveness of health and safety enforcement measures.<sup>272</sup>

These four cases, although not dealing specifically with women's issues, are significant to female maquiladora workers because they highlight the importance of freedom of association in maquiladoras and focus attention on maquiladora health and safety issues. These are problems of general concern that affect all maquiladora workers, including the many women who work in such factories. These submissions appear to have caught the attention of the U.S. NAO, which responded with particular concern in the Sony, Han Young, and Echlin cases by recommending Ministerial Consultations,<sup>273</sup> the next available step of the NAALC enforcement procedures. This indicates that the U.S. NAO is at least willing to employ the next available level of NAALC enforcement, and is doing so on a regular basis. Hopefully, these and similar cases will continue to focus attention on freedom of association and health and safety concerns, leading to greater public concern and increased willingness by Mexican authorities and maquiladora management to improve working conditions.

One problem with the NAALC that may hinder workers' ability to gain effective relief, however, is that Ministerial Consultations are the highest level of review available for the allegations of freedom of association violations.<sup>274</sup> If more stringent measures were available against Mexico for the violation of these rights, including sanctions, problems with CABs, management intimidation, and violence against workers might be addressed more rigorously.

In contrast, the NAALC provides additional recourse beyond Ministerial Consultations for health and safety violations. These include ECEs<sup>275</sup> and sanctions, which are available for a "persistent

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271. See *id.* (citing concerns about various aspects of the union organizing effort).

272. See *id.* at 71-72 (suggesting goals of the proposed Consultations).

273. See *Public Report #9702*, *supra* note 215, at 48 (recommending Ministerial Consultations in the Han Young case); *Public Report #94003*, *supra* note 215, at 32 (recommending Ministerial Consultations in the Sony case); *Public Report #9703*, *supra* note 215, at 72 (recommending Ministerial Consultations in the Echlin case).

274. See NAALC, *supra* note 3, art. 22 (establishing Ministerial Consultations as the final remedy available under the NAALC for freedom of association violations).

275. See *id.* art. 23 (discussing the establishment of ECEs).

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pattern of failure” to enforce related health and safety laws.<sup>276</sup> The fact that the U.S. NAO has accepted two health and safety submissions and determined that further review is appropriate<sup>277</sup> indicates that it is, at the very least, willing to address problems in this area. It remains to be seen if the NAO will be willing to pursue additional levels of enforcement, such as ECE review or penalties, if Mexican authorities do not adequately address the U.S. NAO’s concerns in this area.

## 2. *The pregnancy discrimination case*

In addition to the previous cases, which addressed the impact of labor rights violations from a gender-neutral point of view, a recent U.S. NAO public report of review addressed maquiladora hiring and employment practices that discriminate against female workers on the basis of pregnancy.<sup>278</sup> Unlike the other maquiladora-related submissions, this case explicitly raised the issue of sex-based employment discrimination.<sup>279</sup> The submission alleged that, in order to avoid government-mandated maternity leave costs,<sup>280</sup> maquiladora managers required female applicants and employees to take pregnancy tests, submit to physical exams, and answer questions about their sexual activity, menstrual schedules, and use of birth control.<sup>281</sup> The petition further stated that maquiladora managers refuse to hire pregnant applicants and attempt to coerce female employees who become pregnant into resigning by giving them work that is physically demanding and by requiring unpaid overtime.<sup>282</sup>

The U.S. NAO held public hearings and released its report on

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276. See *id.* art. 39 (discussing the standards and procedures for applying penalties).

277. See *Public Report #9702(II)*, *supra* note 215, at 43 (recommending Ministerial Consultations for health and safety matters in the Han Young case); *Public Report #9703*, *supra* note 215, at 72 (recommending Ministerial Consultations for health and safety matters, among others, in the Echlin case).

278. See *Public Report #9701*, *supra* note 137, at 2.

279. See *id.* at 2-3.

280. See *Public Communication #9701*, *supra* note 123, at 19 (citing Article 123(A)(V) of the Mexican Constitution and Articles 170(1)(II) and (IV)(II) of the Federal Labor Law). Mexican labor law entitles pregnant employees to maternity leave that includes full wages paid by their employers. See *id.* Women who have worked for an employer for more than thirty weeks in the previous twelve-month period receive subsidies that are shared by their employers and the government Social Security System. See *id.* at 19-20. Women who have not worked for the thirty-week period, however, receive maternity subsidies that are paid entirely by their employers. See *id.* at 20. Because employers are unwilling to pay the entire cost of employee maternity leave, they justify testing female applicants for pregnancy as a way to avoid the financial hardship associated with newly-hired employees who require pregnancy benefits. See *id.*

281. See *id.* at 20-21.

282. See *id.* at 22 (claiming that managers mistreat pregnant workers in order to dissuade other female employees from becoming pregnant).

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January 12, 1998.<sup>283</sup> The NAO focused its analysis on the legality of pregnancy discrimination under Mexican law, because the NAALC does not apply unless a violation of the law occurs.<sup>284</sup> It found that employment discrimination against pregnant workers violates Mexican labor laws that prohibit dismissal or discrimination against pregnant current employees.<sup>285</sup> Although some women obtained relief for illegal dismissals through CABs, the NAO found that the available venues for reporting violations are not widely accessible to maquiladora workers, who are often incapacitated by little education, poverty, and the fear of being labeled as troublemakers by maquiladora managers.<sup>286</sup> The NAO's findings about discrimination against pregnant women were less decisive, due to conflicting opinions about the legality of practice.<sup>287</sup> Although job applicants are not formally protected by Mexican labor laws because they lack contracts, the U.S. NAO looked to international agreements and Mexican governmental bodies that have questioned the validity of the practice.<sup>288</sup> In order to further investigate the legality of pre-hire pregnancy testing and to more thoroughly examine the availability of redress for illegally dismissed pregnant women, the U.S. NAO recommended Ministerial Consultations.<sup>289</sup>

This decision is especially significant for female maquiladora workers because of its focus on an aspect of maquiladora employment that specifically affects women. The U.S. NAO's attentive handling of the case, especially its willingness to look beyond Mexican federal law to international law documents and non-legal Mexican sources for opinions about pre-hire pregnancy discrimination,<sup>290</sup> demonstrates that the NAO system can be responsive to problems of gender discrimination. This decision also shows that advocacy groups are responsive enough to female workers' concerns to file submissions on women's behalf.<sup>291</sup> As with the maquiladora submissions concerning freedom of association, however, the lack of sanctions available under NAALC procedures for

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283. See *Public Report #9701*, *supra* note 137, at 47.

284. See *id.* at 33-43 (describing the NAO's analysis of how Mexican law treats discrimination against pregnant workers and job applicants).

285. See *id.* at 43-44 (reporting findings of post-hire discrimination analysis).

286. See *id.* at 42-43.

287. See *id.* at 44.

288. See *id.* at 34-41 (considering the prohibitions against gender-based discrimination in CEDAW and ILO Convention 111, and the finding by the Human Rights Commission of the Federal District of Mexico that disapproved of pregnancy screening by governmental agencies).

289. See *id.* at 45-46.

290. See *id.* at 35 (discussing sources of disapproval for the practice of pre-hire screening).

291. See *id.* at 2 (reporting that the authors of the report were Human Rights Watch, the International Labor Rights Fund, and the Asociación Nacional de Abogados Democráticos).

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cases of gender discrimination may hinder truly effective enforcement of labor laws in the NAFTA free trade zone.<sup>292</sup> In addition, the NAO's difficulty with the legality of pre-hire pregnancy discrimination, because Mexican labor laws do not clearly prohibit this practice,<sup>293</sup> indicates the hazards of relying on an individual country's laws for enforcement of the workers' rights standards that the NAALC protects.

#### IV. RECOMMENDATIONS

It should be noted that, despite the problems outlined here, the NAALC is a significant step toward greater recognition and enforcement of workers' rights, including those of female workers.<sup>294</sup> There are, however, elements in both the NAFTA and the NAALC that do not adequately safeguard the working conditions and living standards of female maquiladora workers, as well as other female workers in Canada, Mexico, and the United States. There are several steps that should be taken to correct these shortcomings.

First, the NAALC should set uniform standards for workers' rights in all signatory countries, in addition to relying on national laws to protect and enforce workers' rights.<sup>295</sup> National laws in Mexico, as discussed, offer neither uniform nor adequate protection to workers. Uniform standards should be drafted with sensitivity to the different realities of work in the signatory nations and should set realistic standards that can be achieved by a majority of employers in all three countries. These standards, however, should be significant and specific and not merely empty suggestions. The signatory parties should also make commitments to treat universal standards as minimum levels to be actively exceeded, and not merely as a ceiling for workers' rights. It is especially important that uniform standards be set guaranteeing procedural rights for union activity, including minimum levels of due process and impartiality for grievance procedures. The NAALC should explicitly ensure the right to maternity and emergency family leave and the right to be free from

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292. See *supra* notes 103-04 and accompanying text (reporting that ECEs are the final enforcement procedure available to gender discrimination cases).

293. See *Public Report #9701*, *supra* note 137, at 44 (discussing conflicting opinions about the practice's permissibility).

294. See Herzstein, *supra* note 11, at 127 (listing equal pay for men and women and nondiscrimination as enumerated labor rights in the NAALC); see also Travis, *supra* note 5, at 192 (speculating that general workers' rights provisions in U.S. trade legislation may benefit women working in maquiladoras and other similar export-processing zones around the world by providing them with a tool for improving working conditions).

295. See NAALC, *supra* note 3, art. 2 (describing the parties' obligation to enforce national labor laws).

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sexual harassment, and it should require monitoring of small and micro-scale production facilities in the informal sector. In addition, the NAALC's prohibition against employment discrimination<sup>296</sup> should be clarified to include nondiscrimination in hiring, promotions, and job assignments. Finally, the NAALC should expand the number of rights that are eligible for arbitral panel consideration. This will help to encourage compliance by making more types of labor violations subject to monetary penalties when a party displays a persistent pattern of noncompliance, in accordance with the procedure for imposing fines.<sup>297</sup>

Second, the NAALC should ensure adequate union protection for women in all three signatory nations so that women have an opportunity to include their voice at the bargaining table.<sup>298</sup> It should do so by including enhanced procedural guarantees in the NAALC itself and by mandating national legislation in each signatory nation to ensure union rights. To obtain enhanced protection for women, the NAALC should provide standards that ensure union access to operate in facilities where women work, especially in maquiladoras and informal workshops.<sup>299</sup> The NAALC should also contain requirements that unions establish internal standards of conduct that provide adequate procedural protections for women during union elections and the opportunity to participate fully in the selection of union leadership. Unions must comply with the NAALC and national standards that prohibit sexual discrimination and harassment, thereby allowing female union members the freedom to participate and make their views known. Finally, unions should pledge to adopt policies that prioritize issues traditionally associated with women. As part of this commitment, unions should recognize the need to advocate actively on behalf of women's concerns during negotiations with employers.

Third, the NAALC should include explicit support for the adoption of nongovernmental organization ("NGO"), governmental, and corporate standards of conduct<sup>300</sup> by companies doing business in

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296. *See id.* Annex 1.

297. *See id.* art. 39.

298. *See supra* note 169 (discussing the low priority of female workers within Mexican unions).

299. *See Compa, supra* note 83, at 152-53 (claiming that female workers do not need special workplace protections if they have full access to union participation and can freely advocate for their concerns).

300. *See Compa, supra* note 1, at 130-31 (describing the "Maquiladora Standards of Conduct," which is a code of conduct for maquiladora operators promulgated by labor, religious, and environmental groups).

Multinational corporations traditionally have not acted as "moral agents" in countries where

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the NAFTA free trade zone. The NAALC's provisions should also call for national legislation that provides incentives to corporations that adopt voluntary, internal self-regulating guidelines and that pledge to support workers' rights actively.<sup>301</sup> It is essential that these corporate codes of conduct include guarantees of respect for union activity, zero tolerance for sex-based discrimination and harassment, compliance with environmental safety standards, and adequate guarantees of maternity, paternity, and family emergency leave. In addition, these standards of conduct should encourage financial contributions by corporations to the communities in which production facilities are located, including support for schools, health care, and environmental cleanup.

Finally, the NAALC should take greater steps to include NGOs, especially Mexican women's groups, in its procedural and substantive activities. These groups are already able to participate in the operation of the NAALC because they can submit petitions to NAOs alleging workers' rights violations in other signatory nations.<sup>302</sup> Because NGOs play a vital role in the promotion and protection of women's and workers' rights,<sup>303</sup> however, the NAALC should go

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they operate, nor have they been recognized as such. See Barbara A. Frey, *Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 156-57 (1997). This lack of involvement with national social conditions began to change, however, when human rights activists began to expose the role that multinational corporations played in supporting human rights violations. See *id.* at 157. The trend toward linking corporate behavior and social conditions has continued as the public and national governments have started to pay more attention to the role that globalization plays in the exercise of human rights around the world. See *id.* As a result of critical public opinion, many multinational companies have voluntarily adopted corporate codes of conduct for no reason other than to make the public feel more confident about purchasing their products. See *id.* at 157-58. Some of the leading codes of corporate conduct that are commonly used as models are those promulgated by Starbucks, Levi Strauss, and Reebok. See *id.* at 177.

Encouragement of corporate self-regulating efforts has come from many sources. Public opinion, mobilized by human rights groups, consumer product activists, religious groups, and labor unions, has been one of the most important factors. See *id.* at 159. The U.S. government has utilized legislative and informal policy activities to regulate the operation of U.S.-based corporations in countries with serious human rights violations and to encourage corporate responsibility. See *id.* at 168-73 (referring to the Anti-Apartheid Act of 1986, the Burma Freedom and Democracy Act, and other legislative and executive efforts concerning human rights). The United Nations, through its declarations and affiliated bodies, has also been active in encouraging corporate activity in this area. See *id.* at 165-67 (citing the U.N. Code of Conduct on Transnational Corporations, which requires multinational corporations to protect human rights).

301. There is precedent for official encouragement of corporate codes of conduct in the Clinton Administration's Model Business Principles ("Principles"), a voluntary set of guidelines for U.S. corporations that do business overseas. See Frey, *supra* note 300, at 172-73. The Principles have been criticized by human rights groups for being vague, and by business leaders for being anti-competitive. See *id.* at 173. Despite these complaints, the Clinton Administration plans to expand its efforts to encourage ethical corporate behavior. See *id.*

302. See Herzstein, *supra* note 11, at 126 (describing the role that outside organizations play in bringing labor violations to the attention of NAOs).

303. See, e.g., KAMEL, *supra* note 51, at 58 (describing feminist critiques of multinational

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further by explicitly recognizing them as important and legitimate voices on behalf of female workers and should encourage their role in the operation and enforcement of the NAFTA and the NAALC. This could be accomplished by providing government funding for ongoing educational programming that teaches workers about their rights and about the conditions of their counterparts in other signatory countries. U.S. and Mexican women's NGOs have already sponsored these types of programs,<sup>304</sup> but their efforts could be dispersed more widely and effectively with the assurance of government funding.

#### CONCLUSION

It is important not to lose sight of the advances that the NAALC represents for female maquiladora workers,<sup>305</sup> but, at the same time, the agreement's substantive and procedural shortcomings for women who work in Mexican maquiladoras should not be underestimated.<sup>306</sup> It is especially important to address these concerns now, because it is possible that the NAFTA, with its side agreements, could expand to

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corporations by women's groups throughout the Third World); Abbott, *supra* note 39, at 996-97 (stating that women's groups have been leaders in the increasing trend towards formal participation by NGOs in international law formulation); Compa, *supra* note 1, at 130-31 (describing the history of NGO activism on maquiladora issues); Compa, *supra* note 83, at 170-71 (describing the solidarity actions taken by U.S. unions on behalf of unionists in South Africa and Guatemala); Frey, *supra* note 300, at 159 (reporting that NGOs have pressured multinational corporations to consider the human rights situation of nations in which they operate); Zulficar, *supra* note 50, at 1029 (advocating that NGOs should play a formal role in the formation of international law because they are important advocates for women).

304. See, e.g., KAMEL, *supra* note 51, at 57-65 (describing cross-border solidarity efforts organized by Texas labor unions and religious groups); Abbott, *supra* note 39, at 997 (describing "transnational issue networks" that women's NGOs have sponsored in order to highlight women's concerns and develop strategies for addressing them more effectively); Compa, *supra* note 1, at 130-31 (reporting joint research and programming activities by labor unions and NGOs in Mexico and the United States).

Different organizations in Canada, Mexico, and the United States, including unions and religious groups, sponsored programs during the NAFTA negotiations in an effort to educate workers about the potential effects that the trade agreement could have on their livelihoods. See Laura Ho et al., *(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, 406-07 (1996). Several of these programs focused specifically on female workers. See *id.* For example, Mujer a Mujer (Woman to Woman) sponsored groups of U.S. and Canadian female workers who traveled to Mexico and spent time with Mexican women who work in maquiladora factories. See *id.* at 410 (reporting that Mujer a Mujer began as a support network for a Mexican garment laborers' union). Women who went on the trip reported that the trip showed them that the NAFTA would affect female workers in all three nations and that no one group of women could afford to isolate itself from the others because they all shared common concerns. See *id.* at 410-11.

305. See Murphy, *supra* note 1, at 406 (hailing the NAALC as an important breakthrough for workers' rights).

306. See Barbieri, *supra* note 40, at 563 (describing the NAFTA's potential effects as "bittersweet").



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include other nations within the hemisphere.<sup>307</sup> If this happens, the problems that Mexican female maquiladora workers have experienced under the NAFTA and the NAALC will affect even greater numbers of women working in similar export factories.<sup>308</sup> For example, the same concerns for female workers that exist in the current signatory nations regarding discriminatory labor laws and working conditions apply to expansion candidates.<sup>309</sup> The United States has indicated that it will invite Chile to be the next member of the NAFTA,<sup>310</sup> with Argentina potentially to follow.<sup>311</sup> This may still occur, despite Chile's hesitance to negotiate without U.S. fast track authority.<sup>312</sup> An additional obstacle to the expansion of the NAFTA is the U.S. Congress, which has proven unwilling to grant fast track renewal authority due to opposing concerns about, on the one hand, expanded free trade's detrimental effect on labor issues and, on the other hand, unwillingness to support fast track authority that would lead to additional labor agreements.<sup>313</sup> Alternatively, it is possible that the NAALC's structure may serve as a model for labor protections in

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307. See *id.* at 551 (reporting that Canada and the United States will require Chile to satisfy the NAFTA's requirements, including labor and environmental accords, before becoming a NAFTA member).

308. See Murphy, *supra* note 1, at 420 (reporting discussions of NAFTA expansion and the creation of a hemispheric Free Trade Area of the Americas trade agreement which would incorporate many other countries with maquiladora-like factories into trade pacts with the United States).

309. See Barbieri, *supra* note 40, at 527 (discussing patriarchal laws, inadequate union representation of women, and women's prominence in the informal economic sector as issues that concern female workers in Argentina and Chile); Murphy, *supra* note 1, at 420-21 (hypothesizing that concerns that precluded the NAFTA's passage will resurface when expansion negotiations begin).

For example, shortcomings exist in the national labor laws of Chile and Argentina. The laws of both nations prohibit sex discrimination and require equal pay for men and women. See Barbieri, *supra* note 40, at 545-46 (discussing anti-discrimination provisions in the constitutions and labor laws of Chile and Argentina). Both nations' laws, however, also include protective legislation that prohibits women from certain types of "dangerous" work, see *id.* at 546-47 (discussing Chilean and Argentine prohibitions against women working at night, working in mines, or working overtime), and mandate maternity leave policies that reinforce the images that women exist only as mothers. See *id.* at 546-48 (outlining Argentine and Chilean laws that give social services to and restrict employment for pregnant women and new mothers).

310. See *id.* (discussing Canadian, Mexican, and U.S. plans to begin expansion talks with Chile); Barbieri, *supra* note 40, at 526 (reporting that Presidents Clinton and Bush both indicated that Chile is the next likely candidate for NAFTA expansion).

311. See Barbieri, *supra* note 40, at 550 (indicating that NAFTA signatories may approach Argentina as an expansion candidate).

312. See Rafael X. Zahraiddin-Aravena, *Chilean Accession to NAFTA: U.S. Failure and Chilean Success*, 23 N.C. J. INT'L L. & COM. REG. 53, 100-01 (1997) (describing the Chilean reaction to the Clinton administration's failure to renew fast track).

313. See M. Jean Anderson, *Implications of NAFTA's Extension to Chile and Other Countries - A U.S. View*, 23 CAN.-U.S. L.J. 227, 230 (1997) (discussing differing motives that U.S. politicians have for opposing fast track renewal). As of this writing, Congress has not renewed fast track authority.

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the proposed Free Trade Agreement of the Americas,<sup>314</sup> a proposed hemispheric-wide free trade zone which thirty-four heads of state endorsed at the 1994 Summit of the Americas.<sup>315</sup> Without modification of the NAALC structure, this approach raises the same concerns as expansion of the NAFTA itself. The signatories should therefore, take steps now to make the NAFTA and the NAALC more responsive to and less problematic for female workers in case new countries join the agreement.

An opportunity to make these changes currently exists. The NAALC requires its governing body, the Ministerial Council, to conduct a review of the NAALC's "operations and effectiveness" after four years of existence.<sup>316</sup> This review process is currently ongoing.<sup>317</sup> As a part of this evaluation, the council will be able to reconsider the effectiveness of the NAALC and suggest necessary changes, such as those that would benefit female maquiladora workers.

The U.S. NAO's National Advisory Committee recently submitted an advisory report to the NAO with its recommendations for changes and improvements in the application and substance of the NAALC.<sup>318</sup> Unfortunately, its recommendations do not discuss women specifically, or any other group that may be suffering a particular detriment under the NAFTA. The report advocates, however, that the evaluation process should critically examine how well the NAALC's substance and procedures fulfill in practice the objectives it sets out for itself.<sup>319</sup> It also endorses an interpretation of the NAALC that would extend ECE review and sanctions to a much broader scope of NAALC-violative activity.<sup>320</sup> These are constructive ideas, which the council's evaluation process should consider and expand on to make the NAALC more responsive to female workers.

If the NAALC incorporates changes that make its terms more helpful to female maquiladora workers, its actions may highlight the

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314. See Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 472 (1995) (hypothesizing what models the Free Trade Agreement of the Americas may adopt for labor rights enforcement).

315. See *id.* at 427-28 (discussing origins of FTAA).

316. See NAALC, *supra* note 3, art. 10(1)(a) (laying out the functions of the Ministerial Council).

317. See U.S. National Advisory Committee, *supra* note 216, at 1-2 (discussing the review process and activities taken in compliance with such).

318. See *id.* at 35-38 (listing recommendations).

319. See *id.* at 37-38 (endorsing a comprehensive review of all aspects of NAALC implementation).

320. See *id.* at 30-31, 38 (suggesting that NAOs apply the phrase "persistent pattern of failure . . . to enforce" workers' rights, the trigger standard for imposition of sanctions, to a wider sphere of activity, including governments' failure to ensure due process and lack of transparency, when determining if a government has violated one of the protected rights).

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need for more attention to be focused on women's concerns throughout the world. This could lead to additional positive changes in both national and international fora that might help women to continue to gain recognition as human beings who deserve their fair measure of rights and dignity.