Pregnancy Discrimination in Mexico: Has Mexico Complied With the North American Agreement on Labor Cooperation?

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I. Introduction

> When I was being hired, after the interview, they asked me when I would have my next period . . . . They said I couldn't actually start work until I had my period. [I]t was still three weeks away so I had to wait. On the first day of my period, I came back. The nurse was there and she said, "Let's see it. Show me the sanitary napkin." They accepted me that same day.[1]

Pregnant women are routinely denied employment in Mexican maquiladoras[2] located along the United States-Mexico border. Maquiladoras obtain information on whether female job applicants are pregnant by requiring them to submit to pregnancy tests and to reveal information about menstruation and sexual activity during the job application process.[3] These practices are disturbing because pregnant women who apply for work in maquiladoras are generally poor and unable to obtain employment in other parts of the formal sector.[4] Without a position in the formal sector women are not eligible for government-mandated maternity benefits, and as a result are placed in a desperate economic situation.[5] This is particularly serious because a significant number of women who seek work at maquiladoras are single mothers who

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1. David Bacon, *Evening the Odds: Cross-Border Organizing Gives Labor a Chance*, THE PROGRESSIVE, July 1997, *available in* LEXIS, News Library.

2. Maria Elena Gómez Montoy, *Mexico: Selling to Maquiladoras*, FINANCIAL TIMES ASIA INTELLIGENCE WIRE, Oct. 16, 1996, *available in* LEXIS, News Library; John E. Tarbox, *An Investors' Introduction to Mexico's Maquiladora Program*, 22 TEX. INT'L L.J. 109, 110 (1987). Mexico's maquiladora program was initiated in 1965 to increase foreign investment in Mexico. The program allows foreign companies to import materials and manufacturing components duty free on the condition that the finished product is re-exported. Many U.S. companies have established factories in Mexico to take advantage of the country's low labor costs. *Id.*

3. *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, 8 HUMAN RIGHTS WATCH, Report No. 6, August 1996, at 2.

4. *Id.* The term "informal sector" is commonly used to refer to self-employed persons or small businesses that are not regulated by Latin American governments. 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, 529 n.9 (1996).

5. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 2, 38, 42.

constitute the sole economic support for their families.[6]

Discrimination against pregnant job applicants in Mexico arguably violates the North American Agreement on Labor Cooperation (NAALC), which is the labor side agreement to the North American Free Trade Agreement (NAFTA).[7] The NAALC requires the parties to the agreement – Mexico, the United States and Canada – to effectively enforce their existing labor laws, and Mexican laws contain many provisions that protect women from employment discrimination based on sex.[8] In 1997, several non-governmental organizations joined together to bring this violation of the NAALC to the attention of one of the treaty's dispute resolution organs, the United States National Administrative Office (U.S. NAO).[9] The organizations requested that the U.S. NAO take action to require Mexico to remedy its violation of the treaty by enforcing its laws against pre-employment pregnancy discrimination.[10] When the U.S. NAO requested that the Mexican government respond to these allegations, Mexico briefly stated that pre-employment pregnancy discrimination does not violate its laws, or the NAALC, because pregnancy testing is legal and its labor law does not apply to job applicants.[11] The U.S. NAO accepted Mexico's blanket dismissal of the allegations, most probably for reasons of political expediency, and no further action has been taken to require Mexico to explain its position.

Mexico's evasive response to the U.S. NAO's well-founded allegations violates the NAALC. Although Mexican legal authorities do not agree on whether Mexican labor law applies to job applicants, and whether it prohibits administering pregnancy tests, there are sound and convincing arguments that it does. If Mexico is not required to supply a more in-depth and reasoned justification for its interpretation of its laws, the NAALC's requirement that the parties to the agreement effectively enforce their labor laws will prove meaningless. If a party can interpret its laws unreasonably then any failure in enforcement can be explained away through interpretation. Part II of this note provides information on the widespread discriminatory practices of the

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6. *Id.* at 4.

7. North American Agreement on Labor Cooperation [hereinafter NAALC], Sept. 14, 1993, entered into force on Jan. 1, 1994, U.S.-Mex.-Can., 32 I.L.M. 1499. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605.

8. NAALC, *supra* note 7, at art. 3. *See* Sections IV and V of this note for a discussion of Mexican law on pre-employment pregnancy discrimination.

9. HUMAN RIGHTS WATCH Women's Rights Project, HUMAN RIGHTS WATCH/Americas, International Labor Rights Fund, and Asociación Nacional de Abogados Democráticos, Submission Concerning Pregnancy-Based Discrimination in Mexico's Maquiladora Sector to the United States National Administrative Office (May 15, 1997). (unpublished document, on file with the U.S. NAO). [Hereinafter Submission]. The Submission was based on a HUMAN RIGHTS WATCH study that documented pregnancy discrimination in maquiladoras. 8 HUMAN RIGHTS WATCH, *supra* note 3.

10. Submission, *supra* note 9, at 4. (The Submission focused on discrimination against job applicants and employees. However, this note will exclusively address pre-employment discrimination. Pre-employment discrimination presents novel legal issues, and, in contrast, all parties agree that discrimination against employees is illegal. *Id.* at 38; Memorandum from Jorge Castañon Lara, Secretary of the Mexican National Administrative Office, to Irasema Garza, Secretary of the United States National Administrative Office (July 11, 1997) (on file with the U.S. NAO) [hereinafter July Memo]; United States National Administrative Office, Bureau of International Labor Affairs, United States Department of Labor, Public Report of Review of NAO Submission No. 9701, at 10 (Jan. 12, 1998) (unpublished document, on file with the U.S. NAO) [hereinafter Report of Review].).

11. July Memo, *supra* note 10, at 2-4.

maquiladora sector. Part III focuses on the NAFTA labor side agreement, its dispute resolution mechanisms and the pregnancy discrimination submission. Part IV argues that Mexican labor law does apply before an employment relationship has been established and demonstrates that there are persuasive arguments that pregnancy screening is illegal. Part V contends that Mexico has misconstrued its NAALC obligations in stating that it has full discretion to interpret its labor laws and by not ensuring access to its labor tribunals. Instead, Mexico must provide a full, public response to arguments that pre-employment pregnancy discrimination is illegal in order to satisfy its NAALC obligations.

II. The Maquiladora Sector and its Policy of Pre-Employment Pregnancy Discrimination

Maquiladoras are Mexican factories that are governed by a special legal regime that allows their owners to import raw materials and components duty-free as long as all finished products are exported.[12] These factories, which are mainly concentrated along the U.S.-Mexico border, play a significant role in the Mexican economy. Maquiladoras generate a large portion of Mexico's export income, provide employment and help Mexico weather economic crises. In the first quarter of 1997, maquiladoras produced over 58,000 new jobs and their exports constituted 40% of Mexico's sales for the period.[13] A 1998 report demonstrates that maquiladoras, which are mainly owned by U.S. companies,[14] contribute $29 billion dollars a year to the Mexican economy,[15] an amount that surpasses oil and tourism.[16] The Maquiladoras' economic contribution is especially important because it is relatively stable. It has grown when other parts of the Mexican economy have shrunk due to economic crises. While the peso devaluation of 1994 negatively affected most sectors of the economy, the maquiladora sector grew because it became less expensive for foreigners to invest in Mexico.[17] This factor has made the maquiladora sector the fastest growing industrial segment of the Mexican economy.[18]

Maquiladoras provide an important source of employment for young women with little schooling. A much higher proportion of women are employed in the maquiladora sector than in other parts of the formal Mexican economy. In January 1998, approximately half of the 900,000 people working in maquiladoras were women, and most female maquiladora workers interviewed in a recent study had not completed primary school.[19] On the national level, female participation in the formal sector is much lower.[20] A job at a

12. Gómez Montoy, *supra* note 2; Tarbox, *supra* note 2, at 110.

13. Diego Cevallos, Mexico-Economy: Social and Environmental Costs of Maquila Boom, INTER PRESS SERVICE, July 15, 1997, available in LEXIS, News Library.

14. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 10-11. ("In 1990, 90% of all maquiladoras were partially or completely owned by U.S. corporations . . . .").

15. Sam Dillon, *U.S. Review Finds Sex Bias in Mexico Plants*, AUSTIN AMERICAN-STATESMAN, Jan. 13, 1998, at A4.

16. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 8.

17. Gómez Montoy, *supra* note 2.

18. *Id.*

19. Mexico Seeks to Review U.S. Job Bias Report, REUTERS, Jan. 13, 1998 (visited Apr. 15, 1998), <http://www.infoseek.com>; 8 HUMAN RIGHTS WATCH, *supra* note 3, at 9.

20. National statistics on female employment in the formal sector are not available for 1998. However, information from past years indicates that it was much lower than female employment in

maquiladora is the best-paid position that most, if not all, undereducated women can obtain in Northern Mexico.[21] If a woman cannot work at a maquiladora, she will most probably only find an undesirable job in the informal sector as a maid, prostitute or street vendor.[22]

Women who seek work in maquiladoras are routinely subjected to pregnancy-based discrimination.[23] Information on whether an applicant is pregnant is obtained through different means depending on the individual maquiladora employer. Typically companies either test women's urine or ask intrusive questions to discover if a given applicant is pregnant.[24] Many companies have their own doctors or nurses administer a general health exam before an applicant is hired.[25] The pregnancy test is then administered in conjunction with other medical exams so the applicant is frequently unaware that her urine has been used to check if she is pregnant.[26] A doctor who worked at the Matsushita-Panasonic Plant in Tijuana in 1993 remarked, "When I first started working..., the director of personnel told me to make sure that I tested every single female applicant for pregnancy . . . [;] [i]t seemed that was all I did."[27] Maquiladora companies that do not perform urine tests either directly ask women whether they are pregnant during job interviews, or include questions about pregnancy on job applications.[28] Employment personnel ask the applicant whether she is sexually active, when she had her last period, and what type of contraception she uses.[29]

If a company discovers that a woman is pregnant she will not be hired. A maquiladora worker in Matamoros has stated, "Everyone knows not to even bother going [to the maquiladoras to look for work] if you are pregnant."[30] Some

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the maquiladora industry. Statistics issued by the Mexican government indicate that in 1995 35% of the female population participated in some form of economic activity in the formal or informal sector. PODER EJECUTIVO FEDERAL, ALIANZA PARA LA IGUALDAD: PROGRAMA NACIONAL DE LA MUJER, 1995-2000, 25 (1996). In 1990, 19.6% of the female Mexican population was employed. Daniel Cohén & Sara Elena Rabner, *Sensibilidad de la Participación Femenina en la Actividad Económica en México*, IDEA ECONÓMICA, Jan. 11, 1995, *available in* LEXIS, News Library.) *See* Barbieri, *supra* note 4 (defining "informal sector").

21. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 9-10. (In 1994, maquiladoras paid approximately five dollars and up a day. *Id.* at 11.).

22. 10 HUMAN RIGHTS WATCH, Report No. 1, *A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Sector 14* (1998). *See also* 8 HUMAN RIGHTS WATCH, *supra* note 3, at 9.

23. *See, e.g.*, 10 HUMAN RIGHTS WATCH, *supra* note 22, at 15-23; 8 HUMAN RIGHTS WATCH, *supra* note 3, at 14-22; Thalif Deen, *Companies Violate Rights of Pregnant Workers*, INTER PRESS SERVICE, Dec. 29, 1998, *available in* LEXIS, News Library; Susana Vidales, *No Mother's Day for Mexican Women Workers*, INTER PRESS SERVICE, Dec. 24, 1998, *available in* LEXIS, News Library; Karen Brandon, *Workers Say Enforcement is Lacking in Mexico*, CHICAGO TRIBUNE, Nov. 29, 1998, *available in* LEXIS, News Library; Laura Eggertson, *Pregnancy Test Common at Factories in Mexico*, THE TIMES UNION, Nov. 23, 1997, at B7; *Mexico Faces Double Protest Over Pregnancy Tests, Women's Rights, NAFTA Violated, Groups Contend*, THE ARIZONA REPUBLIC, Nov. 9, 1997, at A17.

24. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 15-16; 8 HUMAN RIGHTS WATCH, *supra* note 3, at 4.

25. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 15; 8 HUMAN RIGHTS WATCH, *supra* note 3, at 15.

26. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 16; 8 HUMAN RIGHTS WATCH, *supra* note 3, at 15.

27. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 15.

28. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 15; *Id.*

29. *Id.*

30. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 14.

maquiladoras are very up front with the requirement and explicitly tell women that they will not be hired if they are pregnant.[31] However, discrimination is sufficiently pervasive to be ascertained even among those maquiladoras that deny they discriminate.[32] Women interviewed in a 1996 study reported that the only women who are consistently denied employment in maquiladoras are the ones who are pregnant.[33]

Mexico has claimed that pregnancy discrimination is not a problem despite the Interior Ministry's statement in 1996 that "[t]o some extent . . . the requirement of a non-pregnancy certification to obtain employment persist[s]."[34] It refuses to acknowledge the principal study documenting pre-employment pregnancy discrimination, conducted by the non-governmental organization Human Rights Watch, because it only included 43 maquiladoras and approximately 50 maquiladora employees.[35] However, while the study did not include every maquiladora in Northern Mexico, virtually all the companies on which it did collect information discriminated against women. Of the 43 maquiladoras included in the study, only five did not appear to avoid hiring pregnant women.[36] Zenith, one of the companies included in the study, admitted, "It is common practice among Mexican and maquiladora employers in Matamoros and Reynosa to inquire about pregnancy status as a pre-existing medical condition . . . [;] these employers commonly do not hire women who are pregnant . . . ."[37] Almost all the women, government officials, community organizers, and the many additional groups interviewed reported that pre-employment pregnancy discrimination is the norm in the entire maquiladora sector.[38]

The primary reason that maquiladoras discriminate against pregnant women is because Mexico's protective labor laws impose a financial burden that businesses seek to avoid.[39] Either the employer or the Mexican Institute of

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31. *Id.* at 15.

32. *Id.*

33. *Id.*

34. Report of Review, *supra* note 10, at 22; July Memo, *supra* note 10, at 4 (denying that pregnancy discrimination is a frequent occurrence).

35. July Memo, *supra* note 10, at 3. (Human Rights Watch has now published a second study that documents additional instances of pre-employment pregnancy discrimination. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 15-23).

36. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 14-15.

37. *Id.* at 49.

38. *Id.* at 15-22, 36-44.

39. *Id.* at 2, 38, 42, 49. (Mexican legislation provides pregnant employees with specific and extensive legal protection. The Constitution discusses the rights of pregnant employees in Article 123(A), paragraph V, which states, "during pregnancy women shall not perform tasks that require considerable exertion and that constitute a danger to their health in relation to gestation; they shall have a mandatory rest period of six weeks before the estimated date of birth and six weeks after that same [date], during which they shall receive their entire salary and conserve their employment and the rights they acquired through the work relationship. During the period of lactation they shall have two extraordinary rest periods per day of a half an hour to feed their children;" CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUCIÓN] art. 123, § A, ¶ V (Mex.). The FLL then expands on Article 123 of the Constitution in Title V. For example, it provides that, "during pregnancy, women shall not perform tasks that require considerable exertion . . . such as lifting, throwing or pushing great weights . . . ." Ley Federal de Trabajo [L.F.T.] art. 170, ¶ 1 (Mex.). Pregnant women may not work over-time if it endangers their health or that of the fetus, L.F.T. art. 166, and if additional maternity leave, beyond the mandatory periods provided in the Constitution, is necessary for health reasons employers must pay the woman half of her salary, L.F.T. art. 170, ¶ V.

Social Security (Instituto Mexicano de Seguro Social) is responsible for paying for maternity benefits, depending on the employment history of the woman.[40] If the woman has made social security payments for at least thirty weeks during the twelve months prior to receiving maternity benefits, the Mexican Institute of Social Security pays for maternity leave.[41] Otherwise, it is the employer's obligation.[42] In effect, this means that employers are extremely reluctant to hire a woman who is pregnant, or likely to become pregnant shortly after starting a new job. Zenith explained that, "if it became the first company . . . to end pregnancy screening, it would expose itself to substantial financial liabilities to the social security system for maternity benefits."[43]

While protective pregnancy laws prevent employers from pressuring pregnant employees to minimize or not take pregnancy leave, they also make women of reproductive age less attractive as employees. A scholar, Antoinette Sedillo Lopez, has argued that instead of providing women with expanded opportunities, this legislation pushes pregnant women out of the workforce, thereby reinforcing male-headed family stereotypes.[44] Nevertheless, a large number of maquiladora employees are women, so there clearly are countervailing factors. The common perception that women are passive and unlikely to bring court cases or unionize may explain why maquiladoras consider women to be desirable employees.[45] However, the countervailing factors lead to job openings only for women who are not pregnant; in the absence of anti-discrimination laws, pregnant women are not hired.

III. The NAALC and the Pregnancy Discrimination Submission

A. The History, Structure and Goals of the NAALC

The NAALC was negotiated as a NAFTA "side" agreement, in response to the criticism that NAFTA's flexible trade regime would allow U.S. manufacturing facilities to rush to Mexico to take advantage of the country's

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According to the FLL, employees can only be fired for limited reasons that do not include pregnancy. L.F.T. art. 53. *See* Section IV.B of this note for further discussion of these protections.).

40. Ley de Seguro Social, art. 109-11 (Mex).

41. *Id.* at art. 110.

42. *Id.* at art. 111.

43. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 49.

44. 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, 253 (1991). *See, e.g.*, Lorraine Hafer O'Hara, *An Overview of Federal and State Protections for Pregnant Workers*, 56 U. CIN. L. REV. 757 (1987) (describing the history of pregnancy discrimination in the U.S. and documenting the balance found between over-protection and prevention of gender discrimination); Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986) (arguing that fetal vulnerability laws and policies can be overprotective and discriminate against pregnant women).

45. Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 244 (1990). *See, e.g.*, Ernesto Perea, *90% de las Obreras Son Víctimas de Acoso en sus Trabajos*, EL NACIONAL, Aug. 3, 1997, *available in* LEXIS, News Library (stating that 90% of women are subject to sexual harassment at work, but few report it).

lower labor costs and lax enforcement of labor laws.[46] American unions and other social groups insisted on the creation of the NAALC because they were afraid that their constituencies' jobs were threatened.[47] To address this concern, the NAALC obliges each party to the treaty – the United States, Canada and Mexico – to enforce its own domestic labor laws, including any international treaties therein.[48] The treaty states that "[e]ach Party shall promote compliance with and effectively enforce its labor law through appropriate government action."[49]

The NAALC clearly includes laws against employment discrimination within the scope of its enforcement mechanisms. The agreement defines "labor law" to include "laws and regulations, or provisions thereof, that are directly related to . . . [the] elimination of employment discrimination on the basis of grounds such as . . . sex, or other grounds as determined by each Party's domestic laws[.]"[50] However, while the NAALC provides for the enforcement of employment discrimination laws, it does not guarantee past or current levels of protection. The NAALC allows the Parties to change their laws.[51]

Parties, however, are not entirely free to change their laws to decrease protection against employment discrimination. One of the NAALC's stated objectives is to "promote, to the maximum extent possible," the "[e]limination of employment discrimination on grounds such as . . . sex . . . , subject to reasonable exceptions."[52] The right to modify laws is also qualified by the obligation to "ensure that . . . labor laws and regulations provide for high labor standards."[53] These statements, however, are not enforceable through the NAALC's dispute resolution mechanisms, and can only be addressed through general consultations.[54]

The NAALC's overriding goal is to make Parties accountable for enforcing their laws or failing to do so. The NAALC creates accountability by: (1) requiring governments to respond to allegations that they have not enforced their laws, and by penalizing them for non-enforcement of select areas of the law; (2) directing governments to provide citizens with access to courts so they

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46. Louise D. Williams, *Trade, Labor, Law and Development: Opportunities and Challenges for Mexican Labor Arising from the North American Free Trade Agreement*, 22 BROOK. J. INT'L L. 361, 361-62 (1996).

47. 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, 122-25 (1995); Ken Jennings & Jeffrey W. Steagall, *Unions and NAFTA's Legislative Passage: Confrontation and Cover*, LABOR STUDIES JOURNAL, March 22, 1996, *available in* LEXIS, News Library; Peter Szekely, *Democrats Make Pilgrimage for Labor Support*, REUTERS NORTH AMERICAN WIRE, Feb. 24, 1994, *available in* LEXIS, News Library; Ivannia Mora, *Governments Welcome NAFTA, Unions Reject It*, INTER-PRESS SERVICE, November 18, 1993, *available in* LEXIS, News Library; Meg Vaillancourt, *Unions Vent Anger, Speak of 'Deals' by Administration*, THE BOSTON GLOBE, November 18, 1993, *available in* LEXIS, News Library; Jerry Moskal, *Battle Against Trade Pact Could Be Labor's Last Stand*, GANNETT NEWS SERVICE, November 12, 1993, *available in* LEXIS, News Library; Meg Vaillancourt, *Labor Rallies Against NAFTA*, THE BOSTON GLOBE, November 9, 1993, *available in* LEXIS, News Library.

48. NAALC, *supra* note 7, at art. 3. This note's description of the NAALC is limited to those aspects essential to an analysis of the issues presented by Submission No. 9701.

49. *Id.* at art. 3(1).

50. *Id.* at art. 49(1)("labor law")(g).

51. *Id.*

52. *Id.* at art. 1(b), annex 1(7).

53. *Id.* at art. 2.

54. *Id.* at arts. 20-22.

can protect their rights, and maintain governmental agencies to investigate and sanction violations of the law; and, (3) encouraging cooperation among governments and providing information on the law and how it functions to the general public.

If a Party to the NAALC does not effectively enforce its existing domestic labor law, a review can be initiated by the National Administrative Office (NAO) located in the territory of the complaining Party. The NAALC established an NAO within each Party to serve as a "point of contact with governmental agencies of that Party, NAOs of the other Parties, and [the general supervisory body for the NAALC,] the Secretariat."[55] In the United States, the NAO forms part of the Bureau of International Labor Affairs of the Department of Labor.[56] In Mexico it is part of the General Coordinator of the Ministry of Work and Social Welfare (*Coordinación General de Asuntos Internacionales, Secretaría del Trabajo y Previsión Social*).[57]

The first step in the review process is for the NAO of the complaining Party to request consultations with the NAO of the Party which is allegedly not enforcing its labor laws.[58] The NAO of the country that is subject to the review is obligated to provide clarifications, explanations and information on "its laws, regulations, procedures, policies or practices."[59] If NAO consultations do not resolve the dispute, the complaining Party can request ministerial consultations and a further exchange of information.[60] If ministerial consultations do not resolve the disagreement, a Party may request that an Evaluation Committee of Experts be established to review the issue and make recommendations.[61] The three independent labor experts who form an Evaluation Committee of Experts are required to engage in an interactive review process before issuing a final report.[62] Additional review procedures and monetary sanctions or the suspension of benefits under NAFTA can only be used if the dispute concerns a "persistent pattern of failure" to "enforc[e] . . . a Party's occupational safety and health, child labor or minimum wage technical labor standards."[63] Disputes over other areas of the law, such as pregnancy-based discrimination, cannot lead to sanctions.

The NAALC requires Parties to provide their citizens with recourse to domestic courts and procedural guarantees. The NAALC states that each party must "ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the [p]arty's labor law," and to "ensure . . . high labor standards."[64] Governments are also required to provide their citizens with "fair, equitable and transparent" courts that comply with the

55. *Id.* at art. 16.

56. Office of the United States Trade Representative, Study on the Operation and Effect of the North American Free Trade Agreement (visited Apr. 15, 1998) <http://www.sice.oas.org/root/forum/p_sector/govt/nafta_repe/ chap3_1.stm>.

57. July Memo, *supra* note 10, at 1.

58. NAALC, *supra* note 7, at art. 21(1).

59. *Id.* at art. 21(2).

60. *Id.* at art. 22(1).

61. *Id.* at art. 23(1).

62. *Id.* at arts. 24-26.

63. *Id.* at art. 27.

64. NAALC, *supra* note 7, at art. 4(1).

due process of law.[65] Judicial proceedings may not be unnecessarily complicated and must provide a remedy.[66]

The governments of Parties are required to engage in "[g]overnment [e]nforcement [a]ction[s]" by monitoring compliance, keeping records, investigating violations, and seeking sanctions for violations.[67] Interested persons must be able to request that the government act to investigate an alleged violation of the law, and the government must give "due consideration" to the request.[68]

The NAALC's preamble, title and articles all emphasize the Parties' emphasis on governmental cooperation during the negotiation of the treaty. The treaty is named the North American Agreement on Labor *Cooperation.* The use of the word "cooperation" in the title clearly illustrates the Parties' emphasis on resolving disputes through interactive means. Additionally, the NAALC states, "The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation."[69] In the treaty's chapter on consultations between NAOs, it requires an "NAO [to] promptly provide . . . descriptions of its laws . . . [or] policies . . . and such clarifications and explanations . . . as may assist the consulting NAOs to better understand and respond to the issues raised."[70]

The NAALC's goal of enhancing public "understanding of the laws and institutions governing labor in each Party's territory" is evident throughout the agreement's text.[71] To this end, the NAALC includes many provisions that require Parties to disseminate information to their citizens, and provide other Parties to the NAALC with information. On the domestic level, Parties must engage in activities such as promoting public education on their labor law.[72] In addition, court proceedings must be open to the public,[73] and interested persons must be given a reasonable opportunity to comment on proposed changes to the law.[74] On the governmental level, the NAALC creates two governing organisms, the Commission for Labor Cooperation and the Secretariat, that prepare publicly available reports on labor law and promote cooperative activities on subjects such as the equality of women and men in the workplace.[75] The NAOs in each Party's territory are required to publish information on labor law matters and reports resulting from governmental consultations.[76] In practice, NAOs also provide the public with information on consultations by

65. *Id.* at art. 5(1)(a).
66. *Id.* at art. 5(1)(d).
67. *Id.* at arts. 3, 5.
68. *Id.* at art. 3(2).
69. *Id.* at art. 20.
70. NAALC, *supra* note 7, at art. 21(2).
71. *Id.* at art. 1(d).
72. *Id.* at art. 7(b).
73. *Id.* at art. 1(b).
74. *Id.* at art. 6(2)(b).
75. *Id.* at art. 8 (establishing the Commission for Labor Cooperation), art. 10(e), art. 10(h) (describing Commission reports and information gathering responsibilities), art. 12 (defining structure and procedures of the Secretariat), art. 14 (describing Secretariat reports and studies), art. 11(1)(m) (describing the promotion of cooperative activities between women and men in the workplace).
76. NAALC, *supra* note 7, at art. 16(3).

holding public meetings and conferences.[77]

One of the pervasive goals of the NAALC is not explicitly stated in its text. That goal is to use the NAALC to create political pressure that may cause Parties to improve enforcement of their labor law. The NAALC review process has exposed Mexico to the opposing agendas of foreign investors, social groups in the United States and Mexico, and international organizations. Foreign investors want cheap labor and flexible labor laws and regulations that make maquiladora investment cost-effective.[78] Labor organizations in the United States fear that American jobs are being sucked South through NAFTA, and therefore have focused on maquiladora working conditions.[79] Mexican organizations and unions want to influence the government to increase labor standards and the enforcement of labor laws.[80] International organizations have moved to defend the labor and human rights of maquiladora workers, and have tried to achieve their objectives through political pressure and mechanisms in the international arena.[81] In the face of these conflicting demands, Mexico has struggled to develop labor policies that satisfy social groups and international organizations while simultaneously not alienating foreign investment in the economically important maquiladora sector.

The NAALC's dispute resolution mechanisms have been used almost exclusively to address freedom of association issues, and until recently, most disputes focused on Mexico's enforcement of its laws. As of February 1999, twenty submissions had been presented to the three NAOs in Canada, Mexico and the U.S.[82] Sixteen of these submissions addressed freedom of association laws, and only three focused on employment discrimination.[83] The first submission to allege ineffective protection against employment discrimination is the subject of this note: the pregnancy discrimination dispute between Mexico and the U.S. Two additional submissions submitted in 1998 allege that the U.S. has not enforced its laws to protect Mexicans working in the U.S. from discriminatory treatment.[84] The focus on freedom of association reflects that the NAALC was passed, in large part, to appease Mexican and U.S. labor unions that vehemently opposed NAFTA.[85]

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77. For example, the U.S. NAO produced press releases on the pregnancy discrimination submission, held a public hearing in Brownsville, Texas, and has made its Report of Review available to the public.

78. Terry Boswell & Steve Dimitris, *Globalization and International Labor Organizing: A World System Perspective*, 24 WORK & OCCUPATIONS 288 (1997).

79. *See supra* note 47 (containing newspaper articles and a law review article that address the influence of unions).

80. Boswell, *supra* note 78. (A Mexican association of attorneys formed part of the group of organizations that presented Submission No. 9701. Submission, *supra* note 9, at 7).

81. *Id.* (Human Rights Watch and the International Labor Rights Fund collaborated to present Submission No. 9701. Submission, *supra* note 9, at 7).

82. Office of the United States Trade Representative, *supra* note 56, at 8; *U.S. to Review First NAFTA-Related Labor Complaint Against Canada*, U.S. NEWSWIRE, Dec. 18, 1998; National Administrative Office of Canada, (visited March 21, 1999) <http://labour.hrdc-drhc.gc.ca/doc/spp-psp/eng/nafta-alena/e/submiss-e.html> (13 submissions have been filed with the U.S. NAO, five with the Mexican NAO and two with the Canadian NAO. Twelve submissions have addressed Mexico's failure to enforce its laws, six have addressed U.S. lack of enforcement, and two have alleged that Canada was the culprit. National Administrative Office of Canada, (visited March 21, 1999) <http://labour.hrdc-drhc.gc.ca/doc/spp-psp/eng/nafta-alena/e/submiss-e.html>.).

83. National Administrative Office of Canada, *supra* note 82.

84. *Id.*

85. *See supra* note 47.

B. *The Pregnancy Discrimination Dispute (Submission No. 9701)*

The U.S. NAO formally accepted Submission No. 9701 for review in July 1997.[86] Shortly afterwards, the Mexican NAO sent its U.S. counterpart a memo requesting that it dismiss the submission.[87] The Mexican NAO stated that specific provisions of Mexican labor law require job applicants to submit to any medical tests required by the employer, including pregnancy exams, and that maquiladora compliance with Mexican labor law is satisfactory.[88] The Mexican NAO then argued that the submission exceeded the intended scope of the NAALC by questioning Mexico's laws instead of their application.[89]

The Mexican response to the submission is in stark contrast with the stance of the United States. Upon accepting the submission, the U.S. Secretary of Labor stated, "This [issue] is exactly the kind of consideration that was intended in adoption of the NAFTA labor side agreement[;] [t]he process is working and working well."[90] Mexico, on the other hand, rejected the jurisdiction of the NAALC and the U.S. NAO.[91]

Despite the Mexican NAO's request, the U.S. NAO persisted in investigating the allegations contained in the submission. The U.S. NAO collected information on pregnancy discrimination through expert reports and a public hearing held in Brownsville, Texas.[92] In addition, the U.S. NAO consulted with the Mexican NAO and requested that it provide answers to specific questions about Mexican labor law and its enforcement.[93] In its response, Mexico stated that Mexican labor law applies only to the employer-employee relationship, and that, therefore, the law does not protect job applicants.[94] Since the law does not apply to job applicants, there is no legal mechanism through which women can seek redress for pre-employment pregnancy discrimination.[95]

After completing its research, the U.S. NAO issued a report stating its position on pregnancy discrimination in Mexican maquiladoras on January 12,

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86. Jane Bussey and Andres Oppenheimer, *U.S. to Study Bias in Mexico; Plants Aren't Hiring Pregnant Workers*, THE ARIZONA REPUBLIC, July 20, 1997, *available in* LEXIS, News Library; Diane Lindquist, *U.S. Planning Maquiladora Investigation*, COPLEY NEWS SERVICE, July 19, 1997, *available in* LEXIS, News Library. (Several non-governmental organizations presented the submission to the U.S. NAO on May 15, 1997. *See* Submission, *supra* note 9.).

87. July Memo, *supra* note 10.

88. *Id.* at 3-4.

89. *Id.* at 2.

90. Bob Zachariasiewicz, *Herman Requests Consultation with Mexican Labor Minister on NAFTA Pregnancy Discrimination Complaint*, U.S. NEWSWIRE, Jan. 12, 1998, *available in* LEXIS, News Library.

91. July Memo, *supra* note 10, at 1-2.

92. Report of Review, *supra* note 10, at 11. *Denuncian Discriminación Sexual Empleadas de Maquiladoras*, NOTIMEX, Nov. 19, 1997, *available in* LEXIS, News Library; Bob Zachariasiewicz, *DOL's NAO to Hold Public Hearing in Texas on Gender Discrimination in Hiring, Employment in Mexican Sector*, U.S. NEWSWIRE, Nov. 13, 1997, *available in* LEXIS, News Library.

93. Memorandum from Jorge Castañon Lara, Secretary of the Mexican National Administrative Office, to Irasema Garza, Secretary of the United States National Administrative Office (Oct. 14, 1997) [hereinafter October Memo].

94. *Id.* at 3.

95. *Id.*

1998.[96] The U.S. NAO's report did not take a clear stance on whether pre-employment discrimination is illegal (although it confirmed that it occurs), because of disagreement within Mexico over its legality.[97] The report recommended that the U.S. NAO pursue ministerial consultations with Mexico on "[t]he differing views of officials of the Mexican Government on the legality and extent of pregnancy screening."[98] The U.S. Secretary of Labor, Alexis M. Herman, followed up on the recommendation of the U.S. NAO on the following day and requested ministerial consultations with her Mexican counterpart, Javier Bonilla, Minister of Labor and Social Welfare.[99]

In October 1998, Mexico and the U.S. signed an agreement detailing the terms of the consultation.[100] Although the agreement specifically lists "the extent for relief for post-hire pregnancy discrimination in Mexico" as a topic for consultations, it makes no specific mention of discrimination against job applicants.[101] The only topic included in the agreement that could be interpreted to include the protection of job applicants is very general. It states that the Parties agree to engage in "an exchange of views . . . on which basis the United States sought ministerial level consultations."[102] Arguably, the United States sought consultations based on its Public Report of Review, which included the recommendation that the Parties consult on "[t]he differing views of officials of the Mexican Government on the legality and extent of pregnancy screening."[103]

The ministerial consultations agreement required that Mexico and the U.S. hold a conference on protecting women in the workplace. This conference took place in Mexico during the beginning of March 1999.[104] The proposed agenda of the conference did not mention pre-employment pregnancy discrimination, and was limited to expert presentations on labor law and its enforcement in Mexico.[105] The schedule allowed for no room for debate on the interpretation of Mexican labor law.

The U.S. government lacks the political will to force Mexico to fully explain why its labor laws do not protect pregnant women when they apply for

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96. Report of Review, *supra* note 10; *Sex Bias at Border Plants*, MEXICO BUSINESS MONTHLY, Feb. 1, 1998; *Mexico Factories Accused of Bias; U.S. Says Pregnant Women Are Harried Out of Jobs in Border Plants*, INTERNATIONAL HERALD TRIBUNE, Jan. 14, 1997, *available in* LEXIS, News Library; Sam Dillon, *supra* note 15, at A4; *Mexico Meeting Urged for NAFTA Claim*, BC CYCLE, Jan. 13, 1998; Diane Lindquist, *Pregnancy Screenings in Mexico Criticized*, COPLEY NEWS SERVICE, Jan. 13, 1998, *available in* LEXIS, News Library.

97. Report of Review, *supra* note 10, at 44-45.

98. *Id.* at 45.

99. Letter from Alexis M. Herman, U.S. Secretary of Labor, to Javier Bonilla, Minister of Labor and Social Welfare (Jan. 13, 1998) (on file with the author and the U.S. NAO); Dillon, *supra* note 15; Zachariasiewicz, *supra* note 90. (Consultations were requested pursuant to NAALC Article 22. NAALC, *supra* note 7, at art. 22).

100. United States National Administrative Office, Ministerial Consultation Implementing Agreement U.S. NAO Submission No. 9701 (visited Apr. 15, 1999) <http://www.dol.gov/dol/ilab/public/programs/nao/mcia.htm>; *U.S., Mexican Labor Secretaries to Consult on Pregnancy Discrimination*, U.S. NEWSWIRE, October 16, 1998, *available in* LEXIS, News Library.

101. Report of Review, *supra* note 10, at 44-45.

102. *Id.*

103. *Id.* at 45.

104. United States National Administrative Office, *Protecting Women in the Workplace*, March 1 & 2, 1999 - Merida, Yucatan, (visited Apr. 15, 1999), <http://www.dol.gov/dol/ilab/public/programs/nao/agenda.htm>.

105. *Id.*

employment. The ministerial consultation process will end in July 1999, and it is not clear whether pre-employment discrimination will be addressed in any greater depth.[106] While the submission process has brought pre-employment pregnancy discrimination into the public eye, Mexican maquiladoras will continue to discriminate against pregnant women unless the U.S. adopts a more aggressive stance.

IV. Mexican Labor Law Can Be Interpreted to Prohibit Pregnancy Discrimination

Mexico's response to the pregnancy discrimination submission is grossly inadequate in light of plausible arguments that its laws do prohibit pre-employment pregnancy discrimination. Mexico failed to consider laws that make pregnancy screening illegal under most circumstances by reaching a blanket conclusion that none of its labor laws apply to job applicants and that pregnancy testing is legal. Both of those statements are false. Several provisions of the Federal Labor Law (FLL) necessarily apply to job applicants, and the Constitution and FLL provide a clear ban on administering pregnancy tests as a routine part of the application process. In addition, numerous sources of domestic law and international treaties ratified by Mexico, specifically the Convention on the Elimination of All Forms of Discrimination Against Women and International Labor Organization (ILO) Convention 111, affirmatively prohibit employers from discriminating against pregnant women seeking employment.[107]

A. Mexican Labor Law Applies to Job Applicants

Virtually all legal scholars and courts interpret Mexican labor law to apply only after a labor relationship has been established. However, none of these sources directly explain why this is the case. In fact, analyses tend simply to assume their conclusions.[108] The most likely explanation for this phenomenon is that scholars believe, based on the use of the words 'worker' and 'labor contract' in the Constitution and the FLL, that the answer is too obvious

106. Report of Review, *supra* note 10.

107. ILO Convention 111*: Convention Concerning Discrimination in Respect of Employment and Occupation*, Conference Session 42, adopted June 25, 1958, entered into force June 15, 1960, 362 U.N.T.S. 31 [hereinafter ILO Convention 111]; Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), adopted Dec. 18, 1979, entered into force Sept. 3 1979, U.N. DOC. A/34/830 (ratified by Mexico on March 23, 1981) [hereinafter CEDAW].

108. The following is a list of some of the analyses of Mexican labor law that assume, without explicit acknowledgement, that the FLL only applies after a labor relationship has been established: R. Leticia Cuevas, *Analysis of Issues Raised in Submission 9701: Gender Discrimination and Pregnancy Based Discrimination*, (Dec. 1997) (unpublished document, on file with the U.S. NAO) [hereinafter Cuevas]; Mario de la Cueva, *El Nuevo Derecho Mexicano del Trabajo: Historia, Principios Fundamentales*, *in* DERECHO INDIVIDUAL Y TRABAJOS ESPECIALES (9th ed. 1984); Alberto Trueba Urbina & Jorge Trueba Barrera, LEY FEDERAL DE TRABAJO: COMENTARIOS, PRONTUARIO, JURISPRUDENCIA Y BIBLIOGRAFÍA (60th ed. 199?); and, Néstor de Buén Lozano, DERECHO DEL TRABAJO (10th ed. 1994).

to warrant explanation.[109] This, however, ignores the lack of clarity in the FLL. The FLL contains several provisions that necessarily apply to job applicants, and, without acknowledging deviation from the general rule, government agencies have consistently applied the law to pre-employment scenarios. Additionally, the constitutional basis for the FLL is not restricted to employees, since the Constitution allows for more specific laws to be enacted on the general topics included in its text.

Submission No. 9701 did not specifically address this issue, and, therefore, it was relatively easy for the Mexican NAO to dismiss its allegations with a very brief and to-the-point response. When the U.S. NAO inquired about "the appropriate recourse in Mexico to address matters of discrimination before hiring," the Mexican NAO responded that, "[t]here is no mechanism in the labor norms that permits addressing complaints of discrimination when no labor relationship exists."[110]

Mexico is a civil law country and the Mexican legal system differs from that of the U.S. in several ways.[111] Mexico's Constitution and statutes are much more specific and lengthy than those of common law countries like the U.S. The Constitution and statutes are specific because they are interpreted by courts with limited outside guidance. In Mexico, binding judicial precedents are created in very limited circumstances.[112] Only the Mexican Supreme Court can create binding jurisprudence by issuing five consistent *en banc* decisions on the same discrete issue.[113] Therefore, judges and attorneys tend to cite statutes and scholarly articles, not prior court decisions on the same subject.[114] For that reason, the following critique of the Mexican NAO's interpretation of Mexican law is primarily based on statutory interpretation.

The position that Mexican labor law applies only after a labor relationship has been established is based on the wording of the Constitution and the FLL. Constitutional Article 123, the enabling article for federal labor laws, states, "[t]he Congress of the Union . . . shall expedite laws on work, which shall govern . . . in general, *all contracts for work.*"[115] Article 1 of the FLL complements the Constitution by stating, "[t]he present law is of general observance in all of the Republic and governs the *relationships of work* included in Article 123, Section A, of the Constitution."[116] Since the Constitution states that the law "shall govern . . . contracts for work," most of the specific FLL

109. CONSTITUCÍON POLITÍCA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUCÍON] art. 123; Ley Federal de Trabajo [L.F.T.] art. 1.

110. October Memo, *supra* note 93, at 3.

111. There are, however, fundamental similarities between the U.S. and Mexican legal systems. For example, as in the U.S., Mexican laws must be rooted in the Constitution. Ignacio Burgoa, DERECHO CONSTITUCIONAL MEXICANO, 357-58 (9th ed. 1994). Jorge Xifra Heras described this structure by stating, "[t]his fundamental character acknowledged by the Constitution marks it as the supreme law of the State, [and] assumes that all legal structures are conditioned by the constitutional norms, and that no state authority possesses more power than that recognized by the Constitution, since the legitimacy of the entire system of norms and institutions that make up that structure depends on it." *Id.* at 358.

112. *Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca: Final Report, 1996*, 12-13 [hereinafter Final Report] (funding for the project was provided by the U.S. NAO) (on file with the author and the U.S. NAO).

113. *Id.* at 11.

114. *Id.* at 8.

115. CONST., *supra* note 39 art. 123 (emphasis added).

116. L.F.T., *supra* note 39 art. 1 (emphasis added).

provisions do exactly that; they focus on the employer-employee relationship.

There are, however, several FLL provisions that apply to job applicants. Thus, unless these provisions are unconstitutional, the constitutional mandate provided by Article 123 cannot be limited to regulation of the labor relationship. The FLL prohibits employers from refusing to accept employees because of their sex,[117] and requires job applicants to submit to certain types of medical exams.[118] These provisions by their terms apply to job applicants. In addition, Articles 154 to 162 of the FLL require preferential hiring for defined groups of job
applicants, such as heads of families.[119] Job applicants who fall within one of the preferential hiring groups have a cause of action if someone outside the groups is hired in their place.[120]

The generally accepted interpretation of the law on preferential hiring is that it is a defined and limited exception to the general rule. A well-known Mexican legal scholar, De Buen Lozano, explains the exception by stating that the word "worker," as used in the preferential hiring articles, imports a social definition that is not used in other parts of the FLL.[121] However, De Buen Lozano's explanation cannot be correct. If the Constitution only applies to the employer-employee relationship, and all laws must be rooted in the Constitution, no exceptions, such as preferential hiring laws, can be constitutional unless the Constitution is changed.

Article 5 of the Constitution, which guarantees the "right to pursue any legal employment," and the preamble to Article 123, which provides for every individual's "right to work," incorporate the right to be considered for work in a fair manner. [122] The right to work means nothing unless one is considered for work on a level playing field.[123] It is a concrete right that can be pointed to in petitioning the government. Since the Constitution prohibits discrimination when applying for legal employment, the federal government has the power to regulate the application process.

While Congress must follow the labor principles included in the Constitution when enacting labor laws, it may expand on them by sanctioning more specific provisions. Since the application process affects and defines the ensuing employer-employee relationship, more specific provisions may be enacted to regulate it.[124] This theory is consistent with the black letter rule that all laws must be rooted in the Constitution. It also provides a coherent global

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117. L.F.T., *supra* note 39 art. 133, ¶ I.

118. L.F.T., *supra* note 39 art. 423 (VIII).

119. L.F.T., *supra* note 39 art. 154-62.

120. L.F.T., *supra* note 39 art. 157. Single mothers or single pregnant women, therefore, have a cause of action and if they prevail can choose between the denied position and monetary damages. *Id. See* discussion of this provision in Section IV.B. of this note.

121. Report of Review, *supra* note 10, at 348-49.

122. CONST., *supra* note 39 art. 123.

123. Cuevas, *supra* note 108, at 7. ("Both Society and the State, that is, the entire Nation is responsible for guaranteeing this social right because it would be incredibly irresponsible and ludicrous to incorporate into the Constitution the text of a right that will not be put into practice, that will not be exercised." *Id.* (quoting Cámara de Diputados, Year III.T.III. No. 15, 6-7 (Sept. 27, 1978) (statement of Congressman Enrique Ramírez y Ramírez)).

124. De Buén Lozano, *supra* note 108, at 3. (In the Mexican legal system the opinions of scholars, like Néstor de Buén Lozano, hold much more weight than in the U.S. Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca: Final Report, *supra* note 112, at 8).

view of existing Mexican labor law that incorporates the preferential hiring laws and other laws that only make sense if they are applied to job applicants, instead of placing them in limbo with no constitutional roots.

B. *Mexican Law Prohibits Pregnancy Discrimination and Indiscriminate Pregnancy Testing*

For pre-employment pregnancy discrimination to be illegal there must be provisions that specifically prohibit it; a finding that Mexican labor law *can* be applied to job applicants is insufficient. The Mexican Constitution and the FLL do prohibit discrimination against pregnant women in the job application process, unless limited exceptions designed to protect pregnant women apply. Mexican law also prohibits employers from indiscriminately testing applicants for pregnancy.

Employers are not allowed to discriminate against pregnant job applicants unless a job requires industrial night work, is dangerous to her or the fetus' health, or cannot physically be performed by a pregnant woman, taking into account legally mandated pregnancy accommodations. The Constitution and the FLL generally prohibit discriminating against women because of pregnancy, and as demonstrated in Section IV.A. of this note, this prohibition applies to both job applicants and employees. The law even requires preferential hiring for single mothers or single women who are pregnant.

The Mexican Constitution contains articles that protect pregnant employees and prohibit gender discrimination. Article 4 states that, "Men and women are equal before the law," and that "[a]ll persons have the right to decide in a free, responsible and informed manner, on the number and spacing of their children."[125] In addition, Article 5 provides that "no person can be prevented from dedicating themselves to the profession, industry, commerce or job that they wish, as long as it is legal," and that right may only be limited by a court judgement or a legal resolution if the job offends the "rights of society."[126]

The Human Rights Commission of the Federal District has interpreted these articles of the Constitution to prohibit the practice of requiring information on pregnancy status in order to be eligible for employment.[127] The Commission reasoned that, "unjustifiably requiring women not to be pregnant in order to give them work is a discriminatory and sexist act that violates the principle of legal and social equality of men and women."[128] Although opinions of the Commission are not legally binding, they have great political influence and, in

125. CONST., *supra* note 39 art. 4.

126. CONST., *supra* note 39 art. 5.

127. Recommendation of Luis de la Barreda Solórzano, President, Human Rights Commission of the Federal District, to various government agencies 14 (June 1995) (on file with the author and the U.S. NAO). (The Commission does not have jurisdiction over labor matters, so its Recommendation framed pregnancy discrimination as a human rights issue. Ley de la Comision de Derechos Humanos del Distrito Federal, chapt. III, art. 18 (Mex.). The Commission's argument is based on articles within the first Chapter of the Constitution which address the human rights of Mexicans. Although one could dispute the validity of the Commission's conclusions by stating that it did not have jurisdiction to consider the issue, whether the issue is a labor or human rights matter is basically a question of opinion.).

128. Recommendation of Luis de la Barreda Solorzano, *supra* note 127, at 18.

practice, are heeded by public agencies.[129] The Commission's interpretation of Articles 4 and 5 was issued as a recommendation to government agencies that had instituted discriminatory practices. After the offending agencies received the Commission's recommendation, they reported back that they had changed their policies.[130]

The FLL also contains specific provisions that support the proposition that pregnancy discrimination is not permissible. Article 3 of the FLL states, "Distinctions may not be established among workers because of . . . sex . . . [,]"[131] and Article 133 states that "it is prohibited for employers to not accept workers because of age or sex."[132] These two articles present one of the strongest arguments that pre-employment pregnancy discrimination is illegal under Mexican law. Only women get pregnant, so denying a woman employment because she is pregnant is essentially the same as rejecting her because of her sex.[133]

Although the constitutional and labor law articles that apply to pregnancy discrimination are broadly phrased, the governing principle for interpretation of the FLL supports a favorable construction that prohibits gender discrimination. Article 18 of the FLL states that, "In case of ambiguity, the interpretation most favorable to the worker shall prevail."[134] This article illustrates the primary goal of Mexican labor law, which is to protect the employee.[135] The law recognizes that there is a material inequality between the bargaining power of the employer and employee, so it seeks to level the playing field.[136] Because the article uses the word "worker", it would seem to apply only to individuals who have already entered an employer-employee relationship. However, Article 18 is a general article of interpretation that presumably applies to the entire FLL, including preferential hiring and the other FLL provisions that clearly apply to job applicants.

The FLL has very specific provisions that apply to single mothers or single pregnant women who apply for employment. Article 154 of the FLL states that, "employers under equal circumstances are required to prefer . . . those who do not have another source of income [and] are responsible for a family."[137] Subsequent articles of the FLL require employers to hire heads of families over groups that are not given a preference by the law, and specifically provide a remedy if employers violate the FLL preference provisions.[138] The FLL also grants preferences to other groups, such as union members.[139] Many

129. Cuevas, *supra* note 108, at 58-59. (The Commission was established in 1993 to relieve judicial pressure on the amparo remedy for the abuses of public officials and agencies. *Id.* at 67.).

130. October Memo, *supra* note 93, at 1.

131. L.F.T., *supra* note 37 art. 3.

132. L.F.T., *supra* note 37 art. 133(I).

133. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 30.

134. L.F.T., *supra* note 37 art.18.

135. Ann M. Bartow, *The Rights Of Workers In Mexico*, 11 COMP. LAB. L.J. 182, 189 (1990); L.F.T., *supra* note 37 art. 2.

136. *Id.* at 189.

137. L.F.T., *supra* note 37 art. 154. (Article 154 states, "Employers under equal circumstances are required to prefer Mexican workers over those who are not Mexican, those who have served satisfactorily for a greater time period, and those who do not have another source of income [and] are responsible for a family and those who are unionized over those who do not belong to a union." *Id.*).

138. L.F.T., *supra* note 39 arts. 155, 157.

139. L.F.T., *supra* note 39 art. 154.

of the women who apply for employment in maquiladoras are single.[140]

Maquiladora employers have argued that Mexico's labor law allows them to exclude pregnant women to assure compliance with the FLL's maternity provisions.[141] These provisions require employers to take measures to accommodate pregnant women and protect their health. Article 166 of the FLL prohibits employers from using pregnant women in "unhealthy or dangerous work, [or] industrial night work."[142] Unhealthy or dangerous work is defined in Article 167 as work that inherently, through the "physical, chemical or biological conditions of the environment in which [the work] is performed, or through the composition of the primary materials used, is capable of affecting the life and physical and mental health of the pregnant woman or the product."[143] Therefore, the FLL can only be interpreted to authorize employers to exclude pregnant women under very limited circumstances. In addition, maquiladora jobs do not typically involve dangerous chemical or biological agents, or require night shifts or exertion that a pregnant woman cannot safely perform.[144]

Conceivably, a job may not affect the health of the pregnant woman or her fetus, but still require physical exertion that a pregnant woman cannot perform. Neither the Mexican NAO nor maquiladora employers have argued that denying pregnant women employment is authorized under such circumstances. However, if the argument were raised it should be fairly evaluated. Physical fitness is generally viewed as a neutral requirement for jobs that demand abnormal levels of exertion.[145] Few maquiladora jobs, however, require physical exertion that cannot be performed by pregnant women, given that the FLL provides for mandatory maternity leave both before and after giving birth, and requires the employer to accommodate pregnant women's physical limitations.[146]

Pregnancy testing is illegal when maquiladora work is not so dangerous as to pose an inherent risk to the pregnant woman and her fetus's health, does not require night shifts, and can be performed by a pregnant woman with reasonable accommodations. According to the General Coordinator of the National Programme for Women, Dulce María Sauri, "Mexican legislation specifically prohibit[s] . . . pregnancy tests prior to hiring women."[147] The only reason to administer a test, absent the protective exceptions, is to gain information to discriminate, which is illegal under Mexican law.

The Mexican NAO has argued that Article 423 of the FLL requires workers to submit to pregnancy screening as part of routine health tests administered prior to hiring.[148] Article 423 requires workplace regulations to state "the time and form in which workers should submit to *prior or periodic* medical exams."[149] Although the article's phrasing is ambiguous it is reasonable

140. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 13.
141. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 32-33.
142. L.F.T., *supra* note 39 art.166.
143. L.F.T., *supra* note 39 art. 167.
144. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 33.
145. *See, e.g.*, O'Hara, *supra* note 44, at 759.
146. 8 HUMAN RIGHTS WATCH, *supra* note 3 at 33.
147. *Progress Made in Advancement of Mexican Women, But Change Not Yet 'Radical,'* M2 PRESSWIRE, Feb. 3, 1998 *available in* LEXIS, News Library, Pressure File.
148. July Memo, *supra* note 10, at 3.
149. L.F.T. art. 423 (emphasis added).

to interpret it as requiring job applicants to undergo medical exams. While the words "prior or periodic medical exams" do not make clear whether medical exams are to be administered prior to hiring or prior to some other event, it is hard to imagine what other event could be referenced.

While the medical exams referenced in Article 423 do apply to job applicants, they do not apply to pregnancy testing. Article 423 cannot be read to authorize any tests not permitted under Article 134, which lists the obligations of employees. Article 134 states that employees are required to "submit to the medical exams anticipated in the interior regulations and other norms in force in the business or establishment, to prove that they do not suffer from a *contagious or incurable* disability or work-related sickness[,] and to "[n]otify the employer of contagious diseases from which they suffer as soon as they have knowledge of their existence."[150] The text of Article 134 clearly indicates that workers are not required to take medical exams unless they seek to detect contagious or incurable diseases. Pregnancy is not contagious or incurable. Therefore, Article 423 is not a blanket authorization for employers to create regulations that require women to take pregnancy tests in order to obtain work.[151] Mexico's statement that women are always legally required to submit to pregnancy tests is clearly incorrect.[152]

In conclusion, Mexico's Constitution and the FLL, without reference to additional obligations imposed by international treaties, does not permit pregnancy testing or pregnancy discrimination unless a job is dangerous, requires night shifts, or cannot be physically performed by a pregnant woman. The law also creates an affirmative duty for employers to select single women who are pregnant or single mothers over most other applicants.

C. *International Law*

Mexico has signed and ratified two principal international treaties that specifically prohibit gender and employment discrimination: the Convention on the Elimination of All Discrimination Against Women (CEDAW)[153] and Convention 111 of the International Labor Organization (ILO) on Discrimination in Respect of Employment and Occupation.[154] These treaties

150. L.F.T. art. 134, ¶¶ X, XI (emphasis added).

151. Public Hearing on Submission No. 9701, Brownsville, Texas 83, 99-101 (Nov. 19, 1997) (transcript available from the U.S. NAO) (testimony of Joel Solomon) [hereinafter Public Hearing].

152. July Memo, *supra* note 10, at 3.

153. CEDAW, *supra* note 107; Public Hearing, *supra* note 151, at 3, paper written by Alice M. Miller (in addition to the transcript of the public hearing, speakers provided papers stating their opinion) (unpublished document, on file with the U.S. NAO).

154. ILO Convention 111, *supra* note 107. Mexico joined the ILO on Sept. 12, 1931, and subscribed to Convention 111 in 1961. Public Hearing, *supra* note 151, at 5, paper written by Terry Collingsworth (in addition to the transcript of the public hearing, speakers provided papers stating their opinion) (unpublished document, on file with the U.S. NAO). Mexico has also signed the American Convention on Human Rights (ACHR) and the International Covenant on Civil and Political Rights (ICCPR). American Convention on Human Rights (ACHR), adopted Nov. 22, 1969, entered into force July 18, 1978, 9 I.L.M. 673; UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR), Dec. 19, 1966, U.N. Doc. A/6316 (1966). However, these treaties are not discussed in the body of this note because they contain only general statements on equal protection laws. The ACHR states that "all persons are equal before the law[,] [c]onsequently, they are entitled, without discrimination, to the equal protection of the law." ACHR, art. 24. The

provide additional legal support for the proposition that Mexican law prohibits pre-employment pregnancy discrimination.

Most Mexican scholars place international treaties, such as CEDAW and the ILO Convention 111, on equal footing with federal laws, and agree that treaty provisions create causes of action in domestic courts. Article 133 of the Mexican Constitution declares that the Constitution, federal laws passed by Congress, and international treaties entered into by the President and approved by the Senate are the Supreme Law of the Land.[155] This article has been interpreted to create a hierarchy among the aforementioned sources of law. Virtually all scholars and courts agree that the Constitution is at the top of the ladder, but there has been disagreement regarding the relationship between federal laws passed by Congress and international treaties.[156] Despite this disagreement, a clear majority of scholars and courts place federal laws and treaties on equal footing.[157]

Treaties signed by Mexico do not need enabling legislation to take effect, and create substantive rights that can be asserted in domestic courts.[158] Treaties that go beyond existing domestic norms are permitted according to a Supreme Court decision that states, "as judicially interpreted, the Constitution 'does not pre[-]establish the subject-matter . . . of treaties and conventions concluded by the Government of the Republic."[159] However, while treaties can add to constitutional rules, those treaty provisions that conflict with the Constitution are void.[160]

Article 1(1)(a) of ILO Convention 111 states that "discrimination includes - - any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of . . . impairing equality of opportunity or treatment in employment or occupation."[161] The meaning of the terms "employment" and "occupation," as used in the Convention, are explained in Article 1(3), which states that they include "access to employment."[162] The Convention requires signatories to institute a national policy to implement the provisions of the

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ICCPR contains a virtually identical statement on equal protection, and then goes on to state that the law should guarantee "effective protection against discrimination on any ground such as . . . sex . . . ." ICCPR, art. 26. The argument that pregnancy discrimination violates the equal protection of the law was already made in the previous section in the discussion of Article 4 of the Constitution and the recommendation of the Human Rights Commission of the Federal District. *See* analysis of the Mexican Constitution *Infra.* in Part IV.B.

155. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUCIÓN] art. 133 (Mex.).

156. *See, e.g.*, Raúl Medina Mora, *El Artículo 133 Constitucional y la Relación entre el Derecho Interno y los Tratados Internacionales*, REVISTA PEMEX-LEX, No. 75-76 at 17-18 (1994) (arguing that conflicting federal laws and treaties should not be fit into a hierarchy, but instead should be classified as national or international in nature); Final Report, *supra* note 112, at 23-24 (arguing that treaties are superior to federal law); Seminar, *International Treaties and Constitutional Systems of the United States, Mexico and Canada*, Baltimore, MD at 80 (Dec. 4, 1997) (stating that there is no clear hierarchy between federal laws and international treaties) (transcript available from the U.S. NAO).

157. *See, e.g.*, Seminar, *International Treaties and Constitutional Systems of the United States, Mexico and Canada*, at 73 (statement of Javier Moctezuma Barragan); Report of Review, *supra* note 10, at 26.

158. Jorge Cicero, International Law in Mexican Courts, 30 VAND. J. TRANSNAT'L L. 1035, 1041-42 (discussing the method of introducing international treaties into Mexican law).

159. *Id.* at 1042.

160. *Id.*

161. ILO Convention 111, *supra* note 107, at art. 1.

162. *Id.* at art. 1(3).

Convention, including efforts to enact legislation "to secure the acceptance and observance of the policy" and "repeal any statutory provisions" that are in conflict with it.[163] Therefore, Mexico is obligated to enforce Convention 111 by interpreting its laws consistently with the Convention, enacting new laws to implement the treaty, and repealing inconsistent laws. The Convention's provisions can also be used in domestic courts.[164]

The ILO Committee of Experts, the authoritative interpretative body for ILO conventions, has consistently interpreted Convention 111 to include pregnancy discrimination. In 1996 the Committee stated that the definition of 'sex-based discrimination' includes "[discrimination] based on . . . pregnancy and confinement."[165] While the Committee has not expressly stated that pregnancy discrimination includes pregnancy screening, it has indicated that it would if the issue were ever squarely presented. The Committee commented on one of Colombia's recent compliance reports by "not[ing] with satisfaction the adoption of [a resolution] which restricts the requirement of a pregnancy test for obtaining employment in both the private and public sectors to employment or occupations where pregnancies might be at risk."[166]

The Vienna Convention on the Law of Treaties, which has been ratified by Mexico, requires that Convention 111 "be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms in their context and in light of its object and purpose."[167] A good faith interpretation of the Committee's decision that the Convention applies to pregnancy discrimination leads to the conclusion that mandatory pregnancy screening is also forbidden. Good faith in interpretation has generally been viewed as an honest effort to determine the plain language meaning of the treaty in light of the parties' intentions.[168] "Discrimination" is defined by Black's Law Dictionary as "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."[169] When a particular job is not dangerous to fetal health and does not require exertion that pregnant women cannot perform, pregnancy screening is administered solely to exclude pregnant women.[170] There is no reasonable distinction to justify "a failure to treat all [women] equally."[171]

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163. *Id.* at arts. 2, 3.

164. *Cf.* Cuevas, *supra* note 108, at 14 (citing De la Cueva's argument that "conventions ratified and approved by the Senate are binding laws.").

165. International Labour Conference, *Special Survey on Equality in Employment and Occupation in Respect of Convention No. 111*, 83rd Sess., Report III(B) at 15 (1996). (The Committee of Experts is a body empowered to make authoritative interpretations of ILO Conventions. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 32 n.155.).

166. International Labour Conference, *Report of Committee of Experts on the Application of Conventions and Recommendations*, 82nd Sess., Report III(4A) at 300 (1995).

167. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 at art. 31(1) (1969) [hereinafter Vienna Convention]. (Mexico has ratified the Vienna Convention. Cicero, *supra* note 158, at 1051.).

168. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 114-15 (2nd ed. 1994) [hereinafter CHENG].

169. BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

170. A recent U.S. employment discrimination case reasons that pregnancy testing, when performed as a uniform precondition of employment, is discriminatory. Bloodsaw. v. Lawrence Berkely Lab., 135 F.3d 1260, 1271-73 (9th Cir. 1998). *Bloodsaw* is not cited to argue for the harmonization of U.S. and Mexican labor laws. The NAALC rejects harmonization, by stating that each party is only required to enforce its own laws. NAALC, *supra* note 7, at art. 2. *Bloodsaw* is

The Mexican and U.S. NAOs have denied that Convention 111 applies to pregnancy screening. The Mexican NAO used peculiar reasoning to explain why it believes that Article 1(2) of the Convention allows for pregnancy screening.[172] Article 1(2) states, "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."[173] The Mexican NAO then claimed that medical exams, including pregnancy screening, are allowed as an "inherent" job requirement.[174] As shown previously, Mexican labor law does not require pre-employment medical exams other than those performed to detect contagious diseases, or if a job requires night shifts, or is inherently dangerous to pregnant women and fetuses.[175] The ordinary meaning of the Article's text, taking into account the other articles of the Convention, is that the term "inherent requirements" refers to characteristics that are necessary to perform the job adequately, such as physical strength.[176] In addition, the ILO has articulated concern that the "inherent requirements" exception be interpreted strictly to prevent, "undue limitation of the protection which the Convention is intended to provide."[177]

If applied across the board, the argument that pregnancy screening is an inherent requirement for employment would eviscerate the Convention's prohibitions against sex discrimination. It implies that any requirement placed on job applicants by an employer that is permitted under Mexican laws (excluding the Convention) is an "inherent requirement" for obtaining the job. In other words, any requirement not illegal under Mexican law does not violate the Convention. This leads to the illogical conclusion that the Convention is meaningless unless Mexican law, without any external guidance, decides to prohibit requirements that constitute prejudiced treatment. Quite to the contrary, Convention 111 requires Mexico to interpret its laws to conform with the Convention or pass new laws that address the Convention's prohibitions.[178] Individual litigants can also invoke the Convention in domestic courts.[179] Essentially, Mexico is invoking its internal laws to avoid compliance with a treaty, which is prohibited by Article 27 of the Vienna Convention on the Law of Treaties.[180]

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simply cited because there are no Mexican primary or secondary authorities that address this issue, and the case provides cogent reasoning for why pregnancy testing is discriminatory.

171. BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

172. July Memo, *supra* note 10, at 2.

173. ILO Convention 111, *supra* note 107, at art. 1(2).

174. July Memo, *supra* note 10, at 2.

175. *See infra* Part IV.B. of this note for a discussion of Mexican law on pregnancy testing.

176. The use of the "ordinary meaning" is required by the Vienna Convention rules of interpretation. Article 31(1) of the Vienna Convention states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention, *supra* note 167, art. 31(1).

177. International Labour Conference, *Equality in Employment and Occupation, General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, 75th Sess., Report III (4B) at 138 (1996).

178. ILO Convention 111, *supra* note 107, at arts. 2, 3.

179. *Cf.* Cuevas, *supra* note 108, at 14 (citing De la Cueva's argument that ILO Conventions can be cited in domestic courts).

180. Vienna Convention, *supra* note 167, at art. 27. ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); *Id.*

The U.S. NAO's evaluation of the pertinence of ILO Convention 111 is also incorrect. In its Report of Review it states, "ILO Convention 111 . . . defined employment to include access to employment and has been interpreted to equate pregnancy discrimination with gender discrimination by the Committee of Experts. Pregnancy screening, however, has not been explicitly addressed by ILO authorities."[181] Most international conventions do not spell out every possible application, and a good faith interpretation of the Convention, as required by the Vienna Convention, leads to the conclusion that it prohibits pregnancy screening as a precondition for employment.

Pre-employment pregnancy discrimination also arguably violates CEDAW.[182] Article 11 of CEDAW states: "Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure . . . the same rights, in particular . . . *the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment* . . ."[183] In fact, the committee that monitors compliance with CEDAW has questioned countries' implementation reports because of laws or practices that hamper women in applying for employment.[184] Parties to the treaty have an affirmative obligation to adopt all measures necessary to comply with its provisions, including interpreting laws to prevent discrimination.[185] CEDAW's provisions can also be cited in Mexican courts since treaties are self-executing within the Mexican legal system.[186]

According to the Vienna Convention on Treaties, CEDAW is to be interpreted "in light of its object and purpose."[187] A good faith interpretation of Article 11 of CEDAW, which requires that the "same criteria for selection" be applied to men and women, prohibits using pregnancy as a consideration in selecting employees under most circumstances. A limited number of maquiladora jobs may require a level of physical fitness and activity which pregnant women cannot satisfy. In that case, CEDAW does not prohibit purposefully selecting men or women who are not pregnant. However, most maquiladora jobs, taking into account the maternity provisions of the FLL, do not require exertion that a pregnant woman cannot safely perform.[188] Therefore, in most cases, CEDAW does not permit using pregnancy tests to discriminate against pregnant women.

Mexico and CEDAW's monitoring committee have specifically indicated that pregnancy discrimination violates Mexican law. In February of 1998, the 23-member committee appointed to monitor signatories' adherence with CEDAW addressed pregnancy screening at a meeting to review Mexico's CEDAW implementation report. An expert on the committee stated that the practice is a "flagrant discrimination against women" and that "the economic progress of Mexico [should] not be bought at the expense of young and pregnant

181. Report of Review, *supra* note 10, at 44.

182. Recommendation of Luis de la Barreda Sólorzano, *supra* note 127, at 14-15; Public Hearing, *supra* note 151, at 3, paper written by Alice M. Miller.

183. CEDAW, *supra* note 107, at art. 11 (emphasis added).

184. Public Hearing, *supra* note 151, at 7-8, paper written by Alice Miller.

185. CEDAW, *supra* note 107, at art. 24; Public Hearing, *supra* note 151, at 3-4, paper written by Alice Miller.

186. *See supra* notes 156-58 and accompanying text.

187. Vienna Convention, *supra* note 167, at art. 31(1).

188. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 33.

women."[189] Mexico itself implicitly admitted that pre-employment pregnancy discrimination is illegal when it stated in its report that "[d]espite the fact that the regulations require that women should be given equal treatment in matters *relating* to employment, some cases have been detected in which women are hired only if they are not married or pregnant . . . ."[190] In addition, the Human Rights Commission of the Federal District has concluded that CEDAW prohibits pregnancy screening in a recommendation issued to Mexico City government agencies.[191] If Mexico admits the authority of the Convention, one would think that it would not be placed in doubt during the NAALC review process.

Several sources indicate that Article 11 of CEDAW and ILO Convention 111, which clearly does prohibit pregnancy discrimination, are linked. The negotiating history of CEDAW and state practice, which consists of the submission of public progress reports to the monitoring committee, demonstrate that Article 11 of CEDAW was based, in part, on ILO Convention 111.[192] In addition, the committees created to monitor both treaties "regularly confer on the meaning and reach of their conventions, and have been specifically consult[ed] in the area of disfavored over-protective legislation."[193]

Both the Mexican and U.S. NAOs rejected the pregnancy submission's argument that Mexico had violated CEDAW. The Mexican NAO did not respond to the allegations at all, and the U.S. NAO's Report of Review did not recommend that CEDAW be included as a topic of discussion in ministerial consultations. The U.S. NAO stated that it did not recommend consultations on CEDAW because the treaty "has no explicit jurisprudence or interpretation on pregnancy screening."[194] In fact, given that CEDAW can be reasonably interpreted to prohibit across-the-board pregnancy screening, the lack of jurisprudence is a reason in support of consultations, rather than against it.

V. Mexico Has Violated Its NAALC Obligation to Enforce Its Labor Law

Mexico has an obligation under the NAALC to reasonably explain its interpretation of its laws, ensure private access to its labor tribunals, and promote public awareness of its labor laws.[195] It has avoided addressing these obligations in its response to the pregnancy discrimination submission by creating an interpretation of the NAALC that makes the treaty potentially

189. *Progress Made in Advancement of Mexican Women*, *supra* note 147.

190. *Mexico: Third and Fourth Periodic Reports of States Parties*, CEDAW/C/MEX/3-4 at ¶ 215 (May 21, 1997). (Mexico also stated in its report, "As occurs in other countries in the world, in response to the labor requirements set out in legislation concerning women and their reproductive function, employers choose to make the hiring of women conditional on their not being pregnant or married. Employers are afraid that their time and energy will be distracted from their work in order to meet their commitments as mothers and wives. Whether or not this fear is well founded, it means that the situation is unfair to those who make up more than one half of the population and have more than enough ability and, most of the time, pressing needs which their families share." *Id.*).

191. Recommendation of Luis de la Barreda Solórzano, *supra* note 127. (*See infra* Part IV.B. for a description of the Human Rights Commission for the Federal District.).

192. Public Hearing, *supra* note 151, at 6, paper written by Alice M. Miller. (The Vienna Convention lists "subsequent practice" as a primary and "preparatory work of the treaty" as a secondary source of interpretory guidance. Vienna Convention, *supra* note 167, at arts. 31, 32).

193. *Id.* at 6.

194. Report of Review, *supra* note 10, at 44-45.

195. NAALC, *supra* note 7, at art. 3, 4.

meaningless. The Mexican NAO's response implies that Mexico believes that it has complete discretion to interpret its domestic laws and to decide which legal claims hold validity without any need to reach a consensus or to engage in a dialogue with the U.S. NAO.[196] The U.S. NAO is complicit in this failure by not applying greater pressure to force the Mexican government to explain its position. The Mexican government has also violated the NAALC by not providing a legal mechanism through which pregnant women can seek judicial recognition of their right to employment. In addition, Mexico's terse rejection of the discrimination submission contravenes the NAALC's goal of increasing public awareness.

A. *Mexico Has Violated Its NAALC Enforcement Obligation by Refusing to Engage in a Good Faith Interpretation of its Laws*:

The NAALC provides that a Party is obliged to "effectively enforce its labor law through appropriate government action,"[197] but it does not include an explicit statement on how labor law should be interpreted. Mexico contends that the pregnancy discrimination submission is beyond the scope of the NAALC because the submission questions the nature of Mexican law instead of the means through which Mexico chooses to enforce it.[198] Mexico's reading of the NAALC's provision on enforcement is problematic because the agreement becomes meaningless if there is no limit on Parties' freedom to interpret their laws. There is a cogent argument that pre-employment pregnancy discrimination violates Mexican law, and the NAALC, at the very least, requires Mexico to formulate a thorough and reasonable response to the pregnancy discrimination submission's allegations.

NAALC's enforcement provision must logically place limits on the Parties' ability to interpret their labor laws. If interpretation is solely within the discretion of the parties to the agreement, NAALC obligations can easily be avoided by creating a convenient construction of the law. When an NAO alleges that another party has not enforced its laws, the offending party can respond by stating that it interprets them to permit its actions. Even violations of clear-cut labor statutes can be explained away through ludicrous interpretations if there are no checks on how the domestic laws are construed. Mexico, the U.S. and Canada surely did not intend to create a meaningless treaty when they sat down at the negotiation table.

International law requires the Parties to the NAALC to engage in a good faith interpretation of its provisions in light of their intentions when they negotiated the agreement.[199] The Vienna Convention on the Law of Treaties states that "a treaty shall be interpreted in good faith." Good faith is difficult to define; however, it has been interpreted to mean "honesty, fairness and reasonableness."[200] Reasonableness indicates that a good faith interpretation of

196. July Memo, *supra* note 10, at 1-2.
197. NAALC, *supra* note 7, at art. 3.
198. *Id.* at 1.
199. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW, 124 (1991); CHENG, *supra* note 168, at 105.
200. O'CONNOR, *supra* note 199, at 124.

a treaty cannot lead to a construction "which renders [it] null and illusive."[201] International law also requires Parties to interpret a treaty "according to the common and real intention of the parties at the time the treaty was concluded, that is to say the spirit of the treaty and not its mere literal meaning."[202]

A good faith interpretation of the NAALC requires Parties to fulfill their obligations under international law and provide a thorough and reasoned response to allegations that they have failed to enforce their labor laws. Mexico must address arguments that its laws do apply to job applicants, and that its Constitution and statutes prohibit both pregnancy discrimination and pregnancy testing under most circumstances. If Mexico reasonably concludes that pre-employment discrimination is legal after thoroughly considering these issues, it will no longer be in violation of the NAALC.

Mexico's claim that the pregnancy discrimination submission is illegitimate constitutes an effort to reject the restrictions the NAALC imposes on Mexico's right to freely interpret its laws. All treaties impose "a general limitation on every right of the State so that none may be exercised in a manner incompatible with the bona fide execution of the obligation assumed."[203] Before ratifying the NAALC, Mexico could interpret its statutes however it wished as long as the interpretation did not conflict with its Constitution. Now, international law prohibits Mexico from using domestic legal principles to justify its refusal to engage in a good faith interpretation of its laws on pregnancy discrimination.

B. *Mexico Has Violated the NAALC by Not Providing Access to Labor Tribunals*:

The Mexican government has stated that it is not required to assure that pregnant job applicants have access to labor tribunals since pregnancy discrimination does not violate Mexican law and the law does not apply to job applicants.[204] Article 4 of the NAALC states that each party must "ensure that persons with *a legally recognized interest* under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law," and to "ensure . . . high labor standards."[205] The Mexican NAO argued that the phrase "persons with *a legally recognized interest*" indicates that it is not required to provide court access, given its conclusion that pregnant women do not have a legally recognized interest in protection from pre-employment discrimination.

The use of the phrase, "legally recognized interest," in Article 4 facially supports the Mexican NAO's position. However, a good faith interpretation of Article 4, in light of purposes of the NAALC, leads to the conclusion that Mexico is in fact wrong. Mexico's interpretation of Article 4 provides its NAO with more power than warranted by the NAALC, and potentially robs the article of meaning.

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201. CHENG, *supra* note 168, at 106.
202. *Id.* at 114.
203. *Id.* at 124.
204. October Memo, *supra* note 93, at 4.
205. NAALC, *supra* note 7, at art. 4(1) (emphasis added).

The phrase, "legally recognized interest," cannot be interpreted in good faith to mean that a remedy must exist only for interests recognized by the Mexican NAO. This interpretation would provide the NAO with much greater powers than those explicitly recognized in the NAALC. The NAALC states that NAOs "shall serve as a point of contact" between governmental agencies, other NAOs and the Secretariat.[206] Serving as a "point of contact" cannot be stretched to confer upon the NAO the power to engage in authoritative statutory interpretation. To date, no legitimate authoritative interpretive body has concluded that pregnancy discrimination does not violate Mexican law.[207] Therefore, by overstepping its authority and drawing premature conclusions, the Mexican NAO has violated its NAALC obligation to provide access to tribunals.

A good faith interpretation of a treaty provision cannot rob it of meaning.[208] If Mexico is not required to assure access to labor tribunals for colorable legal contentions, the government can consistently avoid its NAALC obligations through self-serving interpretations of its laws. Since Mexico's legal regime contains few limits on how statutes are interpreted, there would be few restraints on this practice.

While Mexico must ensure that women have access to labor tribunals, and that trials comply with due process,[209] it is not required to guarantee that every pregnant woman who experiences discrimination wins her case. In fact, interference with labor tribunals is prohibited by the NAALC's provision on judicial independence.[210] Mexico is simply required to provide access so women can argue that they do have standing to sue companies that rejected them because they were pregnant.

Acknowledgment of pregnant women's rights is not sufficient to satisfy Mexico's NAALC obligations. The NAALC requires Parties to ensure that individuals "have appropriate *access* to . . . labor tribunals."[211] Tribunals currently do not allow women to press pre-employment pregnancy discrimination claims because in order to bring a suit, a woman must first establish a labor relationship with an employer.[212] In addition, Mexican labor tribunals and the governmental entity assigned to help workers present legal claims are corrupt and biased against pregnant women. These flaws in the legal system must be changed before pregnant job applicants can have meaningful access to courts.

First, Conciliation and Arbitration Boards (CAB), administrative bodies with exclusive jurisdiction to adjudicate labor disputes, do not believe that they have jurisdiction to consider claims based on discrimination against job applicants.[213] For example, the President of the CAB in Reynosa stated, "There is no recourse [in this office] for a woman who thinks she was not hired because

206. *Id.* at art. 16.

207. *See* Final Report, *supra* note 112, at 12. (There are several persuasive sources of statutory interpretation in the Mexican legal system, but the only authoritative sources are decisions on which the Supreme Court or the Collegiate Circuit Tribunals have issued five decisions on the same point, without contradiction. *Id.*).

208. CHENG, *supra* note 168, at 106.

209. NAALC, *supra* note 7, at arts. 4(1), 5(1)(a).

210. NAALC, *supra* note 7, art. 5(4).

211. NAALC, *supra* note 7, art. 4(1) (emphasis added).

212. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 41-42.

213. 10 HUMAN RIGHTS WATCH, *supra* note 22, at 40; Submission, *supra* note 9, at 23-24; Report of Review, *supra* note 10, at 17.

she was pregnant, because there is no established labor relationship."[214] For women to have access to labor tribunals the government would have to specifically instruct the tribunals that they do have jurisdiction.

Second, there is ample evidence that the CAB process lacks transparency and credibility with workers and is biased against women.[215] This bias was demonstrated by the President of the CAB in Tijuana when he stated, "the owner [of a maquiladora] is right to try to avoid the cost [of maternity leave] . . . . Some women look for work just when they are pregnant to avoid the costs."[216] As a result, even if a CAB were to acknowledge jurisdiction over discrimination against job applicants, a pregnant woman is unlikely to receive a fair hearing.

Finally, even if women were successful in bringing petitions before CABs, Mexico has not effectively enforced its prohibition against blacklisting. Since blacklisting does occur, most women do not try to challenge the CABs decision on jurisdiction. They prefer to wait out their pregnancies without receiving maternity benefits or a maquiladora salary and then look for another job after giving birth.[217] This is preferable to running the risk of being shut out of the sector permanently.[218]

Mexico not only fails to provide access to tribunals, it also inadequately informs pregnant women of their rights. The Office of the Labor Rights Ombudsman (*Procuraduría de la Defensa del Trabajo*) is responsible for providing workers with information on their labor rights, and helping them to resolve disputes and prepare cases for the CABs free of charge.[219] Unfortunately, the institution is woefully under-funded and many officials that work in these offices are unresponsive to workers' problems.[220] For example, Human Rights Watch encountered problems in obtaining the name and whereabouts of the Ombudsman responsible for Reynosa and Río Bravo.[221] Once they did identify him, they discovered that he was the leader of an industrial association that represents the interests of maquiladoras. The Inspector of Labor in Reynosa commented on this conflict of interest: "How can he, head of this industrial chamber, pretend to be interested in defending the rights of workers? . . . Who would ever go to him? People know. We do not see him here."[222]

In conclusion, Mexico's interpretation of the NAALC provision on access to tribunals is incorrect. The provision cannot be interpreted in good faith to require a remedy only for rights recognized by the Mexican NAO. The NAALC requires Mexico to acknowledge that its labor tribunals have jurisdiction to

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214. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 42.

215. *Id.* at 44.

216. *Id.*

217. *Id.* at 44. (Blacklisting is specifically prohibited by constitutional Article 133, Paragraph IX, which states, "Employers may not . . . employ the system of creating an index of employees that have been separated or will be separated from their employment in order that they not be given work again[.]" CONST. art. 133, ¶ IX).

218. *Id.*

219. Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L.J. 269, 297 (1996).

220. 8 HUMAN RIGHTS WATCH, *supra* note 3, at 40.

221. *Id.* at 39-40.

222. *Id.* at 40.

consider pre-employment pregnancy discrimination claims. In addition, Mexico must also ensure that women have access to tribunals by reforming the CABs and the Office of the Labor Rights Ombudsman to eradicate their bias against pregnant women and lack of transparency.

C. *Mexico Has Contravened the NAALC's Goal of Fomenting Governmental Cooperation and Public Discussion*:

The NAALC was created to promote public awareness of labor laws and governmental cooperation in their interpretation and enforcement.[223] These objectives are evident throughout the NAALC's text. Governmental cooperation is essential to the successful implementation of the treaty because many NAO disputes cannot be decided by a third party. The only disputes subject to sanctions and binding third party decision-making are those that concern persistent failures to enforce occupational safety, child labor or minimum wage laws.[224] The treaty's text reflects the realization that most disputes will only be satisfactorily resolved if the Parties cooperate. Public awareness of labor laws and policies is important to the treaty's goal of effective legal enforcement and improvement of labor protections. If the public is not aware of its rights it will be unable to defend its rights or lobby for greater legal protection. Both Mexico and the U.S.' responses to the pregnancy discrimination submission thwart these goals.

At this point, Mexico's response prevents instead of promotes discussion and cooperation among NAOs, and deters public awareness and understanding of Mexico's laws on pregnancy discrimination. Mexico's response latches on to a narrow reading of its domestic laws and the NAALC in order to discard the submission's allegations. This failure to engage in a dialogue contravenes Mexico's treaty obligations.

Mexico's explanations of its laws and the NAALC must be public and widely disseminated to satisfy the NAALC's provision on "public information and awareness."[225] The pregnancy discrimination submission emphasized the importance of public information by recommending that Mexico post a ministerial declaration explaining pregnant women's labor rights in all offices that enforce labor laws for no less than 360 continuous calendar days.[226] The people affected by the interpretation of Mexican labor laws on pregnancy discrimination are women who work in Mexican maquiladoras. If Mexico does not provide a more thorough and public explanation of why it believes that pregnancy discrimination is legal, women will not be able to effectively respond to defend their rights.

The U.S. NAO has indicated that it does not wholly agree with the Mexican NAO's stance on pre-employment pregnancy discrimination.[227] Therefore, to comply with its NAALC obligations, Mexico must take measures to convince the U.S. NAO that its position is correct. Mexico will only be

223. Williams, *supra* note 46, at 361-62.
224. NAALC, *supra* note 7, at art. 29.
225. *Id.* at art. 7.
226. Submission, *supra* note 9, at 38.
227. Report of Review, *supra* note 10, at 44-45.

persuasive if it clarifies its own stance and responds more fully to arguments, such as those developed in this note, that pregnancy discrimination is illegal.

The U.S. NAO has also contravened the NAALC's objectives on governmental cooperation and public awareness by accepting the Mexican NAO's unsatisfactory response to the pregnancy discrimination submission. In its Report of Review, the U.S. NAO took a very judicious stance. It did not mention specific problems with Mexico's interpretation of the NAALC and its domestic laws. It simply stated that ministerial consultations should clarify "the differing views of officials of the Mexican government on the legality and extent of pregnancy screening," and illustrated this disagreement by mentioning the argument of the Human Rights Commission of the Federal District.[228] Since then, the U.S. NAO has made no public effort to pressure Mexico to clarify its position. Unless the U.S. NAO requires Mexico to explain its position more fully and questions interpretations that cut against the objectives and viability of the NAALC, the NAALC review process will serve little purpose. The NAALC review of the submission on pre-employment discrimination does not bode well for the future viability of the treaty.

VI. Conclusion

Mexican maquiladoras routinely discriminate against pregnant women who seek employment. In 1997, several human and labor rights groups requested that the U.S.' dispute resolution organ for the North American Agreement on Labor Cooperation (NAALC), the U.S. National Administrative Office (U.S. NAO), require Mexico to comply with its NAALC obligations by enforcing its labor laws on discrimination. The Mexican government responded that it had not violated the NAALC because its labor law does not apply to job applicants, and, therefore, does not prohibit discrimination against pregnant women when they apply for a maquiladora job.

Mexican law does arguably prohibit pre-employment pregnancy discrimination. Both the Mexican Constitution and Mexico's labor laws apply to job applicants, and there are several legal provisions that prohibit indiscriminately testing applicants for pregnancy and discriminating against pregnant applicants. In addition, international treaties signed by Mexico prohibit the practice.

Mexico has violated the NAALC by engaging in a bad faith interpretation of its treaty obligations. To comply with the treaty Mexico must engage in a thorough and reasoned analysis of its labor laws that responds to arguments that Mexican law prohibits pre-employment pregnancy discrimination. Such a response would remedy Mexico's contravention of the NAALC goals of increasing governmental cooperation and public debate on labor laws. Mexico must also provide pregnant women who have experienced discrimination in the job application process with access to labor tribunals so they can attempt to vindicate their rights.

228. *Id.* at 45.