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Briones, Joshua

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# STUDENT SCHOLARSHIP

## **PAYING THE PRICE FOR NAFTA: NAFTA'S EFFECT ON WOMEN AND CHILDREN LABORERS IN MEXICO**

Joshua Briones\*

### ABSTRACT

Women and children laborers in Mexico are badly mistreated. The North American Agreement on Labor Cooperation ("NAALC"), one of the two side agreements to the North American Free Trade Agreement ("NAFTA"), has had little impact on the current domestic labor laws and does little to safeguard against discrimination, inhumane treatment, dismal working conditions, and even the presence of children in the workforce. In this Comment, Joshua Briones discusses the prevalence of women and children in the Mexican labor force. He identifies why and how employers exploit women and children in Mexico. He then proposes that the NAALC is ineffective in stopping the abuse of women and children in Mexico by demonstrating how the NAALC is simply reinforcing existing domestic laws, rather than providing meaningful international oversight. Finally, he presents suggestions to redraft the NAALC to improve the treatment of women and children workers in Mexico.

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	303
II.	THE MEXICAN LABOR FORCE AFTER NAFTA ....	304
	A. <i>General Overview of Economic and Labor         Conditions in Mexico</i> .....	304
	B. <i>Women and Children in the Mexican Labor         Force</i> .....	306
III.	WOMEN AND CHILDREN LABORERS ARE MISTREATED IN MEXICO.....	308
	A. <i>Maquiladora Expansion, Corruption, and         Ignorance of the Law Leave Women and         Children in Mexico Vulnerable to         Mistreatment</i> .....	308
	1. <i>Maquiladora Expansion Leads to Rapid             Overpopulation</i> .....	308
	2. <i>Incessant Corruption Among Government             and Business Officials</i> .....	309
	3. <i>Dependency and Ignorance Leads to Fear             of Retaliation</i> .....	310
	B. <i>Low Wages, Deplorable Working Conditions,         and Discrimination Are Some of the Ways in         Which Women and Children Suffer         Mistreatment in Mexico</i> .....	311
	1. <i>Low Wages</i> .....	311
	2. <i>Deplorable Working Conditions and             Discrimination</i> .....	312
IV.	AN ATTEMPT TO MOLLIFY THE PROBLEM: THE NAALC'S HISTORY, PROPOSED GOALS, AND ENFORCEMENT MECHANISMS .....	312
	A. <i>The History of the NAALC</i> .....	312
	B. <i>The Proposed Goals of the NAALC</i> .....	314
	C. <i>Enforcement Mechanisms under the         NAALC</i> .....	314
V.	THE NAALC IS INEFFECTIVE IN CURTAILING THE MISTREATMENT OF WOMEN AND CHILDREN IN MEXICO TODAY .....	316
	A. <i>The NAALC in Practice in Mexico Today</i> .....	316
	B. <i>Four Factors Make the NAALC Ineffective in         Stopping the Abuse of Women and Children in         Mexico Today</i> .....	318
	1. <i>NAALC Protection is Limited to             Unionized Workers</i> .....	319

1999]	<i>PAYING THE PRICE FOR NAFTA</i>	303
	2. Legal Assistance is Impractical .....	320
	3. The NAALC is Too Difficult to Enforce .....	321
	4. "Flexibilization" .....	322
VI.	RECOMMENDATIONS FOR REDRAFTING THE NAALC .....	323
	A. <i>The NAALC is Futile</i> .....	323
	B. <i>Goals for Reform</i> .....	325
	1. Better Enforcement.....	325
	2. A Gender Perspective in the NAALC.....	326
	3. International Solutions.....	326
	C. <i>Implementing Reforms</i> .....	327
VII.	CONCLUSION .....	327

## I. INTRODUCTION

As you read this, a female laborer in Mexico breathes toxic fumes while toiling in an improperly vented work site. This woman probably works with a job-related injury that has not healed because her employer refuses to give her sick leave. Likely, this woman is hungry. Despite the sixty-hour workweek, she still does not have enough money to feed herself or her family. If it is late at night, the woman might have to resort to prostitution for the money she needs for food.

Throughout Mexico, tens of thousands of women and children are working in agricultural fields, sweatshops, and factories to produce goods for American families. They are busy from morning until night, often seven days a week, sewing the clothes for our families; picking fruits and vegetables for our dinner tables; assembling appliances and furniture for our homes; and making toys for our children. The North American Free Trade Agreement ("NAFTA") brought the U.S. lower prices through free trade. It brought Mexican women and children a living nightmare.

In an effort to curtail the abuse of workers in Mexico, the North American Agreement on Labor Cooperation ("NAALC"), one of two side agreements to NAFTA,<sup>1</sup> attempted to impose a set of international labor standards. The NAALC,

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1. The NAALC was created by the United States, Canada and Mexico in final draft form on September 13, 1993 as a side agreement to the North American Free Trade Agreement ("NAFTA"). See North American Agreement on Labor Cooperation, Sept. 13, 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

however, has had a minimal impact on the current domestic labor laws in Mexico and does little to safeguard against discrimination, inhumane treatment, dismal working conditions, and even the presence of children in the workforce.

In this Comment, I discuss how the NAALC is ineffectual in stopping the abuse of women and children in Mexico by demonstrating how the NAALC is simply reinforcing existing domestic laws rather than providing meaningful international oversight. My discussion will proceed in five parts. First, after a brief general overview of economic and labor conditions in Mexico after NAFTA, I will discuss the prevalence of women and children in the Mexican labor force. Second, I will identify why women and children are being exploited and the ways in which this exploitation is implemented in Mexico. Third, I will discuss the history, enforcement mechanisms, and proposed goals of the NAALC. Fourth, I will discuss the ways in which the NAALC has failed to protect women and children laborers in Mexico. Finally, I conclude by proposing ways to redraft the NAALC to mitigate the mistreatment of women and children in Mexico.

## II. THE MEXICAN LABOR FORCE AFTER NAFTA

### A. *General Overview of Economic and Labor Conditions in Mexico*

Mexico has a land area of 756,066 square miles, making it the world's fourteenth largest country and the fifth largest in the Americas.<sup>2</sup> It is comparable in area to France, Italy, Germany, Spain and the United Kingdom combined.<sup>3</sup> With a population of 98.6 million, Mexico is the world's eleventh most populous country.<sup>4</sup> Mexico's size and population, together with its proximity to the U.S., have made it an ideal trading partner. NAFTA was a landmark event intended to facilitate further trade between the two countries.<sup>5</sup> It created the world's largest and first continent-

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2. See 24 THE NEW ENCYCLOPAEDIA BRITANNICA 27 (15th ed. 1995) [hereinafter ENCYCLOPAEDIA]; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 310 (1998).

3. ENCYCLOPAEDIA, *supra* note 2, at 27.

4. *Id.*

5. NAFTA phases out tariffs among the U.S., Canada and Mexico on goods produced in North America and provides for the elimination of many nontariff barriers. When the agreement was executed, half of all U.S. exports to Mexico became eligible immediately for duty-free treatment. Remaining tariffs were scheduled for elimination over five, ten or fifteen years. In addition to reducing tariffs, NAFTA:

i. opens government procurement to firms in all three countries;

wide free trade area, uniting a total population of nearly 360 million people and a combined production of over seven trillion dollars.<sup>6</sup> Moreover, the agreement converted the U.S. and Mexico into a unified economic force, enhancing each country's ability to compete globally.

Since NAFTA took effect on January 1, 1994, Mexico's trade with the U.S. and Canada has increased thirty-five percent.<sup>7</sup> Total Mexican exports rose from a mere \$16.2 billion in 1986 to nearly eighty billion dollars in 1995.<sup>8</sup> Mexico's exports consist of products from all sectors of the economy including the textiles,<sup>9</sup> steel,<sup>10</sup> automotive,<sup>11</sup> and factory assembly<sup>12</sup> industries.

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- ii. eliminates restrictions on foreign investment and ensures nondiscriminatory treatment for local companies that are owned by investors in other NAFTA countries;
  - iii. eliminates barriers that prevent service companies from operating across North American borders, including financial services;
  - iv. provides rules preventing governments from using monopolies and state enterprises to restrict trade;
  - v. facilitates border crossing for individuals engaged in business in all three countries;
  - vi. provides comprehensive rules to protect intellectual property rights; and
  - vii. provides dispute settlement mechanisms.

North American Free Trade Agreement – NAFTA (visited May 5, 1999) <[www.cbsc.org/ontario/bis/1294](http://www.cbsc.org/ontario/bis/1294)> [hereinafter NAFTA].

6. National Center for Policy Analysis, *Benefits of NAFTA* (visited Apr. 11, 1999) <[www.public-policy.org/~ncpa/bg/bg130sb.html](http://www.public-policy.org/~ncpa/bg/bg130sb.html)>.

7. NAFTA, *supra* note 5.

8. *Id.*

9. *Id.* Mexico moved from fifth to third place in the U.S. market for textile exports, outperforming South Korea and Taiwan between 1994 and 1996. The Mexican share of the U.S. import market climbed from 4.4% in 1993 to 9.4% in the first half of 1996. Main textile and garment exports to the U.S. include men's suits, T-shirts, sweaters, cotton knits, ladies' outfits and blouses, and sportswear. *Id.*

10. *Id.* Mexico moved from fifth to third place in steel exports and overtook Taiwan and Germany between 1993 and the first half of 1996. Main steel products exported to the U.S. include flat-rolled steel and stainless steel products, laminated springs, iron bars and sections, metal mesh and screens, and pipefittings. *Id.*

11. *Id.* The automotive industry is the most integrated in North America. As a result, Mexico's share of total U.S. automotive imports rose from 10.6% in 1993 to 17.1% in the first half of 1996. Mexican automotive sector exports soared in 1995, rising 57% over 1993 figures. Main exports include vehicles, internal combustion and diesel engines, headlights, windshield wipers, motor parts and electric start devices. *Id.*

12. *Id.* Between January and June 1996, 285 new maquiladora plants opened in Mexico. More than seventy thousand new jobs were created, which brings the total number of jobs in the sector to over 750,000. *Id.* See *infra* note 24 for a detailed description of a maquiladora.

The free trade movement between the U.S. and Mexico, amplified by NAFTA, will inevitably continue if not accelerate. Corporations, organized labor, and individuals within both the U.S. and Mexico should encourage that growth because it will increase economic opportunities, jobs, and mutual respect. Alexander Hamilton envisioned in *The Federalist* No. 12 the creation of "one great American system—a large Commercial Republic."<sup>13</sup> There is no reason why Hamilton's dream for one large Commercial Republic cannot be expanded to also include the entire Western Hemisphere. This push toward greater economic union and prosperity, however, should not come at the expense of individual human rights.

### B. *Women and Children in the Mexican Labor Force*

In 1995, a man was the sole supporter in only one out of every ten Mexican households.<sup>14</sup> A woman was the only source of income in one out of ten Mexican households; in five out of every ten, women were the principal wage earners; and in three out of ten, the woman contributed the same income as her male counterpart.<sup>15</sup> Some estimate that women made up half of the Mexican workforce.<sup>16</sup>

By encouraging free trade, NAFTA has increased export processing and other forms of assembly manufacturing by U.S. companies.<sup>17</sup> In lowering barriers for goods, NAFTA has also

13. Betty Southard Murphy, *The Commercial Republic and the Dignity of Work*, NAT'L F., Fall 1984, at 49.

14. *Social Statistics on Gender and Work in Mexico*, MEXICAN LABOR NEWS AND ANALYSIS, (visited Apr. 11, 1999) Vol. II <<http://www.igc.apc.org/unitedelect/vol3.html>>.

15. See Joan B. Anderson & Denise Dimon, *The Impact of Opening Markets on Mexican Male/Female Wage and Occupational Differentials*, 32 SOC. SCI. J. 309, 310 (1995). The authors also note:

The gap between the productivity and earnings of men and women is further widened because those women who are employed in the formal sector are concentrated in unskilled jobs. . . .

This polarization is reinforced by the dominant cultural ideology in most developing countries, including Mexico, which views women's proper role as that of wife and mother. Paid employment is in conflict with these roles. . . . Work as an extension of women's domestic roles reinforces the notion of labor segmentation by gender with women predominating in the informal (unorganized, low capital, low productivity) sector. *Id.*

16. *Id.*

17. See *id.* at 309. Export processing in Mexico is achieved largely in the northern maquiladora plants. See Jaime Ros, *Mexico and NAFTA: Economic Effects and the Bargaining Process*, in *Mexico and the North American Free Trade Agreement:*

encouraged tourism by facilitating the establishment of hotel chains and other service providers that rely on such goods.<sup>18</sup> Being mainly a service industry, tourism encompasses informal sector domestic work.<sup>19</sup> Growth in both of these industries has increased the demand for female labor. More than 1.2 million Mexican women labor as domestic workers, the largest single occupation of women workers in the Mexican economy.<sup>20</sup> NAFTA has also contributed to child labor.<sup>21</sup> There are an estimated five million children working in Mexico.<sup>22</sup> With its effect in bolstering trade, NAFTA has forced farmers and factory managers to meet the increased demand by relying on child labor.<sup>23</sup>

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Who Will Benefit? 11 (Victor Bulmer-Thomas et al. eds., 1994). Maquiladoras' gross exports account for over 20% of Mexico's total exports. See *id.* at 26 n.1. Approximately 60% of maquila workers are women. See Kathryn J. Ready, *NAFTA: Labor, Industry, and Government Perspectives*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: LABOR, INDUSTRY, AND GOVERNMENT PERSPECTIVES* 3, 13 (Mario F. Bognanno & Kathryn J. Ready eds., 1993).

18. See Anderson & Dimon, *supra* note 15, at 311.

19. *Id.* at 309.

20. *Id.*

21. Estimates of the number of children under fifteen years of age working vary considerably from eight million, or 25.8%, as given by UNICEF, to eleven million, or 34.4%, as given by the Mexican Statistics Institute (INEGI). Dep't of State, *Mexico Country Reports on Human Rights Practices for 1993*, 502 (Feb., 1994) [hereinafter *Country Reports*]. The passage of NAFTA has converted Sinaloa, a state along Mexico's northwest coast, into Mexico's leading agricultural export state. Sinaloa produces 900 million U.S. dollars worth of red tomatoes and other agricultural produce each season. *Agricultural Employers Call for Change in Child Labor to Prevent Boycott of Mexican Crops*, MEXICAN LABOR NEWS AND ANALYSIS, October 2, 1997, Vol. II, No. 18 [hereinafter *Agricultural Employers*]. Children as young as eight years old cultivate and harvest tomatoes. *Country Reports, supra* at 502. Mario Luis Fuente, the general director of the Mexican government's national System of Integral Family Development (DIF), estimates that in the agricultural fields alone, more than one million minors between seven and fourteen years of age work as agricultural laborers. *Child Labor and Child Prostitution: Growing Problems in Mexico*, MEXICAN LABOR NEWS AND ANALYSIS (visited Apr. 11, 1999) <<http://www.igc.apc.org/unitedelect/vol2no23.html>>. Maria Teresa Guerra Ochoa, a lawyer and human rights activist, believes a quarter of Mexican workers are under fourteen, and 37% are in the limited-work category of fourteen to sixteen years old. *Id.* Diego Aguilar Acuna, leader of the National Union of Wage Workers of the Fields (Sindicato Nacional de Asalariados del Campo) said that child labor in the fields is a long-established practice, and that workers expect that their entire families will work in the agricultural fields. *Agricultural Employers, supra*.

22. *Country Reports, supra* note 21, at 502.

23. Telephone Interview with Andres Kornegay, Professor of Economics and Political Science at the Centro de Enseñanza Técnica y Superior (CETYS), Tijuana, B.C., Mexico (Oct. 16, 1998) [hereinafter Interview with Kornegay].



Yet, despite the large number of women and children laborers and their role as income earners in the family, women and children workers in Mexico are badly mistreated.

### III. WOMEN AND CHILDREN LABORERS ARE MISTREATED IN MEXICO

#### A. *Maquiladora Expansion, Corruption, and Ignorance of the Law Leave Women and Children in Mexico Vulnerable to Mistreatment*

##### 1. Maquiladora Expansion Leads to Rapid Overpopulation

Maquiladora<sup>24</sup> expansion encouraged by NAFTA precipitated a mass exodus<sup>25</sup> of the poor from southern Mexico to the northern border regions to seek work.<sup>26</sup> The trend of rapid overpopulation in the border region has had the most drastic effect

24. A maquiladora is a Mexican assembly or manufacturing operation [located along the U.S.-Mexican border]. . . . A maquiladora utilizes competitively priced Mexican labor in assembly processing and/or other manufacturing operations, . . . [and] temporarily imports most components from the U.S. and other sources. . . . Maquiladora operations [are] generally labor-intensive cost centers, with most productions geared for export from Mexico. Finally, maquiladoras may be entirely foreign managed, unlike other multi-nationals operating in Mexico.

*Ciudad Juarez: Maquiladoras* (visited Apr. 11, 1999) <<http://cs.utep.edu/juarez/maquila.html>>.

25. High unemployment resulting from depressed local economies throughout Mexico has caused many people to travel to the border regions in the hope of gaining employment in the expanding maquiladora sector. Interview with Kornegay, *supra* note 23.

26. For example, Ciudad Juárez, "set opposite El Paso on the Texas-Chihuahua border, is home to an estimated 1.5 million people — the great majority recent immigrants to the city — and 350 maquiladoras." *With 130 Women Dead, Parish Buries Three More Victims As Killings Continue in Ciudad Juarez*, MEXICAN LABOR NEWS AND ANALYSIS (published June 2, 1998) <<http://www.igc.apc.org/unitedelect/vol3no11.html>>. "City officials estimate that 218,000 Juárez residents, just under half the city's labor force, work in the maquilas." *Id.* Even if the city were to spend its entire budget for the next fifteen years paving roads, many of the streets built to accommodate the burgeoning population would still be unsurfaced in 2010. Sam Dillon, *Big Mac? Not for Maquiladoras Workers*, 1995 N.Y. TIMES NEWS SERVICE, Dec. 5, 1995. Reynosa Tamaulipas, located along the Texas border, has also seen spectacular growth. *Maquiladoras Remain Strongest Sector of Mexican Economy, Fastest Growing*, MEXICAN LABOR NEWS AND ANALYSIS (published Sept. 16, 1998) <<http://www.igc.apc.org/unitedelect/vol3no16.html>> [hereinafter *Maquiladoras Remain Strongest*]. Reynosa grew from 282,000 inhabitants in 1990 to 850,000 in 1998, with the number of maquiladora workers expanding from 23,500 in 1990 to 77,000 in 1998. *Id.* In Tijuana, water is so scarce that tens of thousands of people living in slums have no running water at all. Nancy Nusser, *NAFTA Fails to Stem Maquiladora Growth Along the Border*, 1995 COX NEWS SERVICE, Dec. 23, 1995.

on women and children. Women comprise over sixty percent of all maquiladora workers in Mexico. Facing abject poverty in their rural communities, many families are forced to travel to the border region in the hopes of finding work.<sup>27</sup> This move forces workers to leave the benefit of their traditional extended families and other communal structures in the countryside, only to live in cardboard hovels alongside rivers full of raw sewage and industrial toxins without running water, sewers, electricity, or paved roads.<sup>28</sup> This migration also tends to promote the entry of children into the workforce.<sup>29</sup> Unfortunately, the terrible conditions caused by overpopulation are only compounded by rampant corruption in Mexico.

## 2. Incessant Corruption Among Government and Business Officials

According to Mexico's federal labor code, companies are required to protect pregnant women<sup>30</sup> and are prohibited from employing children under the age of fourteen.<sup>31</sup> The federal labor code sets strict regulations for the employment of those up to eighteen years old.<sup>32</sup> Despite the many protections of Mexican

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27. Interview with Kornegay, *supra* note 23.

28. *Maquiladoras Remain Strongest*, *supra* note 26.

29. One commentator, Kenneth Klothen, states:

"... (T)hese factors have the effect of bringing large numbers of young people and families to areas where they do not have the benefit of traditional extended family and other communal structures to provide assistance to the family economy, and where educational services, day care and other social benefits are lacking. These effects tend to promote the entry of children into the work force."

KENNETH L. KLOTEN, *CHILD LABOR IN THE EXPORT MANUFACTURING SECTORS OF CENTRAL AMERICA AND MEXICO* 18 (1994).

30. For example, Mexico's federal labor code requires companies to: (1) protect pregnant women from performing tasks that would cause danger to their health in relation to the fetus; (2) pay pregnant women maternity leave of six weeks before delivery and six weeks after delivery; (3) allow new mothers two paid extra breaks for half hour each to breast feed their infants; and (4) allow pregnant women to take an extra sixty days off while receiving 50% of their salary apart from the twelve weeks of maternity leave. Ley Federal de Trabajo (The Federal Labor Law), Tomo CCXC IX, No. 26 (1970) [hereinafter L.F.T.].

31. *Id.*

32. *Id.* Among these various provisions, minors in this age group are prevented from work that is "dangerous or unhealthy," underground or underwater, itinerant, or which "may affect their morals or good behavior." *Id.* at art. 175. In addition, according to the L.F.T., minors may not work after 10:00 p.m. in an industrial plant, work for more than six hours per day, or work for more than three hours without a one-hour break. *Id.* at art. 177. The L.F.T. also requires that, in order to work, children under eighteen are required to have permission from a legal guardian or

labor laws, the exploitation of women and children persists because of corruption and a lack of enforcement mechanisms. Thus, Mexico's generous labor standards are laws in form, but meaningless in application.<sup>33</sup>

Faced with the pressures of competing in the global economy, many factory owners in Mexico overwork, underpay, and otherwise take advantage of vulnerable women and child workers.<sup>34</sup> Particularly in maquiladoras, labor officials are unable to monitor compliance with the federal labor code.<sup>35</sup> These officials fear reprimand from higher officials in Mexico City, because the government sees maquiladoras as an untouchable source of employment and foreign-income earnings.<sup>36</sup> Often, Mexican government officials condone this exploitation of women and children because many have ownership interests in the factories that use women and child labor.<sup>37</sup> Other government officials frequently accept bribes in exchange for allowing the labor violations to continue.<sup>38</sup> Furthermore, even if labor inspectors could be relied upon to enforce labor laws, most women and children would not report incidents of mistreatment for fear of losing their jobs.

### 3. Dependency and Ignorance Leads to Fear of Retaliation

Most women, particularly when pregnant, cannot afford to lose their jobs. Because women applicants are often single

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parent, have regular medical examinations, and their employers must post a list of dangerous tasks not to be performed by minors. *Id.* at arts. 23, 174, and 423.

33. In fact, on paper, Mexican workers are covered by what probably is the most comprehensive set of labor rights, not only in North America, but perhaps even the world. Article 123 of the Mexican Constitution provides that "every person is entitled to suitable work that is socially useful. MEX. CONST. at art. 123, reprinted in X CONSTITUTIONS OF THE WORLD 97 (A.P. Blaustein & G.H. Flanz eds., 1988). Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law." *Id.* The Mexican Constitution goes on specifically to protect a myriad of worker rights. *Id.* Article 123 provides workers the right to organize labor unions, protects the right to strike, and provides for an implied right to enter into collective bargaining contracts. *Id.* In addition, it protects individual worker rights by establishing a minimum wage, an eight-hour work day, a maximum work week of six days, and provides for overtime pay and for maternity leave. *Id.*

34. DEP'T OF LABOR, REPORT TO CONGRESS, *By the Sweat and Toil of Children* (July 15, 1994) [hereinafter LABOR REPORT].

35. Interview with Kornegay, *supra* note 23.

36. *Id.* By documenting activities that are illegal under domestic laws and violate international labor standards the Mexican government would reveal extensive and embarrassing labor problems to the world. *Id.*

37. LABOR REPORT, *supra* note 34.

38. Interview with Kornegay, *supra* note 23.

mothers or their families' primary wage earners,<sup>39</sup> their desperation to get or retain their jobs combined with ignorance of the law make them reluctant to contest discriminatory treatment.<sup>40</sup> Thus, when women workers become pregnant, fear often compels them to hide their pregnancies, and risk the well-being of themselves and their unborn babies.<sup>41</sup> These three factors—the terrible conditions caused by overpopulation, rampant corruption, and workers' fear of losing their jobs—open the door to the mistreatment of women and children in Mexico.

B. *Low Wages, Deplorable Working Conditions, and Discrimination Are Some of the Ways in Which Women and Children Suffer Mistreatment in Mexico*

1. Low Wages

Many Americans perceive Mexico to be inexpensive. However, food and other necessities are at least as expensive as they are in the United States. For example, a meal at a local restaurant would be a full day's wages for maquiladora workers who earn about thirty-five cents an hour.<sup>42</sup> Most food Americans take for granted are unaffordable luxuries for maquiladora workers. The Secretary of Coordination at the Comit Urbano Popular Asociaciòn Civil ("CUPAC"), Eduardo Badillo Martínez, adds that salaries for maquila workers are so small that most cannot buy basic necessities for survival.<sup>43</sup>

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39. See generally JAMES A. SWEET, *WOMEN IN THE LABOR FORCE* (1973).

40. Interview with Kornegay, *supra* note 23.

41. *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, HUM. RTS. WATCH PUBLICATIONS, No. 6(B) (Aug. 8, 1996) [hereinafter *No Guarantees*].

42. Dillon, *supra* note 26.

43. Dennis Demaio, *Hell Mexican Factory: A First-Hand Account of What NAFTA Has Wrought*, THE ORGANIZER, May 14, 1995. One resident of Ciudad Juarez described the situation this way: "Maquila workers earn between [three and six dollars a day]." He goes on to say, "[B]etween them, a husband and wife barely earn the [the income] necessary to just support a family. For a family of five or six, two salaries just don't make it, so the children have to work. . . ." *Id.* See also *Women Domestic Workers Speak out on March 30 International Day of Women in Domestic Service*, MEXICAN LABOR NEWS AND ANALYSIS, (visited Apr. 2, 1998) <<http://www.igc.apc.org/unitedelect/vol3no7.html>>. Like women in maquiladoras, domestic workers also receive low salaries. *Id.* According to a study conducted by Mary Goldsmith of the Metropolitan Autonomous University (UAM), using the National Employment Statistics of the Mexican Institute of Statistics (INEGI), 29.3% of all domestic servants earn only about three U.S. dollars per day. *Id.* Some 48.4% receive between three and six U.S. dollars per day. *Id.* And 51.2% of domestic workers report that they receive no benefits whatsoever. *Id.* Goldsmith's study,

## 2. Deplorable Working Conditions and Discrimination

Because most women and children are desperate for the wages they need to survive, employers regularly mistreat their women employees, particularly those who are pregnant.<sup>44</sup> They regularly invade the privacy of their female applicants by requiring pregnancy tests and by asking intrusive questions about the applicant's menses schedule, whether she is sexually active, and her method of birth control.<sup>45</sup>

For women already employed, a woman's pregnancy brings serious health and safety concerns. In attempts to save money, employers regularly avoid paying maternity benefits to their pregnant employees. Managers sometimes reassign women to more physically difficult work or demand overtime work in an effort to force a pregnant woman worker to resign.<sup>46</sup> Pregnant women routinely get assignments in improperly vented work sites where they must breathe in toxic fumes.<sup>47</sup> Employers force these women to face a horrible choice: breathe the toxic fumes that harm them and their unborn babies or quit before they are entitled to the maternity benefits required from companies under Mexican law.

In short, NAFTA was supposed to lift Mexican workers out of poverty by creating more and better jobs. Instead, women and children toil for wages less than one dollar an hour in an environment where they are treated with less dignity than the unsafe machinery and tools they use.

#### IV. AN ATTEMPT TO MOLLIFY THE PROBLEM: THE NAALC'S HISTORY, PROPOSED GOALS, AND ENFORCEMENT MECHANISMS

##### A. *The History of the NAALC*

Although NAFTA itself has received attention in the press,<sup>48</sup> and in academic circles,<sup>49</sup> the NAALC has been rela-

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based on 315 interviews, indicates that 40% work more than forty hours a week, and of those, 45% work more than sixty hours a week. *Id.* Only 5.4% of the domestic workers had leave to rest on the seven legally recognized holidays stipulated in the L.F.T. and the Mexican Constitution. *Id.*

44. Demaio, *supra* note 43.

45. See *No Guarantees*, *supra* note 41.

46. Demaio, *supra* note 43.

47. *Id.*

48. See Bob Davis, *One America?*, WALL ST. J., Sept. 24, 1992, at R1. See also Bob Davis, *Going South*, WALL ST. J., Oct. 28, 1994, at R1.

tively ignored. At the time the U.S., Mexico, and Canada negotiated the NAALC, there were only two existing international labor agreements to look at as models and neither fit the North American situation.<sup>50</sup> One, the model of a political union, the European Union ("EU"), involved common international laws capable of superseding domestic law legislated by an international Parliament and enforced by international courts.<sup>51</sup> Another, the International Labor Organization ("ILO") model, used voluntary international standards with essentially voluntary compliance.<sup>52</sup> Neither model was appropriate. NAFTA countries were looking for the same obligations on all the signatories and obligations that were binding and focused on enforcement.<sup>53</sup> The U.S. government was opposed to the delegation of powers over labor issues to an international labor commission.<sup>54</sup> The Mexican government feared that the trilateral agreement would interfere with Mexican domestic labor policy.<sup>55</sup>

NAFTA itself came to provide a new model. Unlike the EU or the ILO, the NAALC places the governments not in a vertical relationship to an international body using international standards, but in a horizontal relationship to each other using domestic standards.<sup>56</sup> As opposed to an international body that creates and regulates all labor law violations, the horizontal relationship allows each country to use their individual standards and enforcement systems to regulate labor laws. The overall purpose of the agreement is to protect the enforcement of labor laws from the competitive pressures generated by free trade.<sup>57</sup> A big fear among many Americans was that to take advantage of labor, a cheap and plentiful resource, Mexican businesses and the Mexi-

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49. See Leonard Bierman et al., *The North American Free Trade Agreement: A Market Analysis*, 27 VAND. J. TRANSNAT'L L. 719 (1994); William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413 (1993); William E. Spriggs & James Stanford, *Economists' Analysis of the Likely Employment and Wage Effects of the North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 495, 495-536 (1994).

50. Interview with Kornegay, *supra* note 23.

51. *Id.*

52. *Id.*

53. *Id.*

54. See Elizabeth C. Crandall, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW 165, 169-72 (1994).

55. See *id.* at 170-72.

56. See NAALC, *supra* note 1.

57. *Id.*

can government would ignore their domestic labor standards. To this end, the NAALC's negotiators created a complex procedural mechanism intended to address labor issues among member countries while keeping foreign interference with any one country's domestic labor laws to a minimum.<sup>58</sup> In its final form, the NAALC was an historic agreement—never before had a U.S. trade agreement been expressly linked to the protection of labor rights in another country.<sup>59</sup>

### B. *The Proposed Goals of NAALC*

Supporters of NAALC's dispute resolution process point out that its goal is not to "punish" a party that is violating the Agreement. Instead, the Agreement seeks a negotiated solution through consultations and cooperation among the parties.<sup>60</sup> The non-adversarial process is intended to maintain friendly relationships between parties and foster cooperation and consultation.<sup>61</sup> Supporters argue that because the NAALC compliance process is public,<sup>62</sup> thereby revealing bad practices to the public, "these proceedings could indirectly lead to better enforcement of the parties' labor laws and, consequently, better observance of those rules by companies."<sup>63</sup> Thus, where long-term relationships are important and valued, as they are in NAFTA, it is thought that this process is well-suited to the successful settlement of disputes.<sup>64</sup>

### C. *Enforcement Mechanisms under the NAALC*

Mexico has strong labor laws, but as I described earlier, these laws are poorly enforced. The NAALC was intended to provide a new model to reinforce the rule of law at an international level. Under the NAALC, Mexican citizens may file com-

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58. *Id.*

59. Neither the U.S.-Canada Free Trade Act nor the General Agreement on Tariffs and Trade, contain provisions related to worker rights. Canada-U.S.: Free-Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281; General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 1987. See also Betty Southard Murphy, *Multinational Corporations and Free Coordinated Transnational Bargaining: An Alternative to Protectionism?*, 28 LAB. L.J. 619, 631 (1977).

60. Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 410 (1995); see also NAALC, *supra* note 1, at art. 20.

61. Murphy, *supra* note 60, at 414-15.

62. *Id.* at 423.

63. *Id.*

64. *Id.* at 414-15.

plaints with the National Administration Office (“NAO”) in the U.S.<sup>65</sup> In addition, any submissions to the NAO must specify to what extent the matters complained of are inconsistent with Mexico’s domestic standards, and to what extent there has been harm to the complainant or other persons.<sup>66</sup> Persons filing submissions must also address whether “the matters complained of appear to demonstrate a pattern of non-enforcement of labor law by [Mexico],” and whether relief has been, or is being sought, in another forum.<sup>67</sup>

Once the complainant makes the appropriate allegations and a submission is filed, the secretary of the NAO has sixty days to determine whether to accept the submission for formal review.<sup>68</sup> The test used in making this decision is whether the submission “raises issues relevant to labor law matters in [Mexico] and if a review would further the objectives” of the NAALC.<sup>69</sup> Conversely, the secretary may deny review if the statements contained in a submission would, even if substantiated, “not constitute a failure of [Mexico] to comply with its obligations” under the NAALC.<sup>70</sup>

If a submission is accepted for review, the secretary is required to issue a public report that includes any findings and recommendations within 120 days.<sup>71</sup> However, an extension of time of up to an additional sixty days may be permitted.<sup>72</sup> Normally, it takes about six months from the time an initial submission is made until a final report is issued.<sup>73</sup>

Should the NAO find in favor of the complainant, it will seek implementation of its findings through “consultations” with

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65. NAALC, *supra* note 1, at art. 15. Article 16 provides that “[e]ach NAO shall provide for the submission and receipt . . . of public communications on labor law matters arising in the territory of *another* Party. *Id.* (emphasis added). Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.” *Id.* at art. 16(3).

66. *Id.*

67. *Id.*; see Section IV(B)(2), *infra*.

68. NAALC, *supra* note 1, at art. 15.

69. *Id.*

70. See Bureau of International Labor Affairs; North American Agreement on Labor Cooperation; Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,661-62 (1994) [hereinafter NAALC Procedural Guidelines].

71. NAALC, *supra* note 1.

72. *Id.*

73. The secretary of the NAO has up to sixty days to decide whether or not to accept a submission for review and then normally up to 120 days to hold a public hearing and issue a report. The total time elapsed is usually about six months. *Id.*



the other relevant NAO.<sup>74</sup> If consultations do not resolve the matter satisfactorily, the Secretary of the NAO will request the Secretary of Labor to seek "consultations at the ministerial level" to resolve the matter.<sup>75</sup> If the issues in the submission involve "occupational safety and health or other technical labor standards,"<sup>76</sup> the NAALC provides for further review beyond the ministerial level consultations.<sup>77</sup>

If at this point further review reveals that the complaint is valid, fines may be issued and ultimately the U.S. may impose sanctions in the form of tariffs.<sup>78</sup> The fines are levied against the Mexican government, not against businesses or individuals, while sanctions are imposed against the specific industry sector concerned.<sup>79</sup> However, neither fines nor sanctions can be imposed until after consultations between the countries have failed to resolve the dispute.<sup>80</sup> This whole process, from the submission of a complaint to fines or sanctions, could easily take three to four years.<sup>81</sup>

## V. THE NAALC IS INEFFECTIVE IN CURTAILING THE MISTREATMENT OF WOMEN AND CHILDREN IN MEXICO TODAY

### A. *The NAALC in Practice in Mexico Today*

"[T]he NAALC is in many respects a quite limited document. The Agreement itself is a sort of administrative agree-

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74. *Id.* at art. 21; see also NAALC Procedural Guidelines, *supra* note 70, at 16,662.

75. See NAALC Procedural Guidelines, *supra* note 70, at 16,662.

76. The term "technical labor standards" is defined quite narrowly in Article 49 of the NAALC to encompass only issues like the prohibitions on forced labor, the protection of child labor, and the enforcement of minimum wage and overtime pay standards. Article 49 specifically leaves out from the definition of "technical labor standards" matters related to the rights to organize, to collectively bargain, and to strike—the very subjects of provisions (a) through (c) of the same article's definition of "labor law." See NAALC, *supra* note 1, at art. 49(a)-(c).

77. Matters falling within this definition can be further reviewed by an evaluation committee of experts pursuant to Articles 23-28 of the NAALC. Some limited issues may then be subject to even further review by an arbitral panel. See NAALC Procedural Guidelines, *supra* note 70, at 16,662.

78. See NAALC, *supra* note 1.

79. *Id.*

80. *Id.*

81. *Id.*

ment, with no real force of law.”<sup>82</sup> The NAALC is not legislation enacted by Congress, nor was it ever even ratified by Congress.<sup>83</sup> Essentially, it is merely a “memorandum of understanding” between the respective governments regarding the issue of labor rights under NAFTA.<sup>84</sup> “Although [t]he enforcement provisions of NAFTA’s side accord on labor would, under ideal conditions, serve as a counterweight to any incentives to promote business at the expense of worker rights, shortfalls in the enforcement mechanisms could leave the Mexican government relatively free to pursue its own agenda.”<sup>85</sup>

The U.S. government entered into the agreement in an attempt to mollify concerns in some political sectors in the U.S. regarding general labor standards in Mexico, and the agreement contains no means of establishing or enforcing worker rights or fair labor standards.<sup>86</sup> With domestic enforcement of domestic law as the guiding principle, Mexico’s extremely low minimum wage, three dollars a day,<sup>87</sup> and its permission for fourteen-year-old children to work in industry,<sup>88</sup> cannot be modified under the NAALC. Indeed, despite promises by U.S. Trade Representative Mickey Kantor that the side agreement would have “real teeth,” liberal and conservative critics alike have dismissed the labor accord as ineffective.<sup>89</sup>

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82. See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT’L L. 533, 561 (1995).

83. Stephen F. Diamond, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 199, 215 (Lance A. Compa & Stephen F. Diamond eds., 1996). If NAALC had been ratified by Congress it would be considered federal law.

84. At the present time, NAALC is apparently not yet binding in Canada. Under Canadian law, the agreement has to be ratified by the provincial governments with the largest workforces, and this has not yet occurred. *Id.*

85. Jill Sanner Ruhnke, *The Impact of NAFTA on Labor Arbitration in Mexico*, 26 LAW & POL’Y INT’L BUS. 917, 937 (1995).

86. See Crandall, *supra* note 54.

87. See Allen R. Myerson, *Peso’s Plunge May Cost Thousands of U.S. Jobs*, N.Y. TIMES, Jan. 30, 1995, at D4.

88. See L.F.T., *supra* note 30, at arts. 173-80.

89. In a speech, Brink Lindsey of the CATO Institute described the side agreements to NAFTA as “feeble.” Brink Lindsey, Address at the American Enterprise Institute’s Seminar on NAFTA Side Agreements (Oct. 5, 1993). The economic, political and social costs of NAFTA’s implementation have been burdensome for Mexico in other areas as well. In the era of NAFTA, not only has unemployment risen, but labor conditions have deteriorated as wages in Mexico have not kept up with corporate profits, salaries of CEO’s or even, in certain instances, inflation. Although low-paying service jobs have grown by almost 50% in Mexico, overall unemployment rates have increased and the real wage has dropped by a third since

B. *Four Factors Make the NAALC Ineffective in Stopping the Abuse of Women and Children in Mexico Today*

More importantly, the NAALC relies only on Mexico's ability to enforce its own domestic laws.<sup>90</sup> Although in its present form, the NAALC suggests that pregnancy should not provide a basis for discrimination,<sup>91</sup> and that women should receive equal remuneration compared to men,<sup>92</sup> Mexico is not accountable to international tribunals until the complainant has exhausted domestic remedies.<sup>93</sup> Obviously, the problem with this mechanism is that existing labor laws in Mexico are not enforced.<sup>94</sup> The U.S. Embassy in Mexico City itself concluded that "government economic and financial policies have undermined labor power, and probably will continue to do so."<sup>95</sup> Therefore, under the NAALC today, women have had to rely for relief from discrimination on the same government that discriminated against them in the past.<sup>96</sup>

Several specific problems are worthy of further analysis. First, the NAALC's protection is limited to unionized workers. Second, the excessive cost of legal assistance in Mexico prohibits women from bringing private actions and receiving adequate access to judicial tribunals. Third, the NAALC is too difficult to enforce. Finally, all of these factors have encouraged employers to adopt a new system of industrial relations that removes whatever the employer considers excessive protection for workers. This new system is commonly called "flexibilization" and has further exploited women and children; a phenomenon that

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the pact took effect. "The Mexican Network on the Free Trade Agreement (RMALC) says that NAFTA resulted in a 32% fall in workers wages in three years. According to Andres Penalzoa of RMALC there was a fall in wages, salaries and benefits of 32% between 1993 and 1996." *The Mexican Network on Free Trade Says NAFTA Lowered Workers Wages*, MEXICAN LABOR NEWS AND ANALYSIS (visited Apr. 11, 1999) <<http://www.igc.apc.org/unitedelect/vol2no4.html>>.

90. See Bierman & Gely, *supra* note 82, at 535.

91. See *id.* at 546.

92. See *id.*

93. See Ruhnke, *supra* note 85, at 938.

94. See Manuel Fuentes Muniz, *NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379, 385 (1995).

95. Dep't of Labor, Bureau of Internat'l Labor Affairs, *Foreign Labor Trends: Mexico* (1992); see also Bierman & Gely, *supra* note 82, at 568.

96. The parties to the agreement must "undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention." See MEX. CONST., *supra* note 32, at art. 24.

the NAALC also fails to address. I will discuss each of these in turn.

### 1. NAALC Protection is Limited to Unionized Workers

“About seventy percent of women who work in Latin America are in the service sector, mostly in domestic service.”<sup>97</sup> This phenomenon denies them many of the protections of the formal labor force including, most importantly, trade union representation. Although women have been encouraged to organize on a community level in their capacities as mothers, these attempts have only focused on women’s concerns in the traditional female industries, such as food and textile factories, as well as the service activities of teaching and telephone work.<sup>98</sup> Women have traditionally been excluded from the male-dominated national unions in Mexico.<sup>99</sup> The impact that this has had on women is plain when one considers that all the Mexican workers who have proceeded to file complaints with the NAO in the U.S. have done so with the support of the large unions.<sup>100</sup> Political support is an important motivating and sustaining factor to which nonunionized women workers are not privy.<sup>101</sup>

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97. See Bureau of National Affairs, Inc., *ILO Study Finds Few Gains for Women in Global Workforce; Decline Projected*, DAILY LAB. REP., Sept. 8, 1992, at A-6.

98. Interview with Kornegay, *supra* note 23.

99. *Id.* Large unions that are closely associated with the Mexican government and industry dominate Mexico. These unions have traditionally excluded women and actively discourage workers from organizing new unions by threatening workers. *Id.*

100. See Crandall, *supra* note 54. The unions involved have mainly been the International Brotherhood of Teamsters (IBT) and the United Electrical, Radio and Machine Workers of America (UE). *Id.*

101. The NAALC also does not protect nonunionized workers because, as discussed below, the NAALC requires only that a member-state comply with its existing labor laws. Thus, to give the appearance of compliance with Mexican labor law, corporations set up ‘company unions’ (frequently called *sindicatos blancos* (‘white’ or ‘blank’) unions) in maquiladora operations as a shield to protect the company against the entrance of authentic unions that would serve worker interests. Dep’t of Labor, *Worker Rights in Export Processing Zones II* (1990). Currently in Mexico, any attempt to form an independent union is punished by immediate discharge, and workers who try it are blacklisted in the rest of the maquiladora zone. Some, like Aurea Susana Codina Barrios even suffer great bodily injury. Barrios, an attorney for the Revolutionary Workers Confederation (COR), was attacked and beaten on April 2, 1998, by “official” union members at the entrance to the Mexican Labor Board (JFCA) in Mexico City. See *Second Woman Attorney Beaten at Labor Board by “Official” Union Goons*, MEXICAN LABOR NEWS AND ANALYSIS (published July 2, 1997) <<http://www.igc.apc.org/unitedelect/vol2.html>>. This behavior is virtually an institution in Mexican labor relations. *Id.* The individuals who do this work, some of them former professional prizefighters, over the years have attacked

## 2. Legal Assistance is Impractical

The possibility of NAO review is a false promise for these women who, aside from the lack of political support due to no union representation, cannot overcome the obvious hurdles of cost and transportation when seeking review by another member's NAO. Under the NAALC, individuals with few resources have little recourse. Private actions are difficult to bring under the NAALC because a claimant cannot submit a complaint to a NAO office located in Mexico.<sup>102</sup> Instead, a complaint must be filed at the NAO office in the U.S. or Canada.<sup>103</sup> A woman or child who earns less than thirty-five cents an hour does not have the money he/she needs to eat, much less the money to travel across international borders to complain about his/her employers.<sup>104</sup> The postal service provides little recourse. Not only is it unreliable, but it is also prohibitively slow. Furthermore, as I outlined above in Section IV. C., the NAALC requires that the complainant make specific allegations. Even if the complainant makes use of the postal service to file his/her complaint, the complainant would need to seek legal assistance. The cost of legal assistance in Mexico, however, is prohibitively high, and the appropriation of free legal assistance is insufficient.<sup>105</sup> In light of these problems, individuals bringing private actions do not receive adequate access to judicial tribunals as required by article 4 of the NAALC.<sup>106</sup>

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union leaders, employers, attorneys and rank and file workers. *Id.* Some, like Wallace de la Mancha, became famous as musclemen or gunmen for the Confederation of Mexican Workers (CTM) and of other unions. *Id.* These "official" union members are part and parcel of the system that includes "protection contracts" and "ghost unions." *Id.* For more accounts of the difficulties in organizing in the maquiladora sector, see written statements of Fernando Castro, Ofelia Medrano, Benedicto Martinez and Robin Alexander, in Transcript of Public Hearing, at 20-50 (Sept. 12, 1994) (on file with U.S. National Administrative Office (NAO)).

102. See generally NAALC, *supra* note 1, at art. 43.

103. *Id.*

104. Even if women and children were afforded the opportunity to pursue private actions under the NAALC, it is questionable whether or not their concerns would be adequately addressed. The NAALC does not require the creation of additional domestic labor tribunals for handling private employee actions. Consequently, the NAO offices in the U.S. and Canada are the only institutions available to handle private employee actions originating in Mexico. See generally, NAALC, *supra* note 1.

105. Interview with Kornegay, *supra* note 23.

106. *Id.*

### 3. The NAALC is Too Difficult to Enforce

Unfortunately, even if a woman or child had the money to meet the cost of legal assistance, the NAALC's provisions are unlikely to be enforced. The side accord states:

A Party has not failed to "effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards . . ." where the action or inaction by agencies or officials of that Party:

- (a) reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.<sup>107</sup>

Thus, in order to prevail, a complainant must show that enforcement officials abused their discretion and that the decision not to enforce compliance was due to factors other than a reasonable decision regarding allocation of resources.<sup>108</sup>

Even if a complainant could prove abuse, and penalties were imposed, the fines are likely to be relatively small. Penalties can be imposed only if two of the three nations decline to block the action and after the bureaucratic process has run its course.<sup>109</sup> This can take several years.<sup>110</sup> Additionally, any country is free to reject the decision of the tribunals and refuse to pay the fine, as the NAALC contains no mechanism to collect the fine in this instance.<sup>111</sup> If Mexico chooses not to pay the fine, the U.S. and Canada can impose sanctions in the form of tariffs, but those tariffs are limited to pre-NAFTA levels.<sup>112</sup> In other words, even in the most severe case, Mexico would be no worse off than it was before NAFTA.<sup>113</sup> All of these factors: the lack of unionization,

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107. See NAALC, *supra* note 1, at art. 49.

108. Diamond, *supra* note 83, at 216-18.

109. *Id.*

110. Keith Bradsher, *NAFTA: Something to Offend Everyone*, N.Y. TIMES, Nov. 14, 1993, at 14.

111. NAALC, *supra* note 1, at art. 41.

112. *Id.*

113. Two other apparent weaknesses in the enforcement provisions also exist. First, enforcement relies upon an accurate understanding of any alleged abuse, and this understanding will be difficult in view of the limited ability of investigators responding to a complaint under NAFTA to gather information; investigators have access only to information that is publicly available. Second, because the side accord expressly allows for wide discretion of government officials in making enforcement decisions, the burden of proof on any party claiming a persistent enforcement failure is great. *Id.*

the excessive cost of legal assistance, and the difficulty of enforcement, have served to further encourage employers and government agencies to exploit women and children.<sup>114</sup>

#### 4. "Flexibilization"

With the knowledge that their activities will not be stopped due to a lack of enforcement, many employers have turned to a form of "customary" industrial relations that has virtually supplanted the constitutional and statutory framework of traditional labor law.<sup>115</sup> Employers in Mexico actively pursue higher profits by making the hiring and firing of employees easier and by taking away other employee benefits. This phenomena is known as "flexibilization."<sup>116</sup>

In many cases the government itself, in its role as an employer, is implementing "flexibilization", particularly in state and intrastate sectors like the oil industry.<sup>117</sup> The government, which

114. Interview with Kornegay, *supra* note 23.

115. "Flexibilization" has been engendered for the following reasons "1) to stimulate investments and promote job creation; 2) to reestablish a proper control of the labor force by management; 3) to adjust the size of the work force in accordance with product demand fluctuations; and 4) to reduce labor costs in order to compete more effectively with other countries." Efren Cordova, *The Challenge of Flexibility in Latin America*, 17 COMP. LAB. L.J. 314, 319 (1996). For a review of the "flexibilization" debate, see MODERNIDAD Y LEGISLACIÓN LABORAL 86-96 (Graciela Bensusan & Carlos Garcia eds., 1989).

116. "Flexibilization" is characterized by the following employer practices:

- i. abolishing job descriptions and job classifications to combine some jobs, eliminate many others, and speed up the pace and extend the hours of production for the workers who remain.
- ii. redefining and reducing rights to holidays, vacations, personal leave, sick leave and the like;
- iii. employing temporary workers, part-time workers, and casual labor while eliminating full-time, secure employment;
- iv. depriving employees of full employment-related litigation by offering immediate cash settlements of less than what workers are owed in return for a release from liability;
- v. docking the weekly pay of salaried employees (effectively converting them to hourly-paid workers);
- vi. abolishing seniority as the basis of promotions and layoffs;
- vii. eliminating union security clauses and permitting "right-to-work" status;
- viii. resisting union organizing campaigns by use of illegal threats and promises; and
- ix. in general, removing whatever the employer considers "excessive protection" for workers.

*Id.*

117. Interview with Kornegay, *supra* note 23.

is supposed to enforce the law on behalf of workers, has effectively abdicated this role.<sup>118</sup>

In short, the NAALC has proven ineffective in curtailing the mistreatment of women and children in Mexico today. If the NAALC is truly going to fulfill its promise to ensure the enforcement of domestic workplace standards, serious and substantial changes need to be made to its provisions.

## VI. RECOMMENDATIONS FOR REDRAFTING THE NAALC

### A. *The NAALC is Futile*

Some feel that any further attempt at harmonization with the U.S. would be an unreasonable goal.<sup>119</sup> This point was well made by one commentator when he said that “[a]s a developing country, Mexico cannot (and should not) replicate every . . . title of our employment and labor law . . . [i]t is unreasonable to expect parity or even harmony among Mexico [and] the U.S.”<sup>120</sup> These supporters feel that requiring harmonization or hemispheric labor standards would have sunk NAFTA at the start.<sup>121</sup> It would require immense changes in the U.S. and Mexican attitudes toward sovereignty, which could only be achieved over a long period of time.<sup>122</sup> Critics have noted that the Agreement “sets the stage for continuing efforts to establish labor standards in the international trade . . . .”<sup>123</sup> It is argued that regardless of a lack of immediate effect, NAFTA should eventually raise labor rights and standards from a purely domestic level to an international one.<sup>124</sup>

Yet, since 1994, when NAFTA first took effect, Mexico has not stiffened labor laws nor increased worker wages.<sup>125</sup> Understandably, Mexico wishes to exploit the competitive advantage provided by their low wages and unregulated working condi-

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118. *Id.*

119. Marshall J. Breger, *How to Save a Trade Agreement*, WALL ST. J., Apr. 20, 1993, at A20.

120. *Id.*

121. *Id.*

122. *Id.*

123. Lance A. Compa & Tashia Hinchliffe Darricarrere, *Private Labor Rights Enforcement Through Corporate Codes of Conduct*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, 216-18 (Lance A. Compa & Stephen F. Diamond eds., 1996).

124. *Id.*

125. Interview with Kornegay, *supra* note 23.



tions.<sup>126</sup> Thus, the question becomes how to reconcile the issues of free trade and worker rights while recognizing Mexican sovereignty. Trade is going to increase, one way or another. But at the same time, legitimate concerns about labor standards must be addressed while the rights of Mexico to control its domestic legislation is also recognized.

The bargain that was struck with the NAALC is seriously flawed because of its failure to provide for an efficacious system to resolve disputes about the enforcement of each party's own labor laws. It would be best to recognize the NAALC's failure and either to declare it a failed experiment or to renegotiate a more effective instrument that would secure labor law enforcement. The economic leverage of the U.S., as reflected in NAFTA Chapters 11, 17, and 19, and other NAFTA chapters, was used to make inroads into the traditional concept of sovereignty in Mexico.<sup>127</sup> For example, one interesting feature of NAFTA, especially in light of the modest labor side accord, is the hammer force of its clause on intellectual property rights ("IPR"). NAFTA's IPR chapter forces Mexico to revise its laws and its judicial structure in line with its U.S. counterparts to impose sharp, swift sanctions on violators. These include such measures as mandatory injunctive relief, border seizures and destruction of counterfeit goods.<sup>128</sup> Traditional notions of sovereignty were overcome for intellectual property. When it came to labor rights, though, sovereignty yielded only grudgingly and weakly.

This same economic leverage could be used to secure an instrument with greater promise of promoting and implementing labor law enforcement than was achieved in the NAALC. In the remainder of this section, I will first identify three principal goals that effective reform requires. Then, I will propose ways to redraft the NAALC to effectively implement the reform goals.<sup>129</sup>

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126. *Id.*

127. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296, 605.

128. *See id.* at ch. 17, Intellectual Property, arts. 1714-18.

129. The reform goals and proposals to redraft the NAALC that follow represent only a limited and brief discussion of the potential remedies. Much more research and consultation with the individuals, agencies and governments involved will be needed to identify and develop the specific remedies essential to ending the mistreatment of women and children laborers in Mexico. My hope is that my own discussion on this problem will stimulate further attention and consideration to the NAALC's present ineffectiveness.

## B. Goals for Reform

### 1. Better Enforcement

As discussed earlier, Mexican workers are covered by what probably is the most comprehensive set of labor rights not only in North America, but perhaps even the world.<sup>130</sup> In practice, however, there is no enforcement<sup>131</sup> and the NAALC has failed to improve the situation. Manuel Fuentes Muñiz, a Mexican attorney who represents unions and workers, rejects NAALC without reservation. His view is entirely pragmatic: NAALC's success should be measured in terms of its effect for or against the interests of Mexican workers.<sup>132</sup> Applying that test, he concludes that NAALC has yet to do anything to protect and advance workers rights in Mexico, nor has it dealt effectively with what he describes as the massive and pervasive trend in his country of a *de facto* failure to enforce labor law rights and standards.<sup>133</sup> Rather, Muñiz is convinced that NAALC, as structured and implemented, in combination with NAFTA, is antithetical to the struggle of Mexican workers to vindicate and retain the rights guaranteed by their constitution and labor legislation. To deal with this massive undermining of Mexican workers' rights and standards, Muniz advocates a trinational Supranational Commission, consisting of three members designated by the ILO, whose mission would be to monitor, in an efficient and immediate fashion, the enforcement of labor laws through the domestic mechanisms of each country.<sup>134</sup>

If a trinational Supranational Commission on labor is expected to promote and secure worker rights and standards, it should be given the necessary authority, resources and tools to

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130. See Mark E. Zelek & Oscar de la Vega, *An Outline of Mexican Labor Law*, 43 LAB. L.J. 466 (1992) (describing the origins of Mexican labor law).

131. While the specter of international oversight would theoretically create pressure to decide cases in favor of the workers, in practice, the fear of undermining the competitiveness of Mexican businesses in what is now a more open market has encouraged arbitrators to favor businesses that ignore Mexican labor laws. NAFTA has increased pressure on the Mexican government—and, through it, the arbitration boards—to decide in favor of companies, thereby creating a favorable environment for business and investment in Mexico.

132. Interview with Kornegay, *supra* note 23.

133. Fuentes Muniz, *supra* note 94, at 390-91. Muniz describes the labor law enforcement process as consisting of two systems of labor law. One is legally official but increasingly inoperative. The other is legally unofficial, indeed contrary to law, and increasingly reflects government and private employer decisions to scale down or eliminate entirely worker rights and standards. *Id.* at 381.

134. *Id.* at 397-98.

do the job.<sup>135</sup> What has yet to be prepared is a plan which would establish priorities, starting with a limited number of core labor rights, plus a commitment to political democracy.<sup>136</sup> Thereafter, the plan would need to provide for subsequent stages of progressive attainment of an expanding number of labor norms with the objective of achieving "upward harmonization" as each party's economy grows and provides for increasing employment opportunities.

## 2. A Gender Perspective in the NAALC

Governmental regulation of maternity-related discrimination must increase.<sup>137</sup> Managers who refuse to hire women due to the presence of strong maternity leave provisions should suffer penalties.<sup>138</sup> Increased regulation of domestic workers will facilitate greater regulation of employee concerns and higher wages. Alternatively, training women for higher-paying industrial occupations may achieve a greater long-term impact. In this way, women could escape the informal sector and potentially unionize, even though "flexibilization" has made this prospect increasingly difficult.

## 3. International Solutions

In her article, *Women Workers In Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers In Argentina and Chile*, Catherine Barbieri suggests that the existence of domestic labor tribunals should not preclude international remedies. Greater international accountability under NAFTA could also highlight women's rights, specifically in the areas of wage equality and gender discrimination.<sup>139</sup> Barbieri suggests that maternity-related discrimination should be consid-

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135. The contrast between the objectives and obligations of NAALC and the resources it has been given is striking. For example, is it realistic to assume that a Secretariat of fifteen members, five from each party, can deal effectively with its assigned workload? The same question surely applies to the NAOs. The U.S. NAO has a staff of eight to monitor labor law enforcement in Mexico and Canada.

136. Ian Robinson, *NAFTA Labour Accord in Canada: Experience, Prospects, and Alternatives*, 10 CONN. J. INT'L. L. 475 (1995).

137. See Catherine T. Barbieri, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile*, 17 COMP. LAB. L.J. 526, 561 (1996).

138. *Id.*

139. *Id.*

ered a violation serious enough to trigger fines and trade suspension under the NAALC or a comparable document.<sup>140</sup>

### C. *Implementing Reforms*

Barbieri suggests one way of implementing reforms: "In the administration of its own labor laws, Mexico must retain a certain degree of sovereignty. One means of facilitating a greater harmonization of labor norms would be to provide compensatory financing. Whereas the current NAFTA document makes no provision for financial aid, an alternative document would fund the 'minimum necessary resources to improve social conditions to guarantee safety and health standards for workers and to improve labor productivity.'<sup>141</sup>

As Barbieri suggests, funding aimed at formalizing illegal, informal markets in Mexico would allow women to receive greater benefits and participate in unions. A labor side agreement with Mexico specifically allocating funds to this area would create more opportunities for women.<sup>142</sup>

## VII. CONCLUSION

In conclusion, the NAALC has proven ineffective in stopping the mistreatment of women and children in Mexico today. For the sake of basic human rights, Mexico and the U.S. must put political concerns aside to address the growing problem of exploitation of women and children laborers in Mexico. If the NAALC is truly going to fulfill its promise to ensure the enforcement of domestic workplace standards, serious, substantial, and immediate changes need to be made to its provisions.

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140. *Id.*

141. Adolfo Aguilar Zinser, *Is There an Alternative? The Political Constraints on NAFTA, in MEXICO AND THE NORTH AMERICAN FREE TRADE AGREEMENT: WHO WILL BENEFIT?* 119, 121 (Victor Bulmer-Thomas et al. eds, 1994), *quoted in* Barbieri, *supra* note 137.

142. *Id.*

