

PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9701

U.S. National Administrative Office
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TABLE OF CONTENTS

I. [INTRODUCTION](#)

II. [SUMMARY OF SUBMISSION 9701](#)

- A. [Submission Summary](#)
- B. [Issues](#)
- C. [Relief Requested](#)

III. [NAO REVIEW](#)

- A. [Initiation of the Review](#)
- B. [Objective of the Review](#)
- C. [Information from the Submitters](#)
- D. [Information from the Mexican NAO](#)
- E. [Information from Legal Expert](#)
- F. [Public Hearing](#)

IV. [NAALC OBLIGATIONS AND MEXICAN LABOR LAW](#)

- A. [NAALC Obligations](#)
- B. [The Maquiladora Industry](#)
- C. [Relevant Mexican Law](#)
- D. [Enforcement Bodies](#)
- E. [Alliance for Equality: National Program for Women, 1995-2000](#)
- F. [Human Rights Commission](#)

V. [INTERNATIONAL CONVENTIONS AND STANDARDS](#)

- A. [International Labor Organization Convention 111](#)

B. [The U.N. Convention on the Elimination of All Forms of Discrimination Against Women \(CEDAW\)](#)

VI. [ANALYSIS](#)

VII. [FINDINGS AND RECOMMENDATIONS](#)

[ENDNOTES](#)

**PUBLIC REPORT OF REVIEW OF
NAO SUBMISSION NO. 9701**

I. INTRODUCTION

The U.S. National Administrative Office (NAO) was established under the North American Agreement on Labor Cooperation (NAALC). The NAALC, the labor supplemental agreement to the North American Free Trade Agreement (NAFTA), provides for the review of submissions concerning labor law matters arising in Canada or Mexico by the U.S. NAO. Article 16 (3) of the NAALC states:

[e]ach NAO shall provide for the submission and receipt, and periodically publish a list, of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with its domestic procedures.

"Labor law" is defined in Article 49 of the NAALC, as follows:

laws and regulations, or provisions thereof, that are directly related to: (a) freedom of association and protection of the right to organize; (b) the right to bargain collectively; (c) the right to strike; (d) prohibition of forced labor; (e) labor protections for children and young persons; (f) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; (g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; (h) equal pay for men and women; (i) prevention of occupational injuries and illnesses; (j) compensation in cases of occupational injuries and illnesses; (k) protection of migrant workers.

Procedural guidelines governing the receipt, acceptance for review, and conduct of review of submissions filed with the U.S. NAO were issued pursuant to Article 16 (3) of the NAALC. The U.S. NAO's procedural guidelines were published and became effective on April 7, 1994, in a Revised Notice of Establishment of the U.S. National Administrative Office and Procedural Guidelines.⁽¹⁾ Pursuant to these guidelines, once a determination is made to accept a submission for review, the NAO shall conduct such further examination of the submission as may be appropriate to assist the NAO to better understand and publicly report on the issues raised therein. The Secretary of the NAO shall issue a public report that includes a summary of the

review proceedings and findings and recommendations. The review must be completed and the public report issued within 120 days of acceptance of a submission for review, unless circumstances require an extension of time of up to 60 additional days.

II. SUMMARY OF SUBMISSION 9701

U.S. NAO Submission No. 9701 was filed on May 16, 1996, by Human Rights Watch (HRW), the International Labor Rights Fund (ILRF), and the National Association of Democratic Lawyers (*Asociación Nacional de Abogados Democráticos*, hereinafter ANAD) of Mexico. The submission raises issues of discrimination against women job applicants and women workers in Mexico's export processing (*maquiladora*) sector.⁽²⁾ The submitters allege that maquiladora employers regularly require female job applicants to verify their pregnancy status as a condition of employment and deny employment to pregnant women. Additionally, the submitters allege that some maquiladora employers discharge pregnant employees or deliberately mistreat them in order to provoke their resignation.

Mexican law guarantees financial and medical support to pregnant workers and their families through the social security system. However, when workers have not been employed for a sufficient period (30 weeks) to qualify for social security benefits, employers are required to provide maternity benefits to pregnant workers, including six weeks of paid leave before and after delivery. Thus, the alleged basis for the discrimination is economic.

The submitters assert that such discrimination is widely countenanced by Mexican Government officials charged with enforcing Mexico's labor laws, and may even be condoned as part of a wider effort to curb population growth. They assert that these actions are in violation of Mexican domestic law which prohibits gender discrimination and provides special protection for pregnant workers. The submitters argue that by failing to enforce its laws, Mexico is in violation of NAALC Article 3(1) on effective enforcement of its labor law, and Articles 4(1) and 4(2) on access to tribunals for enforcement of labor law and recourse to procedures through which labor rights are protected. Moreover, such discrimination is asserted to be inconsistent with the Preamble of the NAALC which commits the Parties to the protection and enforcement of basic worker rights as well as the promotion of Labor Principles included in Annex 1 of the NAALC, specifically the principle committing the Parties to the elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds. The submitters further argue that Mexico is in violation of international law, namely Convention 111 of the International Labor Organization (ILO); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the American Convention on Human Rights. All of these instruments have been ratified by Mexico and, it is asserted, have legal force in accordance with the Mexican Constitution.

The submitters requested that the U.S. NAO (1) initiate a review pursuant to NAALC Article 16; (2) hold public hearings on the matter; (3) engage the Mexican Government in a public evaluation of the issues raised; (4) encourage the Mexican Government to meet its NAALC obligations; and (5) urge the Secretary of Labor to request consultations with the Mexican

Secretary of Labor and Social Welfare in accordance with NAALC Article 22.

A. Submission Summary

In March 1995, a HRW mission traveled to the cities of Tijuana, Baja California State, Chihuahua, Chihuahua State, and Matamoros, Reynosa and Rio Bravo, Tamaulipas State. The purpose of the mission was to investigate possible discrimination against women job applicants and women workers employed in the maquiladora sector, who were pregnant or who may become pregnant. The mission conducted interviews with women's rights activists, maquiladora personnel, labor rights advocates, Mexican Government officials, community organizers, and women workers.

The results of the interviews were released in a report in August, 1996.⁽³⁾ HRW reported that pregnancy-based gender discrimination takes three forms: (1) testing and interviewing of job applicants during the hiring process to determine their pregnancy status; (2) denial of employment to pregnant applicants; and (3) dismissal of pregnant workers or the mistreatment of pregnant workers in an effort to bring about their resignation.

According to the submitters, the report showed that pregnancy testing by maquiladora employers is widespread. HRW alleged the use of pregnancy testing or other methods of determining the pregnancy status of job applicants in thirty-eight companies in the five cities. These other methods include direct and intrusive questioning of applicants by personnel officers on whether the applicant is sexually active, when she last menstruated, and the type of contraceptive(s) she uses. In some cases, the questions were included in the written job application. On some occasions, doctors, nurses, or other maquiladora personnel allegedly informed job applicants that if they were found to be pregnant they would not be hired. In other companies, personnel officers reportedly informed workers that if they became pregnant after they began work, they would lose their jobs.

HRW found that after a worker became pregnant, she could be subject to pressure to resign or harassment and mistreatment for becoming pregnant. It was alleged that working conditions were applied arbitrarily and punitively against pregnant workers in order to persuade them to resign. Such conditions were reported to include reassignment to more difficult tasks; alteration of work shifts on a weekly basis; being forced to stand instead of being offered a seat; and being obliged to work overtime hours without compensation as a condition for keeping their employment. Further, pregnant workers reported that maquiladora employers frequently use probationary contracts of thirty to ninety days as a mechanism to refuse permanent positions to pregnant workers. Finally, a number of the women interviewed reported that they were coerced and intimidated into submitting resignations after they were discovered to be pregnant.

The submitters assert that women who are subject to the treatment described are not afforded relief in Mexico, either through the appropriate administrative labor tribunals or the courts. They allege that the Inspectors of Labor (*Inspectores del Trabajo*) and the Office for the Defense of Labor⁽⁴⁾ (*Procuraduría de la Defensa del Trabajo*) lack jurisdiction on the issue of pre-employment pregnancy-based discrimination and are unresponsive to complaints on the issue. They also allege that the Conciliation and Arbitration Boards (*Juntas de Conciliación y Arbitraje*

- CABs), which are the primary bodies charged with the investigation and adjudication of labor disputes, are ineffective in dealing with gender discrimination issues.

According to the submitters, many of the women employed in the maquiladoras come from rural backgrounds, are poor, and have limited formal education. They are in need of employment and are not always aware of their rights under the law. This makes them particularly vulnerable to the actions described. Many of the workers lack confidence in the official institutions and mechanisms in place for the enforcement of the law and the protection of their rights.

B. Issues

The submitters allege (1) employment discrimination on the basis of gender in violation of the obligation of Mexico to enforce its labor laws, including obligations related to international conventions, under Article 3 (1) of the NAALC; and (2) failure to ensure appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of a Party's labor law and failure to ensure that persons shall have recourse to procedures by which rights arising under a Party's labor law can be enforced, in violation of Articles 4 (1) and 4 (2) of the NAALC.

In support of the first allegation, the submitters argue that Mexico's Constitution and Federal Labor Law prohibit sex discrimination, guarantee equality between men and women, protect women workers during pregnancy, and guarantee the right to decide freely on the number and spacing of children. Further, they argue that Mexico has ratified a number of international treaties against gender discrimination which, according to Mexican law, are binding on Mexico. These include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the American Convention on Human Rights, and Convention 111 of the ILO on Discrimination in Respect of Employment and Occupation. The submitters claim that pregnancy testing is widespread, that the Government of Mexico is aware of the practice, and that it has failed to take corrective action.

In support of the second allegation, the submitters argue that the institutions that exist to enforce compliance and adjudicate labor issues are not effective in gender discrimination issues. The primary institutions for the adjudication of disputes arising under the Federal Labor Law (FLL) are the CABs. Several of the government officials that HRW reportedly interviewed said that the CABs are limited in their jurisdiction to cases in which a labor relationship is already established, that is after a worker has been hired, and, therefore, lack the authority to adjudicate pre-employment issues. The submitters also maintain that the CABs have no clear position on whether pre-employment pregnancy-based discrimination is illegal. They further assert that the CAB process is time consuming and that the CABs lack transparency and credibility among the workers. Consequently, few workers use the CABs.⁽⁵⁾

The submitters assert that other institutions charged with the protection of workers and their rights are equally ineffective. In Submission 9701 and in the *HRW Report*, labor inspectors who were interviewed reportedly responded that they lack support from their superiors, as well as the legal and material resources, to pursue cases involving pregnancy discrimination. The Office for the Defense of Labor is allegedly subject to similar constraints as well as possible conflict of interest in some cases. This last allegation was made on the basis that one local attorney of an

Office for the Defense of Labor also served as head of an industrial association representing employers.⁽⁶⁾

C. Relief Requested

The submitters requested that the NAO undertake the following measures:

1. initiate a review pursuant to Article 16 of the NAALC;
2. hold public hearings on the matter;
3. engage the Government of Mexico in a process of public evaluation of the problems documented in the petition;
4. encourage Mexico to meet its NAALC obligations by (a) taking steps against employment discrimination by enforcing its labor laws; (b) declaring that the Minister of Labor has failed to enforce laws against sex discrimination in employment; (c) vigorously enforcing sex discrimination labor laws; (d) posting copies of the ministerial declaration in all appropriate government offices; (e) staffing the offices of the Inspectorate of Labor, [Office for the Defense of Labor] and Conciliation and Arbitration Boards to enable them to handle non- hiring cases; and (f) empowering those bodies to adequately investigate and pursue cases involving gender discrimination; and
5. urge the Secretary of Labor to request consultations at the ministerial level with Mexico's Secretary of Labor and Social Welfare on the issues raised in the submission and, if matters are not resolved through consultations, request the appointment of an Evaluation Committee of Experts (ECE).

III. NAO REVIEW

The NAO procedural guidelines specify that following a determination by the NAO Secretary to accept a submission for review, the Secretary shall publish promptly in the Federal Register a notice of determination, a statement specifying why the review is warranted, and the terms of the review. Moreover, the NAO shall then conduct such further examination of the submission as may be appropriate to assist the NAO to better understand and publicly report on the issues raised.

A. Initiation of the Review

Submission No. 9701 was filed on May 16, 1997. It was accepted for review on July 14, 1997, within sixty days of its receipt, as required by the NAO's procedural guidelines. The NAO published its notice that Submission No. 9701 had been accepted for review on July 17, 1997.⁽⁷⁾

Review of this submission was deemed appropriate because it satisfied the criteria for acceptance as stated in Section G.2 of the NAO procedural guidelines: (1) it raised issues related to labor law matters in Mexico and (2) a review would further the objectives of the NAALC as set out in Article 1. Article 1 provides that the objectives of the NAALC include improving working conditions and living standards in each Party's territory; promoting, to the maximum extent

possible, the labor principles set out in Annex 1; promoting compliance with, and effective enforcement by each Party of, its labor law; and fostering transparency in the administration of labor law.

The NAO further stated that acceptance of the submission for review was not intended to indicate any determination as to the validity or accuracy of the allegations contained in the submission.

B. Objective of the Review

Consistent with Section H.1 of the NAO guidelines, the review focused on compliance with, and effective enforcement by the Government of Mexico, of labor laws that provide protection against employment discrimination and on the access to the appropriate tribunals or other government bodies by workers who claim they have been discriminated against. The review also included NAALC Article 7 on the promotion of public awareness and public education on gender discrimination laws.

C. Information from the Submitters

NAO officials met with representatives of the submitters on June 19, 1997, to supplement information included in the submission.

D. Information from the Mexican NAO

In a memorandum dated July 11, 1997, the Mexican NAO stated that a review of the submission would exceed the intended scope of the NAALC in that it questioned Mexican law rather than its application and enforcement. The Mexican NAO also stated that the cases of abuse reported in the submission were limited in number and that Mexican law adequately protects women in matters involving gender discrimination. The Mexican NAO provided supplemental information in support of this position.⁽⁸⁾

In a memorandum dated October 14, 1997, the Mexican NAO responded to questions submitted by the U.S. NAO on July 18, 1997. In its memorandum, the Mexican NAO stated that there is no explicit prohibition in Mexican law against pre-employment pregnancy screening and that there is no legal mechanism by which a person may pursue a claim of pre-employment gender discrimination prior to the establishment of the employment relationship. The response also included information on a recommendation by the Human Rights Commission of the Federal District of Mexico, Mexican law on gender and employment issues and the role of the courts in these types of cases.⁽⁹⁾

E. Information from Legal Expert

The NAO contracted the services of an expert in Mexican labor law and gender issues. The scope of the research included information on the proper mechanism for bringing forth claims of pregnancy-based employment discrimination in Mexico; Mexican law and practice on pre-employment issues; cases involving pregnancy-based employment discrimination brought before

Mexico's Federal and state courts; cases brought before labor and other administrative tribunals; and other Mexican jurisprudence relevant to the issues raised in the submission.⁽¹⁰⁾

F. Public Hearing

The NAO held a public hearing on Submission No. 9701 in Brownsville, Texas, on November 19, 1997. Notice of the hearing was published in the Federal Register on October 17, 1997.⁽¹¹⁾

Twelve witnesses presented information at the hearing on behalf of the submitters. These included seven expert witnesses who provided information on Mexican labor law, ILO Convention 111, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), employer practices concerning pregnancy, and the practices of Mexico's executive and judicial authorities as regards the issues raised in the submission.

Five women workers employed in the maquiladora sector testified as to their experiences regarding both pre-employment and post-hire pregnancy practices by maquiladora employers.⁽¹²⁾

IV. NAALC OBLIGATIONS AND MEXICAN LABOR LAW

A. NAALC Obligations

Part One of the NAALC lists the objectives to which the Parties commit themselves, including the promotion, to the maximum extent possible, of the labor principles set out in Annex 1. The seventh principle of Annex 1 commits the Parties to the elimination of "employment discrimination on such grounds as race, religion, age, sex or other grounds."

Part Two of the NAALC sets out the obligations agreed to by the Parties to the Agreement. Three of the NAALC articles are pertinent to this submission. These are Article 3 on Government Enforcement Action; Article 4 on Private Action; and Article 7 on Public Information and Awareness.

B. The Maquiladora Industry

Mexico's export processing (*maquiladora*) industry traces its origins to the Decree for the Development and Operation of the Maquiladora Export Industry (the Maquiladora Decree) which was enacted in 1965. This law allows companies to import components into the maquiladora sector free of duty provided that they are re-exported as assembled products. A company wishing to avail itself of the duty free privileges must obtain a permit from Mexico's Secretariat of Commerce (SECOFI). Though the maquiladora industry began along the northern border with the United States, and is still largely concentrated there, a maquiladora can be established anywhere within Mexico.

The law was amended by the 1989 Maquiladora Decree which implemented a number of measures to streamline and expedite procedures. The 1989 amendment also enables the

maquiladoras to sell an increasing portion of their production in the Mexican market.⁽¹³⁾

By July, 1997, the maquiladora industry had grown to include 908,000 workers in 2723 establishments.⁽¹⁴⁾ Of this total, over 731,000 workers are employed in the six northern states that share the border with the United States. Production line workers constitute over 738,000 of the total number of employees, with production technicians numbering 104,512 and administrative employees totaling 64,762. Statistics on gender are only provided for production workers, with women comprising about 58% (426,112) of the total.⁽¹⁵⁾

Labor relations and standards in maquiladora operations are regulated by the Mexican Federal Labor Law, which regulates all individual and collective labor relations in the private sector. No exceptions to labor laws and standards are provided in the Maquiladora Decree.

C. Relevant Mexican Law

Equality between the sexes before the law is ensured in the Political Constitution of the United Mexican States (hereinafter, the Mexican Constitution), Article 4, which was enacted in 1974, and states, in relevant part: "Man and woman are equal before the law. This will protect the organization and development of the family."⁽¹⁶⁾ Article 4 goes on to state "[a]ll persons have the right to decide in a free, responsible and informed manner, on the number and spacing of their children."⁽¹⁷⁾ Article 5 of the Constitution states "[n]o person shall be prevented from pursuing the profession, trade, business, or work of their choice, provided it is legal."⁽¹⁸⁾

Article 123(A) of the Mexican Constitution governs labor standards and labor- management relations. Paragraph V establishes protection for pregnant workers.⁽¹⁹⁾ Paragraph VII addresses equal pay for equal work, without regard to sex or nationality.

Article 123(A) is implemented by the Federal Labor Law (*Ley Federal del Trabajo*, hereinafter the FLL).⁽²⁰⁾ Article 3 of the FLL states: "[t]here shall not be established distinctions among workers for [reason] of race, sex, age, religious creed, political doctrine or social position."

Title V of the FLL deals with the employment of women. Article 133 of that title lists prohibited practices by employers. Article 133 (I) states that employers may not "[r]efuse to accept workers for reason of age or sex"

Article 164 states "[w]omen enjoy the same rights and have the same obligations as men."

Article 170 of Title V addresses pregnancy and maternity and states that working mothers shall have the following rights:

(I) during the period of pregnancy they shall not perform work demanding considerable strength, which is dangerous for their health in relation to the gestation period, such as lifting, dragging or pushing heavy weights, that which produces rapid vibrations, remaining in a standing position for long periods or that which may alter their mental or emotional state;

(II) they shall be entitled to maternity leave of six weeks duration before and after [delivery];

(III) the maternity leave referred to in the preceding item is extended by the time necessary if it is impossible for the woman to return to work on account of her pregnancy or confinement;

(IV) during the period of lactation the woman shall be entitled to two extra breaks each day of one half hour's duration each to breast feed her infant, in suitable hygienic premises designated by the enterprise;

(V) during the maternity leave referred to in item II the woman shall be entitled to her full wages. In case of the extended maternity leave referred to in item III, the woman shall be entitled to half pay for a period not exceeding sixty days

FLL Title II, Chapter IV, Articles 46-52 and Chapter V, Articles 53-55 addresses the termination of the labor relationship. Article 47 lists fifteen causes for justified termination of the labor relationship, none of which includes pregnancy.

Article 38 of the FLL allows temporary contracts for a fixed term only when necessary due to the nature of the work, when temporarily replacing another worker, or as otherwise provided in the law. Mexican labor law does not provide for probationary or trial periods of employment to determine a person's ability and proficiency to perform a job, or for any other reason.⁽²¹⁾ There appear to be no provisions in Mexican labor law that would permit the use of temporary contracts to refuse permanent positions to pregnant workers, which practice the submitters refer to in the submission.

The Law of Social Security (*Ley de Seguridad Social*), Mexican Federal Law 93, established the social security system in Mexico and created the Mexican Institute of Social Security (*Instituto Mexicano de Seguridad Social*) to implement and regulate the law. To be entitled to paid maternity leave, a worker must have participated and made payments to the Social Security Fund for at least thirty weeks during the twelve-month period prior to receiving the benefit.⁽²²⁾ Workers who do not qualify for coverage by social security are entitled to the same rights and protections under FLL Article 170 at the expense of the employer.

D. Enforcement Bodies

Three Mexican Government entities appear to have jurisdiction in cases involving allegations of employment discrimination on the basis of sex.

1. The Federal and Local Conciliation and Arbitration Boards (CABs) adjudicate most individual and collective disputes between labor and management. FLL Article 604 establishes the Federal Conciliation and Arbitration Board (CAB) and empowers it to hear and decide labor disputes between workers and their employers. Article 621 establishes the Local Conciliation and Arbitration Boards (CABs) and empowers them to adjudicate disputes that do not fall within the jurisdiction of the Federal CABs.

FLL Article 604 states that "[t]he Federal Conciliation and Arbitration Board shall hear and decide labor disputes arising between workers and employers or between workers only or

employers only, arising out of the labor relationships or acts closely connected with such relations"

Article 621 of the FLL states that "[l]ocal Conciliation and Arbitration Boards shall operate in each of the States of the Federation. They shall hear and settle labor disputes which do not fall within the competence of the Federal Conciliation and Arbitration Board."

The Mexican NAO asserts that there is no mechanism to bring cases of pre-employment pregnancy screening as both Article 123 (A) of the Mexican Constitution and the Mexican Federal Labor Law protect only the rights of those parties already engaged in a labor relationship.⁽²³⁾ Documented interviews with officers of the CABs, in which these officers gave similar responses on the non-application of the FLL and the absence of jurisdiction of the CABs in pre-employment issues, were included in both the *HRW Report* and in Submission No. 9701.

On post-hire pregnancy discrimination, there is general agreement that the CABs have the authority and jurisdiction to act under FLL Articles 46-55. In such cases, the action would be against unjustified dismissal. The submitters provided information at the public hearing that the CAB and the Office for the Defense of Labor in Juarez, Chihuahua, handle approximately one case per month of unjustified dismissal, some of which involved dismissal for pregnancy, and that favorable rulings for the workers have been obtained.⁽²⁴⁾ The Secretariat of Labor and Social Welfare (STPS) estimates that the federal CABs heard over 53,000 cases in 1996, most of them individual cases. More than 9,000 of the CAB decisions were appealed to the courts using the *amparo* process.⁽²⁵⁾ The NAO has no information on how many of these cases involved pregnancy discrimination or other forms of employment discrimination.⁽²⁶⁾

2. The Inspectorate of Labor is primarily charged with workplace inspections. FLL Article 540 specifies the functions of the Inspectorate of Labor as follows:

(I) to ensure fulfillment of labor [standards];

(II) to provide technical information and advise workers and employers as to the most effective manner for fulfilling the labor [standards];

(III) to report to [the authorities] any failure to observe, and violations of, the labor [standards] it discovers in enterprises and establishments;

(IV) to make such studies and collect such data as may be required by the authorities and those which it deems necessary to achieve harmony in the relations between workers and employers; and

(V) such other functions as may be assigned to it by law.

Article 541 states that labor inspectors will have the following powers and duties:

(I) to ensure that the labor [standards] are observed, in particular those prescribing the rights and obligations of workers and employers, those concerning the prevention of employment injuries,

safety and health;

(II) to inspect enterprises and establishments during the hours of work (day or night) on producing [appropriate] identification;

(III) to put questions to workers and employers, in the presence or in the absence of witnesses, on any matter connected with the application of the labor [standards];

(IV) to require the [presentation] of any books, registers or other documents required to be kept by the labor [standards];

(V) to suggest that any non-observance of the employment conditions be corrected;

(VI) to suggest that any duly ascertained defects in plans and methods of work be put right if they constitute a violation of the labor [standards] or a danger to the workers' safety or health, and the adoption of immediate measures in the case of any imminent danger;

(VII) to examine the substances and materials used in enterprises and establishments in the case of dangerous work; and

(VIII) any other powers and duties assigned to them by law.

The submitters maintain that the inspectors lack authority, support, and resources to effectively discharge their responsibilities. On the other hand, the Mexican NAO provided information that during 1997 STPS conducted 809 inspections of 437 maquiladoras and found that they were substantially in compliance with the law. In those cases where violations were detected, corrective action was taken which, in some cases, could include the application of sanctions against those companies found to be in violation of the law.⁽²⁷⁾ The plants that were inspected reportedly employed 138,712 workers, of whom 3,414 were pregnant and 484 were nursing.⁽²⁸⁾ In another memorandum, the Mexican NAO stated that approximately 48,000 worksite inspections are conducted annually in Mexico. According to the Mexican NAO, very few of the inspections revealed the violation of maternity protection laws.⁽²⁹⁾

The Mexican NAO has stated that STPS maintains an ongoing dialogue with the National Council of the Maquiladora Industry (CNIME), which cooperates in securing the compliance of its member companies with labor laws and standards and in correcting deficiencies. Further, since 1996, STPS has reportedly conducted a program of consciousness awareness among maquiladora employers on discrimination against women employed in the maquiladoras.⁽³⁰⁾

3. The Office for the Defense of Labor has the following functions, as outlined by FLL Article 530:

(I) to advise workers and their trade unions or represent them [before] any authority whenever requested, in matters connected with the application of the labor [standards];

(II) to bring ordinary and extraordinary appeals which may arise on behalf of a worker or trade

union; and

(III) to propose [negotiated] solutions to the parties concerned for the settlement of their disputes and make official reports of the results thereof.

The submitters argue that the Office for the Defense of Labor is ineffective in discharging its obligations in pre-employment pregnancy cases because it is legally restricted to addressing only post-hire cases. On post-hire cases, the submitters allege that some of the attorneys of that agency are inaccessible to workers and lack the necessary material and human resources to effectively advocate on their behalf. On the other hand, in testimony at the public hearing, the submitters indicated that in Juarez, Chihuahua, the Attorney for the Defense of Labor did take up and win cases of post-hire dismissal for pregnancy before the CAB. The Mexican NAO has indicated that very few of the unspecified number of requests for assistance to the Office for the Defense of Labor involved complaints of violations of the FLL against pregnant or nursing women.⁽³¹⁾

Mexico's courts entertain *amparo* appeals through which an individual or legal entity may seek protection against the violation of constitutional guarantees by the government or its agents. *Amparos*, however, must be filed against an action by the government or its agent.⁽³²⁾ Further, according to the Mexican NAO, unless an action is prohibited by law, the *amparo* process may not be used to seek redress against the action.⁽³³⁾ The *amparo* has been used with some success against decisions by the CABs in labor cases. As noted previously, over 9000 *amparo* appeals against CAB decisions were filed during 1996. There is no indication, however, that affected workers have availed themselves of the *amparo* process in gender discrimination cases.⁽³⁴⁾

E. Alliance for Equality: National Program for Women, 1995-2000

The Mexican NAO provided information on efforts the Mexican Government is undertaking to improve the enforcement and awareness of the rights of women workers. The *Alliance for Equality: National Program for Women 1995-2000 (Alianza para la Igualdad: Programa Nacional de la Mujer, 1995-2000)* was designed to rectify inequalities that persist in Mexican society between men and women. This document, the product of the Secretariat of Government (*Secretaría de Gobernación*), articulates general programs to address problems affecting women including (1) access to health services; (2) education; (3) employment; (4) poverty; (5) development of small businesses; (6) family problems; (7) women's rights; (8) violence against women; and (9) stereotypical images of women.⁽³⁵⁾

The labor objectives of this program include (1) improved access for women to employment opportunities and protection of their labor rights; (2) improved working conditions; and (3) an increase in employment and training opportunities available to women workers.

In its background statement describing problems faced by working women, this document states: "To some extent the practices of dismissal for reason of pregnancy and the requirement of a non-pregnancy certification to obtain employment persist."⁽³⁶⁾ The *Alliance for Equality* goes on to state: "Additionally, women workers are frequently subjected to discriminatory practices in obtaining employment and in dismissal from employment for reason of pregnancy or because

they are nursing."⁽³⁷⁾ The program calls for a broad range of actions, including the establishment of "mechanisms to ensure the respect for the rights of women workers and their access to the welfare and social security systems, on an equal footing with men, in compliance with the Federal Labor Law, in order to avoid discrimination for reason of sex, age, civil status and pregnancy . . ." Priority is also assigned to the implementation of information and orientation programs to enable working women to better defend their labor rights.⁽³⁸⁾

F. HUMAN RIGHTS COMMISSION

The Human Rights Commission of the Federal District is an autonomous body that derives its statutory authority from Article 102, Part B of the Mexican Constitution. Article 102, Part B, authorizes the National Congress and the State legislatures to establish bodies to protect those human rights that are covered by Mexican law. Their essential function is the investigation of administrative acts or omissions on the part of any governmental authority or individual that may violate human rights. The recommendations of the bodies created under the law are not binding and they are precluded from ruling on matters properly within the jurisdiction of the courts. Further, they are explicitly precluded from becoming involved in electoral, labor and jurisdictional issues.⁽³⁹⁾

The National Human Rights Commission was established on June 29, 1992.⁽⁴⁰⁾ In a 1994, report to the United Nations General Assembly, it was designated as the national institution responsible for overseeing the implementation of human rights.⁽⁴¹⁾ The Human Rights Commission of the Federal District was established on June 22, 1993.⁽⁴²⁾ The President and Council of both commissions are prominent citizens nominated by the President of Mexico. Members of the National Commission are confirmed by the Senate, while those of the Federal District are confirmed by the Legislative Assembly of the Federal District.

Beginning on February 15, 1995, the Commission for the Federal District conducted an investigation of allegations that women in Mexico's Federal District were required to undergo pregnancy testing or provide certificates attesting to their non-pregnancy before being accepted for employment in a number of federal agencies located in the Federal District. The agencies included in the investigation were the Department of the Federal District, the Superior Court and Judicial Council of the Federal District, and the Office of the Attorney General for the Federal District. This case was considered a human rights case, not a labor case, and was, therefore, within the jurisdiction of the Commission. The Commission issued its report and recommendations on June 1, 1995, finding that such practices did occur, that they did discriminate against women, and that they were in violation of Articles 4 and 5 of the Mexican Constitution. The Commission cited Article 11(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁽⁴³⁾ in support of its conclusions and recommended that the federal entities that were engaging in this practice cease doing so.⁽⁴⁴⁾

The Mexican NAO has provided information stating that the recommendations of the Commission were accepted and implemented in their entirety.⁽⁴⁵⁾

V. INTERNATIONAL CONVENTIONS AND STANDARDS

The submitters maintain that the practices outlined in the submission are in violation of the International Covenant on Civil and Political Rights (ICCPR), CEDAW, the American Convention on Human Rights, and Convention 111 of the International Labor Organization (ILO) on Discrimination in Respect of Employment and Occupation.

Article 133 of the Mexican Constitution sets forth the hierarchy of laws within the Mexican legal system:

[t]his Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be bound to the said Constitution, the laws and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or Laws of the States.

Article 6 of the Federal Labor Law addresses the issue of international treaties with respect to labor law: "[t]he respective laws and the treaties ratified and approved in accordance with the terms of Article 133 of the Constitution will be applicable in labor relations in all that benefits the worker, as of the date they enter into effect."

There are different opinions among Mexican legal scholars on the position of international treaties within the hierarchy of Mexican law. This was addressed by the NAO in its review of Submission No. 9601.⁽⁴⁶⁾ The debate has focused on whether international treaties are superior to, equal to, or inferior to organic federal laws in the Mexican legal hierarchy.⁽⁴⁷⁾ Most Mexican legal scholars place them on equal footing.

Although there is disagreement over their force under Mexican law, ILO Conventions have been cited by the Mexican courts in support of decisions concerning labor rights under the law. In its review of earlier submissions, the NAO ascertained that ILO Convention 87 was cited by the Mexican Supreme Court in two 1996 decisions⁽⁴⁸⁾ and by the Third Collegiate Tribunal of the First Circuit of Mexico City in a decision dated June 4, 1997,⁽⁴⁹⁾ concerning the Fishery Ministry Workers Union (SUTSP). In all three cases, the supremacy of the Mexican Constitution, which guarantees freedom of association, was the principal argument. However, Convention 87, and its ratification by Mexico, was cited in support of the courts' broad interpretation of freedom of association under Mexican law.

A. International Labor Organization Convention 111

Convention 111 of the ILO has figured prominently in the submission and associated documents, and has also been the subject of interpretive reports by ILO bodies over the years. Convention 111 was adopted by the ILO on June 4, 1958, and ratified by Mexico in 1961.

Article 1 of Convention 111 states:

1. For the purpose of this Convention the term discrimination includes--

a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' organizations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2 of the Convention states:

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3 states in relevant part:

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice--

a) to seek the cooperation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;

b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; [and]

c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with this policy

In 1988, the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter the Committee of Experts or the Committee) noted that some national laws against discrimination on the basis of sex sometimes fail to provide an adequate definition of gender discrimination. Other countries, however, specify that such discrimination includes "acts of discrimination on the basis of civil status, marital status or family status, pregnancy or confinement."⁽⁵⁰⁾ The Committee described as discriminatory, under the terms of the Convention, those requirements that are imposed only on individuals of one sex stating:

"[t]he discriminatory nature of distinctions on the basis of pregnancy, confinement and related medical conditions is demonstrated by the fact that up to the present time they have only affected women."⁽⁵¹⁾

In 1996, the ILO Committee of Experts indicated that the definition of sex-based discrimination includes "[discrimination] based on marital status or, more specifically, family situation (especially in relation to responsibility for dependent persons), as well as pregnancy and confinement."⁽⁵²⁾ The Committee also clarified "indirect" discrimination as a practice that:

refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job.⁽⁵³⁾

Two cases are indicative of the Committee's concern about the inappropriateness of pregnancy testing prior to employment. In 1991, 1993, and 1996 the Committee reviewed allegations of sex discrimination in Colombia, which included requiring negative pregnancy tests before employing women. In 1995, the Committee stated that it:

notes with satisfaction the adoption, following receipt of technical assistance from the Office, of Ministry of Labour and Social Security Resolution No. 3716 of 3 November 1994 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. It also notes with satisfaction the adoption of resolution No. 3941 of 24 November 1994 which specifies that such employment and occupations shall be only those listed as "high risk" in Decrees Nos. 1281 and 1835 of 1994. It also notes with interest the copy of the Ministry of Labour's circular, addressed to all regional labour directors and labour inspectors, recalling the importance of verifying compliance with constitutional provisions on equality of opportunity between men and women, including the elimination of sex-based discrimination and sexual harassment.⁽⁵⁴⁾

In 1993, the Committee reviewed allegations that employers in Brazil frequently require that women of reproductive age who seek employment submit certificates attesting to their sterilization. In its report, the Committee also addressed pregnancy testing by stating:

The Committee notes with interest Law No. 11081 of 6 September 1991 and Decree No. 30497 of 6 November 1991, of the Municipality of Sao Paulo, which empower the Municipality of Sao Paulo to impose sanctions on commercial or industrial establishments and entities, as well as civil associations or societies which have restricted a woman's right to employment, in particular, by requiring a pregnancy test or proof of sterilization in order to be hired or to remain employed or by requiring gynecological examinations on a periodic basis as a condition for maintaining employment, and by discriminating against married women or mothers in employment selection or dismissal. The Committee requests the Government to supply information on the practical application of Municipal Law 11081 and of 6 September, 1991 and Decree No. 30497 of 6 November 1991, including the sanctions imposed where an employer has asked women for proof

of sterility or pregnancy in order to be employed.⁽⁵⁵⁾

B. The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the United Nations General Assembly in resolution 34/180 of December 18, 1979, and opened for signature, ratification and accession in March 1980. In accordance with Article 27, the Convention entered into force on September 3, 1981. The Convention was ratified by Mexico and published in the Official Diary (*Diario Oficial*) on May 12, 1981.

Article 11 of CEDAW addresses discrimination against women in the field of employment. Article 11 states, in relevant part:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status

Oversight of CEDAW is provided for in Article 17 which establishes the Committee on the Elimination of Discrimination against Women. The CEDAW Committee submits annual reports to the General Assembly of the United Nations. Article 18 of CEDAW commits States Parties to submit reports on measures they have adopted to give effect to the provisions of the convention and on progress made. Such reports are to be submitted within one year after the convention enters into force in the respective state and every four years, or when requested by the CEDAW Committee, thereafter. Mexico has submitted the required reports.

VI. ANALYSIS

The relevant portions of the NAALC are Article 3 on Government Enforcement Action; Article 4 on Private Action; and Article 7 on Public Information. Also relevant are the provisions of ILO Convention 111 and, to a lesser extent, CEDAW, both of which Mexico has ratified.

Article 3 (1) of the NAALC states that "[e]ach Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

(b) monitoring compliance and investigating suspected violations, including through on-site inspections;

(c) seeking assurances of voluntary compliance;

(d) requiring record keeping and reporting; . . .

(f) providing or encouraging mediation, conciliation and arbitration services; or

(g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."

Article 3 (2) states: "[e]ach Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law."

Article 4 (1) states: "[e]ach Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or labor tribunals for the enforcement of the Party's labor law."

Article 4 (2) states:

[e]ach Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights under:

(a) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and

(b) collective contracts

can be enforced.

Article 7 states:

[e]ach Party shall promote public awareness of its labor law, including by:

(a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

(b) promoting public education regarding its labor law.

MEXICAN LAW AND PRACTICE

Gender discrimination is clearly prohibited in Mexico's Constitution and in its Federal Labor Law. Article 4 of the Mexican Constitution states "Man and woman are equal before the law" Article 5 guarantees that individuals shall not be prevented from pursuing the work of their choice. Article 4 further provides that all persons have the right to determine the spacing of their children. Article 3 of the FLL states that "[t]here shall not be established distinctions among workers for motives of race, sex, age, religious creed, political doctrine, or social position." Article 133 states that employers may not "[r]efuse to accept workers for reason of age or sex" Article 164 states that "[w]omen enjoy the same rights and have the same obligations as men."

International agreements also provide insight on how pregnancy-based gender discrimination is defined. ILO Convention 111 defines discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" It explicitly includes access to employment within its scope, stating, in Paragraph 3 of Article 1: "For the purpose of this Convention the terms employment and occupation include access to vocational training, [and] access to employment. . . ." Additionally, the ILO Committee of Experts has expressly defined gender discrimination to include discrimination based on family status, pregnancy and confinement.⁽⁵⁶⁾ As noted previously, Mexico ratified Convention 111 in 1961.

Although the ILO Committee of Experts has considered discrimination on the basis of pregnancy to come within the definition of gender discrimination, it has yet to specifically address whether pregnancy screening is a prohibited practice under the terms of Convention 111. However, the Committee's comments in 1995 on Colombia indicate that it approves of measures taken against this practice. Though the submitters refer to ILO Convention 111 in the submission, as well as CEDAW, the NAO was unable to find any applicable international jurisprudence that specifically defines pregnancy screening to be a prohibited practice under either agreement.⁽⁵⁷⁾

Pre-Employment

Submission No. 9701 contains allegations indicating that pre-employment pregnancy screening is practiced in Mexico, that the authorities are aware of it, and that the federal government agencies responsible for the enforcement of the labor laws have not taken corrective or enforcement action against the practice. The submitters argue that this practice is prevalent and in violation of Mexican law. The Mexican Government answers that pre-employment pregnancy screening is not widespread, and, to the extent that it is practiced, is not inconsistent with Mexican law.

Information provided by the submitters indicates that federal executive authorities with jurisdiction over monitoring and enforcing labor laws do not consider pre-employment pregnancy screening to be illegal. Submission No. 9701 and the *HRW Report* include documented interviews with officials of the three federal agencies responsible for enforcement and compliance of the FLL: (1) the Inspectorate of Labor; (2) the Office for the Defense of Labor; and (3) the CABs. The interviewees reportedly asserted that (1) the law does not prohibit

pre-employment pregnancy screening; and (2) that enforcement agencies have no jurisdiction over pre-employment cases as raised in the submission.⁽⁵⁸⁾

The submitters argue that pregnancy screening constitutes gender discrimination in Mexico, and posit three arguments in support of this position: (1) pregnancy is a condition experienced only by women and, therefore, any discrimination based on pregnancy is discrimination against women, in violation of Mexican law; (2) Mexico has ratified four international conventions, including CEDAW and ILO Convention 111, which prohibit gender-based discrimination, and are, in accordance with the Mexican Constitution, enforceable as law within Mexico; and (3) the Human Rights Commission of the Federal District found pregnancy screening practiced in the Federal District by Federal Government agencies to be unconstitutional.

In support of their position that pregnancy screening is widespread, the submitters point to responses from companies identified in the original *HRW Report* of August, 1996.⁽⁵⁹⁾ In letters to HRW and the U.S. NAO, four of the companies acknowledged that they have engaged in the practice of screening female job applicants for pregnancy. Three of the four also indicated that they did so only after ascertaining that the practice is legal in Mexico. In a letter appended to the HRW Report, one of these companies additionally stated that the practice is used to avoid the possibility that pregnant women may seek employment only to obtain maternity benefits that the Social Security system does not provide.⁽⁶⁰⁾ In letters responding to the NAO review of the submission, two of the companies stated that, although the practice of pre-employment pregnancy screening is legal and common in Mexico, they had, of their own volition, ceased inquiring and/or screening for pregnancy.⁽⁶¹⁾ The NAO was also informed that, on at least one occasion, Secretary of Labor and Social Welfare Javier Bonilla García met with the National Council of the Maquiladora Industry (CNIME) and urged that its members discontinue pregnancy screening.

The submitters position is further supported by the testimony of women workers at the public hearing conducted on November 19. Women testified that they were required to fill out medical questionnaires that went beyond simply ascertaining whether they were pregnant. These included questions on their last menstruation, sexual activity, birth control methods, and the number of children they had. They testified that they were interviewed on these same matters and required to produce urine samples which, they were told, were for the purpose of determining pregnancy. They told of being hired for training periods and being required to sign documents agreeing to their dismissal if they became pregnant during that period. They testified as to warnings they received that they would be dismissed if they became pregnant and told of being compelled to resign after it was learned by their employer that they were pregnant.⁽⁶²⁾

Maria Vazquez Perez testified that she was required to fill out a questionnaire that included:

a series of questions that had nothing to do with body illnesses but rather with the private issues of life, which I felt were very intimate and that had nothing to do with my need or my skill in performing a job. These questions basically were my last menstruation, sexual activity, [and] birth control methods as well as questions on the [number] of children that one had.⁽⁶³⁾

She said she found this experience to be "humiliating because they invade the most intimate part

of a woman."⁽⁶⁴⁾

Ana Rosa Rodriguez testified that she underwent a physical examination shortly after beginning work. She stated that:

[t]he doctor, who no longer works at the company, carried out the exam, which was basically a urine sample, blood sample, as well as blood pressure testing, clinical information, your health, which is part of the exam. He asked me questions on my sexual activity, the use of birth control methods, and the date of my last menstruation. When I was asked for the urine sample, I asked what that sample was for. The nurse told me that it was for pregnancy tests. And, playing around, I asked, "And if I'm pregnant?" She replied "Well, we will kick you out of here," which means that I would be fired.⁽⁶⁵⁾

Dulce Maria Gonzalez testified that at her medical examination, she was asked:

if I was pregnant and the last date of my menstruation. They also asked me if I was sexually active and what kind of birth control methods I was using. At the end of the interview [on] the medical background, the nurse gave me a form and said "Sign it". I asked her what I was going to sign and why. She said that it was a letter stating if I became pregnant during the hiring period of three months, I would be automatically fired.⁽⁶⁶⁾

Maria Isabel Teresa Sanchez testified that she was forced to resign when her employer discovered she was pregnant, stating:

I did not wish to resign, and because I needed the work, I went to speak with the union representative, who told me she could not help me. Ms. Emily, the person in charge of the plant, called me to her office and asked me if I was pregnant. I told her that I was. She stated that I shouldn't come to work anymore because I couldn't work like that at the plant. I signed the resignation sheet, and on that sheet she stated the reason for my dismissal was work distraction. This happened at the beginning of October of '96. I didn't have any medical insurance for the rest of my pregnancy, nor leave time. During my pregnancy, my mother and I made *tamales* and *posoles* to sell, and this is how I was able to survive this period of time.⁽⁶⁷⁾

Rafaela Rojas Cruz testified that she signed a three month hiring (probationary) contract when she was hired and was fired when she was found to be pregnant during her first month of employment. She said the union was unable to help her.⁽⁶⁸⁾ She testified that she subsequently applied for a job at another maquiladora, where she "underwent and passed all the skills tests, but the pregnancy test came out positive." She was informed by the nurse that "I had come up pregnant in the test and thus they would not be able to hire me, due to the insurance and coverage and leave time that the company would have to pay if I were hired."⁽⁶⁹⁾

The Mexican Government has provided information that pregnancy screening is not widely practiced, and that to the extent that it is, it is legal in Mexico. In its response to the submission, the Mexican NAO disputed the extent of the problem, asserting that while HRW uncovered instances in which pre-employment pregnancy screening occurs, the representative sample was far too small to justify the conclusions arrived at by HRW and included in the report and

submission. The Mexican NAO also stated that, in the absence of an employment relationship, the FLL provides for no legal process for bringing forth cases of employment discrimination.⁽⁷⁰⁾

However, the *Alliance for Equality* discusses the practice of pre-employment pregnancy screening. This document states that discrimination in hiring and in dismissal for reason of pregnancy occurs "frequently." The *Alliance for Equality* is a five-year policy guideline prepared by the Secretariat of Government of Mexico, a cabinet level government agency. In that document, the government discusses both discrimination in hiring due to pregnancy and dismissal from employment for reason of pregnancy. The government proposes to establish "mechanisms to ensure the respect for the rights of women workers and their access to the welfare and social security systems, on an equal footing with men, in compliance with the Federal Labor Law, in order to avoid discrimination for reason of sex, age, civil status and pregnancy"⁽⁷¹⁾

Additional information provided by the Mexican Government indicates that it is conducting programs of consciousness awareness among women workers and has sought to obtain the voluntary cooperation of the maquiladora employers to cease the practice of pre-employment pregnancy screening.⁽⁷²⁾ Evidently, the government finds these practices to be inappropriate, even if they may be technically legal under Mexican law.

Moreover, the Human Rights Commission for the Federal District offers a markedly different interpretation to that of the Mexican NAO on the legality of pre-employment pregnancy screening. The Commission found (1) that the federal agencies it investigated did, in fact, conduct pregnancy screening and, (2) this practice violated Mexico's Constitution.

The Mexican NAO has asserted that the recommendations of the Commission are not binding and do not establish jurisprudence. The enacting legislation for the Commission, however, imposes an obligation on the responding agencies to comply with the recommendations once they accept the findings of the report.⁽⁷³⁾ Additionally, the Commission was created pursuant to the Mexican Constitution and implemented by Federal law. It is composed of prominent jurists, appointed by the President and confirmed by the legislature, and their recommendation, in this case, was complied with by Federal Government agencies. Further, though the case involved public sector agencies, in its recommendation the Commission made no distinction on the application of the appropriate constitutional guarantees between the public and private sectors.

The position of the Human Rights Commission on the legality of pregnancy screening is markedly different from that expressed by the Mexican NAO. Moreover, the *Alliance for Equality* recognized pregnancy screening as a problem and outlined a plan of action to address such discriminatory practices. That pregnancy screening occurs and is of concern is supported by information from companies conducting business in Mexico, agencies of the Government of Mexico, women workers, and the submitters. It also appears that the intrusive nature of the questioning described in the submission goes beyond what is necessary to determine if an applicant for employment is pregnant.

An additional question is raised with regard to the lack of any legal procedure by which to bring cases of pre-employment gender discrimination. The Mexican NAO asserted that the FLL does

not provide for the adjudication of cases involving pre-employment discrimination. CAB officials interviewed by HRW also indicated that the CABs had no jurisdiction over these cases as they involved issues that occurred prior to the establishment of the employment relationship. The Mexican NAO's position appears to go beyond the question of pre-employment pregnancy screening to also include the lack of a legal procedure for bringing any pre-employment discrimination issue. Since Mexican law clearly prohibits employers from discriminating in hiring for a variety of reasons,⁽⁷⁴⁾ the Mexican NAO's response creates a question as to what process exists for bringing such pre-employment discrimination claims.

Post-Hire

Mexico's laws are clear on the matter of post-hire dismissal or reprisal on the basis of gender, pregnancy, or for any reason not provided for by the law. Mexico's Constitution and labor law guarantee the right of all citizens to employment and the FLL provides specific causes and procedures by which the employment relationship can be terminated.⁽⁷⁵⁾ Essentially, the employment relationship imposes contractual obligations that are enforceable by the labor authorities and by the courts.⁽⁷⁶⁾ Pregnancy is not listed as a justified cause for dismissal from employment and, therefore, dismissal for reason of pregnancy is prohibited under the FLL.⁽⁷⁷⁾ Actions taken against pregnant workers to coerce them into resigning violate maternity protection clauses under Article 170 of the FLL.⁽⁷⁸⁾ Finally, the FLL makes no provision for probationary labor contracts under which a worker could be dismissed without cause.⁽⁷⁹⁾

The CABs and the courts have jurisdiction over these cases as do the Office for the Defense of Labor and the Inspectorate of Labor. The submitters provided information that the CABs have ruled in a number of cases involving unjustified dismissal for reason of pregnancy and have found in favor of the dismissed workers.⁽⁸⁰⁾ Moreover, the Mexican Government has asserted that it has a program of workplace inspections and that the CABs and Office for the Defense of Labor have significant case loads involving workers complaints, including unjustified dismissal, though the NAO has been unable to obtain information on the number of cases involving pregnancy.

Despite information that women have been able to win their cases in the CABs against post-hire dismissal for reason of pregnancy, the submitters assert that women workers lack confidence in the CABs for the enforcement of their rights against dismissal for reason of pregnancy. This also was attested to by some of the witnesses at the public hearing.⁽⁸¹⁾ Working women's perceptions of the CABs may be reinforced by the lack of awareness of their rights and their economic circumstances, which mitigates against challenging authority.⁽⁸²⁾ Women with little formal education and limited economic means may lack the wherewithal to pursue legal remedies. Further, fear exists, whether real or perceived, of the blacklisting of workers who cause trouble.⁽⁸³⁾ Moreover, a number of the women approached their union and were advised that there was nothing that the union could do in their defense.⁽⁸⁴⁾ Indeed, the need for a program of orientation and information for women workers is recognized by the Mexican Government in its *Alliance for Equality* program.

The *Alliance for Equality* addresses dismissal for reason of pregnancy and indicates that the government is preparing steps to bring about compliance with the law. The existence of the

document and the action plan included indicates that the Government of Mexico is aware of this problem and intends to address it. The *Alliance for Equality* proposes to improve enforcement and compliance with the law by the appropriate institutions, improve access for working women to these institutions, and expand the dissemination of information to women workers to enable them to better pursue and defend their rights.

VII. FINDINGS AND RECOMMENDATIONS

The NAO makes the following findings:

1. The Mexican Constitution and the Federal Labor Law prohibit discrimination on the basis of gender.
- 2 Pre-employment pregnancy screening is practiced in Mexico's maquiladora sector. There are differing opinions within the Government of Mexico on the constitutionality and legality of the practice.
3. Post-hire pregnancy discrimination, by way of unjustified dismissal for reason of pregnancy or pressure exerted on pregnant women to resign, is clearly in violation of Mexican law and is enforceable through the appropriate tribunals. In some cases, it is apparent that relief has been obtained. However, it is also evident, from the information provided by witnesses as well as in the Government's *Alliance for Equality*, that additional efforts need to be directed toward awareness programs for women workers, the protection they are afforded by the law, and the means and procedures by which they may seek redress.
4. ILO Convention 111, which has been ratified by Mexico, defines 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. CEDAW, similarly, has no explicit jurisprudence or interpretation on pregnancy screening.

The review of Submission No. 9701 raises serious matters regarding the treatment of women workers who are pregnant in Mexico's maquiladora sector and the protection they are afforded by the Mexican authorities. Women are subjected to pregnancy screening and intrusive questioning. They are denied employment if they are pregnant. There are instances where they are dismissed from employment after becoming pregnant or are pressured into resigning for the same reason. The level of awareness amongst women of their rights is in question and they may lack confidence in the procedures and mechanisms by which those rights can be protected.

It would further the objectives of the NAALC to clarify the law and practice in Mexico on pre-employment pregnancy screening and post-hire discrimination on the basis of pregnancy. The issues for consultation, discussed in detail in this report, include:

1. The differing views of officials of the Mexican Government on the legality and extent of

pregnancy screening.

The Mexican NAO questioned the extent of the problem and asserted that there is no legal prohibition in Mexico against pregnancy screening, and that the Federal Labor Law makes no provision for bringing forth cases alleging pre-employment discrimination.

The Human Rights Commission for the Federal District found that Federal Government agencies in the Federal District conducted pregnancy screening and that such screening was unconstitutional. The Commission recommended that the practice be discontinued, and the appropriate agencies complied.

2. The extent of relief for post-hire pregnancy discrimination, given the information provided by the submitters, the lack of data on cases, and information from the Alliance for Equality.

There is significant evidence that women workers lack awareness of their rights and confidence in the institutions responsible for the enforcement of post-hire pregnancy discrimination laws. The Government of Mexico, in its *Alliance for Equality* document, recognized that pre-employment and post-hire pregnancy discrimination occur frequently and are a matter of concern. Although, neither this document nor the Mexican NAO provided data on the extent of the problem, the *Alliance for Equality* expressed the need to improve enforcement and compliance with the law.

For these reasons, the NAO finds that further consultations are appropriate, permitting a full examination of the matter and furthering the objectives of the NAALC. Pursuant to Article 22 of the NAALC, "[a]ny Party may request consultations with another Party at the ministerial level regarding any matter within the scope of this Agreement." The NAO, therefore, recommends that the Secretary of Labor consult with the Secretary of Labor and Social Welfare of Mexico for the purpose of ascertaining the extent of the protections against pregnancy-based gender discrimination afforded by Mexico's laws and their effective enforcement by the appropriate institutions.

Respectfully Submitted;
Irasema Garza
Secretary
U.S. National Administrative Office
January 12, 1998

ENDNOTES

1. 59 Fed. Reg. 16660-16662 (1994).
2. *Maquiladoras* are companies operating in Mexico that import components free of duty

provided that they are re-exported as assembled products. Such companies have grown significantly in Mexico since that country enacted the *Decree for the Development and Operation of the Maquiladora Export Industry (the Maquiladora Decree)* in 1965. More information on the maquiladora industry is included beginning on p. 12 of this report.

3. Human Rights Watch, *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector, A Human Rights Watch Short Report*, vol. 8, no. 6, August 1996, (hereinafter the *HRW Report* or *No Guarantees*).

4. HRW uses the term Labor Rights Ombudsman. In this report, the NAO translation Office for the Defense of Labor will be used.

5. *Submission No. 9701*, pp. 27-29. See also *No Guarantees*, pp. 37-45.

6. *Submission No. 9701*, p. 27.

7. 62 Fed. Reg. 38327 (1997).

8. Memorandum from the National Administrative Office of Mexico to the U.S. National Administrative Office (July 11, 1997), *Subject: Submission No. 9701* (on file with the U.S. National Administrative Office).

9. Memorandum from the National Administrative Office of Mexico to the U.S. National Administrative Office (October 14, 1997), *Subject: Submission No. 9701* (on file with the U.S. National Administrative Office).

10. Cuevas, Leticia, *Analysis of Issues Raised in Submission No. 9701: Gender Discrimination and Pregnancy-Based Discrimination*, (U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, January, 1998).

11. 62 Fed.Reg. 54128-54129 (1997).

12. At their request, women workers who testified at the public hearing used pseudonyms. These pseudonyms are used in this report and in the official transcript of the hearing.

13. United States International Trade Commission, *Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1992-1995*, (USITC Publication 3032, April, 1997) p. 4-1.

14. Instituto Nacional de Estadística, Geografía e Informática (INEGI), *Industria Maquiladora de Exportación, Septiembre, 1997*, (Mexico, September, 1997), p. 2.

15. *Ibid.*, pp. 8-9.

16. *Political Constitution of the United Mexican States*, (U.S. NAO Staff translation).

17. Ibid.

18. Ibid.

19. Paragraph V states: "[w]omen, during their pregnancy, will not perform work that requires considerable exertion and constitutes a danger to [their] health in relation to gestation; they shall be entitled to rest for approximately six weeks prior to the date of delivery and six weeks following delivery, with full pay and without losing employment or employment rights acquired in the employment relationship. While nursing, women shall have additional rest periods of one-half hour each during the day to nurse their children"

20. *Federal Labor Law*, (as amended through December, 1993) (Ormond Beach, Florida, Foreign Tax Law Publishers, Inc., trans.). This English translation of the FLL is used throughout this report.

21. Cuevas, *Analysis of Submission No. 9701*, pp. 32-33. See also the testimony of María Estela Ríos, *Public Hearing on Submission No. 9701*, Department of Labor, Bureau of International Labor Affairs, National Administrative Office, November 19, 1997, pp. 112- 113.

22. *Law of Social Security (Ley del Seguro Social)*, Article 110.

23. Mexico NAO memorandum dated October 14, 1997.

24. Testimony of LaShawn Jefferson, *Public Hearing on Submission No. 9701*, November 19, 1997, p. 19.

25. *Programa de Empleo, Capacitación y Defensa de los Derechos Laborales, 1995- 2000*, Secretaría del Trabajo y Previsión Social, México, 1996, pp. 78-81.

26. In reviewing a previous submission, an expert retained by the NAO ascertained that on individual employment issues, including unjustified dismissal, the CABs act expeditiously and equitably, although this review did not specifically consider allegations of dismissal for pregnancy. See Middlebrook, Kevin J., and Quintero Ramirez, Cirila, *Conflict Resolution in the Mexican Labor Courts: An Examination of Local Conciliation and Arbitration Boards in Chihuahua and Tamaulipas*, (U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, North American Agreement on Labor Cooperation, April, 1996).

27. Mexico NAO memorandum dated July 11, 1997. The Mexican NAO did not provide information on the number of violations found or the application of sanctions.

28. Ibid.

29. Mexico NAO memorandum dated October 14, 1997. The Mexican NAO did not provide information on the number of violations found.

30. Mexico NAO memorandum dated July 11, 1997.
31. Mexico NAO memorandum dated October 14, 1997.
32. *Constitution of the United Mexican States*, Articles 103 and 107.
33. Mexico NAO memorandum dated October 14, 1997.
34. The NAO explicitly requested this information from the submitters, the Mexican NAO, an expert in Mexican labor law and gender issues, and from several of the witnesses at the public hearing. They were unable to cite any case involving gender discrimination that underwent the *amparo* process.
35. *Alliance for Equality: National Program for Women, 1995-2000 (Alianza para la Igualdad: Programa Nacional de la Mujer 1995-2000)*, Secretaría de Gobernación, México, March, 1996, pp. 59-65, (U.S. NAO Staff translation). See also Mexico NAO memorandum dated July 11, 1997.
36. *Alliance for Equality*, pp. 88-90.
37. *Ibid.*, p. 88.
38. *Ibid.*, pp. 88-90.
39. *Constitution of the United Mexican States*, Article 102, Part B.
40. *Law of the National Human Rights Commission (Ley de la Comisión Nacional de Derechos Humanos)*, published in the Official Diary of the Federation, June 29, 1992.
41. United Nations, International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties, Mexico*, 23 November 1994, paragraph 64.
42. *Law of the Human Rights Commission of the Federal District (Ley de la Comisión de Derechos Humanos del Distrito Federal)*, published in the Official Diary of the Federation, June 22, 1993.
43. Article 11(1) states as follows: "[s]tates Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
 - (a) The right to work as an inalienable right of all human beings;
 - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment"

44. Comisión de Derechos Humanos del Distrito Federal, *Recomendación 6/95*, pp. 14- 19.
45. Mexico NAO memorandum dated October 14, 1997.
46. U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, North American Agreement on Labor Cooperation, *Public Report of Review of Submission No. 9601* (1997), p. 22.
47. Organic Federal Laws derive their authority directly from the Constitution. Lesser Federal Laws may be secondary or tertiary laws that implement and clarify organic laws.
48. Decisions on *Amparo* Suits 337/94 and 338/95. See also Anna Torriente, National Law Center for Inter-American Free Trade, Tucson, Arizona, *Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca*, U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, (November, 1996).
49. Decision on *Amparo* Suit DT 13-97.
50. International Labour Conference, 75th Session, Report III (B), *Special Survey on Equality in Employment and Occupation in Respect of Convention No. 111* (Geneva, International Labour Office, 1988), pp. 38-39.
51. *Ibid.*, pp. 39-40.
52. International Labour Conference, 83rd Session, Report III (Part B) *Special Survey on Equality in Employment and Occupation in respect of Convention No. 111* (Geneva, International Labour Office, 1996) p. 15.
53. *Ibid.*, p. 13.
54. International Labour Conference, 82nd Session, Report III (Part 4A), *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, International Labour Office, 1995), p 300.
55. International Labour Conference, 80th Session, Report III (Part 4A), *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, International Labour Office, 1995), p 300. pp. 321-322.
56. *Special Survey on Equality in Employment and Occupation in Respect of Convention No. 111*, (1996) p. 15.
57. The submitters cite C-177/88 Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus. In this case, the Court of Justice of the European Community found that an employer who refuses to recruit a worker because she is pregnant is in violation of Directive 76/207/EEC. This decision interpreted an EEC directive,

however, and its scope is limited to the EEC.

58. *Submission No. 9701*, pp. 23-29; *No Guarantees*, pp. 37-45.

59. HRW interviewed women who worked or had worked in forty-three maquiladoras near the U.S.-Mexico border. HRW found that thirty-eight companies routinely required women to undergo pregnancy exams as a condition of employment and/or required women applicants to indicate their pregnancy status on the job application or during an interview. A list of the companies is found in *No Guarantees*, pp. 14-15.

60. *No Guarantees*, Appendix B. Letter from Dennis R. Winkleman, Vice-President, Human Resources, Zenith Electronics Corporation, to LaShawn R. Jefferson, Research Associate, Human Rights Watch (July 12, 1996).

61. Three other companies responded to the U.S. NAO's inquiries but did not provide specific information about the practices at their facilities in Mexico.

62. *Hearing on Submission No. 9701*, November 19, 1997, pp. 23-55.

63. *Ibid.*, p. 24.

64. *Ibid.*, p. 26.

65. *Ibid.*, p. 30.

66. *Ibid.*, p. 34.

67. *Ibid.*, p. 44-45.

68. *Ibid.*, pp. 47-48.

69. *Ibid.*, p. 48.

70. Mexico NAO memorandum dated July 11, 1997.

71. *Alliance for Equality*, p. 89.

72. Mexico NAO memorandum dated July 11, 1997.

73. *Law of the Human Rights Commission of the Federal District*, Art. 49.

74. For example, Article 133(I) of the FLL prohibits employers from "[r]efusing to hire workers for reason of age or sex." The FLL, in Article 154, also includes provisions for the preferential hiring of Mexican nationals, workers with families, and union members.

75. *FLL* Articles 46-52.

76. See Paul A. Curtis, Esq. and Alfredo Gutierrez Kirchner, Esq., *Questions on Labor Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards*, U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor (August 8, 1994), pp. 6-7.

77. Mexico NAO memorandum dated October 14, 1997. The Mexican NAO went on to note, however, that no cases involving unjustified dismissal for reason of pregnancy have been heard by the Federal CABs in Mexico's Federal District.

78. *FLL* Article 170, Paragraph I, provides that pregnant women shall not be required to perform work requiring strong physical effort that could affect their health or gestation, such as lifting, pulling, or pushing heavy weights, that produces excessive shaking, that requires standing for extended periods, or that otherwise affects their physical or mental state.

79. *FLL* Article 38 specifies the terms and conditions under which a temporary contract can be entered into. See also Cuevas, *Analysis of Submission No. 9701*, pp. 32-33 and testimony of María Estela Ríos, *Public Hearing on Submission No. 9701*, November 19, 1997, pp. 112-113.

80. Testimony of LaShawn Jefferson, *Public Hearing on Submission No. 9701*, November 19, 1997, p. 19.

81. *Hearing on Submission No. 9701*, November 19, 1997, pp. 14-15, 67, 79, 108-109.

82. See testimony of Edgar Krueger, *Hearing on Submission No. 9701*, November 19, 1997, pp. 65-71.

83. Allegations of blacklisting of workers by employers are made with some frequency in Mexico. See U.S. Department of Labor, Bureau of International Labor Affairs, National Administrative Office, *Follow-up Report: NAO Submission No. 940003* (December 4, 1996), p. 4.

84. *Hearing on Submission No. 9701*, November 19, 1997, pp. 38-39, 48, 51-52, 53-54.