

Submission Concerning Pregnancy-Based Sex Discrimination in Mexico's Maquiladora Sector
to the United States National Administrative Office

Submitted by
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Human Rights Watch/Americas,
International Labor Rights Fund, and
Asociación Nacional de Abogados Democráticos

May 15, 1997

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I. INTRODUCTION

The petitioners present this submission requesting that the United States National Administrative Office (USNAO) help address and ameliorate systematic labor rights violations — discrimination against women workers and job applicants — in Mexico's export-processing (*maquiladora*) sector. This petition describes the Mexican government's failure to enforce anti-discrimination laws and its failure to establish effective judicial remedies. In the North American Agreement on Labor Cooperation (NAALC), signatories to the North American Free Trade Agreement (NAFTA) covenanted to "protect, enhance, and enforce basic worker rights" and to work jointly to maintain "a progressive, fair, safe and healthy working environment."¹ This submission documents a pattern of widespread, state-tolerated sex discrimination against prospective and actual female workers in the maquiladora sector along the Mexico-U.S. border.² The information contained in this submission is based on an August 1996 Human Rights Watch Women's Rights Project report, "No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector," attached as Appendix 1.

Maquiladora employers regularly require female job applicants to verify their pregnancy status as a condition of employment. Pregnant women are denied hiring. Moreover, maquiladora employers sometimes mistreat and discharge pregnant employees. Women who suffer this discrimination lack effective remedial mechanisms.

Employment bias based on the capacity to bear children constitutes sex discrimination.³

¹ North American Agreement on Labor Cooperation (NAALC), November 13, 1993, Preamble.

² NAALC, Article 49, states that "Pattern of practice means a course of action or inaction beginning after the date of entry force of the Agreement, and does not include a single instance or case."

³ The ILO Convention 111 on Discrimination in Respect of Employment and Occupation specifically prohibits discrimination based on gender in access to employment. The ILO Committee of Experts has interpreted the scope of Convention 111 to prohibit pregnancy discrimination as a form of sex discrimination. *Conditions of Work Digest*, Volume

Mexican domestic law prohibits sex discrimination, announces a right to determine the number and spacing of children, and provides special protections for pregnant workers.⁴ Additionally, multiple treaties binding on Mexico forbid sex discrimination and establish the right to determine the number and spacing of children.

However, discrimination is widely countenanced by officials charged with enforcing anti-discrimination provisions in Mexico's labor law. Though some officials condemn pregnancy discrimination, others contend they are incapable of enforcing the law. Still others, including the president of the Conciliation and Arbitration Board in Tijuana, defend pregnancy-based discrimination as legitimate, observing that employers may rightfully avoid the costs associated with maternity leave mandated by Mexican law.⁵ One major U.S. corporation operating in the maquiladora sector even contended that the Mexican government actually condones discrimination against pregnant women as part of a wider policy initiative to control population growth.⁶ In any case, the Mexican government has taken no serious action to end obligatory pregnancy testing or prosecute those who practice it.

13, 1994 (Geneva: International Labor Office, 1994), p. 24.

In addition, the U.S. Supreme Court clarified in the landmark case of *International Union v. Johnson Controls* that workplace discrimination against women on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964 (Section VII), as amended by the 1978 Pregnancy Discrimination Act (PDA). The PDA makes clear that the terms "because of sex" and "on the basis of sex" as used in Title VII encompass but are not limited to discriminatory conduct "because of or on the basis of pregnancy, childbirth or related medical conditions." Under law, employers cannot refuse to hire or fire a woman because she is or may become pregnant. Prohibitions against sex discrimination extend to any aspect of employment, including promotion, transfer, working conditions, benefits and remuneration. *Facts About Pregnancy Discrimination*, U.S. Equal Employment Opportunity Commission, <http://www.inform.umd.edu/pregnancy-discrimination>.

⁴ For a discussion of protective maternity schemes under Articles 166–172 of Federal Labor Law, see section VI.(B) and VI.(C)(1)(b) of this submission.

⁵ An explanation of Mexican maternity law and benefits is found in section V. (A) of this submission.

⁶ See July 12, 1996 letter from Zenith Electronics Corporation to Human Rights Watch, Appendix B: Responses from Corporations, in "No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector."

This failure to act against pregnancy discrimination violates NAALC Article 3(1), which requires that each signatory “promote compliance with and effectively enforce its labor law through appropriate government action.” Further, by failing to provide an effective judicial remedy, the government violates NAALC Articles 4(1) and 4(2) regarding access to tribunals for the enforcement of labor law and recourse to procedures through which labor rights can be enforced.

NAALC signatories are covenanted to allow review of their labor rights practices by the other signatories so as to promote compliance with labor law and ensure access to proper judicial mechanisms. For this reason, petitioners urge the USNAO to 1) initiate a review pursuant to NAALC Article 16; 2) hold public hearings, preferably in the U.S. border municipalities of San Diego, California, and Brownsville, Texas, to facilitate participation by victims, with adequate arrangements for transportation, translation and visas for witnesses, and adequate notice to petitioners under Section (e) (3) of the USNAO regulations; 3) initiate steps to compel Mexico to meet its NAALC obligations; 4) engage with the Mexican government in public evaluation of problems documented here, with the goal of developing a plan to end abuses of women’s employment rights and enforce domestic and international laws prohibiting sex discrimination; and 5) engage with the Mexican government in developing effective prohibitions and remedies against sex and hiring discrimination.

II. THE PETITIONERS

A) Human Rights Watch is the largest United States-based nongovernmental human rights organization. It conducts regular, systematic investigations of human rights abuses in over seventy countries. Based on these investigations, it documents abuses of internationally recognized human rights around the world.

The Human Rights Watch Women's Rights Project was established in 1990 to monitor violence and gender discrimination against women throughout the world. It reports on a wide range of issues, including state-sponsored and state-tolerated violence against women, forced trafficking of women and girls, mistreatment and abuse of women workers, and violence against women in conflict situations.

Human Rights Watch/Americas, a division of Human Rights Watch, was founded in 1981 to promote internationally recognized human rights in Latin America and the Caribbean. Based in New York, Human Rights Watch/Americas has worked extensively in international legal fora, such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, to protect human rights in the region.

B) The International Labor Rights Fund (ILRF) is a nonprofit nongovernmental organization representing human rights, labor, religious, consumer, academic, and business groups dedicated to ensuring that all workers labor under humane conditions with adequate protection of basic worker rights. It was founded in 1986 and concentrates heavily on issues of workers' rights and international trade.

C) The National Association of Democratic Lawyers (Asociación Nacional de Abogados Democráticos, ANAD) is a network of legal professionals in Mexico committed to providing legal services, analysis and litigation in the defense of democracy and human rights. Its approximately 230 members include some of the most prestigious human rights authorities in Mexico, including noted specialists in labor law, arbitration, and collective bargaining.

III. JURISDICTION

The petitioners present this submission pursuant to Sections C, F, and G of the procedures established in the Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,660 (April 7, 1994) [hereafter "USNAO Guidelines"], as explained here:

A. Section C

Section C holds that the USNAO "shall receive and accept for review, and review submissions on labor matters arising in the territory of another Party," and may at the discretion of the Secretary initiate a review of any matter covered by the Agreement."⁷

B. Section F

The USNAO has jurisdiction over this complaint because Section F requirements have been met,⁸ as explained in the following:

1. Action Inconsistent with Obligations Under NAALC, Part II

The Mexican government has failed to meet obligations under Part II of NAALC requiring each party to "promote compliance with and effectively enforce its labor law through appropriate government action."⁹ NAALC defines labor law to include laws and regulations directly related to "elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each country's domestic laws."¹⁰ Mexican law prohibits sex

⁷ Bureau of International Labor Affairs; North American Agreement on Labor Cooperation (NAALC); Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines, Federal Register, April 7, 1994, Vol. 59, No. 67, Section C (4) (5), p. 16661.

⁸ *Ibid.*, Section F.

⁹ NAALC, Part Two, Article 3(1).

¹⁰ NAALC, Part Six, Article 49(1)(g).

discrimination, guarantees equality between men and women, protects women workers during pregnancy, and guarantees the right to decide freely on the number and spacing of children¹¹ (further described below).

Employment discrimination on the basis of sex extends to discrimination in hiring as well as to post-hire discrimination. The Mexican government has violated Part II of NAALC by failing to enforce its labor law and eliminate employment discrimination on the basis of sex through mechanisms that explicitly address sex discrimination both in hiring and on the job.

Moreover, Mexico has violated NAALC's requirement that a Party "ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law"¹² and that each Party shall ensure by law that "such persons may have recourse to . . . procedures by which rights arising under: (a) its labor law . . . can be enforced."¹³

2. Harm to Submitter or Other Persons

The discrimination documented in this petition involves substantial harm. Women affected by pregnancy discrimination in the maquiladora sector are typically poor, inexperienced, and minimally educated. They are often single mothers and/or primary wage earners for their families. If denied jobs in the maquiladora sector they become virtually unemployable.

Fearing mistreatment and job loss, pregnant women workers often hide their pregnancies, placing themselves and their fetuses at risk because they don't seek prenatal medical care or request

¹¹ Mexican Constitution, Article 4; Federal Labor Code Article 3, Article 133(I), Article 164, and Article 170(1).

¹² NAALC, 4(1).

¹³ NAALC, 4(2).

job reassignments to avoid toxic exposures. Fear of mistreatment and job loss also compromises autonomy in reproductive choice.

3. Demonstrated Pattern of Non-Enforcement of Labor Law

Practices described in this petition constitute a pattern of non-enforcement of domestic labor laws by the Mexican government. Pregnancy testing by maquiladora employers is widespread. Human Rights Watch documented systematic obligatory pregnancy testing and other methods of checking pregnancy status as a condition of employment in thirty-eight maquiladora companies in five Mexican border cities.¹⁴ The Mexican government knows these practices are widespread.¹⁵ Human Rights Watch has tried and failed to obtain clarification from the Mexican government on its

¹⁴ Human Rights Watch, "No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector," *A Human Rights Watch Short Report*, vol. 8, no. 6, August 1996.

¹⁵ See generally Maria Patricia Fernández-Kelly, *For We are Sold, I and My People: Women and Industry in Mexico's Frontier* (Albany: State University of New York Press, 1983), p. 122; Kathryn Kopinak, "Gender as a Vehicle for the Subordination of Women Maquiladora Workers in Mexico," in *Latin American Perspectives* (Boulder), 1995, Issue 84, Vol. 22, Winter 1995, p. 44; Norma Iglesias, *La flor más bella de la maquiladora (The Most Beautiful Flower of the Maquiladora)*, (Mexico City: Centro de Estudios Fronterizos del Norte de México, 1985), p. 78; María Patricia Fernández-Kelly, "Asia y Frontera México-Estados Unidos" (*Asia and the Mexico-U.S. Border*), in Jorge Carrillo (compiler), *Reestructuración industrial: Maquiladoras en la Frontera México-Estados Unidos (Industrial Restructuring: Maquiladoras on the Mexican-U.S. Border)*, (Mexico City: Colegio de la Frontera México, 1986), p. 171; Jorge Carrillo and Alberto Hernández, *Mujeres fronterizas en la industria maquiladora (Border Women in the Maquiladora Industry)*, (Mexico City Centro de Estudios Fronterizos del Norte de México, 1985), p. 178; Michelle Ruess, "Many Mexican Women Stuck in Factory Grind," *The Plain Dealer* (Cleveland), May 9, 1993; Kate Lebow, "For Women, the NAFTA Promises Anything but Freedom and Prosperity," *The Houston Chronicle* (Texas), November 14, 1993; Jay Root, "NAFTA's Impact Doesn't Reach Levels Predicted by Forecasters," *The Houston Post* (Texas), January 1, 1995; Eva Solís, "Gran violencia padece la mujer en las Maquiladoras de la región fronteriza," (Women Suffer Great Violence in the Maquiladoras of the Border Region), *El Universal* (Mexico City), November 26, 1994; and Dora Elena Cortés, "Piden suspender el régimen de excepción a Maquiladoras" (a suspension of the rule of exception for Maquiladoras requested), *El Universal* (Mexico City), July 30, 1993.

See also Human Rights Watch, "No Guarantees;" John Rice, "Rights Group Claims Discrimination in Border Plants Against Women," *The Associated Press*, August 17, 1996; Diane Lindquist, "Pregnant Need Not Apply," *The San Diego Union Tribune*, August 18, 1996; Alexander Cockburn, "Ladies and Gentlemen, I Give You the President," *The Nation*, September 9/16, 1996; Molly Moore, "Rights of Pregnant Workers At Issue on Mexican Border," *The Washington Post*, August 21, 1996; Leslie Crawford, "Defiance Pays Off for Bikini Women," *The Financial Times*, August 29, 1996; Hayes Ferguson, "Sex Discrimination Alleged Along Mexican Border," *Staten Island Sunday Advance*, September 15, 1996; Mark Wukas, "Rights Group Criticizes U.S. Plants on Mexico Border for Sex Bias," *The Chicago Tribune*, September 29, 1996; Cece Modupé Fadopé, "Production vs. Reproduction," *The Multinational Monitor*, October 1996; and Alberto Tea Guzmán, "Violan Derechos Humanos en Maquiladoras," *El Mañana de Reynosa*, December 3, 1996.

interpretation of applicable labor law.¹⁶

4. Relief Sought

Given the stark realities of the maquiladora sector and state-sponsored labor law compliance and adjudication structures, petitioners conclude that effective relief for pre-hire sex discrimination cannot be found through Conciliation and Arbitration Board mechanisms or the offices of the Labor Rights Ombudsman.

Discrimination in hiring is explicitly prohibited under Mexican labor law Article 133(I), which states that employers are prohibited from “refusing to accept workers for reasons of age or sex.” However, effective domestic relief for sex discrimination in hiring does not exist because state labor dispute mechanisms are available in practice only to those who are actually employed.¹⁷ In Mexico, labor lawyers, labor rights advocates, and even the administrators of state-established labor law compliance and adjudication structures provide contradictory information regarding whether or not pre-hire labor disputes — including sex discrimination in the hiring process — can be brought before the CABS. For example, the labor inspector for Reynosa and Río Bravo stated that making an inquiry on a woman complainant's behalf to discover why the maquiladora did not hire her would be outside his mandate, since no labor relationship had been established.¹⁸ In essence, the government of Mexico discourages the use of CABS for the resolution of pre-hire discrimination cases.

¹⁶ On October 22, 1996, Human Rights Watch sent the Mexican Secretary of Labor, Javier Bonilla García, a copy of “No Guarantees: Sex Discrimination in Mexico’s Maquiladora Sector,” and a letter asking for a formal response. In December, 1996, representatives of Human Rights Watch gave a copy of the letter to an official at the Mexican Embassy in Washington, D.C. and again asked for a response from the Mexican government. To date, none has been forthcoming.

¹⁷ Based on Human Rights Watch interviews with José Mandujano Álvarez, president of the CAB in Tijuana; Luis A. Alonso Siqueiros P., president of the CAB in Chihuahua; Carlos Francisco Martínez de León, president of the CAB in Reynosa; Eduardo Chávez Uresti, inspector of labor in Reynosa; Jesús Terán Martínez, president of the CAB in Matamoros; and C. Gustavo Belmares Rodríguez, inspector of labor in Matamoros, March 1995.

¹⁸ Human Rights Watch interview, Eduardo Chávez Uresti, inspector of labor, Reynosa, March 20, 1995.

María Estela Ríos, the president of the National Association of Democratic Lawyers, a co-petitioner in this case, argues that the CAB mechanisms are available in theory for pre-hire discrimination cases, but not in practice. She points out that the Mexican labor code says that companies cannot discriminate based on the sex of the worker and that the law establishes a legal expectation among job applicants that justice will be done if they are discriminated against on these grounds; the law's requirements for presenting cases to the CABs in no way rule out pre-hire discrimination.¹⁹

Petitioners have sought but not found cases in which pre-hire discrimination cases stemming from pregnancy testing were brought to CABs. Such cases before the CABs, if they are brought at all, would appear rare. There may be multiple reasons for this, including that CAB representatives who share the Río Bravo/Reynosa labor inspector's view simply dismiss such cases. Labor activists and victims of discrimination widely regard the CABs as closed to pregnancy testing cases. In addition, workers who are denied jobs because of their pregnancy status are exceedingly vulnerable, given that they must find work to support families and cannot be expected to have either the time or money to

¹⁹ According to Ms. Rios, "It must be said in the first place that, even though the law does not establish express mechanisms against sex discrimination, we must conclude, based on an interpretation of the law, that job aspirants are legally entitled to go to the labor tribunals to accuse owners over the failure to hire them because of their pregnancy. In this sense, one has to take into account the prohibition placed on owners by Article 133. On the other hand, based on Articles 154 and 157, read with other provisions, job applicants have the expectation of a legal remedy that can give origin to a suit for hiring and payment of lost wages. It is clear that neither the inspector of work, nor the labor rights ombudsman, nor the CABs accept this type of suit, but this is not due to the non-existence of legal right, but rather to the lack of will on the part of labor authorities to carry out the defense of women workers against sex discrimination based in pregnancy. For this reason, the authorities fail to carry out the law on the subject." May 7, 1997 memo from María Estela Rios to Human Rights Watch.

Article 133 of the federal labor law states that it is forbidden for employers to refuse to accept workers because of age or sex. Article 154 of the federal labor law states that "Patrons are obligated to prefer in equal circumstances Mexican workers over non Mexican workers, those who have served satisfactorily for a great time, those having no other source of economic earnings have in their charge a family and those who are unionized over those who are not . . ." Article 157 states that "The meeting of the requirements contained in Articles 154 and 156 gives the right to the victim of discrimination to present a case before the CAB, according to his selection that the CAB grant/award the worker the corresponding position or that the worker be indemnified with three months of salary. The worker shall have the right in addition to be paid the salary that is referred to in the second paragraph of Article 48 (salarios vencidos).

spend fighting cases in a tribunal system that, if anything, is highly inhospitable to pregnancy testing cases.

Given the breadth of the discrimination problem, the failure of the Mexican government to clarify Mexican labor law's standards regarding forced pregnancy testing, and the government's inattention to use of CABS to resolve pre-hire discrimination cases, petitioners conclude that effective mechanisms for resolving forced pregnancy testing cases do not exist for maquiladora workers.²⁰

Even for explicitly prohibited post-hiring discrimination, existing enforcement mechanisms fail to protect against pregnancy discrimination and related abuses.²¹ Potential complainants, expecting neither effectiveness nor impartiality from labor dispute mechanisms, fail to pursue available relief. Moreover, fear of job loss, reprisals, and blacklisting create powerful disincentives for lodging discrimination complaints.

5. Status Before International Bodies

Matters addressed by this petition are not pending before any international body.

C. Section G

²⁰ Based on Human Rights Watch interviews with José Mandujano Alvarez, president of the CAB in Tijuana; Luis A. Alonso Siqueiros P., president of the CAB in Chihuahua; Carlos Francisco Martínez de Leon, president of the CAB in Reynosa; Eduardo Chávez Uresti, inspector of labor in Reynosa; Jesus Terán Martínez, president of the CAB in Matamoros; and C. Gustavo Belmares Rodríguez, inspector of labor in Matamoros, March 1995.

It should be noted here, however, that in theory, the inspector of work, the labor rights ombudsman, and the conciliation and arbitration boards are obliged to investigate and adjudicate cases that involve prospective workers. Article 154 of the federal labor code states that "Patrons are obligated to prefer in equal circumstances Mexican workers over non Mexican workers, those who have served satisfactorily [in this type of work] for a great time, those having no other source of economic earnings have in their charge a family and those who are unionized over those who are not . . ." Furthermore, Article 157 states that "The meeting of the requirements contained in Articles 154 and 156 gives the right to the victim of discrimination to present a case before the CAB, according to his selection that the CAB grant/award the worker the corresponding position or that the worker be indemnified with three months of salary. The worker shall have the right in addition to be paid the salary that is referred to in the second paragraph of Article 48 (salarios vencidos).

²¹ Based on Human Rights Watch interviews with the following government officials: José Mandujano Alvarez, president of the CAB in Tijuana; Luis A. Alonso Siqueiros P., president of the CAB in Chihuahua; Carlos Francisco Martínez de Leon, president of the CAB in Reynosa; Eduardo Chávez Uresti, inspector of labor in Reynosa; Jesus Terán Martínez, president of the CAB in Matamoros; and C. Gustavo Belmares Rodríguez, inspector of labor in Matamoros in March 1995.

Petitioners urge that USNAO accept this submission because review will “further the objectives of the Agreement,” as required by Section G(2) of the USNAO Regulations.²²

Those objectives include promoting “the labor principles set out in Annex 1,”²³ including “elimination of employment discrimination on such grounds as . . . sex . . . ;”²⁴ “compliance with, and effective enforcement by each Party, of its labor law . . . ;”²⁵ improved “working conditions . . . in each country;”²⁶ and transparency in labor law administration.

Acceptance of this submission will serve these objectives by calling the Mexican government’s attention to the problems documented here.

IV. RELEVANT LAWS

NAALC’s definition of labor law includes laws regarding employment discrimination based on sex.²⁷ Petitioners have reviewed Mexico’s Federal Labor Law and its Constitution. They have also reviewed international anti-discrimination obligations, since the Mexican Constitution incorporates

²² USNAO, Guidelines, Section G(2).

²³ NAALC, Part One, Article 1(b).

²⁴ NAALC, Annex 1(7): “Elimination of employment discrimination on such grounds as race, religions, age, sex, or other grounds, subject to certain reasonable exceptions, such as, where applicable, *bona fide* occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.”

²⁵ NAALC, Part One, Objectives, Article 1(b)(f).

²⁶ *Ibid.*, Article 1(a).

²⁷ NAALC, definition of “Labor Law.”

international treaties into the “Supreme Law of all the Union,”²⁸ and therefore into domestic law.²⁹ Hence Mexico’s NAALC obligation to “promote compliance with and effectively enforce its labor laws”³⁰ apparently requires fidelity to treaties. Each of the international conventions cited in this section is binding on Mexico.

Petitioners understand that in its Public Report of Review on NAO Submission No. 9601 (“Report”), the USNAO requested ministerial consultations on “the relationship between and the effect of” international treaties and Mexican constitutional law on domestic labor laws.³¹ The Report notes “various legal opinions on the standing of ILO Convention 87 under the Mexican Constitution,”³² and applicability of international standards that contradict domestic standards. No such issues arise in this submission, since the international standards we cite are not contradicted anywhere within Mexican law.

A. Prohibitions Against Sex Discrimination

Petitioners provide here a list of pertinent legal provisions regarding sex discrimination:

1. Constitution of Mexico

Article 4 of the Mexican Constitution: “[M]en and women are equal before the law.”

2. Federal Labor Law

²⁸ Constitution of Mexico, Article 133. “This Constitution, the laws of the Congress that are based on it and all treaties that are in accord with it . . . will be the Supreme Law of the Union.”

²⁹ Pursuant to Article 133 of the Political Constitution of the United Mexican States, international treaties signed by the President of the Republic and approved by the Senate, are the Supreme Law of Mexico. Moreover, in contrast to the situation in Canada and the United States, international treaties are of direct application; they are self-executing and thus are directly integrated into the corpus of Mexican law without the necessity of enabling legislation or judicial action.

³⁰ NAALC, Article 3(1).

³¹ National Administrative Office, “Public Report of Review,” January 27, 1997, p. 33.

³² *Ibid.*, p. 32.

Article 3: “There shall not be established distinctions among workers for motives of race, sex, age, religious creed, political doctrine or social position.”

Article 133(I): Employers are prohibited from “refusing to accept a worker for reasons of age or sex.”

Article 164: “Women enjoy the same rights and have the same obligations as men.”

Article 170(1): “During the period of pregnancy, [a woman worker] will not perform work that requires considerable force and signifies a danger for her health in relations to gestation . . .”

3. The International Covenant on Civil and Political Rights (ICCPR)³³

Article 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion.”

4. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³⁴

Article 2: “State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: . . . (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; © To establish

³³ Ratified by Mexico on March 23, 1981.

³⁴ Ratified by Mexico on March 23, 1981.

legal protections of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.”

Article 11(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: . . . (b) *The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment* (italics added for emphasis); (c) The right to free choice of profession and employment . . .”

Article 11(2) (a): calls on governments to take appropriate measures to “prohibit, subject to the imposition of sanctions, dismissal on grounds of pregnancy or of maternity leave . . .”

5. The American Convention on Human Rights³⁵

Article 24: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

6. Convention 111 of the International Labor Office (ILO) on Discrimination in Respect of Employment and Occupation³⁶

³⁵ Ratified by Mexico on April 3, 1982.

³⁶ Ratified by Mexico on September 11, 1961.

Article 1(1) of Convention 111: “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; . . .”

Article 1(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.”

B. The Right to Determine The Number And Spacing of Children

Petitioners provide here a list of pertinent legal provisions regarding freedom to determine the number and spacing of children:

1. Mexican Constitution

Article 4: Protects the “organization” and “development” of the family, including the fact that, “[e]very person has the right to decide in a free, responsible and informed way on the number and spacing of [her] children.”

2. Convention on the Elimination of All Forms of Discrimination Against Women

Article 16 (1): States are obliged “to take all appropriate measures to eliminate discrimination against women in all matters related to family and family relations.”

Article 16 (1) (e): States are required to ensure, for women, on a basis of equality with men, “[t]he same rights to decide freely and responsibly on the number and spacing of their children . . .”

V. STATEMENT OF FACTS

A. Sex-Based Employment Discrimination

Human Rights Watch interviews³⁷ with women's rights activists, maquiladora personnel, labor rights advocates, Mexican government officials, community organizers, and workers revealed that women in the maquiladoras routinely suffer a particular form of discrimination. Maquiladora employers routinely require women workers to undergo pregnancy testing as a condition of employment, and deny employment to those found pregnant. Moreover, employees found to be pregnant soon after they are hired may be discharged.

Employers contend that they discriminate based on pregnancy because Mexican law³⁸ guarantees financial and medical support to pregnant workers and their families from the Social Security system (IMSS and ISSSTE).³⁹ Companies are required to provide maternity benefits to pregnant workers, including six weeks' leave before and after delivery, extra paid breaks to new mothers for breast-feeding, and an extra sixty days of maternity leave after birth at half-pay for up to one year if requested.

During maternity leave, a worker is entitled to employment and the rights acquired under her labor contract,⁴⁰ and to full wages. Usually, the cost of this maternity leave wage subsidy (and other wage subsidies like those provided to workers on occupational sickness or injury leave) is shared by

³⁷ The information contained in this section is based on a March 1995 Human Rights Watch mission to the U.S.-Mexico border to investigate pregnancy-based sex discrimination.

³⁸ Mexican Constitution Article 123(A)(XXXIX) provides for the enactment of a social security law. It is considered to be of public interest and includes insurance against disability, old age, sickness and accidents; life insurance; unemployment benefits; infant care services and other forms of insurance for the well-being of factory and other workers. Anna Torriente, "Minimum Employment Standards in Mexico," National Law Center for Inter-American Free Trade, September 1995. [Http://www.natlaw.com/pubs/Torriente/htm](http://www.natlaw.com/pubs/Torriente/htm).

³⁹ Social Security provides workers and their families full medical attention, medicines, hospitalization, surgical care, pre-and post-natal care, plus repayment of salary after the third day of disability. Ibid, page 2.

⁴⁰ Mexican Constitution Article 123(A)(V); Federal Labor Law, Article 170 (I(II), (IV) (V).

the government, workers and employers through contributions to IMSS. However, to be eligible for the IMSS-funded maternity leave wage subsidy, a worker must have contributed payments to IMSS for 30 weeks in the 12 month period prior to taking maternity leave. If not, her employer must pay 100 percent of her maternity leave wage benefit.⁴¹

This 100 percent wage payment to a limited number of workers (those on maternity leave without the requisite 30 weeks tenure in the Social Security system) is used as an excuse by employers to single out pregnant workers as an extraordinary financial burden. In response to a letter from Human Rights Watch, Zenith Electronics Corporation admitted to pregnancy-based discrimination, explaining the practice as a response to “restrictions the Mexican government places on worker eligibility for government-funded social security maternity benefits.” Zenith argued that the Mexican government “. . . implicitly condoned this practice — by refusing to extend maternity benefits to women with fewer than 30 weeks’ tenure in the social security system — as part of a wider policy initiative to control population growth.”

General Motors concurred,⁴² stating that it discriminated against pregnant applicants to avoid “substantial financial liabilities to the social security system for maternity benefits.” To its credit, General Motors announced that it had voluntarily changed its policy,⁴³ and that effective March 1, 1997, it no longer administered pregnancy tests to female job applicants in its Mexican maquiladora

⁴¹ Although food bonuses, overtime, attendance and punctuality bonuses and retirement savings are exempted from the wage amount, decreasing the normal weekly pay amount. In addition, employers often register workers with IMSS as earning only the legal minimum wage to keep their costs low. Anna Torriente, “Minimum Employment Standards in Mexico,” p. 1.

⁴² Appendix B: Responses from Corporations, “No Guarantees: Sex Discrimination in Mexico’s Maquiladora Sector,” Human Rights Watch, August, 1996.

⁴³ March 7, 1997 letter from General Motors to Human Rights Watch.

factories. However, it is important to note that this policy change was voluntary, and not the result of enforcement of prohibitions against discrimination by the Mexican government.

1. Scope of Sex-Based Employment Discrimination in the Hiring Process

Women applying for maquiladora jobs are routinely submitted to pregnancy exams, usually through urine samples.⁴⁴ They are also sometimes required to reveal their pregnancy status. Interviewers and applications also routinely inquire about pregnancy status through intrusive questions about menses schedules, sexual activity, and birth control.⁴⁵ Such inquiries and their results – the denial of employment to women found pregnant — constitute a discriminatory hiring practice.

2. Scope of Post-Hire Sex-Based Employment Discrimination

a. Mistreatment of Pregnant Workers

⁴⁴ The implicated companies (with parent company in parentheses) are: Plásticos Bajacal (Phoenix, AZ-based Carlisle Plastics), Dalila (closed), Maquiladora de Accesorios para Mascotas (Chula Vista, CA-based Coyote Pet Products), Exportadora de Mano de Obra (closed; was owned by Downey, CA-based American United Global), Chappel (100 percent Mexican owned), Temco, Ensamblados de Precisión de las Californias (Gardena, CA-based Pacific Electricord), and Administración de Maquiladoras (closed, was owned by Temecula, CA-based Hudson Oxygen Therapy Sales now called Hudson Respiratory Care) in Tijuana; Alambrados y Circuitos Eléctricos (Detroit, MI-based General Motors) in Chihuahua; Partes de Televisión de Reynosa (Glen View, IL-based Zenith, now majority owned by South Korea-based Goldstar), Controles de Reynosa (Milwaukee, WI-based Johnson Controls), Datacom de México (Chantilly, VA-based GENICOM), and Zenith (based in Glen View, IL; now majority owned by South Korea-based Goldstar) in Reynosa; and Sunbeam-Oster (based in Fort Lauderdale, FL), Texitron (Chicago, IL-based Midwestco), Zenith (based in Glen View, IL; now majority owned by South Korea-based Goldstar) in Matamoros, and ITT Industries (based in White Plains, NY) in Río Bravo. In a February 12, 1997 letter to Human Rights Watch, ITT Industries announced that it had no longer administered pregnancy tests or inquired into applicants' pregnancy status.

⁴⁵ In the following maquiladoras, women applicants were required either to reveal their pregnancy status on a job application or during an interview with maquiladora personnel: Plásticos Bajacal (Phoenix, AZ-based Carlisle Plastics), Dalila (closed), Maquiladora de Accesorios para Mascotas (Chula Vista, CA-based Coyote Pet Products), Exportadora de Mano de Obra (closed; was owned by Downey, CA-based American United Global), Chappel (100 percent Mexican owned), Temco, Ensamblados de Precisión de las Californias (Gardena, CA-based Pacific Electricord), and Administración de Maquiladoras (closed, was owned by Temecula, CA-based Hudson Oxygen Therapy Sales now called Hudson Respiratory Care) in Tijuana; Alambrados y Circuitos Eléctricos (Detroit, MI-based General Motors) in Chihuahua; Partes de Televisión de Reynosa (Glen View, IL-based Zenith, now majority owned by South Korea-based Goldstar), Controles de Reynosa (Milwaukee, WI-based Johnson Controls), Datacom de México (Chantilly, VA-based GENICOM), and Zenith (based in Glen View, IL; now majority owned by South Korea-based Goldstar) in Reynosa; and Sunbeam-Oster (based in Fort Lauderdale, FL), Texitron (Chicago, IL-based Midwestco), Zenith (based in Glen View, IL; now majority owned by South Korea-based Goldstar) in Matamoros and ITT Industries (based in White Plains, NY) in Río Bravo.

The general principle of Mexico's Federal Labor Law is that all jobs are permanent unless spelled out in a written contract as temporary. Justified discharges of employees are allowed only in cases of grave misconduct, such as thievery, violence, or unjustified absenteeism.⁴⁶ Otherwise, discharges require severance pay, usually three months' salary and benefits plus 20 days salary for each year of seniority.⁴⁷ Because of the financial liabilities for firings, other obstacles to discharge, and the desire to avoid severance pay, employers often use other means to avoid extending permanent employment to pregnant workers. These include the use of illegal 30-90 day probationary contracts.

On occasion they also include mistreating and harassing employees who become pregnant shortly after hire. To force resignations and perhaps to deter other employees from getting pregnant, supervisors subject pregnant workers to abusive practices and unreasonable conditions. Using reprehensible tactics that workers commonly understand as attempts to get rid of "undesirable" workers, managers reassign pregnant workers to physically harder work, demand uncompensated overtime, alter work shifts, and deny rights to sit while working. As detailed in this submission, ILO and domestic law protect pregnant workers and require accommodation in the form of seated work,⁴⁸ for example lighter work, and so on. Supervisors who try to make pregnant workers overexert force them to choose between healthy pregnancies and their jobs. In one case documented by Human Rights Watch, a supervisor's refusal to release a pregnant worker from the assembly line at a

⁴⁶ Federal Labor Law Article 46 and Article 47.

⁴⁷ "Labor in Mexico: A Guide to Mexican Compensation and Labor Law," p. 2. [Http://www,itrade.com/dir05/facts/8502.html](http://www,itrade.com/dir05/facts/8502.html).

⁴⁸ Federal Labor Law, Article 172 requires the employer to provide a sufficient number of chairs for working mothers. Article 132 (V) obliges employers to provide a sufficient number of chairs to workers regardless of sex or maternal/gestational status.

Plásticos Bajacal factory in Tijuana, owned by Carlisle Plastics, ended in miscarriage.⁴⁹

b. Forced Resignations and Attempted Forced Resignations

Supervisors often seek fake pretexts to fire pregnant workers, and use threats of dismissal to intimidate others. Employers also force resignations on pregnant employees. Such resignations — tendered at the insistence, instigation, and urging of maquiladora managers — amount to constructive dismissal.⁵⁰ Many women contend that resigning was necessary to avoid employer blacklisting that would block employment in other maquiladoras.

B. Legal Redress for Employment-Based Sex Discrimination

Conciliation and Arbitration Boards (CABs) are the appropriate labor-dispute tribunals for the maquiladora sector. In contrast to the U.S., Mexico has no private monetary remedy available to either pre-hire and post-hire or victims of employment discrimination. This remedial deficit undermines Mexico's ability to enforce its labor law effectively.

To comply with NAALC's requirements on labor tribunal access, maquiladora job seekers (as well as workers) must be able to use the CABs, the Inspectorate, and the Ombudsman. However, as detailed in this submission under section III, Jurisdiction, B. Section F (4), Relief Sought, these agencies are in practice available only to actual employees, not job seekers discriminated against in

⁴⁹ Human Rights Watch interview, María Elena Corona Caldero, Tijuana, March 1, 1995. This is the worker's actual name. Her case has been widely reported in the Mexican press.

⁵⁰ Women workers often used the term "forced" to describe their resignations . . . the women resigned only in the most technical sense of the word — which is to say they tendered their resignations or signed a resignation letter at the insistence, instigation and urging of maquiladora managers. Petitioners consider these forced resignations to be tantamount to firings, given the coercion involved and given the fact that the women workers all said they felt they had no other choice than to sign and leave the maquiladora on terms that would allow them later to seek work in another maquiladora. In all instances Human Rights Watch investigated where pregnant women workers were forced to resign the workers themselves believed they were the only ones forced to resign, despite, in some instances, a company's claim that there was no longer enough work for all the workers.

hiring.⁵¹

Available dispute mechanisms for women who suffer on-the-job discrimination do not effectively or consistently function,⁵² and fail consistently to condemn discrimination against women in any form. Moreover, these bodies do not collect data on cases and their resolution disaggregated by gender or gender-specific claims. Hence, they remain unaware of the nature and extent of employment-based sex discrimination.

Women workers show little faith in the labor dispute system. Disillusioned with government in general and Conciliation and Arbitration Boards in particular, many believe labor dispute offices are biased against workers, provide redress only rarely, and fall under undue company influence.⁵³ Others do not realize that pregnancy exams may be illegal, are ill-informed about complaint and resolution mechanisms, or are completely unaware that government mechanisms to resolve labor disputes and provide legal assistance exist at all.

1. Inspector of Labor and Labor Rights Ombudsman

The Inspector of Labor is chartered as an impartial investigator under the Secretary of Labor and Social Security. The Inspector of Labor is charged generally with ensuring that companies are

⁵¹ Based on Human Rights interviews with José Mandujano Alvarez, president of the CAB in Tijuana; Luis A. Alonso Siqueiros P., president of the CAB in Chihuahua; Carlos Francisco Martínez de Leon, president of the CAB in Matamoros; and C. Gustavo Belmares Rodríguez, inspector of labor in Matamoros in March 1995.

⁵² Human Rights Watch interviewed the government officials: José Mandujano Alvarez, president of the CAB in Tijuana; Luis A. Alonso Siqueiros P., president of the CAB in Chihuahua; Carlos Francisco Martínez de Leon, president of the CAB in Reynosa; Eduardo Chávez Uresti, inspector of labor in Reynosa; Jesus Terán Martínez, president of the CAB in Matamoros; and C. Gustavo Belmares Rodríguez, inspector of labor in Matamoros in March 1995.

⁵³ The basis for their skepticism was confirmed by one former maquiladora manager in Chihuahua, who said that the CAB there has been "... hostile to the interest of maquiladora workers in particular because all the maquiladora unions are with the CTM which is with the Institutional Revolutionary Party (PRI). All the groups work together to encourage foreign investment in Mexico. And they all work together to block the rights of the worker, instead of defend them, so that foreign investment will continue to come. So long as the Mexican economy is dependent on the dollar, you'll have this problem." Human Rights Watch interview, Eréndira, Chihuahua, March 7, 1995.

in compliance with Mexican federal labor law and with investigating allegations of non-compliance.⁵⁴ The Office of Labor Rights Ombudsman is charged with advising workers on their rights. Ombudsmen are obliged to “represent workers or unions, whenever they are solicited, before any authority on issues which relate to the application of labor law,”⁵⁵ and to offer workers free legal advice on resolving labor disputes. For any dispute the inspectors cannot resolve, they must help prepare and present a case to the CAB.

Human Rights Watch interviews with labor inspectors and ombudsmen revealed a dispute resolution system completely unresponsive to complaints of pregnancy discrimination and unequipped legally and materially to pursue them.⁵⁶

The Inspector of Labor for Reynosa and Río Bravo complained that although he had inspected maquiladoras to resolve unjustified firings or suspensions, he had met with substantial official resistance. He complained about his lack of authority to inspect or meet with the companies, inferred that he lacked support from his superiors because they were in collusion with industry, and explained

⁵⁴ The office is charged with “monitoring the fulfillment of work norms; facilitating technical information and advising workers and patrons about the most effective manner of fulfilling work norms; making known to authorities the deficiencies and violations of work norms that he/she observes in companies and establishments; carrying out studies and gathering data that authorities solicit and consider useful in order to procure harmony of the relations between worker and patron . . .” from Bastar Cavazos Flores, *Las 500 Preguntas Más Usuales sobre Temas Laborales (500 of the Most Usual Questions about Labor Themes)*, (Mexico City, Trillas, 1984 (reimp. 1994)), p. 244.

⁵⁵ Paul A. Curtis and Alfredo Gutierrez Kirchner, *Questions on Labor Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards* (Washington, D.C.: U.S. Department of Labor National Administrative Office, 1994) p. 27.

⁵⁶ The inspector for Reynosa and Río Bravo stated that making an inquiry on a woman complainant's behalf to discover why the maquiladora did not hire her would be outside his mandate, since no labor relationship had been established. He explained that, technically speaking, under the Federal Labor Law's anti-discrimination article, his office could investigate a company for post-hire pregnancy-based sex discrimination, but emphasized that “Mexico's labor laws are light years ahead of U.S. laws, but in terms of interpretation and enforcement, we are centuries behind,” and painted his office as being, “. . . an authority without a body and without hands. We have a head only. Only for show. If I request a company to come here for an official inquiry I have no way of obliging them to show up. Not realistically. We have the right to issue fines, but we rarely do.” Human Rights Watch interview, Eduardo Chávez Uresti, inspector of labor, Reynosa, March 20, 1995.

that his office is prevented from applying the law to the maquiladoras:

They provide 15,000 people with work each shift.⁵⁷ They are a source of employment and hard currency to be left alone. You can't touch manufacturing, and maquilas form a part of this When there is not a complaint, we need an order from our superiors to inspect the Maquiladoras. Otherwise, with one telephone call I would be out on the street.⁵⁸

Labor inspectors underscored their unsuitability for alleviating pregnancy discrimination. According to them, they have no authority over discrimination in hiring; federal labor code allows discharges without explanation in the first thirty days;⁵⁹ and such latitude facilitates pregnancy discrimination, coupled as it is with difficulties in proving that any given woman was dismissed for being pregnant.

Workers may approach Ombudsman local offices for assistance with disputes, but Human Rights Watch had disturbing difficulty identifying and locating the ombudsman for Reynosa and Río Bravo. His secretary knew neither his whereabouts nor his office schedule, misidentified as the ombudsman someone who had vacated the position six months before,⁶⁰ and was unable to describe

⁵⁷ Tamaulipas, the Mexican state that contains the towns of Reynosa, Río Bravo, and Matamoros has 18.3 percent of Mexico's maquiladora workers, as reported by Tim Loughran, "Mexico's Maquiladora Industry Expands 10.5% Through November," *Bloomberg Business News* (New York City), February 2, 1996.

⁵⁸ Human Rights Watch interview, Eduardo Chávez Uresti, inspector of labor, Reynosa, March 20, 1995.

⁵⁹ The petitioners question the legitimacy of the assertion that employers can discharge workers in their first 30 days "without justification." Federal labor law Article 46 allows for discharges with "justified cause," which Article 47 lists as including thievery, inebriation, or misrepresentation of job abilities. Employers must pay indemnization to workers dismissed without justified cause.

⁶⁰ The secretary told Human Rights Watch that the name of the labor rights ombudsman was Rafael Morales de la Cruz. However, this person had not been labor rights ombudsman since six months previously, according to our subsequent interview on March 3, 1995 with Eduardo Chávez Uresti, inspector of labor for Reynosa, who shares an office with Geraldo Dávila González, labor rights ombudsman. Dávila González left his position as labor rights ombudsman at the end of 1995. As of January 1996, the labor rights ombudsman was Juan Martín Silva Domínguez.

his most basic functions.⁶¹ Moreover, the ombudsman appeared to have a serious conflict of interest acting as workers' advocate because he served also as head of an industrial association representing companies.

If the Reynosa-Río Bravo situation is typical, legal assistance from ombudsmen is inaccessible to workers.

2. Conciliation and Arbitration Boards (CABs)

Workers may theoretically approach the local CAB with a grievance. Like the Inspectorate, the CAB is chartered as an impartial investigative body under the Secretary of Labor and Social Security. It is comprised of representatives of the interests of workers, employers, and government.⁶² Its decisions are binding and it can levy financial penalties against companies.⁶³ Labor dispute decisions issued by CABs can be appealed to the federal circuit court through a petition for direct relief, *amparo*,⁶⁴ which is the main instrument to protect individuals from constitutional infringement of their rights.⁶⁵

Several factors make the CABs ineffective for victims of pregnancy-based sex discrimination.

1) CAB officials believe that labor anti-discrimination laws in practice protect only job-holders, not applicants; 2) CABs have no clear official position on the illegality of pregnancy-based discrimination;

⁶¹ Conversation, Blanca, secretary, Reynosa, March 20, 1995.

⁶² CABs exist at the state and federal levels. Federal-level CABs have jurisdiction over cases in twenty-five specific categories. Local conciliation and arbitration boards have jurisdiction over all other cases.

⁶³ Human Rights Watch interview, Carlos Francisco Martínez de León, president of the CAB, Reynosa, March 16, 1995.

⁶⁴ Anna Torriente, "Minimum Employment Standards in Mexico," page 1.

⁶⁵ NAO Submission No. 9601, Public Report of Review. US National Administrative Office, Bureau of International Labor Affairs, US Department of Labor. January 27, 1997. Page 17.

3) the process is time-consuming, individual cases taking from six months to one year,⁶⁶ and 4) CABs lack transparency and credibility with workers, so few workers use it.

The President of Reynosa's CAB⁶⁷ contended that pregnancy exams violate federal law and fall under the CAB authority when they involve job-holders, but not applicants.⁶⁸

The President of the Tijuana's CAB contends, on the other hand, that pregnancy exams and dismissals do not violate the law.⁶⁹ He cites Article 47 (1) of the federal labor code, which lists conditions under which an employer can rescind a labor contract by right. He believes that conditions allowing rescission include worker disabilities, including pregnancy. But Article 47 authorizes rescissions only "If the worker deceives. . . [the employer] or. . . the syndicate. . . proposed or recommended him with false certificates or references in which he was attributed as having capacities, aptitudes or faculties that he lacks." Other observers point to Article 134 as authority for pregnancy testing. Article 134 allows employers to require medical exams,⁷⁰ but the explicit intent of this statute is to ensure that workers do not suffer from contagious or incurable incapacities or illnesses at work. Pregnancy is not contagious or incurable, and is not an illness. Hence, reliance on Article 134 to

⁶⁶ Representatives on the CABs are elected. The representative of the employees and his or her substitute are elected by a convention every six years; the representative of the employers and his substitute are elected by a local chamber of commerce; and the representative of the government and his or her substitute are appointed by the governor of the state.

⁶⁷ Human Rights Watch interview, Carlos Francisco Martínez de León, president of the CAB, Reynosa, March 16, 1995.

⁶⁸ Curtis and Gutiérrez Kirchner, *Questions on Labor Law Enforcement*, p. 44.

⁶⁹ Human Rights Watch interview, José Mandujano Alvarez, president of the CAB in Tijuana, March 16, 1995.

⁷⁰ Article 134 (X and XI) states that a worker is required to ". . . submit himself [sic] to medical examinations foreseen in the internal regulations and other observed norms of the company or establishment, in order to verify that he does not suffer from some incapacity or sickness of work, *contagious* (emphasis added) or *incurable* (emphasis added); Make cognizant to the employer *contagious sickness* (emphasis added) that are suffered from, as soon as he has knowledge of them; . . ."

In an interview with Human Rights Watch, Eduardo Chávez Uresti, inspector of labor, Reynosa, March 20, 1995, stated that Mexican labor codes were written in 1917 at a time when contagious disease was a serious public health concern.

justify requiring pregnancy exams from applicants is also baseless in law.

The Tijuana CAB President also cites Article 170 (II), mandating six-weeks maternity leave before and after giving birth, and sees employers as within their rights avoiding such costs, not to mention maternity payments for new employees ineligible for social security maternity benefits.⁷¹

VI. ARGUMENT

A. Obligatory Pregnancy Testing is Sex Discrimination and Violates Mexican Labor

Law

Pregnancy testing is discriminatory. It targets a condition experienced only by women. Mexico's National Human Rights Commission (Comisión Nacional de Derechos Humanos, CNDH) found this in its 1994 report on women's rights, noting: "The demand that women present certification that they are not pregnant when they are to be hired constitutes recurrent discrimination."⁷²

In June 1995, the Commission for Human Rights of Mexico City (CDHDF) urged [Recomendación 6/95] that several entities in the capital city — including the Superior Tribunal of Justice, the Office of the Institute of Professional Formation of the Attorney General of Justice of the Federal District, and the Institute of Training and Development of the Collective Transportation System (Metro) — stop requiring proof of non-pregnancy from applicants. The Commission

⁷¹ Human Rights Watch interview, José Mandujano Alvarez, president of the CAB in Tijuana, March 16, 1995.

⁷² CNDH, *Los Derechos Humanos de las Mujeres en Mexico* (Mexico City: Comisión Nacional de Derechos Humanos, 1994), p. 26.

concluded:

To require unjustified of women that they not be pregnant to give them work is a discriminatory and sexist act that violates the principle of social and legal equality between a man and a woman. The role of women in procreation cannot be a cause for discrimination, be it with the pretext of a debatable productivity or with that of a supposed protection.⁷³

Several multinational companies whose Mexican affiliates require pregnancy tests have argued that such requirements do not violate Mexican law. For instance, Zenith told Human Rights Watch, “Regarding pregnancy screening, the advice of counsel — Mexican attorneys who specialize in labor law — is that Mexican labor codes contain no provision explicitly precluding companies from inquiring about the pregnancy status of women applicants.”⁷⁴ This argument rests on the notion that because Mexican labor law does not *explicitly* prohibit pregnancy testing, it is not discriminatory or illegal.

B. Obligatory Pregnancy Testing is Sex Discrimination and Violates International Law

International law binding on Mexico also deems pregnancy discrimination to be discrimination against women. ILO Convention 111 holds:

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

⁷³ Carta del Presidente de la CDHDF al Jefe del Departamento del Distrito Federal: (Letter from the President of the CDHDF [National Human Rights Commission of the Federal District] to the Head of the Federal District) in *La Gaceta* (Mexico City), June 1995.

⁷⁴ Appendix B: Responses from Corporations, “No Guarantees: Sex Discrimination in Mexico’s Maquiladora Sector,” Human Rights Watch, August, 1996.

or impairing equality of opportunity or treatment in employment or occupation.” The ILO Committee of Experts (COE)⁷⁵ interprets the Convention 111's ban to include pregnancy discrimination.⁷⁶

CEDAW provides authoritative and explicit obligations to eliminate discrimination against women. It explicitly prohibits pregnancy-based employment discrimination.⁷⁷ Article 11(1)(b) of CEDAW calls on states to ensure that women have “the right to the same employment opportunities, including the application of the same criteria for selection for matters of employment.”⁷⁸ CEDAW calls on governments to take appropriate measures to “prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave . . .”⁷⁹

It is not sufficient for employers to defend pregnancy discrimination as a means of protecting maternal and fetal health. Contemporary anti-discrimination policy stresses that maternal and fetal health should be protected with on-the-job accommodation wherever possible, not with hasty resort to discharges. Although the Mexican Constitution provides that men and women are equal before the law and the Federal labor law prohibits employers from differentiating between workers on the grounds of sex, Article 166 of Federal labor law does create a special protective scheme for maternity which in theory is without prejudice to a female employee's salary, benefits and other rights under

⁷⁵ The Committee of Experts is an authoritative body charged with elaborating on and clarifying the scope and application of ILO standards.

⁷⁶ *Conditions of Work Digest*, Volume 13, 1994, (Geneva: International Labor Office, 1994), p. 24.

⁷⁷ Ratified by Mexico on March 23, 1981.

⁷⁸ CEDAW, Article 11(1)(b).

⁷⁹ CEDAW, Article 11(2)(a). Also, in Article 11(1) CEDAW obliges governments to “eliminate discrimination against women in the field of employment . . .”

her employment agreement.⁸⁰

Concern to protect working women in connection with pregnancy and childbirth appeared when women first entered factory employment, and was reflected in the provision of maternity leave in some countries. Over time, maternity protection evolved to include measures to protect the pregnant woman's health so that work does not harm the development of the fetus. For example, CEDAW's Committee places great emphasis on the ability of women to make informed voluntary choices about health risks, including access by the women to information relating to health hazards in the workplace.

C. NAALC's Requirement to Promote Compliance and Effective Enforcement

1. Prohibitions Against Sex Discrimination

a. Mexican Law

Mexico has violated Article 3(1) of the NAALC's requirement that each Party "promote compliance with and effectively enforce its labor law through appropriate government action." Pregnancy discrimination, including testing, is widespread among private maquiladora companies and is known to the Mexican government.⁸¹ By failing to prevent, investigate, prosecute, or punish such

⁸⁰ A further aim of contemporary maternity protection policies is to ensure that women are not discriminated against at work because they bear children. The U.S. Supreme Court's *Johnson Controls* decision made clear that gender-specific fetal protection policies "that adversely affect an employee's status" constitute discrimination under Title VII as amended by the PDA. In *Johnson Controls*, the Supreme Court recognized the need for some protection as it reiterated the principle that women are as capable of doing their jobs as their male counterparts and may not be forced between having a child and having a job.

The usefulness of special protective measures for women has been much debated, although maternity protection has never been questioned. It is seen as an integral part of the promotion of equal opportunities and treatment between men and women in employment. From a summary of an article in "Conditions of Work Digest, Volume 13, June 1995. [Http://ilo.com.html](http://ilo.com.html), and "U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women: An overview and analysis of U.S. law relating to the obligations of the Women's Convention." International Human Rights Law Group, August 1994.

⁸¹ The Mexican Secretary of Labor received a copy of the Human Rights Watch Report, "No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector," in August 1996 and again in October 1996. To date, no response has been forthcoming.

discrimination, Mexico has failed to enforce several domestic labor laws: those that guarantee gender equality, prohibit sex discrimination, protect pregnant workers, and guarantee the right to determine the number and spacing of children.⁸²

Article 3(1) of the NAALC defines promotion of compliance and effective enforcement of labor law through appropriate government action to include appointing and training inspectors; monitoring compliance and investigating suspected violations, including on-site inspections; seeking assurances of voluntary compliance; requiring record keeping and reporting; providing or encouraging mediation, conciliation and arbitration services; and seeking sanctions for violations. With respect to pregnancy discrimination, Mexico has failed on each count.

b. International Law

Pregnancy-based discrimination constitutes sex discrimination, prohibited by Article 26 of the ICCPR; Articles 2 and 11(1) of CEDAW; Article 24 of the Inter-American Convention on Human Rights, and ILO Convention 111 on Discrimination in Respect of Employment and Occupation.⁸³ Mexico has ratified each of these international treaties.⁸⁴

ILO standards protecting pregnant employees and new mothers from strenuous work and

⁸² These rights are found in Article 4 of the Mexican Constitution, Articles 3, 133 (I), 164, and Article 170(1) of the Federal Labor Law.

⁸³ ILO Convention 111 in its entirety prohibits discrimination on several grounds and outlines government obligations to enforce this policy. ILO conventions and recommendations bind governments and provide international legal guidance for the formulation or revision of domestic labor laws. ILO expert opinions are meant to provide definitive and authoritative interpretation of conventions and recommendations.

⁸⁴ Mexico acceded to both the ICCPR and the ICESCR on March 23, 1981, ratified CEDAW on March 23, 1981 and Convention 111 on September 11, 1961.

harmful chemicals do not authorize pregnancy discrimination.⁸⁵ Convention 158 specifically prohibits termination of employers due to pregnancy.⁸⁶ Employer concern over pregnant workers' health should result in accommodation, not discharge.

Exceptions to ILO anti-discrimination provisions apply only to inherent job requirements.⁸⁷ The ILO cautions that this exception not undermine Convention 111's protection against discrimination and urges that exceptions be interpreted narrowly.⁸⁸

Women interviewed by Human Rights Watch contended they would have been able to work until late in their pregnancies then take authorized maternity leave at seven and a half months of pregnancy. They added that reassignments to lighter, less taxing work were nearly always possible, had managers so attempted. Reasonable accommodations have been endorsed by the ILO.

Employers admitted to Human Rights Watch that they shed pregnant workers to avoid paying maternity benefits, a reason not recognized by ILO guidelines as legitimate.

2. The Right to Determine the Number and Spacing of Children

⁸⁵ Article 5 of Convention 158 Concerning Termination of Employment at the Initiative of the Employer reads, in part: "The following, *inter alia*, shall not constitute valid reasons for termination: . . . (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; . . ." Mexico has yet to ratify this convention.

⁸⁶ See Convention 103 Concerning Maternity Protection (revised 1952) and Recommendation 95 Concerning Maternity Protection.

⁸⁷ Convention 111, Article 1, paragraph 2 reads: "Any distinction, exclusion or preference in respect to a particular job based on inherent requirements thereof shall not be deemed to be discrimination."

⁸⁸ An ILO Committee of Experts goes on further to say that regarding *bona fide* or legitimate grounds to justify an exception to the principle of equality, "[a]s a general rule, the employer is required to prove that the special treatment is justified by objective reasons unrelated to a discriminatory criterion, or that this discriminatory criterion constitutes an essential requirement for the work involved." The COE concludes, "The concept of reasonable accommodation is considered a fundamental principle of equality of access to employment, for it takes account of limitations and special needs which may lend themselves to unlawful distinctions . . . [T]he unjustified refusal to undertake such adaptations may in itself constitute an act of discrimination." Equality in Employment and Occupation, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 75th. Session, 1988, Report III (Part 4B), (Geneva: International Labor Office, 1996), pp. 138, 141, 146.

CEDAW obliges states “to take all appropriate measures to eliminate discrimination against women in all matters related to family and family relations.”⁸⁹ To meet this obligation, CEDAW requires states to ensure that women enjoy, equally with men, “rights to decide freely and responsibly on the number and spacing of their children . . .”⁹⁰

By failing to act against pregnancy discrimination in employment, Mexico has failed to protect rights to determine number and spacing of children. Women who seek work in the maquiladora sector have been denied work because they are pregnant — an obvious manifestation of their decision to have children. Other women are forced out of their jobs when maquiladora personnel discover their pregnancies. Others worry about getting pregnant because they believe they might lose their jobs.

Although women and men experience different consequences to their decisions to have children, international standards establish that this difference is not an acceptable basis for penalizing women for the decision to reproduce. Such penalization inherently infringes on women's ability to exercise that right freely. The Mexican government, by allowing women to be denied work for becoming pregnant and having children, is permitting women to be treated unequally in their freedom to reproduce. This is a clear violation of Mexico's CEDAW obligation.

B. Violations of NAALC Obligations to Provide Impartial Labor Tribunals

NAALC requires access to tribunals for enforcing domestic law,⁹¹ and proceedings that are

⁸⁹ CEDAW, Article 16(1).

⁹⁰ CEDAW, Article 16(1)(e); Mexican Constitution, Article 4.

⁹¹ NAALC, Article 4(1).

impartial, independent, and free of conflicts of interest.⁹² Mexico's labor tribunals are inaccessible, ineffective and apparently biased. Although discrimination in hiring is explicitly prohibited under Mexican labor law Article 133(I),⁹³ with respect to victims of discrimination in hiring, there is no effective or impartial domestic protection because established tribunals in practice are open only to actual employees, not to applicants.

As documented in this submission and in "No Guarantees," government bodies charged with enforcing prohibitions against post-hire discrimination inconsistently condemn pregnancy discrimination, protest that identifying it is beyond their powers, and sometimes even defend it as legitimate. These government bodies cannot be considered effective, disinterested enforcement mechanisms against pregnancy discrimination.

C. Mexico's Failure to Meet International Standards

Mexican labor law includes obligations to provide equal protection under the law, to ensure the human rights of all people under its jurisdiction, and to comply with and enforce a variety of anti-discrimination statutes found in treaties by which Mexico is bound, including the ICCPR, the CEDAW, the Inter-American Convention on Human Rights, and ILO Convention 111 on Discrimination in Respect of Employment and Occupation. Mexico's constitution gives the status of "Supreme Law of the Union" to treaties, making them part of domestic law. The NAALC is considered a treaty in Mexico.⁹⁴

⁹² NAALC, Article 5(4).

⁹³ Employers are prohibited from "refusing to accept workers for reasons of age or sex."

⁹⁴This point was explained by Eduardo Ruiz Vega, director of legal affairs of the Mexican National Administrative Office, to workers of a Sony plant during ministerial-level consultations in August 1995. Referring to the NAALC, he explained, "This agreement is considered a Treaty by Mexico, because we do not differentiate between treaties and conventions." See Mexican Secretariat of Labor and Social Insurance, National Administrative Office of Mexico,

Lack of legal relief against discrimination for job applicants seriously undermines rights under Mexican domestic and international law.

Mexico might argue that the NAALC cannot be used to challenge existing labor law, only its non-enforcement. But because international law norms are incorporated into Mexican domestic law, NAALC requires effective enforcement of them. The USNAO in its review of NAO Submission No. 9601 observed that the prevailing view of legal scholars is that international treaties outrank federal law within the Mexican legal hierarchy.⁹⁵ Lack of access to tribunals for the enforcement of Mexico's labor law violates binding international agreements.

VII. RELIEF REQUESTED

The petitioners urge the USNAO to

- 1) Initiate a review pursuant to Article 16 of the NAALC;
- 2) Hold public hearings on this matter, preferably in the U.S. border municipalities of San Diego, California, and Brownsville, Texas, to facilitate participation by victims, with adequate arrangements for transportation, translation and visas for witnesses, and adequate notice to petitioners under Section (e) (3) of the USNAO regulations;
- 3) Engage the Mexican government in a process of public evaluation of the problems documented here, with the goal of developing a plan to end abuses of women's employment rights and enforce domestic and international prohibitions against discrimination. Such plan includes all

"Ministerial Level Consultations," Public Document No. 940003, distributed by the Mexican NAO on February 16, 1996, p. 42.

⁹⁵ NAO Submission No. 9601. Public Report of Review, January 27, 1997, page 22. US National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor.

remedies listed in recommendations below, and other measures needed to eradicate discrimination against women.

4) Encourage Mexico to meet its NAALC obligations by

a) taking steps against employment discrimination and enforcing its labor laws through proper proceedings and sanctions.

b) declaring that the Minister of Labor has failed to enforce laws against sex discrimination in employment, including pregnancy discrimination; condemning employment practices that discriminate against women; and undertaking, to remedy acts or omissions resulting in failure to enforce relevant laws.

c) enforcing vigorously sex discrimination labor laws and prosecuting employers who require women to disclose pregnancy status, contraceptive use, sexual practices or other information relating to reproductive choices and health.

d) posting copies of the Ministerial declaration in all offices of the Secretary of Labor and Social Security, the Inspector of Labor, the Labor Rights Ombudsman and all federal Conciliation and Arbitration Boards for no less than 360 continuous calendar days.

e) staffing the offices of the Inspector of Labor, the Labor Rights Ombudsman, and the Conciliation and Arbitration Boards to allow them to handle non-hiring cases along with those involving actual employees.

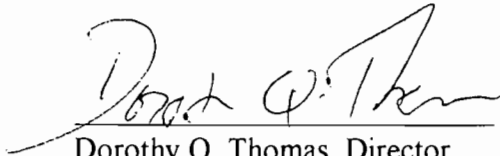
f) authorizing the Inspector of Labor, the Labor Rights Ombudsman, and the Conciliation and Arbitration Board to:

I) obtain information from an employer relevant to complaints

- ii) visit and investigate any workplace complained of
- iii) compel investigatory meetings with employer agents, and
- iv) oblige the Inspector of Labor, the Labor Rights Ombudsman and the Conciliation and Arbitration Boards to maintain public records of cases and decisions.

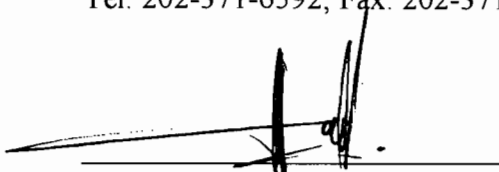
5) Urge the U.S. Secretary of Labor to request consultations with Mexico's Labor Minister under NAALC Article 22 or alternatively, urge that the U.S. Secretary of Labor seek an explanation from the Mexican government about its persistent pattern of failure related to matters raised here and, in either case, if matters raised here are not resolved after ministerial consultations, request appointment of an Evaluation Committee of Experts (ECE).

Respectfully Submitted,



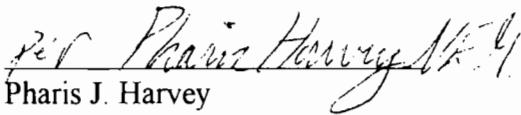
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