PREGNANCY DISCRIMINATION IN LATIN AMERICA: THE EXCLUSION OF "EMPLOYMENT DISCRIMINATION" FROM THE DEFINITION OF "LABOR LAWS" IN THE CENTRAL AMERICAN FREE TRADE AGREEMENT

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Regional trading blocs and bilateral trade agreements have become increasingly important within the western hemisphere. The North American Free Trade Agreement (NAFTA), the U.S.-Chile Free Trade Agreement, and the Central America Free Trade Agreement (CAFTA) have all been passed in the last fifteen years. This Article will focus principally on the labor provisions in NAFTA and CAFTA.[1] Additionally, with the Andean Trade Preference Act set to expire in 2006, the United States initiated negotiations with three Andean countries in May 2004: Peru, Colombia, and Ecuador. The United States Trade Representative (USTR) signed the United States-Peru Trade Promotion Agreement in April 2006, concluded negotiations with Colombia in February 2006, and is participating in ongoing discussions with Ecuador.[2] Furthermore, the Administration

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[1] To examine the labor provisions in the U.S.-Chile FTA, see Chile–United States Free Trade Agreement, U.S.-Chile, ch. 18, June 6, 2003, Hein's No. KAV 6375, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. For a detailed treatment of labor in the U.S.-Chile FTA, see Stacie E. Martin, *Labor Obligations in the U.S.-Chile Free Trade Agreement*, 25 COMP. LAB. L. & POL'Y J. 201 (2004); Jay V. Sagar, *The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement Over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?*, 21 ARIZ. J. INT'L & COMP. L. 913 (2004).

[2] Press Release, Office of the U.S. Trade Representative, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html.

announced in 2003 that it intends to launch negotiations for a separate agreement with Panama, and the Senate recently approved a resolution of advice and consent for a United States-Uruguay Bilateral Investment Treaty in September 2006.[3] All of these bilateral and regional agreements represent a "building block"[4] in the attempt to secure a Free Trade Area of the Americas despite its current dim prospects.[5]

Free Trade Areas/Agreements (FTAs) are cross-border arrangements in which the trade barriers—both tariff and non-tariff barriers—among participating nations are reduced, sector-by-sector over

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[3] Press Release, Office of the U.S. Trade Representative, U.S. and Panama to Begin FTA Negotiations on April 26 (Mar. 26, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/March/US_Panama_to_Begin_FTA_Negotiations_on_April_26.html; Press Release, Office of the U.S. Trade Representative, United State Senate Approves U.S.–Uruguay Bilateral Investment Treaty (Sept. 14, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/September/United_State_Senate_Approves_US_-_Uruguay_Bilateral_Investment_Treaty.html.

[4] Press Release, Office of the U.S. Trade Representative, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2005/December/asset_upload_file744_8518.pdf.

[5] For example, Peter Hakim has discussed the dim prospects of a Free Trade Agreement of the Americas following the 2005 Summit of the Americas, noting that while

> Some bilateral relationships are remarkably strong . . . Latin American countries, divided among themselves, are by no means clamoring for a renewal of hemispheric cooperation. Chvez's [sic] antics at the Summit of the Americas in November 2005 obscured the real tragedies of the gathering–that is, how little the leaders accomplished, how badly the hemispheric agenda has unraveled, and how deeply divided the countries of the Americas are. Despite enthusiasm in the region for economic partnership, Latin Americans' fundamental ambivalence toward the United States' foreign policies has forcefully reemerged.

Peter Hakim, *Is Washington Losing Latin America?*, FOREIGN AFF., Jan.–Feb. 2006, at 39, 52–53. In addition, Jonathan Wheatley has echoed this sentiment:

> The disagreement at the fourth Summit of the Americas . . . was seen by analysts as a victory for Mr. Chavez, who had pushed the FTAA on to the agenda. The summit had been expected to discuss issues such as employment and poverty, but instead all attention focused on the failure by the 34 countries to agree to a date to move forward on FTAA negotiations.

Jonathan Wheatley, *Bush and Lula Try to Paper Over Divisions Seen at Summit of Americas*, FIN. TIMES, Nov. 7, 2005, at 8.

time, and often eventually abolished. Unlike a customs union or a common market, each member country of the FTA remains free to determine its own external trade barrier against non-FTA members. For businesses operating within the FTA, the market expands because consumers in member states can purchase their products for a lower price than before the FTA was established, and usually also at a lower price than goods originating outside of the member countries.[6] At the same time, businesses are subjected to increased competition.

While labor rights provisions are now standard in American FTAs,[7] their incorporation has not been without controversy. The movement to incorporate labor rights into FTAs is driven by a number of interests, including labor interests in the United States, international labor rights movements, and human rights activism. The incorporation of labor rights in FTAs, however, is often resisted on two main grounds: (1) as an attempt to lower the less-developed countries' comparative advantage of lower wages, and/or (2) as an infringement on the less-developed countries' sovereignty.[8]

The integration of trade and labor has been incremental. For example, the original NAFTA agreement did not include labor protections; instead, the labor agreement was negotiated separately from, and subsequent to, the passage of NAFTA.[9] More recently, CAFTA explicitly incorporated labor rights into the core text, indicating acceptance of the idea that labor rights and trade should be addressed simultaneously. When one compares the two labor agreements, however, the North American Agreement on Labor Cooperation (NAALC) used an eleven-part definition of "labor laws" that included "elimination of employment discrimination . . . ,"[10] while CAFTA reduced the definition to five labor rights, and excluded "employment discrimination" from its definition of labor law.[11]

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[6] Sagar, *supra* note 1, at 915 (citing Ricky W. Griffin & Michael W. Pustay, *Formulation of National Trade Policies*, *in* INTERNATIONAL BUSINESS: A MANAGERIAL PERSPECTIVE 254, 256 (2d ed. 1999)).

[7] Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN. J. GLOBAL TRADE 227, 257–58 (2005) (using CAFTA's chapter on labor as an example).

[8] For a summary of the policy debate, see Marianne Hogan, *DR-CAFTA Prescribes a Poison Pill: Remedying the Inadequacies of Dominican Republic-Central American Free Trade Agreement Labor Provisions*, 29 SUFFOLK U. L. REV. 511, 514–21 (2006). The issue of sovereignty will be further discussed *infra* in Part V.C.

[9] *See infra* notes 18-20.

[10] Article 49 of the NAALC sets forth the NAALC's eleven-part definition, explaining that "labor law" means:

In relation to labor protections, pregnancy discrimination is an issue of growing importance in U.S.-Latin America FTAs. Pregnancy discrimination is considered a form of sex discrimination, as it is based on a condition unique to women.[12] This issue first emerged in the NAFTA context following the publication of a 1996 Human Rights Watch report that exposed pervasive pregnancy discrimination in *maquiladoras* in Mexico.[13] In 2004, Human Rights Watch released a report confirming that

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> [L]aws and regulations, or the 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, 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; [and] k. protection of migrant workers.

North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States pt. 6, Sept. 13, 1993, Hein's No. KAV 3723, *available at* http://www.dol.gov/ilab/regs/naalc/naalc.htm [hereinafter NAALC] (emphasis added). In addition, Annex 1 sets forth the Parties' "guiding principles" regarding the NAALC's labor provisions.

[11] Article 16.8 of CAFTA defines "Labor laws" as:

> [A] Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The Dominican Republic–Central America–United States Free Trade Agreement, U.S.-Dom. Rep., art. 16.8, Aug. 5, 2004, Hein's No. KAV 6420, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA].

[12] *See* 42 U.S.C.A. § 2000e(k) (2003) (defining the terms "because of sex" or "on the basis of sex" as including "because of or on the basis of pregnancy, childbirth, or related medical conditions").

[13] *See generally* BLACK'S LAW DICTIONARY 985 (8th ed. 2004) (A "*maquiladora*" is "[a] Mexican corporation, esp. one that holds a permit to operate under a special customs regime that temporarily allows the corporation to import duty-free into Mexico various raw

pregnancy-based discrimination was pervasive in the Dominican Republic's free trade zone.[14] Women in both of these countries were, and continue to be, routinely required to undergo pregnancy tests or answer intrusive questions regarding their possible pregnant status as a condition of being hired or maintaining employment.[15]

The growth of women in the workforce, particularly in the *maquiladora*-type industries that are so common in Mexico, the Dominican Republic, and Central America, makes this issue especially salient for U.S.-Latin America FTAs. This Article considers the exclusion of "employment discrimination" from the definition of "labor laws" in the Central America Free Trade Agreement and proposes measures that seek to adequately protect women from pregnancy discrimination. First, this Article provides background on pregnancy discrimination. Part I focuses on NAFTA, both its formation and the ensuing pregnancy discrimination in Mexican *maquiladoras*. To situate this issue in the broader context, Part II focuses on the current treatment of labor discrimination by examining the International Labour Organization (ILO), as well as pregnancy discrimination protection in the United States and non-U.S. trade blocs. This Part demonstrates that such protection against pregnancy discrimination, both pre- and post-hire, is in line with both U.S. and foreign public policy. Part III focuses on the inclusion of labor rights in U.S. free trade agreements.

The argument section begins in Part IV with a discussion of the prevailing labor conditions and labor laws in Central American countries and the Dominican Republic. It then focuses on the definition of "labor laws" under CAFTA and the effect of excluding "employment discrimination" from the definition. It argues that the exclusion of "employment discrimination" from CAFTA's definition of "labor laws" was not the result of legislative ignorance. The Executive and Legislative

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materials, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for export. – Often shortened to *maquila*."). For a discussion on the history of the *maquiladora* sector, see Joshua M. Kagan, *Workers' Rights in the Mexican Maquiladora Sector: Collective Bargaining, Women's Rights, and General Human Rights Law: Law, Norms, and Practice*, 15 J. TRANSNAT'L L. & POL'Y 153, 155–59 (2005). *See also* Juan Carlos Linares, *The Development Dilemma: Reconciling U.S. Foreign Direct Investment in Latin America with Laborers' Rights: A study of Mexico, the Dominican Republic and Costa Rica*, 29 N.C. J. INT'L L. & COM. REG. 249 (2003).

[14] HUMAN RIGHTS WATCH, PREGNANCY-BASED SEX DISCRIMINATION IN THE DOMINICAN REPUBLIC'S FREE TRADE ZONES: IMPLICATIONS FOR THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT (CAFTA) (2004), *available at* http://hrw.org/backgrounder/wrd/cafta_dr0404.htm [hereinafter PREGNANCY DISCRIMINATION IN THE DOMINICAN REPUBLIC].

[15] *See infra* notes 30–34, 113–132 and accompanying text.

branches were aware of the inadequate protections for labor, as well as pervasive gender and, more specifically, pregnancy discrimination in the Dominican Republic and Central America. After exploring potential explanations, this Article advances a variation on the traditional economic theory that less-developed countries seek to attract foreign direct investment (FDI) by lowering their labor standards. As a result of the restrictive definition of "labor laws," countries are effectively exempted from enforcing any of their own antidiscrimination legislation, as sanctions cannot be imposed for failure to do so.[16] Arguably, this omission was done in large part to acknowledge labor rights without requiring antidiscrimination action by the governments and businesses seeking to benefit from CAFTA. This argument should be considered in the context of the shifting of FDI traditionally invested in Latin American *maquiladora*-type industries to China and other Asian countries. Part IV demonstrates that Congress was aware of this omission at the time of CAFTA's passage.

Finally, Part V discusses hypotheses as to why Congress excluded "employment discrimination." The Article concludes with suggestions of remedial measures, offering three main suggestions. First, by defining "labor laws" according to the ILO's Core Labor Standards, free trade agreements would automatically include "employment discrimination" under "labor laws." Second, a provision specifically addressing the prohibition of pre-hire and post-hire pregnancy discrimination, along with an enforcement mechanism, would further discourage this practice. Third, in order to maintain their public image, corporate actors should be encouraged to act responsibly and not perpetuate these practices. None of these solutions are mutually-exclusive; in conjunction, they would strive to provide adequate protection against pregnancy-based discrimination. Given women's increasing role in the workplace, it is imperative to take steps to adequately protect them from pregnancy discrimination. Trade agreements provide a key mechanism by which to improve labor rights and provide basic standards for the workplace.

I. NORTH AMERICAN FREE TRADE AGREEMENT

A. Formation

The North American Free Trade Agreement (NAFTA), an agreement among the United States, Mexico, and Canada, went into effect

[16] This Article does not address situations where a country has *no* non-discrimination legislation. All CAFTA and NAFTA countries have adequate national non-discrimination laws in place. *See infra* notes 35–45, 102–112 and accompanying text.

on January 1, 1994.[17] Labor was not addressed in the core document; instead, labor provisions were addressed in a side agreement after NAFTA's effect on domestic (un)employment became a salient issue in the 1992 presidential race.[18] That side agreement, the NAALC, was signed in 1993.[19] In general, the NAALC strives to eliminate employment discrimination by "promot[ing] compliance with and effective enforcement by each Party of its domestic labor laws."[20] While the agreement purports to address the needs and desires of each country, it primarily was drafted "to satisfy concerns about the Mexican government's failure to enforce its labor laws and to protect workers' rights."[21]

The NAALC sets forth eleven guiding labor principles which Mexico, the United States, and Canada commit themselves "to promote, subject to each Party's domestic law. . . ."[22] These eleven principles specifically include the elimination of employment discrimination.[23] The

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[17] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 (1994), 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[18] Many scholars cite the 1992 presidential election as a catalyst for the inclusion of labor provisions in trade agreements. For example, in a 2003 law review article, Marley S. Weiss stated:

> The administration of President George H.W. Bush negotiated the original free trade agreement, and during the 1992 presidential election campaign, the impact of free trade on the jobs and labor rights of Americans became a major campaign issue. . . . Bill Clinton, caught between his commitment to expansion of free trade and the pressure from his political allies in the United States labor and environmental movements, crafted a compromise position: he would support NAFTA subject to the inclusion in side agreements of provisions protecting against a downward spiral in both labor and environmental protections.

Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 701–02 (2003).

[19] NAALC, *supra* note 10.

[20] *Id.* at pmbl.

[21] Elizabeth C. Crandall, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L L. 165, 181 (1994).

[22] NAALC, *supra* note 10, at Annex 1.

[23] *Id.* The other ten principles are: freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced

NAALC explicitly provides that the non-discrimination principle applies to women, as it supports the elimination of discrimination "on such grounds as race, religion, *sex* or other grounds."[24] The term "labor laws," under NAFTA, is defined in "subject matter terms equivalent to these eleven principles."[25]

The NAALC requires the three signatory governments to comply with and enforce their own labor law through governmental action, and ensure that persons with a "legally recognized interest . . . have appropriate access to administrative, quasi-judicial, judicial, or labor tribunals for the enforcement of the Party's labor law."[26] In addition, the NAALC established a new forum for transnational justice, the Commission for Labor Cooperation,[27] and, most importantly, required each of the three signatory countries to establish a National Administrative Office (NAO). [28] In order for a penalty to be imposed under the NAALC, a party must follow a

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labor, labor protections for children and young persons, minimum employment standards, equal pay for women and men, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers.

[24] *Id.* (emphasis added).

[25] Weiss, *supra* note 18, at 709 (comparing Annex 1, 32 I.L.M. at 1515–16 (listing the eleven labor principles) with art. 49, 32 I.L.M. at 1513–14) (defining "labor law").

[26] NAALC, *supra* note 10, at pt. 2 ("Each Party shall 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.").

[27] The Commission for Labor Cooperation, created under the NAALC, consists of three main bodies. First, a Ministerial Council oversees the implementation of the NAALC, supervises the activities of the Secretariat, and promotes tri-national cooperative activities in areas of labor law, labor standards, labor relations, and labor markets. Second, the Secretariat provides information through research and public reports on labor law and administrative procedures, trends, and administrative strategies related to the implementation and enforcement of labor law, labor market conditions, and human resources development issues such as training and adjustment programs, and acts as the general administrative arm of the Commission. Third, three National Administrative Offices (NAO) were created within the Department (or Ministry) of Labor in each country. U.S. DEP'T OF LABOR & N. AM. INTEGRATION & DEV. CTR., CONFERENCE PROCEEDINGS, THE ROLE OF THE NEW NAFTA INSTITUTIONS: REGIONAL ECONOMIC INTEGRATION (1998), *available at* http://www.dol.gov/ilab/media/reports/nao/ucla.htm#box1.

[28] A National Administrative Office is part of each NAFTA signatory's labor ministry. One of the NAO's functions is to accept and review complaints that charge another member country with labor abuses. *See* NAALC, *supra* note 10, at pt. 3.

detailed and time-consuming complaint process that strives for a mutually satisfactory resolution. Under the NAALC, only governments have standing to initiate the complaint process. There is no private right of action. A brief overview will demonstrate the complexity of the process: (1) the claim must be filed with and processed through the NAO and ministerial consultations of the three member nations; (2) if the matter has not been resolved, an Evaluation Committee of Experts (ECE) is formed for a second review; and (3) should the ECE be unable to resolve the matter, a series of party consultations, a special session of the council, and arbitration may all follow.[29]

B. Human Rights Watch on Pregnancy Discrimination in *Maquiladoras*

In 1996, Human Rights Watch (HRW) began an investigation into several allegations of pregnancy discrimination in *maquiladoras*. In its report, *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, HRW concluded that pregnancy discrimination pervaded the *maquiladora* industry, manifesting itself in three ways: (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.[30] These conclusions were based on a series of interviews with victims of pregnancy discrimination, *maquiladora* personnel, women's and labor rights advocates, Mexican government officials, and community organizers at forty-three *maquiladoras* located in five Mexican cities.[31] With few exceptions, HRW found that pre-hire pregnancy discrimination occurs primarily in the form of pregnancy exams administered through urine samples either on-site by doctors or nurses employed at a particular *maquiladora*, or at private clinics contracted by the *maquiladoras*.[32] In addition, women are asked "intrusive

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[29] NAALC, *supra* note 10. For a complete discussion of the procedure, see Crandall, *supra* note 21, at 185–89.

[30] HUMAN RIGHTS WATCH, NO GUARANTEES: SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR (1996), *available at* http://www.hrw.org/reports/1996/Mexi0896.htm [hereinafter NO GUARANTEES].

[31] Interviews were conducted in Tijuana, Chihuahua, Matamoros, Reynosa, and Rio Bravo. *Id.*

[32] *Id.*

questions" in the interview process in order to ascertain pregnancy status.[33] Once a woman is hired and becomes pregnant, "maquiladora managers sometime attempt to reassign women to more physically difficult work or demand overtime work in an effort to force the pregnant woman worker to resign."[34]

The following year, HRW filed a complaint, Submission No. 9701, with the U.S. NAO.[35] The submission contended that pregnancy-based discrimination was occurring within the Mexican *maquiladora* industry, and that it violated several provisions of domestic and international law. In terms of domestic law, Submission No. 9701 argued that both the Mexican Constitution and Mexican 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.[36] In terms of international law, Submission No. 9701 argued that Mexico violated Convention 111 (Discrimination in Respect of Employment & Occupation) of the 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 which have been ratified by Mexico.[37] In particular, petitioners alleged (1) employment discrimination on the basis of gender in violation of the obligation of Mexico to enforce its labor law, including obligations related to

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[33] *Id.*

[34] *Id.*

[35] U.S. DEP'T OF LABOR, U.S. NAO PUBLIC SUBMISSION 9701: SUBMISSION CONCERNING PREGNANCY-BASED DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR TO THE UNITED STATES NATIONAL ADMINISTRATIVE OFFICE (1997), *available at* www.dol.gov/ilab/media/reports/nao/submissions/sub9701.htm [hereinafter SUBMISSION 9701] (submitted by Human Rights Watch Women's Rights Project, Human Rights Watch/Americas, International Labor Rights Fund, and Asociación Nacional de Abogados Democráticos).

[36] *Id.* Article IV of the Mexican Constitution guarantees equality among the sexes and ensures a person's absolute right to determine the spacing and number of one's children. In Articles 3 and 56 of the Mexican Federal Labor Code, sex-based distinctions are prohibited. Article 133(I) prohibits discrimination in hiring based on sex, and Article 164 ensures equality among the sexes. For a detailed discussion on Mexican laws that are violated by pre- and post-hire pregnancy discrimination, see Laurie J. Bremer, *Pregnancy Discrimination in Mexico's Maquiladora System: Mexico's Violations of its Obligations Under NAFTA and the NAALC*, 5 NAFTA: L. & BUS. REV. AM. 567, 576–77 (1999).

[37] SUBMISSION 9701, *supra* note 35.

international conventions under Article 3(1) of the NAALC; and (2) failure to ensure appropriate access to tribunals in violation of Articles 4(1) and 4(2) of the NAALC.[38] Submission No. 9701 was the first submission addressing sex discrimination to come before the U.S. NAO.[39]

In its official report, released on January 12, 1998, the U.S. NAO concluded that pre-hire pregnancy screening[40] occurred in the Mexican *maquiladora* industry.[41] In response, the Mexican NAO conceded that Mexican law prohibits post-hire pregnancy discrimination, but distinguished this from discrimination during the pre-hire period, stating that "there is no explicit prohibition in Mexican law against pre-employment discrimination. Mexican law reaches discrimination only where there is an existing employment relationship."[42] Nonetheless, Mexico has perhaps addressed the illegality of pre-hire pregnancy discrimination through a new federal antidiscrimination law that came into effect on June 12, 2003.[43] Article IV of the antidiscrimination law arguably makes pre-hire pregnancy discrimination illegal, as it excludes women based on pregnant status.[44] Nonetheless, despite the enactment of the antidiscrimination law, employment discrimination continues to occur.[45]

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[38] *Id.*

[39] *Id.*

[40] The word "screening" in this Article refers to the use of pregnancy tests as well as oral questions during interviews and written questionnaires in the hiring process.

[41] U.S. Department of Labor, Bureau of International Labor Affairs, Status of Submissions under the North American Agreement on Labor Cooperation (NAALC), *available at* http://www.dol.gov/ilab/programs/nao/status.htm#iia6 (last visited Dec. 12, 2006).

[42] Natara Williams, *Pre-Hire Pregnancy Screening in Mexico's Maquiladoras: Is It Discrimination?*, 12 DUKE J. GENDER L. & POL'Y 131, 146–50 (2005). *See also* Press Release, Human Rights Watch, U.S. and Mexican Groups Urge the U.S. to Oppose Sex Discrimination in Mexico (Jan. 15, 1998), *available at* http://hrw.org/english/docs/1998/01/15/mexico1037.htm (stating that the Mexican NAO asserted "that pre-employment pregnancy screening does not violate Mexican law and that labor tribunals are barred from hearing complaints by people who are not employed, including women who are seeking jobs but who have not been hired").

[43] For a detailed discussion of the new Federal Antidiscrimination Law, see Williams, *supra* note 42.

[44] Article IV states that for the purposes of the Antidiscrimination Law:

> [D]iscrimination will be understood to be any distinction, exclusion, or restriction that, based on ethnic or national origin, sex, age,

II. INTERNATIONAL AND DOMESTIC PROTECTION FROM EMPLOYMENT DISCRIMINATION

A. International Labour Organization

As discussed in this Part, the ILO Core Labor Standards have a role to play in establishing minimum labor standards in free trade agreements. One of the first attempts to develop and recognize international labor standards was through the creation of the ILO by the Treaty of Versailles in 1919. Currently, the ILO is the United Nations agency that "seeks the promotion of social justice and internationally recognized human and labor rights."[46] It furthers its mandate by adopting conventions, recommendations, and guidelines after consulting with governments,

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> disability, social or economic condition, health condition, pregnancy, language, religion, opinions, sexual preferences, marital status or any other reason, has the effect of impeding or annulling the acknowledgment or exercise of rights and the true equality of opportunities for people.

Williams, *supra* note 42, at 146 (translating Article IV). In its original Spanish, Article IV reads:

> *Para los efectos de esta Ley se entenderá por discriminación toda distinctión, exclusión o restricción que, basada en el origen étnico o nacional, sexo, edad, discapacidad, condición social o económica, condiciones de salud, embarazo, lengua, religión, opiniones, preferencias sexuales, estado civil o cualquier otra, tenga por efecto impedir o anular el reconocimiento o el ejercicio de los derechos y la igualdad real de oportunidades de las personas.*

Decreto por el que se expide la Ley Federal para Prevenir y Eliminar la Discriminación, Diario Oficial de la Federacion [D.O.], 11 de junio de 2003 (Mex.), *available at* http://cgservicios.df.gob.mx/prontuario/vigente/148.htm. Since its enactment, the U.S. Department of State has published a report stating that non-governmental organizations have claimed that the law "had little effect since many persons were not aware of its existence." U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES–2004: MEXICO (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41767.htm.

[45] *See* Marla Dickerson & Meredith Mandell, *U.S. hiring standards get left at border: Job ads that in this country might bring lawsuits alleging bias are routine in Mexico*, CHICAGO TRIBUNE, Oct. 30, 2006 ("[I]n Mexico, where jobs are scarce and enforcement of anti-discrimination laws all but non-existent, employers routinely select hires on criteria more appropriate for a beauty contest.").

[46] International Labour Organization, About the ILO: Mandate, http://www.ilo.org/public/english/about/index.htm (last visited Nov. 24, 2006).

employers, and labor unions.[47] The ILO defines "conventions" as "legally binding international treaties that may be ratified by member states."[48] "Recommendations," on the other hand, serve as "non-binding guidelines," and supplement the convention with details on how it may be applied.[49]

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration identifies four "Core Labor Standards," including elimination of discrimination in the workplace.[50] In contemplating the meaning of "elimination of discrimination in the workplace," the ILO evidently intended to address not only post-hire discrimination, but also access to the workplace. In its discussion of this particular Core Labor Standard, the ILO website explains:

> Eliminating discrimination starts with dismantling barriers and ensuring equality in access to training, [sic] education as well as the ability to own and use resources such as land and credit. It continues with . . . policies and practices related to hiring, assignment of tasks, working conditions, pay, benefits, promotions, lay-offs and termination of employment.[51]

The United States has been a member of the ILO from 1934 to 1977, and from 1980 to the present.[52] Nonetheless, the United States has

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[47] *Developments in the Law–Jobs and Borders III: Legal Tools for Altering Labor Conditions Abroad,* 118 HARV. L. REV. 2202, 2205 (2005).

[48] International Labour Organization, International Labour Standards, Conventions and Recommendations, http://www.ilo.org/public/english/standards/norm/introduction/what.htm (last visited Nov. 11, 2006).

[49] *Id.*

[50] Other standards were freedom of association and the right to collective bargaining, elimination of forced and compulsory labor, and abolition of child labor. International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Sess., Geneva (June 1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT [hereinafter 1998 ILO Declaration].

[51] International Labour Organization, The Issues: Elimination of Discrimination in Respect of Employment and Occupation, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=ISSUESDISCRIMINATION (emphasis added) (last visited Nov. 10, 2006) [hereinafter ILO: The Issues].

[52] International Labour Organization, ILOLEX Database of International Labour Standards: Member States of the ILO, http://www.ilo.org/ilolex/english/mstatese.htm#msu (last visited Nov. 10, 2006) [hereinafter ILO Member States]. Various explanations for the three-year withdrawal by the United States are available. *See* SUMNER M. ROSEN, GLOBAL

failed to ratify two of the four ILO Core Labor Standards: the Discrimination in Respect of Employment & Occupation Convention, as well as the Right to Organize and Collective Bargaining Convention.[53] The main explanation for the ratification by the United States of only two Core Labor Standards is a traditional hostility towards binding standards and a claim that the United States already complies with the standard.[54] Nevertheless, the ILO's Core Labor Standards are important, as they establish international standards. Furthermore, as evidenced by the NAO's findings with regards to Submission No. 9701, the United States has invoked the ILO standards as binding international law for countries that have ratified its conventions,[55] demonstrating acceptance of international standards.

B. Pregnancy Discrimination under U.S. Law and Non-U.S. Trade Blocs

The following section examines the treatment of employment and specifically pregnancy-based sex discrimination in U.S. law; the law of two Latin American trade blocs, the Caribbean Community and Mercosur; and the European Union. All four bodies treat non-discrimination in their labor

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POLICY FORUM, CU LABOUR SEMINAR: INTERNATIONAL LABOR ORGANIZATIONS (2000), *available at* http://www.globalpolicy.org/socecon/inequal/labor/history.htm#7 (contending that the 1977 withdrawal was precipitated by two key events: first, in 1970 a Soviet official was appointed as Assistant Director General; and, second and more seriously, the Palestinian Liberation Organization was admitted to observer status); Encyclopedia of the Nations, The International Labour Organization (ILO): Membership, http://www.nationsencyclopedia.com/United-Nations-Related-Agencies/The-International-Labour-Organization-ILO-MEMBERSHIP.html (last visited Nov. 10, 2006) (stating that then-U.S. Secretary of State Henry Kissinger claimed that the ILO had been "falling back" in four fundamental areas: workers' and employers' groups in the ILO falling under the domination of governments; an "appallingly selective" concern for human rights; "disregard of due process" in condemning member states "which happen to be the political target of the moment"; and "increasing politicization of the organization").

[53] International Labour Organization, ILOLEX Database of International Labor Standards: Ratifications of the Fundamental Human Rights Conventions by Country in The Americas, http://www.ilo.org/ilolex/english/docs/declAM.htm (last visited Nov. 10, 2006) [hereinafter ILO Ratifications by Country].

[54] *See* Philip Alston, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 466–70 (2004). *See also* ILO Ratifications by Country, *supra* note 54 (showing that the United States has only ratified the Abolition of Forced Labor Convention and the Worst Forms of Child Labor Convention).

[55] *See supra* note 37 and accompanying text.

laws. With the exception of Mercosur, each explicitly prohibits pregnancy discrimination in employment. This section demonstrates that antidiscrimination provisions are in line with both domestic and foreign policy. To enforce antidiscrimination laws is not granting a special right, but enforcing a right to which all human beings are entitled, as recognized by the ILO, American public policy, at least two Latin American trade blocs, and the European Union.

1. Civil Rights Act of 1964 as Amended by the Pregnancy Discrimination Act; U.S. Case Law

Title VII of the Civil Rights Act of 1964 officially made employment discrimination, including on the basis of sex, unlawful in the United States.[56] Pregnancy-based sex discrimination, however, was not officially prohibited until 1978, when the Pregnancy Discrimination Act (PDA) officially amended Title VII.[57] The PDA explicitly includes pregnancy classifications within the definition of sex discrimination.[58] Any

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[56] Title VII of the Civil Rights Act of 1964 states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C.A. §§ 2000e to 2000e-17 (2003)) [hereinafter Civil Rights Act].

[57] For a detailed account of the evolution of the right to protection from pregnancy-based sex discrimination in the United States, see Robert Richard Rico, *Pregnancy-Based Sex Discrimination*, 5 WM. & MARY J. WOMEN & L. 167 (1998).

[58] Section 2000e(k) of the Pregnancy Discrimination Act states:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an

discrimination on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Title VII.

United States case law has established that women are protected from pregnancy discrimination in the pre-hire stage and throughout their employment. In the landmark case of *International Union v. Johnson Controls, Inc.*, the Supreme Court held that the defendant's practice of barring all women, in the name of "fetal protection," from jobs involving actual or potential lead exposure was discriminatory and violated Title VII.[59] In *Quaratino v. Tiffany & Co.*, the Second Circuit held that, once the plaintiff establishes a prima facie case for pregnancy discrimination, the burden shifts to the employer to articulate "a legitimate, clear, specific and non-discriminatory reason for discharging the employee."[60] If the employer makes such a showing, the burden shifts back to the plaintiff to demonstrate that the employer's reason was pretextual.[61] Most recently, the court in *Kocak v. Community Health Partners of Ohio, Inc.* held that the PDA applies in the pre-hire stage of employment, because the PDA protects a person from being "refused employment on the basis of her potential pregnancy."[62] Thus, women working in the United States have a cause of action for pregnancy discrimination in both the pre- and post-hire employment context.

> employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C.A. § 2000e(k) (2003).

[59] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[60] Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995). *Quaratino* lists the standard requirements for establishing a prima facie claim:

> A plaintiff can establish a *prima facie* case of pregnancy discrimination under Title VII by showing that: (1) she is a member of a protected class; (2) she satisfactorily performed the duties required by the position; (3) she was discharged; and (4) her position remained open and was ultimately filled by a non-pregnant employee.

Id. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Tex. Dep't Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[61] *Quaratino*, 71 F.3d at 64.

[62] Kocak v. Cmty. Health Partners of Ohio, Inc., 400 F.3d 466, 470 (6th Cir. 2005).

2. CARICOM[63]

The Caribbean Community (CARICOM), was established in 1973 by the Treaty of Chaguaramas,[64] and has fifteen member states.[65] In 1997, CARICOM adopted the Charter of Civil Society, which supplements the Treaty of Chaguaramas.[66] The Charter of Civil Society discusses workers' rights in Article XIX[67] and non-discrimination in Articles V and XII.[68] Furthermore, within a framework "aimed at strengthening gender equality," the Charter of Civil Society recognizes both equal opportunity for employment and equal remuneration for work of equal value, as well as non-discrimination in the event of pregnancy and lactation.[69]

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[63] For a more detailed discussion of CARICOM, see P.K. Menon, *Regional Integration: A Case Study of the Caribbean Community (CARICOM)*, 5 CARIBBEAN L. REV. 81 (1995).

[64] The Prime Ministers of Barbados, Guyana, Jamaica, and Trinidad and Tobago signed the Treaty at Chaguaramas, Trinidad on July 4, 1973. The Treaty came into force on August 1, 1973. Treaty Establishing the Caribbean Community, July 4, 1973, *available at* http://www.caricom.org/jsp/communications/publications/treaty_caricom_index.jsp?menu=communications.

[65] Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad & Tobago. *Id.*

[66] Charter of Civil Society for the Caribbean Community, 1997, *available at* http://www.caricom.org/jsp/secretariat/legal_instruments/chartercivilsocietyresolution.jsp?menu=secretariat.

[67] *Id.* at art. XIX. Other rights are freedom of association, collective bargaining, occupational safety and health, and social security rights.

[68] *Id.* at arts. V, XII. Article V discusses equality before the law, providing that "3. No person shall be favoured or discriminated against by reason of age, colour, creed, disability, ethnicity, gender, language, place of birth or origin, political opinion, race, religion or social class." *Id.* at art. V. Article XII specifically addresses the non-discrimination of women, in particular stating that "For the promotion of policies and measures aimed at strengthening gender equality, all women have equal rights with men in the political, civil, economic, social and cultural spheres. Such rights shall include the right: . . . (c) not to be discriminated against by reason of marital status, pregnancy, lactation or health-related matters which affect older women . . . ." *Id.* at art. XII.

[69] *Id.*

3. Mercosur

The *Mercado Común del Cono Sur* (Southern Cone Common Market, or Mercosur) has attempted to establish a Social Charter, also known as the Charter of Fundamental Labor Rights.[70] In 1998, the Mercosur Sociolabor Declaration was signed by the presidents of each Member State.[71] In the Declaration's preamble, the Member States reaffirm their membership in the ILO and their ratification of the Core Labor Standards.[72] Thus, the Sociolabor Declaration addresses a broad range of standard workers' rights, including the right to non-discrimination.[73]

4. European Union

The Treaty Establishing the European Community requires "equality between men and women with regard to labor market opportunities and treatment at work."[74] Article 13 of the Treaty empowers the Council to "take appropriate action to combat discrimination based on sex . . . ."[75] The European Union (EU) strongly adheres to the ILO Core Labor Standards. For example, in 2001, the EU adopted a regulation to implement a Generalized System of Preferences for a three-year period.[76] The regulation sought to provide "special incentive arrangements" to countries that have incorporated the substance of the ILO Core Labor Standards.[77]

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[70] Adelle Blackett, *Toward Social Regionalism in the Americas*, 23 COMP. LAB. L. & POL'Y J. 901, 950 (2002).

[71] *Id.* at 951.

[72] *Id.* at 951–52.

[73] *Id.* at 952; Sociolabour Declaration art. 1, Dec. 10, 1998, *available at* http://www.mercosur.int/msweb/principal/contenido.asp. This provision contains a broad list of grounds of discrimination, including sexual orientation and other such social or family conditions. The scope of this Article is not broad enough to discuss the enforcement of the Sociolabor Declaration.

[74] Consolidated Version of the Treaty Establishing the European Community art. 137(1)(i), Mar. 25, 1957, *available at* http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html.

[75] *Id.* at art. 13.

[76] Alston, *supra* note 54, at 492.

[77] Council Regulation 2501/2001, art. 14, 2001 O.J. (L 246) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_346/l_34620011231en00010059.pdf.

Two EU directives are relevant to the discussion. First, the 1976 Equal Treatment Directive requires all member states to ensure "the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training . . . ."[78] Specifically in terms of pregnancy-based sex discrimination, the European Court of Justice has held that an employer's dismissal of, or refusal to hire, a woman on the basis of pregnancy constitutes direct sex discrimination in violation of the Equal Treatment Directive.[79] Furthermore, the Pregnant Workers Directive,[80] enacted in 1992, provides specific protection for pregnant workers, those who have just delivered a baby, and those who are currently breastfeeding.[81] Under this directive, EU member states must also provide a remedy for those female workers who have been terminated unlawfully on the basis of pregnancy.[82]

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[78] Council Directive 76/207, 1976 O.J. (L 39) 40 (EEC), *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1976&nu_doc=207, *amended by* Council Directive 2002/73, 2002 O.J. (L 269) (EC).

[79] Ursula R. Kubal, *U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union*, 25 N.C. J. INT'L L. & COM. REG. 207, 255 (1999). *See* Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassen Plus, 1990 E.C.R. I-3941 (holding that the refusal to hire a woman based on her pregnancy status constituted direct discrimination on the base of sex); Case C-179/88, Hertz v. Dansk Arbejdsgiverforening, 1990 E.C.R. I-3979 (ruling that the dismissal of a female worker on account of pregnancy was direct discrimination based on sex).

[80] Council Directive 92/85/EEC, 1992 O.J. (L348) 1, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31992L0085:EN:HTML.

[81] *Id.* The Pregnant Workers Directive provides three key protections: (1) pregnant workers may take time off for prenatal medical exams without pay penalties; (2) women workers are entitled to a minimum of fourteen continuous weeks of maternity leave, and must be ensured pay or an allowance equivalent to sick pay; and (3) employers are prohibited from terminating a woman's employment from the beginning of pregnancy through the end of her maternity leave, barring exceptional circumstances.

[82] *Id.* at art. 10(3).

III. LABOR RIGHTS IN U.S. FREE TRADE AGREEMENTS

A. General System of Preferences

The General System of Preferences (GSP) was first implemented by the U.S. Congress in 1976, with the purpose of promoting economic development through increasing exports. Trade liberalization seeks to increase exports by "eliminating impediments to free trade in goods, capital, and services among signatory countries."[83] In turn, FTAs are expected to promote economic development in less-developed countries by increasing local Gross Domestic Product (GDP).

Although the 1976 legislation did not originally contain provisions for labor rights,[84] when the GSP came up for renewal in 1984, the U.S. Congress had already begun to require developing countries to comply with the five workers' rights it considered fundamental. According to two people who participated in drafting the GSP Renewal Act of 1984, "the ultimate . . . [inclusion] of these five [internationally recognized workers' rights] reflected political compromise and an assessment of which provisions would be politically palatable."[85] These five rights are: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of any form of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[86] Importantly, the five enumerated rights deviate from the ILO's Core Labor Standards by omitting any reference to nondiscrimination. The exclusion of nondiscrimination deserves to be acknowledged, as the GSP Renewal Act of 1984 was passed subsequent to both the 1964 Civil Rights Act and the 1978 PDA. Both of these acts demonstrate that the right to be free from discrimination is consistent with U.S. public policy. Furthermore, the PDA and subsequent case law

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[83] John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 6 AM. U. J. GENDER & L. 615, 618 (1998).

[84] 19 U.S.C.A. § 2461 (1996).

[85] Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173, 178 (1992) (noting that the Renewal Act "makes no explicit reference to the right to strike as an [internationally recognized worker right], because this right is restricted under U.S. law," and similarly, the Act "sets no minimum age for the employment of children, due to disagreements regarding the extent to which minimum age should be tied to a country's level of economic development").

[86] 19 U.S.C.A. § 2467(4) (2002).

explicitly prohibit both pre-hire and post-hire discrimination based on pregnancy.[87]

In 1984, Representative Donald Pease (D-Ohio) sought to revise the GSP program, and introduced a bill that attempted to make "the prohibition and elimination of discrimination in respect of employment and occupation" an internationally recognized workers' right under the GSP.[88] However, in preliminary negotiations, the non-discrimination provision was deemed "untenable" as a "workable criterion for evaluating labor rights observance," and was consequently withdrawn.[89] The exclusion of nondiscrimination was intentional:

> The absence of a non-discrimination clause in the U.S. statutory scheme is a result of an unavoidable political compromise demanded by the then-minority Republican members of the House Ways and Means Committee. They insisted that an "international Title VII" was too much to include in the bill, and that they would recommend a veto by President Reagan if the non-discrimination clause remained. Labor rights advocates compromised on this point, agreeing to drop the clause in exchange for bipartisan support for the bill.[90]

As the following discussion demonstrates, the exclusion of a nondiscrimination provision in 1984 perpetuated itself in the 2002 Bipartisan Trade Promotion Authority Act and subsequent free trade agreements. Excluding nondiscrimination has clearly become an acceptable norm in the U.S. government's definition of "labor law."

B. Business and Economic Reasons for Excluding Non-Discrimination

Some scholars argue that the Reagan Administration wanted to exclude the non-discrimination provision because of domestic and international political concerns, including "souring relations with allied oil-

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[87] Both the 1964 Civil Rights Act and the Pregnancy Discrimination Act are discussed in detail *supra* in Part II.B.1.

[88] Travis, *supra* note 86, at 179 (citing H.R. 5136, 98th Cong. (2d Sess. 1984)).

[89] *Id.* For a detailed discussion on the legislative process of passing the GSP Renewal Act of 1984, see Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199, 202–04 (2001).

[90] Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 347 (1995).

producing states where discrimination against women and non-Muslims is prevalent," "not want[ing] to subject Israel to criticism over the treatment of Palestinian workers," and concerns about reviving the recently defeated Equal Rights Amendment to the U.S. Constitution.[91] Such a provision may also have been considered "untenable" based on additional business and economic concerns. Similar to the GSP Renewal Act's failure to set a minimum age for child labor,[92] U.S. companies likely did not want to be subjected to the higher U.S. labor standards in countries with lower standards. Lower labor standards, coupled with lower labor costs, further enhanced the comparative advantages that foreign countries have to offer. Obligating U.S. companies to follow U.S. non-discrimination laws in foreign states presumably would reduce this comparative advantage.[93]

C. Bipartisan Trade Promotion Authority Act of 2002

The Bipartisan Trade Promotion Authority Act of 2002 (BTPAA)[94] grants the Executive the power to negotiate and finalize trade agreements with a simple majority vote from both houses of Congress. This "fast-track authority" prohibits either house from making any amendments to the trade agreement—legislators may only vote "yes" or "no."[95] The BTPAA prescribes parameters for the negotiation of FTAs, one aspect of which is the inclusion of labor protections.[96] Under the BTPAA, the President is charged with "promot[ing] respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in section 3813(6) of this title)."[97] Furthermore, the Executive must seek "to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its . . . labor laws, through a sustained or recurring

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[91] Compa & Vogt, *supra* note 89, at 203.

[92] *See supra* note 85 and accompanying text.

[93] For example, many companies reportedly relocated to Mexico to avoid paying maternity benefits in the United States. *See* NO GUARANTEES, *supra* note 30.

[94] 19 U.S.C.A. §§ 3801–3813 (2005).

[95] *Id.* § 2191 (2002).

[96] *Id.* §§ 3801–3813 (2005).

[97] *Id.* § 3802(a)(6).

course of action or inaction, in a manner affecting trade between the United States and that party . . . ."[98]

Section 3813(6) defines "core labor standards" as: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of any form of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[99] Thus, although the BTPAA claims to define labor rights in line with the ILO, the BTPAA's definition of core labor standards is identical to that used by the General System of Preferences and deviates from the ILO's Core Labor Standards by omitting any reference to nondiscrimination.

IV. CAFTA: CENTRAL AMERICA–DOMINICAN REPUBLIC–U.S. FREE TRADE AGREEMENT

In 2003, the United States concluded negotiations for CAFTA with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.[100] Shortly thereafter, in January 2004, the United States and the Dominican Republic began a two-month long series of negotiations to add the Dominican Republic.[101]

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[98] *Id.* § 3802(b)(11)(A).

[99] *Id.* § 3813(6).

[100] Press Release, Office of the U.S. Trade Representative, U.S. & Central American Countries Conclude Historic Free Trade Agreement (Dec. 17, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/December/US_Central_American_Countries_Conclude_Historic_Free_Trade_Agreement.html; Press Release, Office of the U.S. Trade Representative, U.S. and Costa Rica Reach Agreement on Free Trade (Jan. 25, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/January/US_Costa_Rica_Reach_Agreement_on_Free_Trade.html.

[101] Press Release, Office of the U.S. Trade Representative, Zoellick to Visit the Dominican Republic January 14 as Free Trade Negotiations Begin (Jan. 13, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/ 2004/January/Zoellick_to_Visit_the_Dominican_Republic_January_14_as_Free_Trade_Negotiations_Begin.html; Press Release, Office of the U.S. Trade Representative, U.S. & Dominican Republic Conclude Trade Talks Integrating the Dominican Republic into CAFTA (Mar. 15, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/March/US_Dominican_Republic_Conclude_Trade_Talks_Integrating_the_Dominican_Rebublic_into_CAFTA.html.

A. Labor Conditions in the Dominican Republic and Central America

According to the ILO's 2003 "Fundamental Principles and Rights at Work" report[102] on Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, all five nations have labor laws (1) prohibiting any type of discrimination in employment and occupation based on sex, (2) prohibiting sexual harassment in employment and discrimination, and (3) affirming equality of opportunity for pregnant women.[103] Deficiencies in enforcement are rampant, however, and the violation of internationally-recognized labor rights is "systemic" in Central America and the Dominican Republic.[104] These abuses include prohibitions against freedom of organization and the

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[102] INTERNATIONAL LABOUR ORGANIZATION, FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOUR LAW STUDY (COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS, NICARAGUA) (2003), *available at* http://www.ilo.org/public/english/dialogue/download/cafta.pdf [hereinafter ILO LABOUR LAW STUDY]. The foreword to the Report explains the process by which the report was compiled:

> The International Labour Office was invited by the Governments of Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua to prepare an updated and objective study of current labour laws relating to fundamental principles and rights at work in each of these countries. The terms of reference for this review were agreed with the governments concerned. The review builds on work already done by the ILO and includes individual country reviews. The desk reviews were complemented by a visit to each of the five countries where meetings were held with representatives of workers' and employers' organizations as well as government representatives. An initial draft of the full study was then shared with the governments and each government had the opportunity to provide written comments on the draft of their own country's review. In accordance with ILO standard practice, it was suggested that the draft document be shared with the social partners and that they be consulted on any comments sent to the ILO.

Id. at 4.

[103] *Id.*

[104] *See* SANDRA POLASKI, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, ISSUE BRIEF: CENTRAL AMERICA AND THE U.S. FACE CHALLENGE–AND CHANCE FOR HISTORIC BREAKTHROUGH–ON WORKERS' RIGHTS (2003), *available at* http://www.carnegie endowment.org/ pdf/files/TED-CAFTA-and-labor.pdf. Polaski bases her assertion on the U.S. Department of State Country reports. *See* U.S. DEPARTMENT OF STATE, 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2002), *available at* http://www.state.gov /g/drl/rls/hrrpt/2001 (describing serious problems with human rights abuses and inefficient or corrupt judiciaries in four of the five countries and continuing problems of somewhat lesser severity in Costa Rica).

right to organize, the usage of child labor, and the existence of employment discrimination against women.[105]

In addition, the International Labor Rights Fund,[106] which was commissioned by the U.S. Department of Labor to write a report on working conditions in the Dominican Republic and five Central American nations, presumably to endorse the U.S. position that existing labor laws[107] in Central America provided sufficient protection to workers,[108] concluded that the working conditions were dismal and enforcement of labor laws was lax. The 400-page report, however, was blocked from release for more than a year.[109] The report stated that there were "systematic barriers" to enforcing existing labor laws, citing sloppy recordkeeping, insufficient opportunities to make claims, and ineffective punishment for violations.[110]

Latin American leaders did not deny the allegations. In April 2005, the CAFTA governments acknowledged their countries' weak enforcement of labor laws, and publicly pledged to improve protection of workers' rights.[111] The trade ministers endorsed a report written by officials from the six countries that made recommendations to better protect workers, including taking steps to end discrimination against women.[112] The following two subsections focus on the pervasive practice of pregnancy discrimination in the Dominican Republic and several Central American countries.

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[105] POLASKI, *supra* note 104. *See also* HUMAN RIGHTS WATCH, DELIBERATE INDIFFERENCE: EL SALVADOR'S FAILURE TO PROTECT WORKERS' RIGHTS (2003), *available at* http://www.hrw.org/reports/2003/elsalvador1203.

[106] The International Labor Rights Fund is a coalition composed of leaders in the human rights, labor, policy-making, academic, and religious communities. It was formed in the 1980s to "fight for the rights of workers in international trade." International Labor Rights Fund, History of the ILRF, http://www.laborrights.org (last visited Nov. 10, 2006).

[107] For references to specific labor laws currently in place, see ILO LABOUR LAW STUDY, *supra* note 102.

[108] Juan Forero, *Report Criticizes Labor Standards in Central America*, N.Y. TIMES, July 1, 2005, at C2.

[109] *Id.* (explaining that Representative Sander Levin (D-Mich.) repeatedly sought its release).

[110] *Id.*

[111] Jeffrey Sparshott, *Nations Vow to Protect Rights: Try Appeasing CAFTA Critics*, WASH. TIMES, Apr. 6, 2005, at C7.

[112] The report also called for steps to better protect workers' right to assemble, organize, and bargain, as well as to end child labor. *Id.*

1. The Dominican Republic

In April 2004, HRW issued a report detailing the prevalence of pregnancy discrimination in the Dominican Republic, *Pregnancy-Based Sex Discrimination in the Dominican Republic's Free Trade Zones: Implications for the US-Central America Free Trade Agreement.*[113] The report discusses how, prior to CAFTA, free trade zones were a major part of the Dominican economy. For example, in 2001, exports from the free trade zone accounted for 7.9% of the Dominican GDP, generating net exports of nearly $1.7 billion.[114] The United States has a major presence in the Dominican Republic; U.S. funds accounted for sixty percent of the total investment in the Dominican free trade zones in 2002.[115] That year, the free trade zones employed 171,000 workers, seventy percent of whom worked in textile manufacturing.[116] Women dominate the workforce in free trade zones, working in textile manufacturing, pharmaceuticals, electronics, plastic products, and tobacco.[117]

Human Rights Watch reported that nearly two-thirds of the thirty-one women interviewed stated that they were required to undergo a pregnancy test as a precondition to being hired or as a requirement to maintain their job.[118] The report alleged that "[t]he Dominican government has done little to curb or end this practice, and certainly nothing that would compel companies to stop mandatory pregnancy testing."[119] In particular, it suggests that the government has not ensured that workers are informed of their right to refuse a pregnancy test or to report illegal testing.[120] As

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[113] PREGNANCY DISCRIMINATION IN THE DOMINICAN REPUBLIC, *supra* note 14.

[114] *Id.* ¶ 4 (citing ECONOMIST INTELLIGENCE UNIT, UNITED KINGDOM, DOMINICAN REPUBLIC: COUNTRY REPORT 5 (2003) (providing statistics focused on the time period prior to CAFTA's passage)).

[115] *Id.* ¶ 6 (citing CONSEJO NACIONAL DE ZONAS FRANCAS DE EXPORTACIÓN DE LA REPÚBLICA DOMINICANA [NATIONAL COUNCIL OF EXPORT-FREE TRADE ZONES OF THE DOMINCAN REPUBLIC] (CNZFE), INFORME ESTADÍSTICO 2002 [STATISTICAL REPORT 2002] (2002), *available at* http://www.cnzfe.gov.do/documentos/informes_estadisticos/Informe_Estadistico_2002_en_Espanol.pdf [hereinafter STATISTICAL REPORT 2002]).

[116] *Id.* ¶ 5 (citing STATISTICAL REPORT 2002, *supra* note 115).

[117] *Id.*

[118] *Id.* ¶ 1.

[119] *Id.*

[120] *Id.* ¶ 14.

discussed above, the Dominican Republic, as a signatory to the ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, should inform workers of those rights.[121] Furthermore, sex discrimination is prohibited by both Dominican domestic law and several human rights treaties to which the Dominican Republic is a signatory.[122] Nonetheless, women working in the free trade zones face widespread sex discrimination, since they are frequently subjected to pregnancy testing as a precondition for employment.[123]

2. El Salvador, Honduras, and Guatemala

Pregnancy discrimination has also been documented in El Salvador, Honduras, and Guatemala. The International Confederation of Free Trade Unions notes that in El Salvador, "[w]omen are underrepresented in senior positions, earn less on average than males, and face discrimination in hiring, including mandatory pregnancy testing on pain of dismissal."[124] In Honduras, female employees of Korean companies report that they are required to take birth control pills as a condition of their employment.[125] In

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[121] ILO Ratifications by Country, *supra* note 53.

[122] PREGNANCY DISCRIMINATION IN THE DOMINICAN REPUBLIC, *supra* note 14, ¶ 8 (citing International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., 1496 plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (ratified by the Dominican Republic in 1978); International Covenant on Economic, Social, and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 (arts. 2(2), 6, 7, 8 ratified by the Dominican Republic in 1978); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) (art. 11 ratified by the Dominican Republic in 1982); and ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (ratified by the Dominican Republic in 1964)).

[123] *Id.*

[124] INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, INTERNATIONALLY-RECOGNIZED CORE LABOUR STANDARDS IN EL SALVADOR, REPORT FOR THE WTO GENERAL COUNCIL: REVIEW OF TRADE POLICIES OF EL SALVADOR (2003), *available at* http://www.icftu.org/displaydocument.asp?Index=991217133&Language=EN.

[125] Michelle Smith, *Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 13 BERKELEY WOMEN'S L.J. 195, 200 (1998). Though this example refers to Korean companies in Honduras, women working in the U.S.-operated *maquiladoras* are at a high risk of suffering similar coercion considering their desperate situations and the employers' continuing disregard for their health and freedom of choice to have children while working. For a

Guatemala, pregnancy-based sex discrimination has been documented by HRW in both the *maquila* and domestic service sectors.[126] Approximately eighty percent of the 80,000 workers in apparel *maquilas* in Guatemala are women.[127] As in the Dominican Republic, many Guatemalan *maquilas* demand to know whether women are pregnant during their job interviews; some even require pregnancy exams or a "certificate" to prove that a woman is not pregnant.[128] Some *maquiladoras* require women to write and sign a statement declaring that they will not have children during their term of employment.[129]

Similar to the Dominican Republic, all three of these nations provide for de jure equality of opportunity for pregnant women. In Guatemala, section 113 of the Labor Code states that women cannot be dismissed absent just cause during pregnancy and for ten months following maternity leave.[130] Section 246 of the El Salvadoran Penal Code imposes penalties on an employer who discriminates against a worker on the basis of pregnancy.[131] Article 128.11 of the Honduran Constitution and sections 124 and 144 of the Labor Code provide similar protections for pregnant women.[132] However, evidence such as the HRW reports demonstrates that these laws are not being enforced. CAFTA attempts to address enforcement by requiring each nation to enforce its own labor laws. The question of why there is a lack of enforcement is addressed in Part V.

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discussion of the plaintiffs' inability to have U.S. labor law applied extraterritorially, see John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 491 (2000) ("Courts follow a presumption that U.S. laws do not apply extraterritorially absent an express intent by Congress to have them do so.").

[126] HUMAN RIGHTS WATCH, GENDER-SPECIFIC LABOR RIGHTS VIOLATIONS IN THE DOMESTIC WORK AND MAQUILA SECTORS (2002), *available at* http://hrw.org/reports/2002/guat/guat0102A.jude-04.htm [hereinafter GENDER-SPECIFIC VIOLATIONS IN GUATEMALA].

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] ILO LABOUR LAW STUDY, *supra* note 102, at 21.

[131] *Id.* at 16.

[132] *Id.* at 23.

B. CAFTA Labor Law

Chapter 16 of CAFTA focuses exclusively on labor. Article 16.1, the "Statement of Shared Commitment," states that "[t]he Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998).*"[133] Article 16.2(1)(a) admonishes that "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties . . . ."[134] Defining "labor laws" is imperative for properly interpreting Article 16.2(1)(a). What constitutes a "labor law" under CAFTA is defined in Article 16.8:

> For purposes of this Chapter: labor laws means a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[135]

Thus, although the "Statement of Shared Commitment" reiterates the countries' affirmation of the ILO Core Labor Standards, CAFTA excludes one of the four ILO Core Labor Standards—the elimination of discrimination in the workplace—from its definition of "labor laws."

While CAFTA excludes "employment discrimination" from its definition of "labor laws," it does acknowledge the problem of discrimination—particularly gender-based discrimination—in the context of employment. Annex 16.5, "Labor Cooperation and Capacity Building Mechanism," provides:

> The Mechanism may initiate bilateral or regional cooperative activities on labor issues, which may include, but need not be limited to:

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[133] CAFTA, *supra* note 11, at art. 16.1.

[134] *Id.* at art. 16.2. This language tracks the BTPAA's statutory language. *See* 19 U.S.C.A. § 3802(b)(11)(A) (2005). Presumably "sustained or recurring course of action" refers to a country's ability to be held accountable for acts of commission or omission.

[135] CAFTA, *supra* note 11, at art. 16.8.

> (a) *fundamental rights and their effective application*: legislation and practice related to the core elements of the ILO Declaration (freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation). . . .
>
> (l) *gender*: gender issues, including the elimination of discrimination in respect of employment and occupation . . . .[136]

The Office of the U.S. Trade Representative explains that this mechanism is designed to strengthen each State's ability to fulfill the labor goals.[137] Its official summary of the agreement states that "[i]n particular, the mechanism will assist the Parties to establish priorities for, and carry out, bilateral and regional cooperation and capacity building activities relating to such topics as . . . the elimination of gender discrimination in employment."[138]

C. Effect of Excluding "Employment Discrimination" from the Definition of "Labor Laws"

CAFTA requires signatory nations to enforce their own labor laws.[139] All CAFTA countries except the United States have ratified the ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.[140] As discussed in Part III, Convention No. 111 defines discrimination as including "any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of

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[136] *Id.* at art. 16.5(3). There is no reference throughout CAFTA as to whether this applies to either pre-hire or post-hire gender discrimination, or both.

[137] OFFICE OF THE U.S. TRADE REPRESENTATIVE, BUILDING TRADE CAPACITY UNDER THE CAFTA (2005), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/Section_Index.html (follow link to "Trade Capacity-Building in CAFTA").

[138] OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE DOMINICAN REPUBLIC–CENTRAL AMERICA–UNITED STATES FREE TRADE AGREEMENT, SUMMARY OF THE AGREEMENT (2005), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/Section_Index.html (follow link to "Section-by-Section Summary of the CAFTA").

[139] CAFTA, *supra* note 11, at art. 16.2(1)(a).

[140] ILO Ratifications by Country, *supra* note 53.

nullifying or impairing equality of opportunity or treatment in employment or occupation."[141] Furthermore, the Convention defines "employment" and "occupation" as applying to both the pre-hire and post-hire timeframe, stating that the terms include "access to employment and to particular occupations."[142] For countries that have ratified Convention No. 111, enforcement is accomplished through domestic law. For countries, such as the United States, that have not ratified Convention No. 111, enforcement of non-discrimination rights are subject to existing constitutional and statutory law.

As the CAFTA nations have all ratified Convention No. 111 and have existing antidiscrimination laws, the problem is not whether the countries' promulgated labor statutes are in compliance with either the ILO Core Labor Standards or the modified CAFTA labor standards. Instead, the major problem is the lack of enforcement of existing laws.[143] By exempting the antidiscrimination provisions from the definition of "labor laws," CAFTA countries are permitted to continue to "turn a blind eye to illegal pregnancy-based discrimination"[144] without any fear of sanction.[145]

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[141] Discrimination also includes "any distinction, exclusion, or preference made on the basis of" race, color, religion, political origin, national extraction, or social origin. International Labour Organization, C111 Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111 [hereinafter ILO Convention No. 111].

[142] In addition, the terms "employment" and "occupation" also apply to both access to vocational training, and terms and conditions of employment in both the pre- and post-hire timeframes. *Id.*

[143] Martin Vaughan, *Central Trade Battle*, CONGRESS DAILY, Feb. 1, 2005.

[144] PREGNANCY DISCRIMINATION IN THE DOMINICAN REPUBLIC, *supra* note 14, ¶ 3.

[145] Under CAFTA, enforcement provisions for failing to enforce labor laws include fines of up to fifteen million dollars per year, per occurrence. Given CAFTA's recent passage, there is no evidence of this sanction having yet been enforced. Additionally, if the violating country fails to pay the fine within sixty days, the United States can impose trade sanctions. OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA'S LABOR PROVISIONS: WORLD CLASS, BEST EVER (2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file58_7878.pdf [hereinafter CAFTA'S LABOR PROVISIONS: WORLD CLASS, BEST EVER].

D. Congress' Awareness of the Omission of "Employment Discrimination"

The exclusion of "employment discrimination" cannot be attributed to mere inattention or lack of controversy. First, as noted above, Annex 16.5, "Labor Cooperation and Capacity Building Mechanism," acknowledges the existence of gender discrimination in CAFTA member countries.[146] Second, two Labor Committee Reports from 2004 criticized the draft of CAFTA, stating:

> In order to protect workers' rights, trade agreements must include enforceable obligations to respect the core labor standards of the International Labor Organization (ILO)—freedom of association, the right to organize and bargain collectively, and prohibitions on child labor, forced labor, and *discrimination*—in their core text and on parity with other provisions in the agreement.[147]

In addition, former U.S. President and CAFTA supporter Jimmy Carter acknowledged the weak labor protections; however, he essentially overlooked them, stating in a letter to lawmakers that our "own national security and hemispheric influence will be enhanced with improved stability, democracy and development in our poor, fragile neighbors in Central America and the Caribbean."[148] Then-U.S. Trade Representative Rob Portman[149] echoed his statement, concurring that CAFTA is "a great

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[146] *See supra* notes 136–138 and accompanying text.

[147] LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY (LAC), THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT REPORT (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf (emphasis added); LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY (LAC), THE U.S.-DOMINICAN REPUBLIC FREE TRADE AGREEMENT REPORT (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/DR_Reports/asset_upload_file12_3321.pdf.

[148] Jeffrey Sparshott, *Official Addresses CAFTA-Vote Snag: Says More U.S. Funds Could Help Back Central American Labor Laws*, WASH. TIMES, June 10, 2005, at C10.

[149] Ambassador Rob Portman was appointed United States Trade Representative in April 2005 and served in this position for slightly more than one year. *Sen. Baucus Welcomes First Approval of New Trade Representative*, US FED. NEWS (Wash., D.C.), May 22, 2006. Ambassador Susan C. Schwab was appointed United States Trade Representative on April 18, 2006, by President George W. Bush. Office of the United States Trade Representative, Ambassador Susan C. Schwab: United States Trade Representative, http://www.ustr.gov/Who_We_Are/Bios/Ambassador_Susan_C_Schwab.html (last visited Nov. 10, 2006).

agreement for our friends and neighbors because it will promote economic growth, development and support democracy . . . ."[150] Most Democrats opposed the deal, despite Carter's endorsement.[151] These Democrats insisted that CAFTA "needs to include explicit guarantees of the internationally recognized right to organize unions and to prohibit child labor and discrimination in employment."[152] Furthermore, a U.S. Trade Representative Spokeswoman confirmed that the USTR had held several meetings with Congressman Adam Smith (D-Wash.) regarding the New Democrats'[153] concern with CAFTA's labor provisions.[154]

The Office of the U.S. Trade Representative's website notes that the CAFTA countries have developed a modernization agenda to address resource limitations that have hampered the implementation of labor laws. The "white paper,"[155] drafted by the trade and labor ministers of those countries, delineates country-specific and regional commitments to provide assistance to build capacity in several areas, including gender and discrimination issues.[156] In relation to gender and discrimination, the U.S. Trade Representative states that one recommendation is specifically to:

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[150] Press Release, Office of the U.S. Trade Representative, Portman Thanks Former President Jimmy Carter For Supporting CAFTA-DR (June 9, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/June/Portman_Thanks_Former_President_Jimmy_Carter_For_Supporting_CAFTA-DR.html?ht=.

[151] *See* Christopher Swann, *Sugar Lobby Deal Mooted to Save Trade Pact,* FIN. TIMES, Apr. 12, 2005, at 11; Elizabeth Becker, *Trade Deal: What's in it for the Workers?*, INT'L HERALD TRIBUNE, Apr. 7, 2004, at 15. Based on press releases and newspaper articles, it does not appear that Carter ever responded to his Party's apparent criticism of his position.

[152] Becker, *supra* note 151.

[153] The term "New Democrat" refers to a coalition of centrist democrats who typically vote in favor of trade deals. Doug Palmer, *Update 1–Pro-Trade U.S. Democrats Deal Blow to CAFTA*, REUTERS NEWS, May 4, 2005.

[154] Christopher Swann & Edward Alden, *New U.S. Democrats Deal Blow to CAFTA Approval*, FIN. TIMES 8, May 4, 2005.

[155] The "white paper" is a document developed by the labor and trade ministers of CAFTA countries. Ambassador Rob Portman, U.S. Trade Representative, Office of the U.S. Trade Representative, Remarks at the IDB Donor Conference (July 19, 2005), *available at* http://www.ustr.gov/Document_Library/Transcripts/2005/July/Remarks_of_Ambassador_Rob_Portman,_United_States_Trade_Representative,_IDB_Donor_Conference.html.

[156] Additionally, commitments were made to provide assistance to build capacity in the administration of labor justice and labor ministries. *Id.*

> *Develop additional policies and enforcement initiatives to address pregnancy testing as a condition of employment*; conduct outreach campaigns to protect women's rights in the workplace; where needed create special offices within the labor ministries to target discrimination and gender issues effectively. *Women—heads of households—who comprise the largest portion of the workforce in factories and maquilas will be treated with dignity and respect for their legal rights.*[157]

The drafters manifestly recognized that there was a general discrimination problem, particularly in relation to women, prevalent in Central America at the time of CAFTA's negotiation.

E. Ad-hoc "International Donor's Conference"

CAFTA's key proponent, then-U.S. Trade Representative Portman, conceded that the workers' rights issues in Central America revolve not around bringing the Central American nations' laws into compliance with international standards, but instead around the lack of enforcement.[158] To remedy this situation, Portman called for an "International Donor's Conference" designed to provide financial support for the Dominican and Central American governments to implement their own labor laws. Portman pointed out that the governments specified three areas of priority: "[S]trengthening their labor ministries, improving their labor court systems, and cracking down on discrimination—especially gender discrimination—in the workplace."[159] In order to address this problem, the Bush administration committed $180 million in labor and environment capacity-building assistance spread over 2005 to 2009. The initial grant of twenty million dollars was already included in the Fiscal Year 2005 foreign appropriations bill, with two million dollars earmarked for "[c]racking [d]own on [d]iscrimination against [w]omen in the [m]aquilas."[160]

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[157] OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA LABOR—BUILDING A CULTURE OF COMPLIANCE! (2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file546_7570.pdf?ht= (first emphasis added).

[158] Keith Koffler, *Portman Hopes New Labor Proposal Will Draw Democrats Toward CAFTA*, CONGRESS DAILY, June 9, 2005.

[159] *Id.*

[160] CAFTA'S LABOR PROVISIONS: WORLD CLASS, BEST EVER, *supra* note 145.

The International Donor's Conference evidences that Portman, the Office of the U.S. Trade Representative, and the current Bush Administration are approaching the problem of non-enforcement as principally (or exclusively) a problem of insufficient financial resources. However, there are many alternative—or additional—explanations for the lack of enforcement. The problem, an under-developed judiciary whose troubles are exacerbated by corruption, is most likely systemic. Therefore, the International Donor's Conference is unlikely to be able to provide any long-term remedy for discrimination against women.

V. HYPOTHESES REGARDING THE EXCLUSION OF "EMPLOYMENT DISCRIMINATION"

This Part offers potential explanations for why CAFTA excluded "employment discrimination" from its five-part definition of "labor laws." First, the U.S. government may advance the explanations that: (1) the CAFTA labor provisions are consistent with those of the BTPAA; (2) democracy, economic development, and stability are more pressing concerns to Central American countries and the Dominican Republic than labor protections; and (3) that sovereignty concerns kept the United States from including additional labor requirements. Additionally, a traditional economic argument is often posited that "employment discrimination" was excluded due to the Latin American nations' desire of foreign direct investment and to appease U.S. companies seeking lower labor standards. Regardless of the possible explanations, while CAFTA pays lip-service to labor standards, the actual provisions permit member nations to avoid enforcing their employment discrimination laws.

A. Consistency with the BTPAA

The U.S. government may contend that the CAFTA definition of "labor laws" merely replicates the BTPAA standards. The BTPAA itself diverged from the ILO Core Labor Standards by excluding employment discrimination from its definition of ILO Core Labor Standards.[161] This explanation, however, is not satisfactory.

First, the NAALC labor provisions went above and beyond the four ILO Core Labor Standards, including not only employment discrimination as part of its definition of "labor laws," but also several other protections

[161] *See supra* notes 94–99 and accompanying text.

listed in its eleven-part list of labor principles.[162] Although the NAALC was passed in 1994, eight years before the BTPAA, it was passed subsequent to the establishment of the GSP in 1984, after which the BTPAA was modeled. Thus, one cannot argue that the U.S. Congress is unduly constrained by the definition of "labor laws" adopted by the GSP and subsequent BTPAA.

Second, the wording of the BTPAA establishes minimums and parameters.[163] The BTPAA's language does not limit the United States government to include only those labor rights it explicitly designates. Third, the government does not appear to be overly attached to the GSP provisions. For example, in a CAFTA policy briefing, the USTR noted that, "[l]abor provisions in CBI/GSP law have been around for twenty years, and they haven't worked particularly well."[164]

B. The "Jimmy Carter Position"

A second explanation likely to be offered is that of the "Jimmy Carter position."[165] This explanation subordinates labor rights to those issues deemed more pressing: democracy, economic development, and stability. This explanation is insufficient. First, economic development and labor rights are not mutually exclusive. As has been discussed above, CAFTA and other FTAs include labor rights in the text of their trade agreements.[166] Second, regional stability is unlikely to be promoted without

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[162] As discussed in Part I, the eleven principles are as follows: (1) freedom of association and protection of the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protections for children and young persons; (6) minimum employment standards; (7) *elimination of employment discrimination*; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational injuries and illnesses; and (11) protection of migrant workers. *See supra* notes 22–25 and accompanying text.

[163] *See* 19 U.S.C.A. § 3802(a) (2004) (referring to the BTPAA as establishing "[o]verall trade negotiating objectives").

[164] CAFTA'S LABOR PROVISIONS: WORLD CLASS, BEST EVER, *supra* note 145.

[165] *See supra* notes 148–152 and accompanying text.

[166] *See supra* introduction, Parts I.A, IV.B. However, as discussed *infra* in Part VII, effective enforcement mechanisms are essential to the protection of labor rights even if they are included in the text of the trade agreement. *See* Press Release, Rep. Nancy Pelosi, Pelosi Statement in Opposition to CAFTA (May 28, 2004), *available at* http://www.house.gov/pelosi/press/releases/May04/CAFTA052804.html (noting that "[t]he countries of Central America have inadequate, poorly-enforced labor and environmental laws that do not follow international standards," and asserting that "enforcement in these

an increase in standard of living among workers. The United Nations recognizes that economic prosperity and improving standards of living are important pre-conditions to prosperity and are necessary for friendly relations among countries.[167]

C. Sovereignty Concerns

A third explanation is that the United States did not want to unreasonably infringe on other nations' sovereignty or have its sovereignty infringed upon.[168] However, this argument fails for two main reasons. First, by joining an FTA, a nation asserts its sovereignty by making the affirmative decision to yield some of its national control.[169] Second, labor provisions were already included in the core FTA. Prior to NAFTA, labor and trade were not treated together. However, in the post-NAFTA context, including CAFTA, labor and trade have become inextricably linked. Nations have come to expect that labor will be addressed in FTAs. Thus, merely expanding the definition of "labor laws" and bringing the definition in line with the ILO's Core Labor Standards does not tread on other nations' sovereignty any more than its original inclusion.

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areas must be written into CAFTA rather than just asking the countries to police themselves").

[167] For example, Article 55 of the U.N. Charter states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55.

[168] The topic of sovereignty and labor law agreements is too vast a subject to treat in this Article. For a discussion on sovereignty concerns in the NAFTA context, see Crandall, *supra* note 21, at 170–73.

[169] *See* Laura Spitz, *The Gift of Enron: An Opportunity to Talk about Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315, 378–79 (2005) ("[I]nsofar as national or governmental sovereignty are meaningful concepts, surely they include the power to give up some of their power. Countries do it as part of ratifying every treaty.").

D. Traditional Economic Argument: Latin American Nations Are Seeking to Increase FDI to Stimulate Economies and Raise the Standard of Living; United States Companies Want Lower Standards.

The traditional economic labor standards argument in the context of FTAs begins with the premise that less-developed countries create, promote, and sustain low-wage export industries in order to attract foreign direct investors.[170] In the context of Mexico, the Dominican Republic, and Central America, this strategy has led to the creation of the *maquiladora* and Export Processing Zones, both of which are "unique sectors that cater to and support the low-cost objectives of foreign investors."[171] The following paragraphs will explore the proposition that traditional economic arguments and the principle of non-discrimination are mutually exclusive.

In the context of Mexico, scholars have thoroughly examined this argument. Following the passage of NAFTA and the explosion of the *maquiladora* industry, scholars such as John P. Isa suggested that the legal use of pregnancy discrimination was an element of Mexico's ability to establish a comparative advantage in terms of labor costs.[172] In the Mexican *maquiladora* sector, nearly two-thirds of the employees are women, many of whom work throughout their reproductive years.[173] Women are the preferred workers because of their apparent familiarity with sewing, due to the perception that they have "nimble hands," and consequently have better dexterity than men, and because they are considered more "obedient" and less "combative" than their male counterparts.[174] Many U.S. companies, preferring female workers but not wanting to bear the costs of maternity,[175] relocated their production factories to Mexico due to Mexico's non-

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[170] THEODORE H. MORAN, BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES 17 (2002).

[171] Linares, *supra* note 13, at 251.

[172] *See* Isa, *supra* note 83.

[173] *Id.* at 635.

[174] GENDER-SPECIFIC VIOLATIONS IN GUATEMALA, *supra* note 126.

[175] The economic effects of the growing phenomenon of paternity leave in the United States is beyond the scope of this Article. *See* Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN ST. INT'L L. REV. 439 (2004).

enforcement of antidiscrimination labor laws.[176] The U.S. companies are able to exert strong pressure over the Mexican government:

> Foreign corporate interests heavily influence the Mexican government's actions and inactions. U.S. corporations relocating to Mexico for the tariff structures, low wages, and available number of workers, has proven to be an integral part of Mexico's economy. There are economic incentives for the Mexican government to not enforce its laws, and corporate interests prevail in the maquiladora sector. The Mexican government, whether directly due to political corruption or to increased investment, has readily overlooked the practices that the maquiladoras employ to screen out potentially costly workers.[177]

Arguably increased investment is the more salient variable; however, political corruption likely plays a part in domestic decision making. What is clear is that the pregnant women have little bargaining power vis-à-vis the *maquiladoras*.[178] As a result, the Mexican government adopted a policy of non-enforcement because a policy of strict enforcement would jeopardize its newly-attracted FDI.

E. A Variation on the Argument that Less-Developed Countries *Relax* Their Labor Laws to Attract FDI.

Perhaps the most cynical—yet most probable—explanation for the exclusion of "employment discrimination" from the definition of "labor laws" is a variation on the preceding argument. Free Trade Agreements are created to enhance prospects for business by "leveling the playing field" through expanding markets and lowering tariff barriers, among other methods.[179] In an ideal world, the creation of an FTA fosters a win-win-win

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[176] Bremer, *supra* note 36, at 582.

[177] *Id.*

[178] Smith, *supra* note 125, at 201 (noting that in the late 1990s, *maquiladoras* accounted for over twenty-nine billion dollars annually in export earnings for Mexico, and at that time *maquiladoras* employed approximately 908,000 Mexican workers). *See also* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117 (1993).

[179] Certainly this is not the only reason bilateral trade agreements or free trade blocs are created. Other explanations include, but are not limited to, fostering economic stability, and consequently enhancing democratic prospects for the region; rewarding allies and punishing defecting governments; creating trade blocs in response to others; etc. *See, e.g.*, Thomas Andrew O'Keefe, *Economic Integration as a Means for Promoting Regional*

situation for the businesses, governments, and workers involved—new markets are created, businesses open factories in less-developed countries due to comparative labor advantages, and standards of living rise. However, the CAFTA legislation will likely result in a win-win-lose outcome. While this explanation may over-simplify the situation, the exclusion of "employment discrimination" maintains the "winning" positions of the businesses and governments, as new markets are created and factories open abroad, creating new jobs and, hence, political capital for the current administration. However, this argument posits that a "losing" position is created because the employees of both domestic and multinational corporations are not protected by antidiscrimination laws.

Excluding employment discrimination from CAFTA probably is in the interests of the United States, the Dominican Republic, and Central American countries. A major sector of the economy that is to benefit from CAFTA is textile manufacturing, as well as other *maquiladora*-type industries. These sectors are dominated by women workers.[180] U.S. corporations relocate plants to less-developed countries in order to reduce their input costs—labor input costs are cheaper as the wages are lower in less-developed countries. However, if these industries are dominated by women, and the local law requires companies to comply with antidiscrimination laws (such as providing women with maternity benefits), then for U.S. companies to relocate to the particular country is less cost-effective. Certainly not all comparative advantages would be lost by according women equal treatment; however, companies would re-engage in cost-benefit analysis. At some point, the U.S. company probably would find moving its plant to another country where there are fewer labor protections or lax enforcement more cost-effective.[181] As stated by one human rights activist, "[t]his is quite a hostile environment for workers, where business and government sectors see protecting workers' rights as going against the country's economic interests."[182]

Political Stability: Lessons from the European Union and Mercosur, 80 CHI.-KENT L. REV. 187 (2005).

[180] *See supra* notes 173–174 and accompanying text.

[181] If all nations universally applied and enforced uniform labor standards, such as the ILO's core labor standards, then this incentive would be curtailed.

[182] Becker, *supra* note 151 (quoting Antonio Aguilar Martinez, deputy of the Office of the Human Rights Ombudsman, an independent government watchdog agency in El Salvador; Aguilar Martinez does not substantiate his claim with economic figures).

The Dominican and Central American governments want to attract U.S. companies and foreign direct investment, as "FDI represents the fastest route to economic growth."[183] In order to do so, they consider the demands of the U.S. companies and investors: cheap labor and a supply of women to work in their *maquiladora*-type operations. One strategy is for governments of the less-developed countries to tacitly agree not to enforce their antidiscrimination laws in order to provide a consistent flow of cheap female labor that can be discriminated against in hiring or fired at will for becoming pregnant. However, this assumes that these governments would otherwise enforce these laws, which, as HRW reports evidence, is not the case.[184]

As labor provisions have become inextricably intertwined with U.S. free trade agreements in the last fifteen years, countries can no longer tacitly agree to not enforce domestic law. Under the BTPAA, FTAs increasingly require countries to enforce their own labor laws. However, if "employment discrimination laws" are not considered to be "labor laws,"[185] then the less-developed countries are not required to enforce those laws. Therefore, although the incorporation of labor standards[186] into the free trade agreement restrains CAFTA countries from relaxing or weakening their labor laws to attract foreign trade and FDI, under CAFTA, member nations are permitted to simply avoid enforcing their employment discrimination laws, achieving exactly the same ends.

F. Application to the Textile Sector

The economic argument has particular applicability to the textile sector. United States cotton growers and textile makers opposed CAFTA because CAFTA permits third-party nations to sell cotton to Central American textile mills, the finished product of which could then be

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[183] Daniel C. K. Chow & Thomas J. Schoenbaum, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 399 (2005).

[184] PREGNANCY DISCRIMINATION IN THE DOMINICAN REPUBLIC, *supra* note 14; NO GUARANTEES, *supra* note 30.

[185] *See supra* Parts III.C, IV.B, and IV.C discussing how the ILO considers "employment discrimination laws" to be part of "labor laws," but both the BTPAA and CAFTA do not.

[186] A debate important to mention, but too large to address in this Article, is whether "labor rights" are "human rights." *See* Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261 (2005) (discussing the characterization of Core Labor Standards as Human Rights).

imported duty-free to the United States.[187] This is a salient issue because apparel retailers are increasing their use of lower-cost fabrics manufactured in China and elsewhere.[188] In an opinion piece in *The Washington Times*, then-U.S. Trade Representative Rob Portman appealed to the U.S. textile workers:

> CAFTA-DR will help preserve thousands of American textile jobs, because we send billions in exports to Central American factories that sew clothing to send back to the United States. Without the agreement, many of these Central American factories will continue to relocate to China, where U.S. inputs aren't used. So for those concerned about Chinese competition and American textile jobs, CAFTA-DR is the right agreement.[189]

Furthermore, El Salvador's ambassador to the United States Rene Len so much as admitted the economic benefits to U.S. employers when he said, "[w]e're basically lending you our labor to be competitive."[190]

Foreign direct investment in Latin America has decreased as unskilled labor competition from China and other countries has increased.[191] Garment-assembly and other low-tech work is moving from Latin American *maquiladoras* to Asia.[192] Consequently, Latin American governments logically do all they can to attract and maintain American and other foreign direct investment.

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[187] Bonnie Pfister, *Bush Administration Pushes Plan to Lower Hemispheric Trade Barriers Forward*, SAN ANTONIO EXPRESS-NEWS, Apr. 8, 2004.

[188] Amy Martinez, *Central American Trade Agreement Touchy for U.S. Textile Industry*, NEWS & OBSERVER, Apr. 15, 2004.

[189] Rob Portman, *Pass CAFTA: A Good Deal for America*, WASH. TIMES, July 27, 2005, at A17. In his article, Portman does not explain to which "exports" or "inputs" he is referring.

[190] Martinez, *supra* note 188.

[191] Linares, *supra* note 13, at 285. *See also* Gordon H. Hanson & Ann Harrison, *Trade Liberalization and Wage Inequality in Mexico*, 52 INDUS. & LAB. REL. REV. 271, 287 (1999).

[192] Linares, *supra* note 13, at 285.

VI. CONCLUSIONS AND POSSIBLE EFFECTIVE PROVISIONS

Evidently, neither NAALC's nor CAFTA's labor provisions adequately protect women from pregnancy discrimination. The complete exclusion of "employment discrimination" from CAFTA's definition of "labor laws" renders the enforcement mechanisms ineffective. Of prime importance is identification of the barriers to enforcement:

> In some cases, the barrier will be a lack of resources, including the need to upgrade skills of the enforcing agencies and courts. In other cases, it will be a conscious decision not to enforce the laws. These decisions may have several explanations, including the inability to address the financial consequences of better enforcement, the desire to attract investment by promoting the country as light on enforcement, or the intent to benefit the elites of the countries who own the majority of factories and plantations. It is this situation that presents the greatest challenge.[193]

CAFTA advances a three-track strategy "specifically designed to improve labor law enforcement."[194] Track One requires effective enforcement, backed by monetary fines; the USTR briefing explains that "CAFTA's labor provisions *require* that countries not fail to effectively enforce their own labor laws."[195] Track Two seeks to identify specific ways to improve labor enforcement.[196] Track Three seeks to build the capacity to enforce labor laws, citing the current administration's fiscal commitment.[197] As detailed in Part IV.E, the Bush Administration has committed $180 million in environmental and labor capacity-building assistance. The twenty million

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[193] INTERNATIONAL LABOR RIGHTS FUND, WRITTEN TESTIMONY REGARDING THE CENTRAL AMERICAN FREE TRADE AGREEMENT (CAFTA) (2005), *available at* http://www.laborrights.org/publications/CAFTA_testimony.pdf.

[194] OFFICE OF THE U.S. TRADE REPRESENTATIVE, CAFTA'S STRONG PROTECTIONS FOR LABOR RIGHTS: A COMPREHENSIVE STRATEGY (2005), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file652_7187.pdf [hereinafter CAFTA: A COMPREHENSIVE STRATEGY].

[195] *Id.*

[196] *Id.*

[197] *Id.* Track Three presumably includes the International Donor's Conference, as well; however, this USTR policy briefing was drafted prior to the proposal for the Conference.

dollars, dispersed in fiscal year 2005, was earmarked for specific projects, including two million dollars for "[c]racking [d]own on [d]iscrimination against [w]omen in the [m]aquilas."[198]

Track Three seeks to address the first barrier to enforcement—lack of resources, including the need to upgrade skills—by allocating funds for CAFTA member countries to strengthen labor ministries and labor court systems.[199] However, the CAFTA three-track system does not address the second barrier, the conscious decision not to enforce the laws, despite the rhetoric espoused in Track One. By excluding "employment discrimination" from the definition of "labor laws," CAFTA tacitly approves the non-enforcement of employment discrimination laws. Given that "employment discrimination" as an entire body of law is excluded from the definition of "labor laws" that CAFTA member nations must enforce—although domestic laws appear to unequivocally protect pregnant women in the workplace—member nations who fail to enforce these laws will not be subject to sanction. With non-enforcement of post-hire pregnancy protections, it follows logically that women will not be protected from pre-hire pregnancy discrimination.[200] If the United States and CAFTA countries desire to protect women from pregnancy-based sex discrimination, several options are available.

A. Define ILO Core Labor Standards According to the ILO definition

The first step would be to truly define ILO Core Labor Standards in concordance with the actual ILO standards. Once again, the ILO Core Labor Standards include: (1) freedom of association and the right to collective bargaining, (2) elimination of forced and compulsory labor, (3) abolition of child labor, and (4) *elimination of discrimination in the workplace.*[201] As discussed in Part III, ILO Convention No. 111

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[198] The rest of the twenty million dollars was earmarked for (1) modernizing the labor justice system—seven million dollars; (2) strengthening labor ministry inspections—seven million dollars; (3) ILO benchmarking, verification, and monitoring of progress—three million dollars; and (4) supporting the Environmental Cooperation Agreement—one million dollars. CAFTA'S LABOR PROVISIONS: WORLD CLASS, BEST EVER, *supra* note 145.

[199] *See supra* notes 197–199 and accompanying text.

[200] As the experiences of the United States, the European Union, and Mexico have shown, the right to be free from pre-hire pregnancy discrimination is recognized only after the right to be free from post-hire pregnancy discrimination has been enforced. *See supra* notes 42–44, 56–62, 74–82 and accompanying text.

[201] 1998 ILO Declaration, *supra* note 50 (emphasis added).

(Discrimination in Respect of Employment and Occupation) speaks to both discrimination in the workplace and discrimination in the hiring process. The BTPAA, as discussed in Part IV, charges the Executive with "promot[ing] respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in Section 3813(6) of this title)."[202] Section 3813(6) proceeds to define "core labor standards" as (1) the right of association, (2) the right to organize and bargain collectively, (3) a prohibition on the use of any form of forced or compulsory labor, (4) a minimum age for the employment of children, and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[203] Thus, section 3813(6) is not consistent with the ILO, as it omits all reference to nondiscrimination, one of the four Core Labor Standards.

B. Specific Provision Addressing Pregnancy Discrimination

Once the FTA defines ILO Core Labor Standards consistently with the ILO by including nondiscrimination, two options emerge. First, it must be determined whether the member countries of the FTA have already promulgated adequate antidiscrimination laws for women. This determination may be made in one of several ways; for example, it could be made in conjunction with (1) local counsel, (2) an international labor organization or NGO, or (3) academic research. If the countries have adequate antidiscrimination laws for women, perhaps no further action is needed, as countries must enforce their domestic nondiscrimination laws or face sanctions under the FTA. However, if one or several member countries do not have adequate antidiscrimination labor laws, then additional provisions to the FTA would be required.

Assuming that the FTA has adopted the ILO Core Labor Standards to establish minimum standards for labor protection, it may also be necessary to provide more specific requirements for all nations. For example, the European Union's Equal Treatment Directive and Pregnant Workers Directive could serve as a model for antidiscrimination law in the workplace. In terms of protection against pregnancy discrimination, the EU directives are especially comprehensive, as they are accompanied by case law demonstrating that the directives apply to both pre-hire and post-hire discrimination.[204] Furthermore, the EU directives are perhaps more

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[202] 19 U.S.C.A. § 3802(a)(6) (2005).

[203] *Id.* § 3813(6).

[204] *See supra* notes 74–82 and accompanying text.

applicable than analogizing from U.S. laws, as the former were specifically designed for a trade bloc.

C. Must Include an Enforcement Mechanism

Furthermore, FTAs that are serious about improving labor conditions should contain a strong enforcement mechanism. Recent scholarship offers three ideas to improve enforcement mechanisms. The first proposal is to follow the Jordanian FTA model, whereby labor provisions do not have separate enforcement mechanisms, but are resolved under the same mechanism as all other commercial obligations.[205] Since FTAs are primarily sought due to their commercial trading advantages, "parties . . . attach more stringent dispute resolution mechanisms to commercial obligations"[206] than those enforcement mechanisms created solely for resolving labor disputes. Thus, by bringing labor under these more stringent requirements, parties will be more likely to adhere to the labor provisions, as the consequences will be more severe.

Second, FTAs could provide for a private right of action so that parties with an "interest" in the enforcement of labor obligations—such as NGOs—would be able to initiate a dispute resolution process without having to assert political pressure on their governments. Currently, NAFTA and CAFTA provide that, although aggrieved parties may submit their complaints, the government is the only party with standing to commence the dispute resolution process. In particular, providing a private right of action would permit groups like HRW to initiate actions on their own accord. However, for the same reasons, governments likely would be unwilling to grant private parties a right of action, as FTAs implicate both domestic public policy and foreign relations.

A third possibility is for the FTA to maintain the separate dispute resolution mechanisms, similar to the existing NAFTA and CAFTA, "but to either increase the monetary damages cap or eliminate it all together."[207] This option would not allow for private parties to have a right of action. By removing the "cap," or "maximum" penalty, however, it increases potential costs on governments. For example, CAFTA currently imposes a maximum

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[205] Under both NAFTA and CAFTA, labor provisions have their own enforcement mechanisms and dispute resolution processes. *See supra* Parts I and IV.

[206] Martin, *supra* note 1, at 221–22.

[207] *See id.* at 223.

penalty of fifteen million dollars (per year, per violation).[208] The threat of increased fiscal penalties would "remove[] the incentive for a state to maximize its net gain by amassing labor violations valuing more than the damage cap."[209] Country-specific considerations would determine the most beneficial option in particular cases.[210]

D. Corporate Responsibility and Public Image

Free Trade Agreements could provide incentives or rewards to corporations that adopt voluntary self-regulating guidelines and promise to guarantee workers' rights in line with the ILO Core Labor Standards. One example of this approach is the United Nations' Global Compact.[211] The Compact challenges corporations to "embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment, and anti-corruption."[212] Of the ten principles, principles three through six address labor, each reflecting one of the four ILO Core Labor Standards.[213] The Global Compact is a non-binding, purely voluntary agreement. There is no monitoring or

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[208] CAFTA: A COMPREHENSIVE STRATEGY, *supra* note 194.

[209] Martin, *supra* note 1, at 223.

[210] Besides the Jordan FTA, I was unable to ascertain additional examples of national/regional systems utilizing the three options. For a scholarly discussion. *See id.* at 221–24.

[211] U.N. Global Compact, About the Global Compact: The Ten Principles of the Global Compact, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Nov. 10, 2006) [hereinafter G.C. Principles]. The U.N. Global Compact website does not state exactly who drafted the standards. However, the website lists the "Participants and Stakeholders" as several U.N. Agencies (Office of the High Commissioner for Human Rights, International Labour Organization, United Nations Environment Programme, United Nations Office on Drugs & Crime, United Nations Development Programme, and the United Nations Industrial Development Organization), business associations, labor, civil society, and academic participants. U.N. Global Compact, Participants and Stakeholder: U.N. Agencies, www.unglobalcompact.org/ParticipantsAndStakeholders/un_agencies/index.html (last visited Nov. 10, 2006). To search for particular participants, see U.N. Global Compact, Participants and Stakeholder: Participant Search, http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html (last visited Nov. 10, 2006).

[212] G.C. Principles, *supra* note 211.

[213] *Id.* (Principle number 6 seeks "the elimination of discrimination in respect of employment and occupation").

enforcement of the agreement once a company has agreed to embrace the principles; instead, "it is designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships."[214]

Another example of self-regulation is the Workplace Code of Conduct,[215] which includes a provision on nondiscrimination: "No person shall be subject to any discrimination in employment, including hiring, salary, benefits, advancement, discipline, termination, or retirement, on the basis of gender, race, religion, age, disability, sexual orientation, nationality, political opinion, or social or ethnic origin."[216] Furthermore, the Fair Labor Association (FLA), unlike the U.N. Global Compact, conducts "independent monitoring and verification to ensure that the FLA's Workplace Standards are upheld where FLA company products are produced."[217] The purpose of this monitoring is not to sanction member companies, but rather to produce public reports in order to provide consumers and shareholders with the information necessary to make "responsible buying decisions."[218]

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[214] U.N. Global Compact, About the Global Compact: Frequently Asked Questions, http://www.unglobalcompact.org/AboutTheGC/faq.html (last visited Nov. 10, 2006).

[215] Similar to the U.N. Global Compact, the Workplace Code of Conduct website does not specifically identify the drafters. However, the Fair Labor Association states that its organization

> represents a multi-stakeholder coalition of companies, universities and NGOs. There are currently 20 leading brand-name companies participating in the FLA. These are adidas-AG, Asics, Eddie Bauer, Drew Pearson Marketing, GEAR for Sports, Gildan Activewear, Liz Claiborne, Mountain Equipment Co-op (MEC), New Era Cap, Nordstrom, Nike, Outdoor Cap, Patagonia, Phillips-Van Heusen, PUMA, Reebok, Top of the World, Twins Enterprise, and Zephyr Graf-X.

Fair Labor Association, About Us, http://www.fairlabor.org/all/about/ (last visited Nov. 9, 2006).

[216] Fair Labor Association, Workplace Code of Conduct, http://www.fairlabor.org/all/code (last visited Nov. 9, 2006).

[217] Fair Labor Association, Welcome, http://www.fairlabor.org/index.html (last visited Nov. 9, 2006). This website also provides details on the monitoring process and accreditation procedures.

[218] *Id.*

This proposal could be particularly effective, as a purely economic assessment may reveal that public image does have dollar value for many countries.[219] Foreign investors in the Dominican Republic and Central America have a heightened obligation to women employees, as the *maquiladora* and assembly-type industries established in these countries specifically target and recruit large numbers of women. Protests, campaigns, and exposés have increasingly pressured companies to improve their labor standards regarding child labor and mistreatment abroad.[220] For example, in recent years the media has targeted Reebok and Levi-Strauss as companies that permit low labor standards. As a result, both companies changed their employment practices, since they depend on their public image for sales.[221] Given the mounting public pressures, even in the absence of tax breaks and other rewards, companies may find it cost-effective to fashion their own internal standards and take a proactive approach to labor standards.[222]

VII. FINAL REMARKS

With women comprising an increasingly equal share of the job market, a provision with adequate protections against discrimination is imperative. Pregnancy discrimination is a form of discrimination unique to women. The path to equality in the workplace for women cannot proceed without adequate protection for women's employment during pregnancy. This point has been acknowledged and accepted in countries like the United States, under the PDA and subsequent case law, and has been incorporated into regional trade blocs like the European Union. This demonstrates that it is feasible to include and enforce antidiscrimination measures specific to protection against pregnancy discrimination. Furthermore, the United States is capable and poised to influence and enhance standards of labor with our trading partners. Trade agreements have become inextricably connected to

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[219] *See* Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 674 (1995) (arguing that an increased probability of negative exposure leads to changes in corporate behaviors).

[220] *See id.* at 674–84 (noting the impact of the pressure on companies associated with the use of child labor or the mistreatment of its workers).

[221] *See id.* at 677 (referring to "an embarrassing media expose [sic] of abusive labor conditions in factories in Saipan . . . that supplied Levi-Strauss").

[222] *See id.* at 674–84 (stating that "[m]any companies have chosen a pro-active route and have begun to fashion their own . . . codes of conduct for human and labor rights").

labor agreements within the last two decades. Promoting fundamental labor rights through trade agreements ensures that workers of the signatory countries will not only benefit from increased FDI and new jobs, but will also begin to enjoy the most basic workplace standards.

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The *Columbia Journal of Gender and Law* (*JGL*) is an interdisciplinary journal created to address the interplay between gender and law and its effects at the personal, community, national, and international levels. Our articles express an expansive view of feminism and of feminist jurisprudence, embracing issues related to women and men of all races, ethnicities, classes, sexual orientations, and cultures. *JGL* also embraces articles about law from other academic disciplines in order to show the connections between law and fields such as psychology, history, religion, political science, literature, and sociology.

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