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# The NAFTA(ization) of Sexual Harassment: The Experience of Canada, Mexico, and the United States

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## *The Experience of Canada, Mexico, and the United States*

*by Renee G. Scherlen and Ruth Ann Strickland*

## I. Cross-National Differences and "Doing Business"

As international markets become increasingly more interdependent due to regional and international economic agreements, labor practices will also become more homogeneous cross-nationally. In the United States, for example, the number of U.S. female workers residing in another country has more than doubled from six percent in 1990 to twelve percent in 1995.[1] It is estimated by Windham International, which conducted a survey on female expatriates, that the number of women expatriate workers will reach 20 percent (of all U.S. expatriates) by the year 2000.[2] The National Foreign Trade Council also estimates that approximately 225,000 Americans worked abroad in 1995, up from 125,000 in 1993.[3] As businesses try to address sexual harassment issues in their domestic workforce, they must also be more conscious of working overseas with employees, customers and vendors of many different nationalities.[4]

Mitsubishi Motor Manufacturing of American Inc. has learned this lesson the hard way. On April 9, 1996, the Equal Employment Opportunity Commission (EEOC) charged that female employees at the Japanese-owned Normal, Illinois automobile factory were subject to groping, sexual graffiti and abusive comments.[5] Management not only failed to address complaints but actually retaliated against the women who levied charges.[6] The EEOC broadened the suit to include not only charges filed in earlier private suits, but all female employees, past and present, who may have been harassed.[7] It estimated that as many as 700 women may have been affected by the alleged instances of harassment.

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1. *Globe Hoppin' Women Executives Increase Within Expatriate Ranks*, WALL ST. J., Sept. 5, 1995, at A1.
2. *Id.*
3. *Id.*
4. Wendy Hardman and Jacqueline Heidelberg. "When Sexual Harassment Is A Foreign Affair," 75 PERSONNEL J. 91 (1996).
5. *See* Leon Jaroff, *Assembly Line Sexism?*, TIME, May 6, 1996, at 56-58; Robyn Meredith, *Few at Mitsubishi Are Silent Over Accusation*, NEW YORK TIMES, Apr. 26, 1996, at A20; Andrew Pollack, *Mitsubishi Wants Settlement of U.S. Sexual Harassment Suit*, NEW YORK TIMES, Apr. 25, 1996, at D1, D8; and Peter Elstrom and Edith Hill, *Fear and Loathing at Mitsubishi*, BUSINESS WEEK, May 6, 1996, at 35.
6. *Id.*
7. *Id.*

Although almost all the allegations are directed at American nationals who worked in the plant, the suit charges Mitsubishi's Japanese managers with complacency and complicity.[8] Mitsubishi, facing the largest sexual harassment punitive damage award payout ever in U.S. history, seeks to settle the cases quietly.[9] Since few women are in management in Japanese home companies, management sensitivity to female workers in their host countries is very low.

As a result of NAFTA, transnational workers' networks (TWNs) have formed such as Mujer a Mujer (Woman to Woman) and Mujeres en Accion Sindical (Women in Union Action). Women in the U.S., Canada and Mexico are communicating their concerns about capital mobility, transfer (or loss of) jobs from one country to another and women's concerns about economic integration.[10] Interdependency, fostered by NAFTA, will ultimately yield numerous exchanges of experiences and mobilization of large numbers of people.

Under NAFTA, sexual harassment in the transnational workforce is an issue that will require considerable attention as indicated in a recent survey.[11] Hardman and Heidelberg surveyed U.S. companies, trying to ascertain their experiences in dealing with sexual harassment cross-nationally. A key question asked by them was: "What have you encountered as far as sexual harassment incidents that occurred between people of two different cultures, whether they were employees, customers, vendors or clients?"[12] The authors encountered some difficulties in obtaining information due to the sensitivity of multinational executives to their organizational image and liability concerns. Many corporate representatives either denied that the problem exists or they simply failed to keep systematic records of reported events. Nonetheless given different cross-cultural understandings about what is acceptable or unacceptable in business and labor practices; transnational businesses increasingly cite the need for cross-cultural training of employees. Differences in managerial style, decisionmaking processes, staffing procedures, contract negotiations, stress placed on teamwork, work ethic and gender roles are often cited as reasons for cross-cultural training.[13]

Certain issues must be addressed *vis-a-vis* sexual harassment and the cross-national workforce. One such issue is whether sexual harassment should be defined by home country or host country standards. Since values about women's rights vary from culture to culture, there may be barriers to full participation of women in some cross-national business ventures. Particularly, representatives from "macho" cultures may find it difficult to interact with female managers on a professional level. For example in 1991, *IABC*

8. *Id.*
9. *Id.*
10. Thalia Kidder and Mary McGinn, *In the Wake of NAFTA: Transnational Workers Networks, 25* SOC. POL'Y 14 (1995); Margorie Griffin, *Macho Economics: Canadian Women Confront Free Trade,* 202 DOLLARS AND SENSE 18 (1995).
11. Hardman and Heidelberg, *supra* note 4, at 92.
12. *Id.*
13. Gregory S. Stephens and Charles R. Greer, *Doing Business in Mexico: Understanding Cultural Differences,* 24 ORGANIZATIONAL DYNAMICS 39 (1995). For instance, Dupont, in order to diminish instances of sexual harassment across cultures, reports that 90 percent of its employees receive sexual harassment training, including international employees on assignment in the U.S. Still most sexual harassment training is content specific to U.S. laws and customs, not to the international host country of expatriate employees. Hardman and Heidlberhg, *supra* note 4, at 92.

*Communication World* reported that in Mexico, "sexual harassment has been recognized as a problem, but is accepted in our [Mexico's] culture where many men consider themselves superior over women."[14]

Another issue of concern is: if sexual discrimination is widespread in a culture, should it simply be ignored when it occurs? How far should corporations carry the principle of cultural relativism? Should some "universal ethics" in the conduct of business be upheld? Of those who responded to the Hardman and Heidelberg survey, many noted that instances of sexual harassment that were reported were often caused by lack of understanding of cultural differences and usually weren't vicious in intent.[15] On the other hand, a culture that is totally resistant to treating women as equals may use cultural misunderstanding as an excuse not to change.

Finally, the laws of trading partners may or may not support U.S. companies' internal policies banning sexual harassment. For example, Section 109 of Title VII of the Civil Rights Act specifically holds that American companies operating abroad can be liable for discrimination that happens there and also states the circumstances under which foreign employers can be held liable for discrimination in the U.S.[16] Yet even section 109 doesn't explicitly cover sexual harassment, although sexual harassment is part of Title VII. Most countries have no laws banning sexual harassment in the workplace.[17] For cooperation on this policy area, the legal environments of host country trading partners are extremely important.

In cross-cultural settings, as in domestic work environments, the costs of sexual harassment can be quite high, taking the form of high absenteeism, job turnover, physiological stress-related outcomes, workplace conflict, job dissatisfaction, low productivity and so on. The exact costs to employers are hard to quantify.[18] A 1988 study of 160 major companies in the U.S. found that on average sexual harassment cost them $6.7 million a year in absenteeism, employee turnover and low productivity.[19] Other costs that may be imposed on companies are punitive and compensatory damage awards allocated to victims of sexual harassment as well as a tarnished public image. Awards in the U.S. of $100,000 or more are not unusual whereas in other countries, awards tend to be substantially less. Legal fees and loss of management time devoted to investigation and remediation of sexual harassment claims are another cost and can impose great burdens on employers. From a cross-national perspective, expatriate employees tend to be valuable, expensive and hard to replace. Due to their high-level nature, when one is lost due to a sexual harassment incident, the loss is a costly one.[20]

This paper compares the responses of Canada, Mexico and the United States to sexual

14. Hardman and Heidelberg, *supra* note 4, at 96.
15. *Id.* at 97.
16. *Id.*
17. *Id.* at 96,97.
18. Audrey J. Murrell et al, *Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers*, 51 J. OF SOC. ISSUES 139 (1995).
19. Robert Husbands, *Sexual Harassment Law in Employment: An International Perspective*, 131 INT'L LABOUR R. 535 (1992).
20. Susan Crawford, *Economic Impact of Sexual Harassment in the Workplace*, U.S.A. TODAY, Mar., 1995, at 35, 36; Husbands, *supra* note 19, at 540.

harassment. Very little cross-cultural comparison among these countries within this policy area exists in the literature. Most studies focus on one nation's reaction to sexual harassment. Additionally, this paper will hopefully fill a gap by comparing how sexual harassment reached the institutional agenda in Canada, Mexico and the United States and also by describing and explaining the socio-cultural, legal and political responses of each nation to sexual harassment. The expected effects of NAFTA on sexual harassment policy in these countries are also examined.

## II. Sexual Harassment in the United States

With the influx of women into the workforce, particularly in the 1970s, and the accompanying demands for equal pay, equal treatment as well as political equality, the issues of sex discrimination and sexual harassment were catapulted into the public eye. Those who had long dominated the political and economic power structure may have felt threatened by these demands and consequently used discrimination and harassment to remind women of their place in society. The women's movement in the U.S. pioneered debates about a range of issues and sexual harassment became one of many heated topics of discussion.

### A. Scope of Sexual Harassment in U.S. Workplaces

Generally, sexual harassment has been present in the workplace since women entered the workforce.[21] Typically, women are the targets of sexual harassment but men have also been subjected to it. A survey of the literature suggests that sexual harassment affects 42 percent of women and 15 percent of men in occupational settings; women, however, are much more likely than men to file a complaint.[22] In the fourteen years since the U.S. Equal Employment Opportunity Commissions (EEOC) first issued guidelines attempting to delineate two broad categories of forbidden behavior—quid pro quo harassment and creation of a hostile work environment—surveys have documented the pervasive nature of sexual harassment in the public[23] as well as the private sectors.[24]

21. Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 Am. Psychologist 1070-1076 (1993).
22. Dara A. Charney and Ruth C. Russell, *An Overview of Sexual Harassment*, 151 Am. J. of Psychiatry 10 (1994).
23. U.S. Merit Systems Board, Sexual Harassment in the Federal Government: An Update, U.S. G.P.O. (1988); Robert C. Ford and Frank McLaughlin, *Sexual Harassment at Work: What is the Problem?*, 20 Akron Bus. and Econ. Rev. 79 (1989); Sylvia Kenig and John Ryan, *Sex Differences in Levels of Tolerance and Attribution of Blame for Sexual Harassment on a University Campus*, 15 Sex Roles 535 (1986).
24. *See* L.M. Asta, *Halting Harassment*, 44 The New Physician 30-33, 37,38. (1995); Janice Goodman, *Sexual Harassment Laws Face Law Enforcement*, 15 Nat'l. L.J. 17 (1993). Donald Bacon, *See You in Court*, 77 Nation's Bus. 17-18 (1989); Ellen H. Wagner, Sexual Harassment in the Workplace: How to Prevent, Investigate, and Resolve Problems in Your Organization (1992); Barbara A. Gutek, Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organization (1985); Lynne Eisaguirre, Sexual Harassment: A Reference Handbook (1993); Ruth Ann Strickland, *Sexual Harassment: A Legal Perspective for Public Administrators*, 24 Pub. Personnel Mgmt 493 (1995).

B. TRIGGERING EVENTS: HOW SEXUAL HARASSMENT REACHES INSITUTIONAL CONSIDERATIONS IN THE U.S.

During the 1960s, the women's movement introduced the term sexual harassment into the popular lexicon. As a consequence of the women's movement, large numbers of women began entering the workforce. The sexual revolution, taking place in close proximity with the women's movement, made sexuality a subject of open and frank discussion. These two forces--the sexual revolution and the women's movement--combined to irreversibly change workplace settings in the U.S. Women moved out of traditional roles and entered into male-dominated professions. Some men, feeling that their economic and social dominance was threatened, reacted negatively to women in the workforce by engaging in discrimination and harassment. Sexual harassment became a form of discrimination used to "keep women in their place."[25]

Decisions on case filings with the U.S. Supreme Court, such as the *Vinson*[26] and *Harris*[27] cases, were ground breaking events—establishing much needed policy guidelines. Other court cases have further defined what sexual harassment is, what forms it may take and the penalties that will be levied for engaging in unacceptable behavior.

Besides case filings, the Clarence Thomas Supreme Court nomination heightened awareness about sexual harassment not only in the U.S. but around the world. After National Public Radio publicly disclosed that Anita F. Hill, a law professor at the University of Oklahoma, had submitted a confidential affidavit to the U.S. Senate Judiciary Committee, charging that her former supervisor and then U.S. Supreme Court nominee Clarence Thomas had sexually harassed her from 1981 to 1983, special hearings were held to verify the charges against Judge Thomas. Although Thomas was confirmed by the Senate and the charges were vehemently denied, a nationwide debate ensued about sexual harassment—how to define it, prevent it and limit liability.[28] The Clarence Thomas-Anita Hill hearings raised awareness of the issues surrounding sexual harassment and were also followed by a dramatic (127 percent) rise in sexual harassment filings with the EEOC between 1991 and 1993.[29]

Soon various scandals emerged surrounding sexual harassment such as the Tailhook scandal—resulting in the resignation of the Secretary of the Navy. Even the President was not immune to accusations as Paula Jones claimed Bill Clinton, as governor of Arkansas, had made a lewd suggestion to her in a hotel room.[30] The careers of prominent political figures, such as Senator Brock Adams (D-WA) and Senator Bob Packwood (R-OR), were demolished by charges of sexual harassment. Senator Adams ended his bid for re-election in October 1992. Ten women stepped forward in November 1992 to charge Senator Packwood with sexual harassment acts allegedly occurring between 1969 and 1980. When Senator Bob Packwood was found guilty of sexual harassment by the Ethics Committee

25. Thomas Li-Ping Tang and Stacie Leigh McCollum, *Sexual Harassment in the Workplace*, 25 PUB. PERSONNEL MGMT 53 (1996).
26. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
27. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).
28. CONSTANCE JONES, LIBRARY IN A BOOK: SEXUAL HARASSMENT (1996).
29. Strickland, *supra* note 24.
30. Jennifer J. Laabs, *He Puts Its Questions On the Line: Sexual Harassment*, 74 PERSONNEL J. 36 (1995).

and censored for years of salacious conduct toward women in the workforce, the issue of sexual harassment truly had reached center court.[31]

C. THE LEGAL AND POLITICAL RESPONSE TO SEXUAL HARASSMENT IN THE U.S.

The Equal Employment Opportunity Commission (EEOC) was created in 1972 and following some highly publicized sexual harassment cases, it issued a set of guidelines in 1980 (and updated them in 1990) on what sexual harassment is. The EEOC is the federal agency that administers Title VII of the Civil Rights Act which prohibits discrimination on the basis of sex. Within 180 days of a sexual harassment incident, victims may file a written complaint with a local EEOC branch office, which states often refer to as human rights commissions. Once they file with the EEOC, they are protected from retaliation. The EEOC investigates such complaints and negotiates settlements but if negotiations fail, it has the power to file suit. The Civil Rights Act provides for five kinds of relief: reinstatement and promotion, back pay and benefits, monetary damages, injunctive relief and attorney's fees.32

After the passage of the Civil Rights Act and the creation of the EEOC, *Barnes v. Train*[33] was filed where a plaintiff claimed she was fired because she refused to have an "after hours" affair with her supervisor, and awareness about sexual harassment in the U.S. began to spread. Although the plaintiff lost in 1974, she prevailed on appeal in 1977 when the U.S. Court of Appeals for the District of Columbia held that a woman forced to have sex to keep her job was victimized merely for being a woman and that this was a form of discrimination.[34]

With this case plus the Equal Employment Opportunity guidelines issued in 1980, Michelle Vinson, a bank employee, was able to prevail in 1986. Vinson, who admitted to having sexual intercourse with the bank vice president and supervisor, Sidney Taylor, on an estimated 40 to 50 occasions, had earlier rebuffed her supervisor's advances. She argued that she finally gave in to the advances because she feared losing her job. Taylor categorically denied all allegations. Eventually Vinson was fired ostensibly for excessive use of the sick leave policy. This case brought forth a landmark ruling from the U.S. Supreme Court which held that sexual harassment under Title VII of the 1964 Civil Rights Act included the creation of a hostile work environment as well as direct harm.[35] The Court also ruled that the mere existence of a grievance policy against sexual harassment did not totally protect an employer from liability, even if the victim chose not to invoke the procedure. According to the Court, it was not relevant whether a victim voluntarily submitted to advances or submitted under duress as long as sexual advances were shown to be unwelcome.[36]

31. Jones, *supra* note 28.
32. Eisaguirre, *supra* note 24; Jones, supra note 28.
33. Barnes v. Train, Civ No. 1828-73 (D.D.C. order of Aug. 9, 1974).
34. William L Woerner and Sharon L. Oswald, *Sexual Harassment in the Workplace: A View Through the Eyes of the Courts*, 1 LAB. LAW J. 786 (1990).
35. *See generally* TITUS E. AARON & JUDITH A. ISAKSEN, SEXUAL HARASSMENT IN THE WORKPLACE: A GUIDE TO THE LAW AND A RESEARCH OVERVIEW FOR EMPLOYERS AND EMPLOYEES (1993)
36. Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 NORTH CAROLINA LAW REV. 499 (1994); *See also generally*, AARON AND ISAKSEN, *supra* note 35; ELIZABETH GRAUERHOLZ AND MARY A. KORALEWSKI, SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION 31 (1991).

The latest most sensational sexual harassment case heard before the U.S. Supreme Court was filed by Teresa Harris. Claiming her employer had made insulting and lewd remarks about her physical appearance in the workplace for years, Harris, a manager at Forklift systems, complained to Hardy, her employer, about his conduct. He apologized to her and told her he would stop making the degrading comments. A lower court ruled against her, claiming she had to document that her employer's actions caused severe psychological harm. On appeal to the U.S. Supreme Court in 1993, the justices in a 9-0 vote held in *Harris v. Forklift Systems, Inc.*[37] that a woman who claims to be injured by sexual harassment in the workplace does not have to prove severe psychological injury; rather, if the reasonable person finds the workplace inundated with sexual impropriety to the point that it interferes with job performance, then a hostile work environment has been created. Writing for the Court, Justice Sandra Day O'Connor argued that the federal law protected victims "before the harassing conduct leads to a nervous breakdown."[38]

The legal and political response to sexual harassment has not only occurred at the federal level but in all fifty states. Despite the EEOC's dominant presence, legal definitions of sexual harassment still vary from state to state. States must use EEOC definitions and guidelines as minimum baseline protections but states may give greater protection if they wish. As of 1994, at least 40 states had laws against sex discrimination in the workplace.[39] Many either included sexual harassment implicitly or outlawed it directly. Some states require employers to establish anti-harassment policies and training. Other states have extended this to school systems. State tort statutes, which cover intentional and outrageous action resulting in harm, may be used to collect damages in civil court for sexual harassment. Criminal prosecution of sexual harassers who assault, rape or blackmail victims is rare.[40] Both the public and private sector have taken all kinds of steps to prevent and remedy sexual harassment in the U.S.

## III. Sexual Harassment in Canada

Like the U.S., the plaintiffs who first alleged sexual harassment in the Canadian workplace were also unsuccessful. Many of the same issues arose in both countries including: (1) whether sexual harassment constituted sex discrimination; (2) how to define sexual harassment; (3) whether an employer was liable for sexual harassment by its employees toward other employees; and (4) whether the plaintiff had to demonstrate tangible losses or harm in a sexual harassment claim.[41]

37. Harris v. Forklift Systems, Inc., 510 U.S. at 17.
38. *Id.*; See also, Robert D. Lee, Jr. and Paul S. Greenlaw, *The Legal Evolution of Sexual Harassment, Sexual Harassment in the Workplace*, 55 PUB ADMIN. REV. 357 (1995); David O. Stewart, *Sex, Lies and the Workplace*, 80 AM. BAR ASS'N J. 44 (1994); Kara Swisher, *Corporations Are Seeing the Light on Harassment: All It Took Was a Little Pat on the Bottom Line*, WASHINGTON POST NAT'L WEEKLY, Feb. 14, 1994, at 21; Anne B. Fisher, *Sexual Harassment: What to Do*, FORTUNE, Aug. 23, 1993, at 84-6, 88.
39. Jones, *supra* note 28.
40. *Id.*
41. Shirish P. Chotalia, *Sexual Harassment Laws in Canada—It's All a Question of Power*, 3 J. OF INDIVIDUAL EMPLOYMENT RIGHTS 155 (1994).

The Canadian Human Rights Commission in 1983 very specifically defines sexual harassment[42] and the Canada Labour Code explicitly forbids "any conduct, comment, gesture or contact of a sexual natures (a) that is likely to cause offense or humiliation to any employee; or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion."[43] The Canada Labour Code further requires every employer in the federal jurisdiction to establish preventive policy statements on sexual harassment and to provide for remediation for victims of sexual harassment.[44]

A. SCOPE OF SEXUAL HARASSMENT IN CANADA'S WORKPLACES.

Little was known about sexual harassment in Canada prior to the 1980s. In the 1970s, about one-third of the Canadian workforce consisted of women but in the 1990s, women make up approximately half of the labor force.[45] Surveys conducted from 1980 until the present have highlighted the need to address the problem of sexual harassment in the Canadian workplace. One of the first polls conducted among women union members in 1980 found that 90 percent of respondents claimed to have experienced sexual harassment and over half saw incidents happening to others.[46] The sexual harassment problem persists as indicated by a 1991 survey which found that 37 percent of women and 10 percent of men believed they had suffered some form of sexual harassment.[47] Another 1991 poll of lawyers and a 1993 survey of selected police departments in Canada found that most female respondents claimed they had experienced some kind of sexual discrimination.[48]

A controversial study conducted by Statistics Canada, often called StatsCan, was released in 1993 and it held that 23 percent of Canadian women (or 2.4 million) had encountered some work-related sexual harassment; 87 percent experienced a sexual harassment incident that was memorable enough to report in the survey, with the most common types of harassment being obscene telephone calls and street harassment which were not workplace-related. Young and unmarried women were found to be most vulnerable. Reaction to the study was sometimes virulent. Because it was part of a larger study of violence against women, StatsCan's Violence Against Women Survey ("VAWS") was criticized vituperatively as methodologically flawed in the wording of the questions asked and

42. The guidelines of the Canada Human Rights Commission describe sexual harassment as:
    1. verbal abuse or threats;
    2. unwelcome remarks, jokes, innuendoes or taunting;
    3. displaying pornographic or otherwise offensive or derogatory pictures;
    4. practical jokes which cause awkwardness or embarrassment;
    5. unwelcome invitations or requests, whether indirect or explicit, or intimidation;
    6. leering or other gestures;
    7. unnecessary physical contact such as touching, patting, pinching, punching; or
    8. physical assault.
43. ARJUN P. AGGARWAL, SEXUAL HARASSMENT IN THE WORKPLACE 10 (2d ed.1992).
44. *Id.* at 10.
45. Michael Crawford, *The New Office Etiquette*, CANADIAN BUS., May 1, 1993.
46. Aggarwal, *supra* note 43, at 4, 5.
47. *Id.* at 5, 6.
48. *Id.* at 5, 6; *See* Rae Corelli, *Aiming for Respect*, 108 MACLEAN'S 46-48 (1995).

the loose way sexual harassment was defined.[49] The survey sparked debate over whether the agency was trying to advance a "politically correct" agenda. Billed as an "once-irreproachable" agency and as an accurate fact-gatherer as well as impartial, questions of credibility arose as a result of VAWS.[50]

The pervasiveness of sexual harassment has been documented in the legal profession, in businesses and banks, in universities, in groceries and construction work.[51] Like the U.S., the sheer scope of the problem has triggered a political and legal response.

### B. TRIGGERING EVENTS: HOW SEXUAL HARASSMENT REACHES INSTITUTIONAL CONSIDERATION IN CANADA.

A 1970 *Report of the Royal Commission on the Status of Women* revealed that women in Canada were poorer than men due to unequal treatment under the law.[53] Access to jobs and equal pay for equal work were denied; unfair tax and property laws as well as inadequate public child care exacerbated the inequality problem. Recommendations of the Royal Commission on the Status of Women, issued in 1970, indicated that women had been neglected and discriminated against in a variety of areas. Many of the recommendations such as elimination of sex discrimination in employment, allowance for maternity leave, equal pay for equal work, and avoidance of sex-typing of occupations were implemented or partially implemented by 1990.[53.5]

This report, along with others, gave women's groups the information they needed to heighten awareness about the consequences of discrimination and provided the impetus to push for change. Under pressure from the National Action Committee on the Status of Women "NAC" and other women's organizations, work began at the federal level to reduce or end overt sexism in federal legislation.[54] By legitimizing women's goals, mobilizing women at the grassroots level and putting "women's issues" on the public agenda particularly in English-Canada, NAC has been judged as a success. Unlike the setback in the U.S. when the Equal Rights Amendment was not ratified, Canadian women got their Charter in

49. Shafer Parker, Jr., *Gender-Sensitive Statscan Strikes*, ALBERTA REPORT/WESTERN REPORT, Sept. 1, 1995; Kren Johnson, *Canada's Survey on Violence Against Women*, WOMEN'S INT'L NETWORK NEWS, June 1, 1994; Holly Johnson & Vincent F. Sacco, *Researching Violence Against Women: Statistics Canada's National Survey*, CANADIAN J. OF CRIMINOLOGY, July, 1995, at 282-304.

50. *Id.*

51. FROM AWARENESS TO ACTION (Linda Geller-Schwartz ed., 1994).

53. *See generally* DAWN BLACK, 20 YEARS LATER: AN ASSESSMENT OF THE IMPLEMENTATION OF THE RECOMMENDATION OF THE ROYAL COMMISSION OF THE STATUS OF WOMEN (1990).

53.5. *Id.*

54. JAMES EL BENNETT & PIERRE M. LOEWE, WOMEN IN BUSINESS: A SHOCKING WASTER OF HUMAN RESOURCES (1975); Lorna R. Marsden, *The Role of the National Action Committee on the Status of Women in Facilitation Equal Pay Policy in Canada, in* EQUAL EMPLOYMENT POLICY FOR WOMEN: STRATEGIES FOR IMPLEMENTATION IN THE UNITED STATES, CANADA, AND WESTERN EUROPE 242 (Ronnies Steinberg Ratner ed, 1980); Marjorie Griffin Cohen, *The Canadian Women's Movement and Its Efforts to Influence the Canadian Economy, in* CHALLENGING TIMES: THE WOMEN'S MOVEMENT IN CANADA AND THE UNITED STATES 215 (Constance Backhouse & David H. Flaherty eds., 1992); JILL VICKERS ET AL., POLITICS AS IF WOMEN MATTERED: A POLITICAL ANALYSIS OF THE NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN (1993).

the Canadian Charter of Rights and Freedoms in April 1982.[56] Canadian feminists were aided by a parliamentary system, widespread acceptance of demands for group rights and a federal government desiring a new constitution. By re-structuring public discourse over issues such as rape, wife battering, prostitution, child abuse, day care and so on, the upcoming debate on sexual harassment seemed to be a natural progression.[56.5]

Until 1978, the term sexual harassment was not in use in Canada and was referred to more often as sexual misconduct or sexual advances. Since 1980, however, changes have occurred in the way Canadians think about and handle sexual harassment. Once considered just a part of the job, sexual harassment is now seen as unacceptable. The infusion of larger numbers of women into the labor force was one contributory factor leading to a change in law and attitudes. As concern for women's rights in general rose, so did concern about their treatment in the workplace.[57] This concern combined with the surveys and studies of the numerous incidences of sexual harassment in the workplace captured the attention of various government agencies, Boards of Inquiry, Human Rights Tribunals and the courts.

The universities in Canada have also served as a forum for a particularly vitriolic debate about sexual harassment. In Canada's universities, the "chilly climate" literature since about 1985 suggests that sexual harassment and marginalization of women is quite prominent.[58] Issues involving gender equity combined with allegations of sexist remarks and sexual harassment have sparked lively debates on university campuses and school boards.[59]

C. THE LEGAL AND POLITICAL RESPONSE TO SEXUAL HARASSMENT IN CANADA.

Because it is a confederation of ten provinces and two territories, numerous definitions of sexual harassment exist in Canada. Like the federal and state governments in the U.S., both federal and provincial governments in Canada have formulated their own definitions and policies toward sexual harassment. The power to pass laws, therefore, is divided between the federal government which has jurisdiction over national matters and the provinces and territories which have more control over local concerns. As of 1994, eight of Canada's jurisdictions expressly forbid sexual harassment.[60] The province of Saskatchewan established a two-person sexual harassment unit in 1994 to work with

56. Melissa H.Haussman, *The Personal Is Constitutional: Feminist Struggles for Equality Rights in the United States and Canada, in* WOMEN TRANSFORMING POLITICS: WORLDWIDE STRATEGIES FOR EMPOWERMENT 108 (Jill M. Bystydzienski, ed. 1992); Sylvia Bashevkin, *Building a Political Voice: Women's Participation and Policy Influence in Canada, in* WOMEN AND POLITICS WORLDWIDE 142 (Barbara J. Nelson and Najma Chowdhury eds.,1994).

56.5. Haussman, *supra* note 56.

57. S.J. WILSON, WOMEN, FAMILIES, AND WORK (1991); AGGARWAL, *supra* note 28.

58. Rachel L. Osborne, *The Continuum of Violence Against Women in Canadian Universities: Toward a New Understnding of the Chilly Campus Climate,* 18 WOMEN'S STUDIES INT'L FORUM 637 (1995)

59. Misao Dean, *Shock Troops on Campus,* 74 CANADIAN FORUM 14 (1995); Margaret Dohan, *Sexual Harassment Policy: A Comparative Analysis of Selected School Board Policies,* 35 EDUCATION CANADA 40; Heinz-Joachim Klatt, *Regulating Harassment in Ontario,* ACADEMIC QUESTIONS, June 1, 1995.

60. Federal, Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Yukon Territory.

employers and employees in businesses and unions to help change workplace policies and practices regarding sexual harassment. British Columbia, under the 1993 Ombudsman Act, made it an offense to discriminate against anyone who files a sexual harassment complaint or who gives evidence or assists the Ombudsman in an investigation.[61]

In Canada, the federal government may pass laws in areas affecting the following industries: banks, railroads, telecommunications and nuclear power. Those working in these industries are protected by the federal Canadian Human Rights Act. The remaining employees are covered by human rights laws passed by provinces and territories where human rights offices exist to process complaints. Examples of local variations in the definition of sexual harassment abound.[62] For instance, the Newfoundland Human Rights Code defines sexual harassment as a "course of vexatious comments or conduct that is known or ought reasonably to be known to be unwelcome."[63] Another definition, put forward by the Manitoba Human Rights Commission, states that sexual harassment is abusive or unwelcome conduct aimed at individuals because of the group to which they belong or appear to belong.[64] More specifically, the Alberta Human Rights Commission and Ontario Human Rights Code similarly state that sexual harassment occurs when someone in a position of authority threatens or seeks reprisal against another when an unwanted sexual solicitation or an unwelcome sexual advance is rejected. The British Columbia Human Rights Commission broadens the application of sexual harassment law to include harassment related to "sexually related interaction while applying for work, during work or after work."[65]

At the federal level, the Canadian Human Rights Commission includes the "display of pornographic materials or derogatory pictures" and/or "condescension or paternalism which undermine self-respect" in its definition.[66] Furthermore, the Canadian Labour Code defines sexual harassment as stated earlier to include any conduct that causes offense or humiliation or might be reasonably perceived as putting sexual conditions on employment, opportunity for training or promotion.[67]

The 1980 *Cherie Bell* case established precedent for a legal response to sexual harassment in the workplace.[68] This case, heard before the Ontario Board of Inquiry, involved complainants who claimed they were fired because they refused their employer's sexual advances. Although the Board found that the facts of this case did not make the employer guilty of sexual harassment, they still held that sexual harassment fell within the general prohibition against sex discrimination in the workplace.[69] Since 1980, the federal, provin-

61. HUMAN RIGHTS DIRECTORATE DEPARTMENT OF CANADIAN HERITAGE, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: FOURTH REPORT OF CANADA. (Minister of Supply and Services ed., 1995).
62. *See generally* LAUREN BATES, HARASSMENT IN THE WORKPLACE (1994).
63. *Id.* at 6-7.
64. *Id.*
65. AGGARWAL, *supra* note 43.
66. *Id.* at 9.
67. Margaret Dohan, *Sexual Harassment Policy: A Comparitve Analsis of Selected School Board Policies*, 35 EDU. CANADA 40-53 (1995).
68. *Cherie Bell*, Ontario Board of Inquiry (1980).
69. AGGARWAL, *supra* note 43, at 33-34.

cial, and territorial boards and tribunals have been saturated with sexual harassment claims.

Alice Clark's sexual harassment lawsuit in 1987 was a landmark case for women police officers.[70] After joining the Mounties in 1980, she later listed 26 incidents of sexual harassment and intimidation by male officers during a five-year period which included verbal and physical abuse. After telling the Federal Court of Canada that she had been grabbed, propositioned, and publicly embarrassed by humiliating pranks, she was awarded $93,000 in damages—a very large award by Canadian standards. In response to her lawsuit, the police stations across the nation began formulating and enforcing anti-harassment policies.[71]

In *Janzen v. Platy Enterprises Ltd.*, Canada's Supreme Court recognized sexual harassment as a form of sex discrimination.[72, 73] Since this case, the Canadian Supreme Court, like the U.S. Supreme Court, broadly defined sexual harassment and even quoted *Meritor Savings Bank v. Vinson*[74] in its *Janzen* decision[75] Later, in 1990, a precedent-setting decision was issued by Ontario's Workers' Compensation Board involving a 44-year old black woman who was harassed by male co-workers for six years during the 1980s. The woman worked at Colgate-Palmolive Canada in the packing line and in court claimed that racist and sexist remarks were frequent and that in one incident, she was given a piece of soap carved in the form of a penis. Although she complained to her union and to management, little was done to change the environment and she later suffered a nervous breakdown. Colgate Palmolive Canada was ordered to pay her an undisclosed amount to redress harm suffered for illnesses and stress on the job.[76] This suit and Alice Clark's opened up new avenues of complaint for victims of sexual harassment.

## IV. Sexual Harassment in Mexico

In comparison to Canada and the United States, Mexico only recently addressed the issue of sexual harassment in legal terms. On January 21, 1991, the penal code for the Federal District (Mexico City) and the Federal Code were modified to include sexual harassment as a type of sexual crime.[77] The code covers this type of activity in any work environment, including domestic service. The crime is punishable by a fine. The code specifies, however, that the harasser may be punished only if the action causes hurt or

70. *Id.*
71. Rae Corelli, *Aiming for Respect*, 108 MACLEAN'S, April 10, 1995, at 46-48.
72. *See supra* note 6.
73. Janzen v. Platy Enterprises Ltd., 59 D.L.R. 4th 352 (Can. 1989). *See also* Shirish P. Chotalia, *Sexual Harassment Laws in Canada—It's All A Question of Power*, 3 J. OF INDIVIDUAL EMPLOYMENT RIGHTS 155, 165 (1994).
74. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
75. Chotalia, *supra* note 8.
76. Janzen, *supra* note 11. *See also* Nora Underwood, *The War of the Sexes*, 104 MACLEAN'S, Oct. 28, 1981, at 86-87.
77. According to Article 259 bis of the Penal Code, it is a crime to use a position of power in the work environment to coerce sexual favors.

damages.[78] However, the code does not state the criteria needed to determine when a victim has suffered damage. Thus, there is a wide latitude for interpretation under the code. Furthermore, the code does not call for preventive measures or public education efforts on the part of government or business.

Given that Mexico operates under a civil law system, the code is central to the enforcement of sexual harassment claims. Except under very special circumstances, the courts in Mexico do not create law or adapt legal rulings in the face of changing social circumstances. [79] Rather, they are charged with the strict enforcement of the written code. Because of this, as well as the cultural milieu of Mexico, those concerned with sexual harassment in Mexico are calling for greater public education about the topic. It is hoped that this will lead to a change in attitudes about what constitutes normal discourse between men and women as well as what is appropriate and inappropriate behavior in a work environment. Women's rights groups also want to see an amplification of the federal penal code to facilitate prosecution of sexual harassment claims. These groups recognize that publicity and greater public awareness are essential. Under the civil code system, public opinion is critical; the people must pressure the legislature to enact changes to expand and improve the sexual harassment laws.

Since the passage of the federal law, few sexual harassment cases have been heard. As a recent newspaper article noted, "in the first year the law took effect ... just 10 sexual harassment complaints were filed in Mexico City, population 20 million; an average of 20 cases have been registered each year since."[80] As will be seen below, this statistic does not mean that sexual harassment rarely occurs in Mexico. Rather, the lack of cases stems from ignorance about the existing laws, as well as fear of reprisals. Under such circumstances, the impact of NAFTA on not only the enforcement of existing laws but also the creation of new standards may be profound.

### A. Scope of Sexual Harassment in Mexican Workplaces.

Machismo is a well-known element of Latin American culture found in all areas of Mexican society. Not surprisingly, this has colored the work place in a number of ways. First, males hold an overwhelming majority of the positions of power. Second, expectations of appropriate female dress and behavior at work emphasize subordinate, feminine, and physical attributes. Third, a woman's marital and reproductive status is often taken into account, illegally, since this is prohibited by the Labor Code, in hiring, promotion, and firing decisions. For instance, a complaint to the Mexico City Human Rights Commission noted that married women applying for jobs commonly must provide a urine sample for

78. *Poder Ejecutivo Federal: Decreto por el que se Reforma, Adicionan y Derogan Diversas Diposiciones del Codigo Penal Paral el Districto Federal en Materia de Fuero Comun, y Para Toda la Republica en Materia de Fuero Federal,* Diario Oficial de la Federacion. Mexico, D.F., Tomo CDXLVIII, No. 14, 21 de enero de 1991.

79. Rene G. Scherlen, *The Mexican Judicial System,* Comparative Criminal Justice (1996).

80. Mark Fineman, *In Mexican Workplaces, Sexual Harassment Is Illegal—And Commonplace,* L.A. Times July 1, 1996, at A6.

pregnancy testing.[81] Finally, the tradition of machismo has led many—both male and female--to consider sexual harassment as a foreign concept that does not make sense in the cultural context of Mexico. All of this contributes to the widespread practice of sexual harassment.[82]

How sexual harassment specifically manifests itself depends greatly on the type of work environment. In professional settings, it is taken for granted that women will wear dresses and look pretty at work. Indeed, in many businesses, and government agencies, there is a position known as the edecan.[83] Clearly, such situations are ripe for exploitation. Furthermore, it makes it difficult for woman to gain respect and advance to higher, more responsible positions. Likewise, business and personal relations are commonly merged in Mexico, as in other Latin American nations, which increases the instances of sexual harassment: long lunches and late nights at restaurants provide greater opportunity for sexual advances. In factory settings and domestic service, sexual harassment often takes a more direct and coercive tone. Rather than subtle signals, women are commonly confronted with a direct command for sexual favors.[84] Under any circumstances, though, the use of power to extract sexual favors is prohibited under Mexican law as of January 1991.

### B. Triggering Events: How Sexual Harassment Reaches Institutional Consideration in Mexico.

Considering the macho tradition in Mexico, many are surprised that the nation has any sexual harassment laws. The inclusion of this crime into the legal code arises directly from the increased presence of women in the Mexican federal legislature. Since most political parties in Mexico have traditionally been highly centralized and basically autocratic, the selection of candidates for office is normally a top-down process: the parties through internal, and often restrictive, procedures chose the slate for all elective offices. Accordingly, this growth in the number of women in the Chamber of Deputies and the Senate reflects a concerted effort on the part of the dominant political party, the Partido Revolucionario Institucional (PRI) to revitalize its image. Other political parties, such as the Partido de Trabajo (PT), the present-day Partido de la Revolucion Democratica (PRD), and the Partido de Accion Nacional (PAN) have also tried to recruit women for political office in order to enhance their electoral appeal.

The presence of this critical mass of women politicians was crucial. Indeed, this group of female legislators—from several different political parties—was the moving force behind the revision of the criminal code for Mexico City (under federal jurisdiction, like Washington, D.C.) and the nation. Such a multi-partisan effort is rare in Mexico: opposition political parties seldom unite together with the PRI to enact legislation. However, these women decided to transform the penal code to reflect more enlightened policies

81. Eugene Wexler, *Mexico: Women in the Business World*, 21 Women's Int'l Net. News 75 (Sept. 1, 1995).

82. Patricia Bedolla & Blanca Elba Garcia, *Consideanciones Conceptuales en Torno al Hostigamiento Sexual*, in Estudios de Genero y Feminismo (I. Bedolla, et.al., eds. 1989). *See also* Gregory S. Stephens & Charles R. Greer, *Doing Business in Mexico: Understanding Cultural Differences*, 24 Organ. Dynam. 39, 55 (1995).

83. This is a women whose sole purpose is to look attractive and be attentive—a type of hostess.

84. Bedolla & Garcia, *supra* note 82.

toward several gender issues such as rape, domestic violence, and sexual harassment. The new legislation became a mechanism for transforming Mexican society, in particular gender relations. Thus, in contrast to Canada and the United States, sexual harassment laws reflect a 'top-down' process rather than the culmination of grassroots efforts[85] (Fineman 1996; Ascencia, 1993).

C. SEXUAL HARASSMENT AND CIVIL LAW IN MEXICO: THE LEGAL AND POLITICAL RESPONSE.

The legal and political response to sexual harassment has limited itself to the 1991 revision of the penal code. And, in the code, Mexico defined sexual harassment quite narrowly as the use of a position to power to coerce sexual favors. Unlike Canada and the U.S., the law does not mention the creation of a hostile work environment.[86] Likewise, the code fails to mandate personnel training or remediation processes to prevent sexual harassment. And, unlike in Canada or the U.S., women in Mexico have no recourse to civil courts and no ability to recoup damages by the person who suffered sexual harassment.[87]

As noted above, few claims have been filed, even in the most well-educated and informed part of the nation. And, even those who are knowledgeable about the law encounter difficulties. A recent case, in which a woman who worked as a typist in the judicial system, highlights this problem. Even after filing a complaint, no action was taken, the harassment continued, and the woman's requested transfer was ignored. Finally, the woman took her own life; her son alleges that it stemmed directly from the failed sexual harassment complaint.[88] Despite this clear indication of the impact that sexual harassment, and the failure to redress the situation can have on women, many consider other gender issues--such as domestic violence--more significant.

To a great degree, though, ignorance is a key issue. "In most cases, people still aren't aware of their rights," according to Maria de la Luz Lima, who drafted the sexual harassment bill when she was a Mexico City prosecutor. She was later elected to Mexico's Chamber of Deputies. It has been noted that "[t]hey don't know what constitutes sexual harassment, and they don't know what to do about it."[89] This lack of information translates directly into the low number of complaints. And, with few complaints and legal cases, there is little publicity given to sexual harassment in Mexico. Thus, a vicious cycle develops.

Clearly, the need for greater education about existing regulations is central to the increased enforcement of Mexico's sexual harassment laws. But, even if awareness of the law increases, many women in Mexico lack the resources to push for enforcement of sexual harassment laws. This disadvantage is compounded by a lack of leverage in the workplace to combat blacklisting and future job discrimination if legal recourse is pursued (Wexler 1995; Fineman 1996).[90] Although many barriers exist to fighting sexual harassment in the courts, certain aspects of NAFTA and the Labor Side Agreement Provisions are viewed as potential assets in the fight to end sexual harassment in Mexico. Similarly, the growing

85. Fineman, *supra* note 10. *See also* Gerardo Gonzalez Ascencio, *Politicas Publicas y Hostigamento Sexual, in* Bedolla et. al., *supra* note 82.
86. *See supra,* note 9.
87. The fine is paid to the state.
88. Fineman, *supra* note 15.
89. *Id.*

number of U.S. and Canadian firms operating in Mexico also opens up opportunities for improvement in the fight against sexual harassment.

## V. NAFTA and Sexual Harassment.

NAFTA's intent is to facilitate the economic integration of Canada, Mexico and the United States. Its architects clearly envisioned an economic tradition union creating companies with operations in all three countries. In the post-NAFTA environment, sexual harassment policies in the three nations may be shaped in new ways. First, one can anticipate a homogenization of business practices, including business policies concerning sexual harassment. Second, provisions in the Labor Side Agreement provide a mechanism to use outside influences, specifically, trade sanctions as well as adverse publicity, to compel compliance with existing labor laws.[91] This second avenue is particularly important in Mexico, where enforcement of sexual harassment laws is lax. Finally, women may seek redress against sexual harassment perpetrated by foreign employers or occurring—with knowledge by the firm—in foreign-owned companies using the laws and the court systems of the other NAFTA nation.[92]

### A. NAFTA, The Diffusion of Labor Practices and Sexual Harassment.

The first path of transformation—through the diffusion of labor practices—may be the very profound. However, it is also likely to be fairly slow. This harmonization of sexual harassment policies is a probable response by most businesses with operation in two or three of the NAFTA nations. That is, developing a single personnel management training program, with the requisite sexual harassment component legally required by both U.S. and Canada law, would appear to be a efficient procedure on the part of any company with operations in Mexico as well as one or both of the other partner nations. As a result, management awareness about sexual harassment, as well as written procedures for prevention and punishment of sexual harassment, should increase in Mexico. This is likely to be enhanced by the increased interchange of personnel within a single company between the three nations, for example, Mexican managers operating in the U.S. while Canadian managers work in Mexico.

### B. NAFTA, The Labor Side Agreement and Sexual Harassment.

The second method noted above—use of NAFTA and the Labor Side Agreement provisions—is more direct. According to the text of the Labor Side Agreement, a persistent pattern of failing to enforce labor laws may result in trade sanctions by the other member

90. *Id.; See also* Wexler, *supra* note 11.
91. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 [hereinafter NAFTA].
92. The North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1502 (1993) [hereinafter NAALC].

nations.[93] This means that the signatories of the free trade agreement are committed to upholding existing laws. As many have noted, "the principal complaint about Mexico has not been its lack of .... laws, but the lack of enforcement of its laws and the related endemic corruption of its legal system." [94] The Labor Side Agreement provides a remedy for these flaws. Thus, those concerned with the enforcement of the sexual harassment code in Mexico may lodge a complaint in the United States or Canada about the repeated failure of the Mexican government to execute its sexual harassment law.

The procedure for redress under the Side Agreement is rather cumbersome and slow-moving. It entails a lengthy four step process. Seeking redress for the lack of enforcement of sexual harassment laws in Mexico would be as follows. First, a complaint must be filed with the National Administrative Office in either the United States or Canada. Upon receipt of a complaint, the two governments consult one another. This is the first opportunity to challenge the claims of persistent failure to enforce. If no resolution manifests itself, the complaint may be forwarded to the Council of the Commission for Labor Cooperation, which consists of the U.S. Secretary of Labor, the Canadian Minister of Human Resources Development, and the Mexican Secretary of Labor and Social Welfare. The Council is charged with negotiating and mediating a resolution to the complaint. If this effort by the Council does not resolve the issue, any one of the parties may request the establishment of an Evaluation Committee of Experts to analyze the particulars of the complaint.[95] A final report with recommendations—and comments from the different parties attached—is submitted to the Council. The Council again attempts mediation. If this fails, then an arbitration board is convened. Only if there is no agreed upon resolution after a stipulated process of consultations, informal mediation, and self-designed action plans, does the arbitration board sanction the nation with monetary penalties and—potentially—suspension of trade benefits.[96]

The above process does not appear to offer any realistic opportunity for compelling enforcement of Mexico's sexual harassment laws. Yet, the side provisions do provide important leverage to female workers who traditionally lack resources. The lodging of a complaint presents an unparalleled chance for significant publicity about sexual harassment laws. Furthermore, the Mexican government may agree to a more rigorous enforcement of the sexual harassment laws at any stage of the process. Indeed, the procedure is designed to encourage the resolution of the complaint without the imposition of sanctions. The threat of sanctions is thought to be sufficient in most cases.[97] Thus, by linking the execution of sexual harassment laws with sustaining free trade benefits, NAFTA may prove to be a critical tool for women in Mexico.

93. NAALC, Article 27.
94. Jack I. Garvey, *Trade Law and Quality of Life-Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439-453 (1995).
95. From the beginning of the process, the Parties consist of governments, not citizens.
96. Garvey, *supra* note 29.
97. If experience with the Evironmental Side Agreement holds true, threats of appealing to the NAFTA arbitration process will be a valuable tool for special interest groups seeking concessions from the Mexican government. Specifically, domestic environmental groups have successfully received concessions through the threat of appeal to the NAFTA arbitration process.

C. NAFTA, SEXUAL HARASSMENT, AND THE SEARCH FOR LEGAL REMEDIES IN THE COURTS OF CANADA, MEXICO, AND TEH UNITED STATES.

The third path toward NAFTA(ization) of sexual harassment is the most unexpected. If successful, it may prove to be the most influential. Employees may pursue legal redress in a court of one of the other NAFTA nations. Specifically, instead of being limited to the legal system where the offense took place, workers may be able to sue in the courts of the home office of the parent corporation. This presents yet more pressure on companies operating in more than one of the NAFTA nations to harmonize their sexual harassment policies.

A court case in California, *Aguirre v. American United Global*[98] demonstrates this effort to hold employers accountable to the sexual harassment laws of one country when they are operating in another nation. In December 1994 female workers from a maquiladora plant in Tijuana (Exportadora Mano de Obra-EMO) filed a sexual harassment suit under California law against the parent company, American United Global/ National O-Ring, Inc (AUG), based in Downey California. Previously, the workers had filed a complaint with the Tijuana labor arbitration board, which the defendant refused to answer. By rejecting Mexican jurisdiction, the possibility of other legal arenas became possible.

The allegations of sexual harassment stem from events which took place at a company picnic organized by EMO. According to the complaint, on that day AUG president and CEO John Shahid forced female workers to participate in a bikini contest. He then videotaped the contestants from the waist down. Shahid not only failed to respond to the complaint filed with the labor arbitration board, but the maquiladora was closed down. The women responded by filing suit in the United States, in Los Angeles Superior Court. And, in October of 1995, the female workers won their case, obtaining an undisclosed amount of compensation (the terms of the settlement are confidential).

Two elements allowed the Mexican workers to triumph in the U.S. court case. The first issue, contested by AUG, was over the relationship between AUG and EMO. The U.S. company claimed that the maquiladora was an independent contractor, while the plaintiffs argued that AUG was its parent company. Los Angeles Superior Court Judge Valerie Baker ruled in favor of the plaintiffs.[99] Second, the judge found (on August 4, 1995) that the Mexican workers had legal standing in the United States. Therefore, the female workers were eligible to sue AUG in civil court for violation of California sexual harassment statutes. As the plaintiffs' lawyer, Fred Kumetz, noted:

> The workers' status as foreigners was not an obstacle by itself ... As long as the court in the U.S. has personal jurisdiction over somebody being sued, which means that person [resides] in the state or district, the court can enter a judgment against that person ...But it first must determine whether it is the most appropriate court for the case, or whether another forum would be more appropriate.[100]

The fact that AUG refused to submit to Mexican jurisdiction aided the case of the workers.

Since the case never reached the appellate level, the decision in *Aguirre v. American United Global* technically did not create a legal precedent. However, the success does provide an example which may prompt others to follow this course. And, as the number of

98. Aguirre v. American United Globe, No. BC118159 (Los Angeles Superior Ct. 1995).
99. *Id.*
100. *Workers Succeed in Cross-Border Bid for Justice*, BORDERLINES 18, (Nov. 1995).

cases increases, so does the likelihood of reaching the appellate level, where precedent would be established. Thus, U.S. companies (and, potentially, Canadian ones as well) operating in Mexico may very well be held to U.S. (Canadian) standards in the realm of sexual harassment. Failure to do so might well result in a court battle. This option might appeal to U.S. workers in Canadian-owned firms as well as Mexican workers in U.S.- or Canadian-owned companies. Since the likelihood of victory in a sexual harassment suit is higher in Canada (given its broader standards), U.S. workers might well seek redress in those courts, even though the average awards granted are lower than in the U.S. Clearly, this third avenue of transforming sexual harassment procedures may prove to be very significant in all of the NAFTA nations.

## VI. Conclusions

Unlike the U.S. and Canada where cultural awareness and an appreciation for the costs of sexual harassment widely exists, in Mexico, there is little awareness of sexual harassment as a crime. The tradition of machismo and the issue of cultural relativism or cultural imperialism hinder efforts to spread cultural awareness. For some, sexual harassment is viewed as a foreign concept. As Lima, a drafter of the sexual harassment code put it: "[w]e know sexual harassment at the workplace is a big problem. But a lot of women are beaten and abused at home. So when someone at work verbally insults them, they say 'Well, that's not such a big deal.' "[101]

The legal environments of these three countries also differ with Mexico's civil rather than common law approach (U.S. and Canada). In Mexico, sexual harassment reforms must go through political process and revision of a code rather than judicial rulings. Also, Mexico doesn't allow class action suits, depending instead on narrow individual rulings. In addition, Mexico defines sexual harassment much more narrowly than the U.S. or Canada, requiring plaintiffs to actually prove psychological, material or physical harm before collecting damages. In the U.S. and Canada, there are preventative and remedial measures in place whereas in Mexico, there is not requirement for anti-harassment training or prevention.

With NAFTA, integration of the three national economies will occur as a result of increased joint operations among the partners. As transnational business grows, harmonization of labor practices results as a natural by-product. In particular, efficiency in terms of management training suggests standardization of sexual harassment policies. Since the U.S. and Canada mandate education and preventative measures, this will eventually lead to the adoption of education and preventative measures in businesses operating in Mexico. The Side Agreement, as well as pursuing legal redress in a court of one of the other NAFTA nations, provide other mechanisms to compel government enforcement of existing labor laws and standards. The ultimate threat for failure to comply is monetary sanctions and loss of trade benefits. However, international and domestic publicity, as well as the mere potential for punishment, may lead to vigorous execution of laws without recourse to

101. Fineman, *supra* note 15.

sanctions. For Mexican women, in particular, this gives them tremendously important leverage to combat the flaunting of sexual harassment laws. Common sense dictates that as female expatriates shift from country to country and workplaces become internationally diverse, understandings of what is acceptable and unacceptable in personnel behavior and treatment must be formulated. The Mitsubishi case clearly demonstrates the costs and implications of the failure to acknowledge this reality.