

1 A Tale of Two Side Agreements

ON OCTOBER 4, 1992, PRESIDENTIAL CANDIDATE BILL CLINTON gave a speech at North Carolina State University in which he took a position in favor of the recently negotiated North American Free Trade Agreement (NAFTA).¹ Yet he faced a dilemma. On the one hand, he called for Americans to embrace the global economy and wider economic integration. Indeed, much of his campaign strategy was focused on the economy—even as he spoke, a now-famous sign hung on the wall in his Little Rock campaign headquarters that read (in part): “It’s the economy, stupid.” The election was fought in the context of recession, and economic policy was Clinton’s main weapon.

But on the other hand, Clinton also made direct reference to environmental and labor standards being violated in Mexico and to the fact that the agreement negotiated by President George H. W. Bush did nothing to address these problems. He vowed to create supplementary institutions to guarantee enforcement of standards, as well as encourage capacity to be developed through cooperative activities between the partners. Once elected, Clinton followed through on his promise and established two “side agreements,” the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC). They were signed in September 1993, despite the irritation of the Canadian and Mexican governments, who thought they had secured a deal and who were not happy about bearing the cost of Clinton’s campaign promises.

This book looks at what happened next. It examines the impact of NAFTA's side agreements on Mexican governance and the conditions under which a pro-rule of law norm has been absorbed by environmental and labor authorities. The side agreements require member states to uphold and enforce their labor and environmental laws. It was widely acknowledged (though never codified in the side agreements) that it was Mexico in particular that had a problem with law enforcement and might enjoy an unfair trade advantage by failing to enforce its own laws and regulatory standards. Under the new side agreements, Mexico could no longer turn a blind eye to the flouting of its own rules.

We begin with a puzzle. External scrutiny (through the NAFTA side agreements) and domestic oversight (through strengthened courts and freedom of information) brought equivalent pressures to both the environmental and labor sectors. But pro-rule of law norms have been internalized to a greater extent in Mexican environmental agencies than in the labor agencies. Given that they were subjected to the same pressures, why did they not adapt at the same rate?

Most analysts of rule of law take the state as the unit of analysis, meaning that change happens to the state as a whole, rather than to certain parts of the state, such as sectoral ministries. No intrastate variation in rule of law is accounted for. For example, international relations (IR) theorists claim that variations in external "mechanisms of socialization" (such as persuasion and shaming) are responsible for variations in the rate at which domestic actors absorb ideas about rights and governance (Checkel 2001, 2005; Johnston 2001). Economists theorize that only states with long-term systems of equality and absence of abuse of authority will sustain rule of law (Weingast 2009).

Similarities between the environmental and labor cases allow a number of potentially important variables to be controlled, and we thus have an excellent natural experiment, enabling us to draw far more fine-grained conclusions about what causes changes to attitudes about rule of law in developing states and how regional agreements can play a part. It is important that we not lose the opportunity to compare these cases. Broader multistate studies of norm change (Risse and Sikkink 1999) and empirical analyses of rule of law (World Justice Project 2011; Kaufmann et al. 2009; United States Institute of Peace 2011) that use the state as the unit of analysis cannot provide this level of nuance.

I have two overarching aims in this book. The first aim is to examine the capacity-building and institutional development effects of the NAFTA side agreements. There is no comprehensive treatment of capacity-building and

institutional development, even though it is an important aim. In fact, most accounts conclude that the institutions created by NAFTA to oversee enforcement of environmental and labor rules have failed to live up to expectations (Hufbauer and Schott 2005). From a policy perspective, understanding how the design of regional institutions affects institutional development and capacity building is important, given the growth of regional trade agreements and the inclusion of emerging and developing countries within them.²

The second aim is theoretical. I seek to contribute to a more general understanding of how differences in institutional design (of the side agreements) and differences in domestic capacity (between the labor and environment sectors) influenced norm socialization. I argue that the relevant design and capacity factors are, first, the independence of the side agreement institutions from national control and the extent to which they permit citizen access and, second, the levels of professionalization and technical capacity of domestic bureaucrats and civil society actors. Professionalization is affected by the level of mobility of actors across professional boundaries (especially from civil society to ministerial positions), the permeability of domestic institutions, leadership within bureaucracies, and the level of politicization of civil service positions.

The most important policy lessons from this study are that regional agreements seeking to improve norms of good governance in developing states need to incorporate (1) citizen complaint mechanisms, (2) opportunities for independent regional authorities to create public factual records that highlight transgressions, (3) means by which civil society can influence the work agenda of the regional institution, and (4) capacity-building resources for domestic authorities and civil society groups.

Domestic authorities should encourage (1) parallel institutions at the national level, such as transparency authorities and independent judiciaries, that reinforce external normative pressures; (2) education and training programs for civil society actors and bureaucrats; (3) opportunities for inward mobility into bureaucracies for trained nongovernmental organization (NGO) personnel; and (4) more secure (depoliticized) career paths for senior civil servants to retain technical capacity within government. Relatively low-cost extrastate institutions with oversight powers, the ability to communicate directly with domestic NGOs, and independent reporting powers can be surprisingly effective in leveraging normative pressures on governments.

The study reveals that although there has been governance change in both areas, environmental governance has improved more. Rule of law norms are

more widely accepted, and technical capacity among civil society and government officials has been strengthened. Mexico has made use of the environmental side agreement to improve federal institutions, upgrade the quality of environmental information, encourage civil society, and develop the border. Mexican environmental bureaucrats now think differently about their own environmental rules. In the labor sector, powerful, government-connected union confederations have for decades controlled unionization and helped repress workers' rights, restricting the normative socialization effect of the labor side agreement. Although some independent unions, labor NGOs, lawyers, and activists have tried to use the NAFTA labor accord to bring rule of law to Mexican labor practice, the path dependency of long-standing corruption and closed opportunity structure prevents a relatively weak external force from exerting enough pressure to bring about adaptation.

These issues are critically important for development and democratization. Transnational markets bring increasing pressures to standardize norms and rules (Bruszt and McDermott forthcoming). Trade agreements formalize compliance pressures. New trade agreements have been concluded (both by the United States and by other developed states) that contain extratrade provisions on environmental, labor, and other regulatory standards. Such pressures are felt acutely by developing states, whose capacity to comply can be severely restricted. Coming to grips with how best to strengthen local capacity and promote pronorm behavior is essential to the task of development and democratization.

Capacity building, institutional development, and norms of good governance matter not simply because they help level the playing field in trade, but because they strengthen domestic politics. In other studies, strong, capable bureaucracies have been shown to improve economic outcomes (Goldsmith 1999; Evans and Rauch 1999). They help a state resist corruption or arbitrary exercise of power on behalf of powerful interests, and they also outlive shifting political priorities. When public policy changes, budgets are cut, or leaders forced out of office, bureaucracies that know how to apply rules fairly and make decisions based on accepted procedures will be healthier. Politicians will be less capable of forcing them to apply rules unequally or arbitrarily. Pro-rule of law attitudes imply that those responsible for enforcing rules take them as given and necessary. They enforce rules even when no one is looking—that is, when those responsible for scrutinizing public behavior are not watching. Conversely, weak rule of law undermines investment and growth, exacerbates

poverty and security problems, and erodes public participation and trust. Rule of law is critical to economic success, social cohesion, and legitimacy (World Justice Project 2011; Americas Society and Council of the Americas 2007).

This book goes beyond a simple accounting exercise of resources devoted to enforcing the law and looks instead at whether and how a culture of rule of law has taken hold. Mexico clearly has a long way to go. Despite some improvements to the institutions of the state, a culture supportive of the rule of law has yet to be created. Without inclusivity, participation, transparency, consensus, and a sense of common ownership, the rule of law cannot root itself (United States Institute of Peace 2011; Finn 2004; Stromseth 2008, 2009). A culture of public trust and confidence in formal institutions is necessary.

Sadly, Mexico continues to suffer from widespread criminality and weaknesses in the justice system, where police, prosecutors, judges, lawyers, and the military can be unprofessional, poorly trained, and underpaid (Cornelius and Shirk 2007). In fact, the militarization of crime fighting may actually weaken other institutions, such as the police. One recent study showed that weak property rights and uncertainty about arbitrary confiscation lead to lower investment in productive activities by individuals and that Mexico needs independent, efficient, and trained judiciaries and bureaucracies; oversight mechanisms such as an ombudsman; and competitive elections by which political leaders are held accountable (Haber et al. 2008).

Regionalism and Domestic Political Change

Both external influences and domestic factors have an impact on how states make the transition from authoritarianism to democracy. Preexisting external links (such as ties to the West) can affect how regimes manage the transition (Levitsky and Way 2010). The role of external advocates and international organizations can also be influential (Keck and Sikkink 1998; Checkel 2005). Likewise, long-standing domestic practices are sometimes slow to change, even under pressure from outside. Rigid, politicized relationships based on particularistic advantage often obstruct reform and opening.

Regional agreements are important external sources of pressure. They can help foster domestic changes. They are crucial tools for development.³ However, our knowledge of how regionalism promotes development is limited, especially outside the European Union (EU). The EU has helped its lagging member states and regions converge with the economic levels of its wealthy

member states, and it distributes funding for these purposes through its structural funds. This contrasts with NAFTA, where guaranteeing market access is assumed to provide a sufficient engine of economic growth and development. There is no large-scale transfer of resources and no requirement to adopt an *acquis communautaire* or ensure democratic or human rights standards. The EU is a “welfare region,” and NAFTA is a “market region” (to borrow from the lexicon of comparative political economy), and so the means by which they encourage development of their poorer member states differs. Unfortunately, however, we know very little about how the market region achieves its development aims, leaving us with no basis for comparison to other regions.

Because much of the U.S. opposition was based on the idea that free trade would cause race-to-the-bottom externalities, NAFTA is the first agreement to link trade opening with environmental and labor issues. Opponents assumed that heavily polluting industries would be encouraged to migrate to Mexico, which did not have the resources to enforce its own regulations or the willingness to raise standards (COHA 2007). Competition from China would undermine willingness to enact and enforce strict environmental controls. The negative effects of NAFTA were thought to be exacerbated by an investor rights provision, prohibiting subnational authorities in any member state from creating new barriers to investment, whether environmental or otherwise.

A counterargument claimed that free trade would lead to environmental benefits because productivity growth in sectors facing import competition creates efficiency gains and resource savings, a reduction in subsidies and other wasteful practices, and transfer of pollution prevention technologies (Galindo 2000: 186; Deere and Esty 2002: 3–4). According to one study, the most heavily polluting sectors were also the most protected, and opening up sectors to competition was likely to reduce pollution (Galindo, 2000: 186). Likewise, economic growth can lead to more resources being devoted to environmental protection.

However, empirical studies of the effect of NAFTA on Mexico’s environment have yielded mixed results (cf. Gallagher 2004; Husted and Logsdon 1997). The studies use different methodologies, applied to different kinds of environmental questions, leading to widely varying results (Deere and Esty 2002: 12). Husted and Logsdon (1997) examined three periods immediately surrounding the entry into force of NAFTA (before 1990, 1990 to 1993, and after 1993) to determine whether environmental policies and regulatory stan-

dards were increased, whether enforcement was strengthened, whether behavioral standards among firms changed, and whether there were significant changes to environmental outcomes. Over this period, they found institutional strengthening and increased budgets in Mexico.

Still, Gallagher found that environmental outcomes worsened measurably after NAFTA came into effect, mainly because neither the Mexican nor the U.S. government committed resources to tackle environmental problems (Gallagher 2004: 2). Compliance and enforcement remained a problem, and after 1993 (when NAFTA entered into effect) real spending and plant-level environmental inspections both fell significantly (Gallagher 2004: 9). Compared with other Organization for Economic Cooperation and Development (OECD) countries, Mexico spends one third as much on the environment, controlling for gross domestic product (GDP) (Gallagher 2004: 71). Other assessments focus only on government compliance and fulfillment of treaty obligations (Deere and Esty 2002: 11). For example, Delgado and colleagues (2006) review Mexican environmental law and levels of pollution, as well as information on institutional responsibilities in the Secretariat for the Environment and Natural Resources (SEMARNAT). But they do not ask what the effect of the NAAEC has been on Mexico's capacity to solve environmental problems or on attitudes among civil servants.

Likewise, on the labor side there are mixed views. Opponents claim that free trade agreements depress wages and standards in developed countries. Although economists paint a mixed picture, the popular imagination is fed by the idea that labor-intensive or low-value production would migrate from the United States and Canada to Mexico, which has little incentive to raise standards or engage in reforms likely to increase costs of production (Gallagher and Wise 2009). Studies confirmed the suspicion that inequality increased in Mexico following NAFTA. Manufacturing plants offered temporary work with few protections, and the agriculture sector suffered high levels of import competition from heavily subsidized U.S. exporters (AFL-CIO 2008: 137ff.; Polaski, 2003).

Furthermore, many consider the NAALC agreement to be virtually worthless because it has not resulted in material improvements to the lives of Mexican workers or corrected abuses on the ground (Alcalde 2006; Bouzas 2006; Bensusán 1999, 2006b). Others point to the limited but detectable changes in practice in the federal labor ministry (STPS) and among some companies on an ad hoc basis, the (slightly) improved dialogue between the government and

independent unions, the capacity-building programs undertaken between STPS and the U.S. Department of Labor, and especially the improved relationship between independent Mexican unions and organized labor in the United States and Canada (Nolan 2009; Compa 2001; Teague 2002).

Like NAFTA, the EU exerts adjustment pressure on member states. Its members are required to comply with the *acquis communautaire*, the accumulated body of EU law, as well as be functioning democracies (among other things). But the EU's institutions are much more powerful and have a longer history. Adjustment pressures in the EU emanate from EU-level legislation backed up by supranational courts. Although scholars have spent some years studying adjustment processes in the EU, they are only just beginning to apply the same energy to other regions.⁴ Because NAFTA lacks legislative instruments, its requirements were negotiated at the outset. It is an intergovernmental agreement and provides far more scope for national autonomy. Its purpose (in the side agreements) is simply to ensure that domestically determined labor and environmental laws are enforced, though there are also provisions for transfer of best practice and capacity building. That makes NAFTA a less likely motor of domestic change than the EU.

Yet despite wide differences, the logic of action at work in NAFTA is the same as in the EU—credible regional integration agreements between states bring about pressures for adjustment at the domestic level (Bruszt and McDermott forthcoming). In both, developing states are under pressure to conform to norms originating in a more developed and powerful center. The pressures vary, and regional agreements may simply be one among many motors of change.⁵ In the EU, scholars have shown that although the pressure for domestic adjustment comes from the regional organization, domestic institutions and interests vary in their acceptance of (and ability and inclination to push for) adaptation at the domestic level, depending on the sector and the power of organized interests (Börzel and Risse 2003).⁶ Domestic institutions and policies can be resistant to transformative pressures: “European signals are interpreted and modified through domestic traditions, institutions, identities, and resources in ways that limit the degree of convergence and harmonization” (Olsen 2002: 936; see also Schmidt 2002; Green Cowles et al. 2001: 6–9; Knill 2001).

Although NAFTA has no provisions like the EU's Copenhagen criteria or explicit requirements to adjust institutions or policies, like the EU, it does provide an external source of legitimacy for domestic leaders seeking to re-

form and modernize. In fact, NAFTA is interpreted as part of a broad Mexican reform strategy that began with the failure of the import substitution model in the wake of the 1982 debt crisis. In other words, NAFTA may be understood as an effect rather than a cause (Dominguez 2004: 380). Nonetheless, it has constrained the policy options of successor governments in Mexico (Denise Dresser, cited in Fox, 2004: 258). To the extent that it brought subsequent unexpected and unwelcome changes in its aftermath, it is worth examining closely. To better understand the effects of regional commitments (as well as understand what works), we need to isolate the NAFTA effect and determine how relevant and important it is to domestic change.

Definitions

Let's clarify some of the concepts used in this study. I use the term *regional organizations* to refer to trade agreements (such as NAFTA), as well as more comprehensive organizations (such as the EU). I use the term *regional institution* (RI), to refer to the formal trilateral side agreement arrangements put in place to monitor compliance. *Capacity building* connotes a range of skills in both bureaucracies and civil society, including higher levels of information processing, acceptance of recognized techniques for solving problems, and better communication, and it can result in a closer worldview among bureaucrats and NGO groups.⁷ *Professionalization* (another important concept in this study) can result from capacity building. It refers both to technical proficiency (knowing the rules and how legal procedures operate) and also to the ability and willingness of individuals to apply rules equally and nonarbitrarily.

Attitude change means agencies have internalized (or socialized) a pro-rule of law norm. Actors are drawn in to the "norms and rules of a given community" (Checkel 2005: 804).⁸ Applied to the norm of rule of law, it means that officials believe in nonarbitrary application of the law. Due process is respected, appeals are available, and legal procedures are followed. Pro-rule of law socialization does not mean that law enforcement is perfect, but attitude change is an early sign that authorities are moving toward good governance. As we will see in the next two chapters, where problems were uncovered through complaints and investigations, environmental agencies typically offered explanations and plans for improvement, signs that it was beginning to take seriously its commitment to respect the rule of law (Risse and Sikkink 1999). Labor agencies denied the existence of problems and accused investigators of interference in national sovereignty.