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GOVERNANCE
IN AREAS OF LIMITED STATEHOOD

# Governance Transfer in the North American Free Trade Agreement (NAFTA)

A B2 Case Study Report

Francesco Duina

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**Foreword**

*Tanja A. Börzel and Vera van Hüllen*

This working paper is part of a series of eight case study reports on governance transfer by regional organizations around the world. It was prepared in the framework of the SFB 700 project B2, "Exporting (Good) Governance: Regional Organizations and Areas of Limited Statehood". Together with regional experts, we have investigated how and under which conditions regional organizations prescribe and promote standards for (legitimate) governance (institutions) at the national level. A comparison of major regional organizations shall enable us to evaluate to what extent we can observe the diffusion of a global governance script. Do regional organizations demand and promote similar criteria for "good governance" institutions, or do regional and local particularities prevail? The B2 case study reports present detailed findings for eight regional organizations in Africa, the Americas, Asia, and the Middle East. They cover the African Union (Julia Leininger), the Economic Community of West African States (Christof Hartmann), the Southern African Development Community (Anna van der Vleuten and Merran Hulse), the Organization of American States (Mathis Lohaus), Mercosur (Andrea Ribeiro Hoffmann), the North American Free Trade Agreement (Francesco Duina), the Association of Southeast Asian Nations (Anja Jetschke), and the League of Arab States (Vera van Hüllen).

The B2 case study reports rely on a common set of analytical categories for mapping the relevant actors, standards, and mechanisms in two dimensions of governance transfer.[1] First, we examine the prescription of standards and the policies for their promotion (objectives, instruments) that create the institutional framework for governance transfer. Second, we investigate the adoption and application of actual measures. Regarding the actors involved in governance transfer, we are interested in the role of regional actors on the one hand, as standard-setters and promoters, and domestic actors on the other, as addressees and targets of governance transfer. Even though the question of which criteria regional organizations establish for legitimate governance institutions is an empirical one, we relate the content and objectives of governance transfer to the broader concepts of human rights, democracy, the rule of law, and good governance. Finally, we classify different instruments of governance transfer according to their underlying mechanism of influence, distinguishing between (1) litigation and military force (coercion), (2) sanctions and rewards (incentives), (3) financial and technical assistance (capacity-building), and (4) fora for dialogue and exchange (persuasion and socialization).

The B2 case study reports result from more than two years of continuous cooperation on the topic, including three workshops in Berlin and joint panels at international conferences. The reports follow the same template: They provide background information on the regional organization, present the findings of a systematic mapping of governance transfer, and suggest an explanation for its specific content, form, and timing. They form the basis for a systematic

1 For detailed information on our analytical framework, please refer to our research guide for case study authors (Börzel et al. 2011).

comparison of governance transfer by these eight regional organizations (for first results, see Börzel, van Hüllen, Lohaus 2013), as well as further joint publications.

We would like to thank the people who have made this cooperation a pleasant and fruitful endeavor and one that we hope to continue: In particular, we would like to thank our regional experts, Francesco Duina, Christof Hartmann, Anja Jetschke, Julia Leininger, Mathis Lohaus, Andrea Ribeiro Hoffmann, Anna van der Vleuten and Merran Hulse for their willingness to share our interest in governance transfer and for their conceptual and empirical input into the project. We are also grateful to Heba Ahmed, Carina Breschke, Mathis Lohaus, Lea Spörcke, Sören Stapel, and Kai Striebinger for their valuable research assistance and other support to our joint B2 project. Special thanks go to Anne Hehn, Anna Jüschke, Clara Jütte, and the entire "Team Z" of the SFB 700, who have unfailingly smoothed the way in all matters concerning administration and publication. Finally, we gratefully acknowledge the financial support from the German Research Foundation (DFG), which made the project possible.

# Governance Transfer in the North American Free Trade Agreement

*Francesco Duina*

## Abstract

While NAFTA itself does not contain any provisions for governance transfer, its two side agreements (NAALC, NAAEC) prescribe standards in the realm of human rights (labor, environment), the rule of law, and good governance and create a number of instruments for their (indirect) promotion. Through technical assistance, fora for dialogue and exchange, monitoring, and complaints procedures that can result in monetary sanctions, the side agreements aim at promoting the effective enforcement of national law rather than regional standards. These provisions reflect the same concerns in the United States and Canada that lead to the conclusion of the two side agreements in the first place: creating conditions for fair competition in light of Mexico's failure to effectively enforce national laws, resulting in de facto lower labor and environmental standards and thus lower costs compared to the northern neighbours. Beyond formal governance transfer, NAFTA has had an impact on domestic governance reforms in Mexico since the early 1990s as it was used as leverage in both international negotiations and Mexican domestic politics.

## Zusammenfassung

Während NAFTA selbst keine Bestimmungen für Governance-Transfer enthält, setzen die beiden Zusatzabkommen (NAALC, NAAEC) Standards im Bereich Menschenrechte (Arbeit, Umwelt), Rechtsstaatlichkeit und Good Governance und schaffen eine Reihe von Instrumenten zu ihrer (indirekten) Förderung. Durch technische Hilfe, Foren für Dialog und Austausch, Monitoring und Beschwerdeverfahren, die zu finanziellen Sanktionen führen können, soll eher die effektive Umsetzung nationalen Rechts als die Einhaltung regionaler Standards erreicht werden. Diese Bestimmungen spiegeln die gleichen Bedenken in den Vereinigten Staaten und Kanada, die zum Abschluss der Zusatzabkommen insgesamt geführt hat: Bedingungen für fairen Wettbewerb zu schaffen, da das mexikanische Versagen, nationale Arbeits- und Umweltstandards effektiv durchzusetzen die tatsächlichen Kosten im Vergleich zu den nördlichen Nachbarn senkt. Jenseits von formalem Governance-Transfer wurde NAFTA als Hebel in internationalen Verhandlungen und der mexikanischen Innenpolitik eingesetzt und hatte somit Einfluss auf nationale Governance-Reformen in Mexiko seit Anfang der 1990er Jahre.

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## 1. Introduction

The North American Free Trade Agreement (NAFTA) came into force in 1994. It brought together Canada, Mexico, and the United States (US) into the world's second largest (by nominal GDP) trade area. It is a free trade area – which means it aims at the elimination of a variety of tariff and non-tariff barriers to the circulation of goods, all capital, and selected services. It does not liberalize labor movement nor does it call for a common external tariff. Progress in the actual implementation of the stated objectives has so far been impressive both in terms of punctuality and thoroughness.

NAFTA does not contain any direct or explicit reference to the transfer of legitimate governance institutions to the member states. This does not mean, however, that the agreement was designed without such transfer in mind or that it does not specify requirements or initiatives that ultimately end up pressuring member states to follow particular governance standards. We will discuss this later in this report (last part of Section 3). More importantly, however, NAFTA comes with two "side", or corollary, agreements which also entered into force in 1994: the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). These agreements stipulate explicit governance-related principles that are of relevance to this report.

Specifically, if we turn to standards, we see that the NAALC commits the three governments to protecting, enhancing, and enforcing basic workers' rights in line with whatever legislation exists already in each of the member states. In a sense, then, the NAALC does not really imply any transfer of governance principles. Still, in an indirect way, the NAALC does push the member states towards a certain type of governance, given that it is ultimately pressuring Mexico in particular to effectively implement existing domestic legislation that is otherwise poorly enforced. The issues in question range from the right of workers to freely associate to the elimination of employment discrimination and to the protection of migrant workers – all issues that concern human rights. At the same time, the NAALC also asks the member states to ensure transparency and efficiency in the management, enforcement, and production of new laws. Thus, it promotes principles that fall under the concept of good governance. Thirdly, the NAALC, by virtue of asking the member states to properly implement their own laws, advances the concept of rule of law.

Still in terms of standards, the NAAEC requires the member states to commit themselves to the protection of the environment and to enhancing existing national legislative frameworks. The language is very vague and broad, and ultimately leaves it to each member state to determine how these objectives should be met. As with the NAALC, this ultimately amounts to a form of pressuring Mexico to practically enforce already existing legislation. In any case, given all this, we can say that the NAAEC advances principles that fall within the realm of human rights. By asking the member states to ensure fair and equitable administrative and judicial proceedings, it also commits them to the rule of law. And by pushing for efficient and transparent regulation, it advances good governance in the member states.

As to actors, the primary targets for both the NAACL and NAAEC are the member states themselves (i.e., the "Parties" to the agreement). However, specific references are also made to state actors such as courts (article 7 NAALC, for instance). Because NAFTA does not have set any standards, there are, technically speaking, no actors worth mentioning.

As to instruments, both the NAALC and NAAEC rely on a combination of complaint procedures (primarily through private-party complaint submissions and panels for dispute resolutions), incentives, and fora for exchange and dialogue.

To conduct this investigation, I relied on a variety of primary and secondary sources. First, the legal texts of NAFTA, the NAALC and the NAAEC served as primary sources, along with all actual cases and legal disputes under the NAALC and NAAEC frameworks. Second, I relied on the transcripts and minutes from meetings of government officials, legal experts, bureaucrats, and others. A third set of primary sources are personal interviews and email exchanges with officials from the NAFTA Secretariat, the NAALC and NAAEC commissions, and US Department of Labor which I conducted for the case study. As secondary sources, I used scholarly analyses on the making of NAFTA and its two side agreements.

The texts of NAFTA, the NAALC, and the NAAEC are the only official texts of relevance to this report since there are no additional NAFTA, NAALC, and NAAEC agreements, laws, or protocols. This is where any official passages relevant to governance transfer can, if they exist, be found. I relied on other sources to (1) ensure a correct interpretation of the NAFTA, NAALC, and NAAEC texts, (2) assess the practical implementation and impact of those passages, as well as to ascertain how NAFTA, the NAALC, and the NAAEC generated pressures for various Mexican governments to improve governance in their country. The above list of sources can therefore be considered comprehensive.

## 2. The North American Free Trade Agreement (NAFTA): an Overview

NAFTA came into effect on January 1, 1994. It is built on the foundations of the Canadian-United States Free Trade Agreement of 1988 which was suspended after NAFTA came into force. The NAALC and NAAEC are two "side" agreements to the NAFTA text. There have been no major revisions, additions, or changes to the NAFTA, NAALC, and NAAEC since adoption (Bélanger 2007).[2] The members of NAFTA are Canada, Mexico, and the United States (see figure 1). No new members have been added since inception. Membership criteria are vaguely laid out in article 2204, where the NAFTA text says that

2 Minor changes have applied only to the NAFTA text and have concerned primarily technical matters, such as revised rules of origins guidelines – prompting politicians, interest groups, and activists to wonder about the need for major revisions. See, for instance, Hussain (2010); Jacobs (2010); Malkin (2008); Finbow (2006: 265); Bélanger (2008). Article 2202 of the NAFTA agreement specifies how amendments can be made.

> "any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable legal procedures of each country."

**Figure 1: Member States of NAFTA**

The Free Trade Commission has no supranational authority, and thus article 2204 simply states that accession will be handled by the NAFTA member states, and in line with the principles of international law. No external country has ever sought membership, nor is it conceivable that the NAFTA member states would be interested in expanding their ranks. A member of NAFTA can, in turn, easily withdraw, as stated in article 2205: "a Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."

Standards for legitimate governance institutions are not part of NAFTA's constitutive norms or explicit mission. The Preamble of NAFTA refers almost exclusively to economic reasons for creating the agreement. The exception might perhaps be references to "special bonds of friendship and cooperation among" the three nations and, in line with the NAALC and NAAEC, a desire to "protect, enhance and enforce basic workers' rights" and to strengthen the "development and enforcement of environmental laws and regulations". Other than that, nothing in the NAFTA text refers to issues of governance and no reference is made to any other regional organization or international organization that might serve as inspiration.[3]

3 Reference is made (article 101) to the General Agreement on Tariffs and Trade (GATT), but only in order to state that NAFTA is in compliance with GATT Article XIV, which lays out the conditions for acceptable trade blocs in the world.

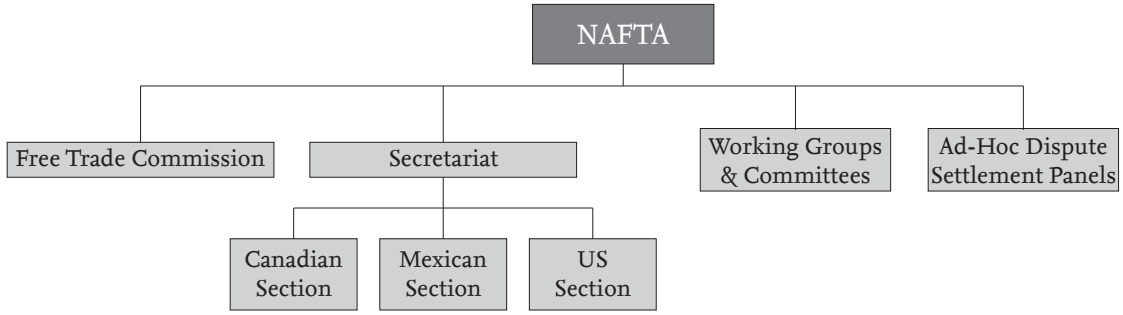
Indeed, article 102-1 identifies the following as NAFTA's objectives:

a) "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
b) promote conditions of fair competition in the free trade area;
c) increase substantially investment opportunities in the territories of the Parties;
d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement."

However, as I discuss in Section 5 of this report, it is fair to suggest that one of the primary unstated objectives of NAFTA has been to help Mexico stabilize as a functioning market economy and, by way of integrating it into the US and Canadian marketplaces, to promote more transparent and effective legal, administrative, and judicial systems. Put differently, the US in particular saw NAFTA as a tool to ensure that Mexico's recently launched market and democratic reforms would take hold and progress; data strongly suggests that the Mexican leadership at the time also felt the same way. Some standards for legitimate governance institutions do appear in the NAALC[4] and the NAAEC – primarily in the context not of "transferring" standards from outside of Mexico into Mexico but, rather, as the requirement that all the member states, Mexico included, commit themselves to enforcing already existing legal texts, constitutional provisions, and other such matters. We shall review those standards in Section 3.

The general mandate of NAFTA is laid out in article 102 of the NAFTA text: the elimination of all tariffs and a combination of non-tariff barriers to the trade of goods by 2003, though sensitive sectors were given until 2008 (annex 302.2). NAFTA also aims at the liberalization of capital movement (chapter 11) and selected services (article 102; chapter 12).[5] To achieve its ends, NAFTA, along with the NAALC and NAAEC, relies on a fairly limited organizational infrastructure (see figure 2).

**Figure 2: NAFTA Institutional Structure**[6]




4 The NAALC text refers to the International Labor Organization only in terms of consultation for selecting a roster of experts to set up Evaluation Committee of Experts (articles 45 and 24).

5 Article 1201 exempts financial services and air transport.

6 Source: Own compilation.

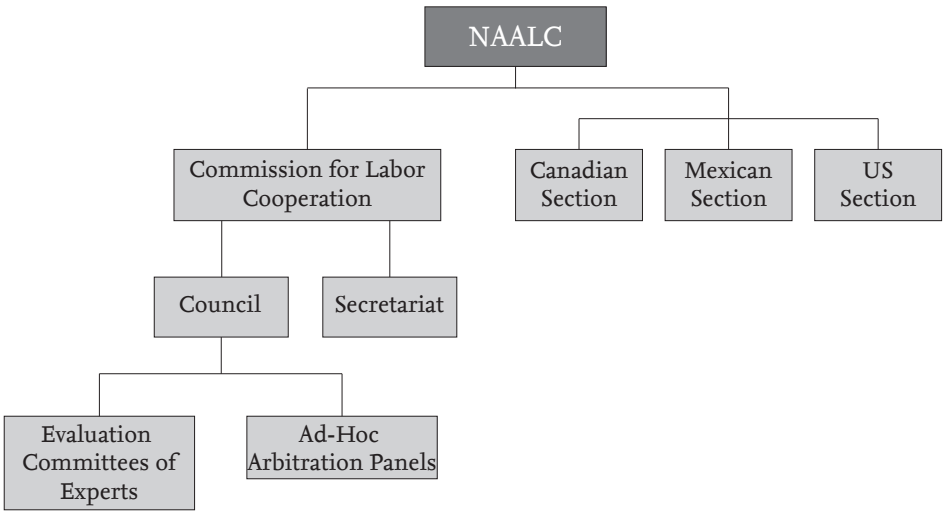
The Free Trade Commission is charged with supervising the implementation of NAFTA, oversee future elaborations, resolve disputes over interpretation and application, and is mandated to supervise the work of all working groups and committees (article 2001). It is composed of ministerial representatives from the member states and does not have an independent location, staff, or building. It convenes annually and is chaired successively by each member state.

The NAFTA Secretariat administers the mechanisms specified under the agreement to resolve trade disputes between national industries and/or governments in a timely and impartial manner (article 2002). The Secretariat is composed of three national-level sections (there is no central coordinating entity), each with its staff and budget (Hufbauer and Schott 2005: 249; NAFTA Secretariat Canadian Section 2002: 18; Interview: NAFTA Secretariat – Canadian Section, 2011; Interview: NAFTA Secretariat – Mexican Section 2011; Interview: NAFTA Secretariat – US Section, 2011). Canada has a budget of over US$ 3.2 million and around 6 staff, Mexico has a budget of US$1-2 million and around 6 staff and the United States have a budget of around US$ 1-2 million and a staff of 3 members. However, the Secretariat section for the US is under the International Trade Administration of the US Department of Commerce and lacks a separate item in the budget.

Furthermore, roughly 30 units charged with overseeing and facilitating trade and investment across the member states form the NAFTA Working Groups and Committees (annex 2001.2). The NAFTA institutional structure further comprises ad-hoc dispute settlement panels. Decisions on chapter 19 for antidumping and countervailing disputes and chapter 11 for investments are binding; those related to chapter 20 for general disputes are not, unless they follow from a quasi-appeal process known as Extraordinary Challenge Committee (ECC) which a government can pursue if it feels that it believes that a decision has been materially affected by either a panel member having a serious conflict of interest, or the panel having departed from a fundamental rule of procedure or having exceeded its authority under the Agreement.

The NAALC and the NAAEC create a similar set of institutions (see figures 3 and 4 below).

**Figure 3: NAALC Institutional Structure**[7]




7 Source: Own compilation.

The Commission for Labor Cooperation, located in Washington, D.C., is composed of a Council (the Secretaries in Mexico and the United States, and Minister in Canada, of Labor) and a Secretariat (article 8). Acting as a single entity, the Council oversees the implementation of the NAALC and directs the activities of the Secretariat. The Council also promotes tri-national cooperative activities on a broad range of issues involving labor law, labor standards, labor relations, and labor markets. The Secretariat staff is drawn equally from the three NAFTA countries. It includes labor economists, labor lawyers, and other professionals with wide experience in labor affairs in their respective countries. They work in the three languages of North America – English, French and Spanish – to advance labor rights and labor standards as an integral part of expanding trade relations. The Secretariat supports the independent Evaluation Committees of Experts and Arbitral Panels (see below) that the Council may establish to resolve disputes under the provisions of the Agreement. Importantly, the NAALC Secretariat was, at the time of writing in March 2012, temporarily suspended (as of August 20, 2010) and without staff, due to the member states and seemingly particularly the United States and the administration of President Barack Obama wanting to reevaluate its role and functions (Council of the Commission for Labor Cooperation 2010). With a budget of around $2.1 million, the NAALC Commission had a staff of up to 15 persons when operating and as low as 3 right before its Secretariat temporarily closed in 2010 (Interview: US Department of Labor, Office of Trade and Labor Affairs, 2011).

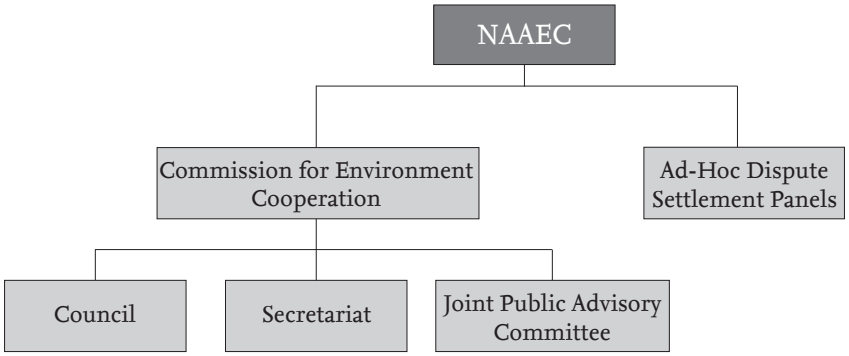
The NAALC also requires each member state to establish and maintain a National Administrative Office (NAO) within its labor department or ministry. Their staff and resources are therefore difficult to assess. The NAOs serve as points of contact and sources of information for concerned private parties, government officials and agencies, the Secretariat, the public, and each other. A key NAO function is to receive and respond to public communications regarding labor law matters arising in another NAFTA country. Each NAO establishes its own domestic procedures for reviewing public communications and deciding what actions to take in response to incoming requests. With the support of the Secretariat, the NAOs initiate the cooperative activities of the Commission. These include: seminars, conferences, joint research projects and technical assistance in relation to the eleven NAALC Labor Principles, labor statistics, productivity, and related matters. The NAOs can also engage in direct bilateral and trilateral cooperative activities with each other.

Additionally, the NAALC puts forth provisions for a citizen petition mechanism, whereby anyone can file a complaint with one of the NAOs alleging that a member state is exhibiting a consistent pattern of violating its own labor, employment, or health and safety laws. This is the first typical step of any complaint. Thus,

> "civil society actors play a vital role in the NAALC as they are the ones who identify and select the cases to be brought to National Administrative Offices, initiating the complaints process, the source of most of the activity around the NAALC … [This] presents the greatest potential for fostering new forms of transnationalism" (Buchannan/Chaparro 2008: 133).

If a matter (most likely raised via the citizen petition process) related to occupational safety and health or other technical labor standards (NAALC's Labor Principles 4-11) has not been resolved after ministerial consultations, any country may request the establishment of an independent Evaluation Committee of Experts (ECE). The ECE presents its report to the NAALC Council. If after consideration of a final ECE report a country believes that there is still a persistent pattern of failure by another country to effectively enforce its occupational safety and health, child labor, or minimum wage technical labor standards, it may request further consultation, and eventually, the establishment of an independent arbitral panel. Arbitral panels consist of five members. Based on the panel's final report and its recommendations, the disputing parties may agree on a mutually satisfactory action plan. Failure to implement the plan could result in fines or trade sanctions.

**Figure 4: NAAEC Institutional Structure**[8]




The Commission for Environmental Cooperation (NAAEC Part III) is located in Montreal and comprises a Council, a Secretariat, and an independent Joint Public Advisory Committee (JPAC). The Council is the governing body of the Commission and comprises cabinet-level or equivalent representatives of each country. The Secretariat provides technical, administrative, and operational support to the Council. JPAC – with five volunteer citizens from each country – advises the Council on any matter within the scope of the NAAEC. As with the NAALC and its citizens petition process, articles 14-15 of the NAAEC allow private parties to submit complaints to the Secretariat of the Commission for Environmental Cooperation, if they believe that a country is "is failing to effectively enforce its environmental law", provided that certain conditions are met for the complaint. Based on the merits of the submission, the Secretariat can request a response by the targeted member state and engage in factual investigations of that member state's activities. The Commission is responsible for implementing the principles asserted in the NAALC. With a budget of approximately US$9 million per triennium, the NAAEC Commission has a staff of around 50 employees (E-mail exchange: Elhadj, Malika at the NAAEC Commission 2011; see also Wold 2008).

8 Source: Own compilation.

The dispute settlement panels under the NAAEC are laid out in the articles 22-36 of the NAAEC and offer provisions for each member state to make allegations that another member state is systematically failing to enforce its own environmental laws. If the accused government is found guilty after a lengthy process, it can have trade sanctions imposed on it in the case of the US and Mexico, and fines determined in domestic courts in the case of Canada.

## 3. Mapping Governance Transfer in NAFTA

### 3.1 The Framework of Governance Transfer: Prescription and Policy

The NAALC and the NAAEC are the two primary legislation documents that are of particular importance for governance transfer; secondary legislation in addition to these documents does not exist. This section considers the NAALC's prescription and policy first, and then the NAEEC's prescription and policy. We shall see throughout that the focus is on compliance with already existing principles found in the three member states, and not on the promotion of new principles. From a substantive point of view, we shall also see that the NAALC is fairly comprehensive in focus since it addresses child labor, migrant workers, women indirectly, and workers in general. We shall also see, especially with knowledge of the genesis (discussed in Section 4 of this report) of the agreement, that it aims at reducing unfair competition in terms of costs between Mexico and the other two member states, the United States and Canada. The NAAEC is in theory even more comprehensive in focus than the NAALC, for it does not identify any particular environmental area or issue, and is therefore designed to ensure above all the enforcement of existing environmental laws in all relevant areas such as land or water. As with the NAALC, the driving preoccupation seems unfair advantages enjoyed by Mexican producers because of non-compliance with existing domestic law.

Keeping clearly in mind the fact that both the NAALC and NAAEC do not actively promote any new governance principles, we can identify in table 1 those governance concepts where the member states are asked to comply with existing domestic legislation. For reference purposes, the figure includes NAFTA as well, which, as already noted, does not contain any relevant passage on governance transfer at all.

**Table 1: Governance Transfer in NAFTA: Standards and Policies**[9]

| Year | Document | Human Rights | Democracy | Rule of Law | Good Governance |
|---|---|---|---|---|---|
| 1994 | NAFTA | - | - | - | - |
| 1994 | NAALC | X | - | X | X |
| 1994 | NAAEC | X | - | X | X |

9 Source: Own compilation.

### 3.1.1 The NAALC

*The Prescription of Standards*

The NAALC is a "side agreement" to NAFTA. It was the first labor agreement negotiated as part of an international free trade agreement. Signed in 1993 by the three member states, it entered into force on January 1, 1994 along with the main NAFTA text. The NAALC is a legally binding piece of international law. In the NAALC, the standard-setters are the member states themselves. As the Preamble states, "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America … have agreed as follows." The addressees are also the member states themselves. All relevant NAALC articles that prescribe standards, in fact, explicitly mention each "Party" to the agreement as their addressee. Having said this, article 5 in particular mentions that each Party should "ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent." Even so, the addressees remain the member states. As to the content of the standards, it must be stressed again that the NAALC does not put forth any new, joint, or harmonized sets of labor principles that the member states commit to embrace. This is widely recognized in the literature. Instead, the NAALC simply states that "[e]ach Party shall promote compliance with and effectively enforce its labor law through appropriate government action" (article 3). The NAALC then focuses on eleven principles it asks the member states to promote, to the extent and way in which they already exist in the domestic legal frameworks (annex 1)., if not all, of the principles belong to the concept of human rights and its three sub-categories civil and political rights, economic, social, and cultural rights, and collective rights.

**Figure 5: NAALC Principles and Human Rights**

| NAALC Principle | | Civil and Political Rights | Economic,Social, and Cultural Rights | Collective Rights |
|---|---|---|---|---|
| 1) | Freedom of association and protection of the right to organize | Right to freedom of assembly and association | --- | Group and collective rights; right to self determination |
| 2) | The right to bargain collectively | --- | --- | Group and collective rights; right to self determination |
| 3) | The right to strike | --- | --- | Group and collective rights |
| 4) | Prohibition on forced labor | --- | Right to leisure, rest and holidays | --- |
| 5) | Child labor protections | Prohibition of slavery and torture | Right to leisure, rest and holidays | --- |

| | | | | |
|---|---|---|---|---|
| 6) | Minimum labor standards with regard to wages, hours and conditions of employment | --- | Right to leisure, rest and holidays | Right to a healthy environment |
| 7) | Non-discrimination in employment | --- | Right to work | Group and collective rights |
| 8) | Equal pay for equal work | --- | Anti-discrimination (gender) | --- |
| 9) | Health and safety protection | --- | --- | Right to a healthy environment |
| 10) | Workers' compensation | --- | --- | Right to social security |
| 11) | Protection of the rights of migrant workers | Equality before the law | --- | Group and collective rights |

At the same time, upon close analysis, we can see that for the purposes of this report the NAALC actually asks the member states to uphold additional standards that we would associate with legitimate governance. The NAALC does not elaborate much on those standards, but they should certainly be pointed out. They concern human rights, the rule of law, and good governance.

Human Rights

Article 2 asks the member states to commit themselves to providing high labor standards, and to continue improving those standards:

> "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."

Such a request, even if very vague, falls within the human rights concept, touching upon economic, social and cultural as well as collective rights.

Rule of Law

Several articles concern issues directly relevant for the rule of law, and in particular compliance and enforcement. Article 3-1 states that "each Party shall promote compliance with and effectively enforce its labor law through appropriate government action."

In turn, article 3-2 states that

> "each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law."

Article 4-1 then asks that

> "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."

To ensure fairness and no conflict of interests, article 5-4 adds that "[e]ach Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter." The primary objective of these articles appears to be to facilitate the investigation of breaches of law.

Given the above, article 4-2 specifies that

> "each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: (a) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and (b) collective agreements can be enforced."

And article 5-3 states that "each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings." Finally, as to enforcement, article 5-5 stipulates that

> "Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures."

Good Governance

The NAALC addresses a number of issues relevant to good governance. Specifically, a fair number of articles deal with transparency. Article 1-g states that one of the objectives of the NAALC is "to foster transparency in the administration of labor law." Article 5-1 is concerned with "procedural guarantees" and asks that "each Party shall ensure that its administrative, quasi-judicial,

judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent.". Article 6, concerning publication, states that

> "each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them."

Still in the realm of transparency, article 7 asks that

> "Each Party shall promote public awareness of its labor law, including by
>
> a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and
> b) promoting public education regarding its labor law."

The NAALC also mentions something that is probably relevant for effectiveness. Article 5-6 states that "each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations."

It is worth noting, however, that despite all of the above passages related to good governance, article 5-7 stresses that "nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general" and, in turn, that article 5-8 states that "for greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement." With these statements, the NAALC makes clear that the member states retain a great deal of control over their governance system.

*A Policy for Active Promotion*

The objectives of the NAALC (article 1) include the commitment to promote and protect substantive human rights standards (labor rights) and procedural standards related to good governance (transparency) and the rule of law (principles of law enforcement) identified above. The focus clearly is on the effective enforcement of national labor laws. This is first of all an obligation of the individual member states, but the NAALC also includes provisions for the active promotion and protection through regional bodies and procedures. The NAALC does not have an overarching policy or specific strategic guidelines. Instead, we find several passages where fairly specific steps are envisioned. A number of articles aim to ensure compliance with and enforcement of the eleven labor principles listed above, as they appear in domestic law, via a variety of instruments. The Council and the Secretariat can provide assistance, facilitate dialogue and exchange, and monitor developments in the member states. In addition, the NAALC foresees an elaborate complaints procedure, ranging from consultations over arbitration to sanctions in the case of non-compliance with national labor laws relevant under the NAALC. Overseeing the correct implementation of the NAALC, the Council and the Secretariat (promoters) are man-

dated to actively promote member states (targets) compliance with the NAALC's standards and their effective implementation of national labor law through monitoring as well as capacity-building and persuasion and socialization. The Council may in particular facilitate "cooperative action" and "consultations" (article 10). It can support cooperation among member states on several issues through the organization of "seminars, training sessions, working groups and conferences," "joint research projects," and the provision of "technical assistance" (article 11). The Secretariat, in general, "shall assist the Council" (article 13). It furthermore prepares regular reports and studies that monitor the situation of labor rights in the three member states (article 14) with the assistance of the respective NAO (article 16).

The NAALC has an elaborate, multi-stage formal complaints procedure in order to settle disagreements over the "interpretation and application of this Agreement" (article 20) in terms of member states' failure to effectively enforce their national labor law. It includes consultations (article 21-22), evaluations (article 23-26), and arbitration (article 27-41). The whole procedure relies on the active involvement of both national (state and non-state) actors as complainants and regional bodies for mediation and arbitration.

Consultations can be initiated and organized by the NAOs (article 21) or at the ministerial level on "any matter within the scope of this Agreement" (article 22). The NAO of any member states can request the NAOs of the other member states to engage in consultations in relation to the latter's labor law, administration, and labor market conditions. These requests from an NAO typically originate from the concerns of private citizens (understood to include non-governmental organizations as well as individuals), relying on "public communications" in order to identify the need for consultations (article 16-3). Similarly, a member state can request consultation with the ministerial level staff of another member states over evidence or information on compliance with NAALC's requirements.

In a next step, each member state can request the Council to establish an ECE in order to investigate "patterns of practice by each party in the enforcement of its occupational safety and other technical labor standards," if they are "trade-related" and "covered by mutually recognized labor laws" (article 23). This covers compliance with all of NAALC's labor principles *except for* freedom of association, the right to collective bargaining, and the right to strike (Article 23-2). For these three rights, no further support other than what is set out in Article 22 is available. The ECE is made up of three experts from a roster developed by the member states. The ECE will issue an evaluation report and submit it to the NAALC Council. The report will be published. The member states will submit their responses to the recommendations set out in the ECE's reports.

Based on the ECE's final evaluation report, member states can again pursue consultations (article 27), supplemented by mediation efforts of the Council (article 28), and ultimately request the creation of an arbitral panel (article 29) composed of five independent experts from a roster established and maintained by the NAALC Council (article 30-31). The scope of the standards covered by this procedure is narrowed down further, dealing only with compliance with "occupational safety and health, child labor or minimum wage technical labor standards" (article 27).

If mediation via the Council fails, arbitration panels are set up to investigate whether a persistent pattern of failure indeed exists. In the case of non-compliance, the panel will recommend an action plan for the member state in question which should be satisfactory to the member state placing the original complaint. If no action plan can be produced or if implementation is incomplete, the panel can recommend an action plan of its own or impose sanctions. These are to take the form of monetary enforcements which, if they are not complied with, can lead to increased trade tariffs against the offending party (article 41).

The above policy steps have not changed since NAALC's inception. There has been no evolution, therefore, in those standards.

### 3.1.2 The NAAEC

*The Prescription of Standards*

The NAAEC is a 'side agreement' to NAFTA. Signed in 1993 by the three member states, it came into force on January 1, 1994 (along with the main NAFTA text). The NAEEC is a legally binding piece of international law.

In the NAAEC, the standard-setters are the member states themselves. As the Preamble states, "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America … have agreed as follows."

The addressees are also the member states themselves. All relevant NAAEC articles that prescribe standards, in fact, explicitly mention each "Party" as their addressee.

As to content of the standards, it must be stressed again that the NAAEC does not put forth any new, joint, or harmonized sets of environmental principles that the member states commit to embrace (for instance, new limits on air pollution or emissions), other than the generic objective set out in article 3, which asks each member state to "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations." This falls within the human rights concept (collective rights subcategory).

Other than what appears in article 3, the NAAEC requires the member states to commit to what we may call three procedural standards, all of which fall under the concept of good governance, as discussed below.

Good Governance

The NAALC calls for three procedural standards. Specifically, article 1 states that the member states agree, as an objective, to "promote transparency and public participation in the development of environmental laws, regulations and policies." This is obviously relevant for the transparency subcategory.

Article 2 asks, in turn, the member states to "promote the use of economic instruments for the efficient achievement of environmental goals." This falls within the efficiency subcategory.

Article 7 asks that "administrative, quasi-judicial and judicial proceedings referred to in articles 5-2 and 6-2 are fair, open and equitable." This, too, is in line with the subcategory of transparency but also accountability.

*A Policy for active Promotion*

As is the case for the NAALC, the NAAEC does not have an overarching policy (or specific strategic guidelines) for the promotion of its governance standards. Instead, we find several passages where fairly specific steps are envisioned that largely resemble those under the NAALC. Similarly to the NAALC, the NAAEC aims in particular to "enhance compliance with, and enforcement of, environmental laws and regulations" (article 1), which gives the NAAEC a mandate to indirectly promote and protect standards related to human rights (clean environment), good governance (transparency), and the rule of law (principles of law enforcement). This is again first of all an obligation of the individual member states, but the NAAEC also includes provisions for the active promotion and protection through regional bodies and procedures. With slight differences, the NAAEC creates the same set of instruments as the NAALC does.

Overseeing the correct implementation of the NAAEC, the Council and the Secretariat (promoters) are mandated to actively promote member states' (targets) compliance with the agreement's standards and their effective implementation of national environmental law through monitoring as well as capacity-building and persuasion and socialization. The Council is itself a forum for discussion and shall "promote and facilitate cooperation" between the member states (article 10). The Secretariat, in turn, "shall provide technical, administrative and operational support to the Council" and any other bodies of the NAAEC (article 13).

When it comes to more tangible enforcement procedures,

> "two mechanisms underscore the NAAEC's emphasis on enforcement and competitiveness concerns. The NAAEC creates a procedure that allows a complaining Party to seek the imposition of a monetary assessment if a Party is found by a tribunal to have engaged in a 'persistent pattern' of failure to enforce environmental law with potential competitiveness effects in the NAFTA region. In addition, it establishes a citizen submission process that provides an avenue for groups or individuals to allege that a Party is failing to effectively enforce its environmental laws. These mechanisms constitute the NAAEC's 'teeth' in what otherwise would be solely a forum for regional environmental cooperation" (Wold 2008: 217).

The first mechanism largely resembles the NAALC's complaints procedure outlined above. The initial stages or consultation and evaluation are less complex, as the NAAEC does not rely on NAOs or foresee the establishment of ECEs. The procedure starts with a member states requesting consultations with a second member state "regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law" (article 22). If consultations fail to resolve the dispute between the Parties, the Council may upon a two-thirds vote convene an arbitral panel of independent experts to prepare a report with recommendations for better enforcement (article 24). At this stage, the scope of standards covered by this procedure is narrowly defined in that it "relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party" (article 24). If the panel finds a persistent failure to enforce environmental law by a member state, the disputing parties "may" agree on a "mutually satisfactory action plan, which normally shall conform to the determinations and recommendations of the panel" (article 33). If the parties cannot agree on an action plan or there is disagreement its implementation, the disputing member state can request that the panel be reconvened (article 34). At this point, the panel may impose an action plan on the parties or a monetary penalty not to exceed .007% of total trade between the parties (article 34 and annex 34). If a member state fails to pay, the other member state in the dispute may suspend NAFTA benefits in an amount not to exceed the monetary assessment (article 36). Interestingly,

> "all monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established in the name of the Commission by the Council and shall be expended at the direction of the Council to improve or enhance the environment or environmental law enforcement in the Party complained against, consistent with its law" (annex 34-3).

The second mechanism, namely the citizen submission or petition procedure, institutionalized in the NAAEC (articles 14-15) is also similar to the NAALC's provisions on "public communications", except that it directly involves the Secretariat instead of the NAOs. Also aiming at the effective enforcement of environmental law at the national level, this procedure actively involves non-state actors in the process of detecting (potential) cases of non-compliance. A citizen, non-governmental organization, or company can file a submission with the Secretariat against a member state for failing to enforce its environmental laws (article 14). Provided that certain conditions are met, the Secretariat can ask the member state in question to respond to the complaint or the Secretariat can simply deem such report unnecessary and close the case. If a report is requested, the member state has 30 days to produce it. The report should specify whether the matter is or was the subject of pending judicial or administrative proceedings, and whether private remedies are available. The Secretariat then has discretion to request authorization from the Council to prepare a factual record upon receiving a response from the Party (article 15). The Council must approve the request by a two-thirds majority. The factual investigation will not assess whether the member state is at fault or even suggest ways in which enforcement could be improved; instead, "by describing the facts of a submission and the

government's response, the factual record shines a light on government action, which readers are free to interpret" (Wold 2008: 221).[10]

### 3.2 Measures of Governance Transfer: Adoption and Application

This section focuses again on the NAALC and NAAEC. Attention turns first to the NAALC's and then to the NAEEC's adoption and application of measures. We see some activities in terms of publications of reports, conferences, and other materials by the NAALC and NAAEC institutions that might be of relevance for the transfer of governance institutions. As public records and scholarly works indicate, the most impressive aspects of both agreements, however, concern their reliance on third-party submissions (citizens, non-governmental actors) to enforce compliance with existing laws. These venues for submission have been used quite a bit to date, and have targeted not only Mexico but Canada and the United States as well.

#### 3.2.1 The NAALC

As the previous section should make clear, the NAALC's policy for governance transfer is very reactive: for the most part, the NAALC sets up institutions to enable the member states to articulate their concerns and resolve disputes in the implementation of the NAALC's eleven labor principles. Articles 10 and 11 in particular do envision that the NAALC Council engages in cooperation and other activities; article 14 asks the Secretariat to make available reports on a variety of topics. The Council and the Commission have in fact executed this function to some extent.

With the above in mind, and also recalling that the NAALC Secretariat is at this point temporarily suspended, we can still identify a small number of initiatives that might qualify as "specific measures" practically applied within the NAALC context. These include the publication of reports, the facilitation of consultations among the member states, cooperative activities among the member states, and the submission by private actors of complaints against the member states.

As to the publication of reports, article 10 of the NAALC states that the Council shall approve publication reports and studies prepared by the Secretariat (as specified, in part, under article 14), independent experts or working groups. Given this, the Council, as promoter, has published reports, with the general public in mind as its target on several occasions. The most important include (Commission for Labor Cooperation 2009; also see the Secretariat of the Commission for Labor Cooperation 2012-a):

- *Migrant Workers Rights in North America (2011)*
- *Workplace Anti-Discrimination and Equal Pay Laws (2007)*
- *Violence at Work in North America (2006)*
- *Benefits in North America (2004)*

10 See Pratt (2006: 751-756) for a discussion of these steps.

- *Guide to Labor and Employment Laws for Migrant Workers in North America* (2004)
- *Workplaces Injuries and Illnesses in North America* (2004)
- *The Rights of Nonstandard Workers: A North American Guide* (2003)
- *Protection of Migrant Agricultural Workers* (2002)
- *Standards and Advanced Practices in the North American Garment Industry* (2000)

Two seminar proceedings were also published:

- Proceedings from a seminar in 2000 in Mexico City with prominent academic economists and high-level labor and business representatives to exchange ideas and experiences in an attempt to understand the links between productivity and workers' income levels (Commission for Labor Cooperation 2001)
- Proceedings from two seminars (the last in 1998) in Dallas with the same sorts of participants and objectives as the 2000 seminar mentioned above (Commission for Labor Cooperation 1998).

As to consultations among the member states, articles 10 of the NAALC states that the Council (as part of the Commission) shall (f) facilitate Party-to-Party consultations, including through the exchange of information. These are some of the relevant activities that the Commission, as the promoter, has engaged in (with the help as well of the NAOs), with the member states as the targets (Commission for Labor Cooperation 2009, 2010):

- Government-to-Government Session (in Puebla, Mexico, on December 2, 2008) on topics of freedom of association and the right to bargain collectively. Participants exchanged information on best practices on numerous issues such as transparent procedures for union registration and access to collective agreements and labor-management cooperation mechanisms. Present were officials from the three member states.
- *Tri-National Government Experts Workshop on the Role of Labor Ministries in the Effective Promotion of Mine Safety and Health in North America* (in Guadalajara, Mexico, on October 30-31, 2007)
- *Tri-National Conference on the Labor Dimensions of Corporate Social Responsibility in North America* (in Ottawa, Canada, on March 30-31, 2005)
- *NAALC Conference on Trafficking in Persons in North America* (in Washington, D.C., on December 6-7, 2004)
- *Fourth Meeting on the Tri-National Working Group of Government Experts on Occupational Safety and Health* (in Toronto, Canada, on April 25-26, 2004).

In the area of cooperation among the member states, article 11 states that the Council, as the promoter, shall promote cooperative activities between the Parties (which are the targets), as appropriate, on a variety of labor-related topics. To that end, article 11 foresees events such as

seminars, training sessions, working groups, conferences, and joint research projects. This is what we can observe (Commission for Labor Cooperation 2010):[11]

- The Secretariat (which supports the Council in its mission) sponsored and/or organized the following events (Commission for Labor Cooperation 2009):
  - Workshop on Supporting Economic Growth Through Effective Employment Services (September 29-30, 2004) in Cancún, Mexico. This workshop was co-sponsored with the Inter-American Conference of Labor Ministers (IACML) and the Organization of American States (OAS), so more than the NAFTA member states participated.
  - Seminar on Workplace Discrimination and the Law in North America (November 18-19, 2004), George Washington University Law School, Washington DC. Experts and officials from the three NAFTA member states presented and attended.
- Two seminars (mentioned above already) on Incomes and Productivity in North America:
  - one in 2000 in Mexico City with prominent academic economists and high-level labor and business representatives to exchange ideas and experiences in an attempt to understand the links between productivity and workers' income levels,
  - one in 1998 in Dallas with the same sorts of participants and objectives as the 2000 seminar mentioned above.
- *The Youth Employment in North America Seminar*, organized by the Secretariat of the Commission for Labor Cooperation, took place in Mexico City on December 4 and 5, 2008. The seminar analyzed how to create employment opportunities for youth (preparing youth for the work place and skills development) and how to engage youth at risk entering the labor market and protecting young people in the workplace.
- A seminar on *Tri-national Government Experts Workshop on the Role of Labor Ministries in the Effective Promotion of Mine Safety and Health in North America* – October 30 & 31, 2007. This was a tri-national seminar organized by the Commission on Mine Safety and Health issues in North America in Guadalajara, Mexico.
- *Labor Market Interdependence in North America: Challenges and Opportunities of an Aging Population* – November 13, 2006. Seminar in Mexico City based on concerns over the rapidly changing demographics in each member country and what can be done to adapt to an aging population.
- *Trilateral Seminar - Labor Boards in North America* – in Monterrey, Mexico, on March 20, 2003.

The submission of private-actor complaints against the member states is perhaps the most consequential of the designated instruments. Article 21 foresees the possibility that a NAO of one member state (following request of private citizens, including non-governmental organiza-

11 It is not easy to determine whether an activity (such as a workshop) falls under the scope of article 10 or article 11 of the NAALC. The above assignment of activities under each article is therefore tentative.

tions, or acting independently) asks for clarifications and documentation from the NAO of another member state concerning the enforcement of its labor principles (Caulfield 2010: 6). Article 22 foresees Party-to-Party ministerial consultations as a first step toward resolution of any dispute that may arise between the member states (Buchanan and Chaparro 2008). Articles 23-26 foresee the use of expert committees (ECEs) if consultations fail (but for freedom of association, the right to collective bargaining, and the right to strike, which can only be considered under article 22). Finally, articles 27-41 lay out the use of Arbitration Panels if ECEs fail, but only for three NAALC principles (health and safety issues, child labor, and minimum wage violations).

In practice, this is what has happened. A complete list (no cases have been filed since 2008) of private-actor complaints stemming from article 21 is published on the NAALC's website (Commission for Labor Cooperation 2008; Secretariat of the Commission for Labor Cooperation 2012-b). A complete list can also be found on the website of the US Department of Labor where this information is available (United States Department of Labor 2010):

- "Thirty-seven submissions have been filed under the North American Agreement on Labor Cooperation (NAALC). Twenty-three were filed with the U.S. NAO of which twenty-one involved allegations against Mexico and two against Canada. Nine were filed with the Mexican NAO and involved allegations against the United States. Six submissions have been filed in Canada, three raising allegations against Mexico and four raising allegations against the United States.
- Eighteen of the twenty-three submissions filed with the U.S. NAO involved issues of freedom of association and nine of them also involved issues of the right to bargain collectively. Two submissions (9802) (2005-03) concerned the use of child labor, one (9701) raised issues of pregnancy-based gender discrimination; three (9801, 2005-01, 2005-03) concerned the right to strike; six (9403, 9901, 2003-01, 2004-01, 2005-03, 2006-01) concerned minimum employment standards; and eight (9702, 9703, 9901, 2000-01, 2003-01, 2004-01, 2005-03, 2006-01) raised issues of occupational safety and health.
- Of the submissions filed to date with the U.S. NAO, four (940004, 9602, 9803, and 2004-01) were withdrawn by the submitters before hearings were held or the review process completed. Hearings were held on ten (940001, 940002, 940003, 9601, 9701, 9702, 9703, 9901, 2000-01, 2003-01). Eight of the U.S. submissions (940003, 9601, 9701, 9702, 9703, 9901, 2000-01, 2003-01) have gone to ministerial-level consultations. The U.S. NAO declined to accept submissions 9801, 9802, 9804, 2001-01, 2005-01, and 2005-02 and 2006-1 for review.
- Mexican NAO submissions 9501, 9801, 9802, 9803, 9804 resulted in ministerial consultations. Canadian NAO submission CAN 98-1 resulted in ministerial consultations. Canada declined to accept submissions CAN 98-2, CAN 99-1, and CAN 05-1 for review."

Some of these submissions, then, have led to ministerial consultations, as laid out in article 22. Importantly, though, none have gone past that phase. Indeed, most of the submissions originat-

ing under article 21 have either been dismissed or withdrawn at the national level. Observers also note that even when evidence of wrongdoing was found, little of consequence happened (Jacobs 2010). Some consultations have led to the workshops and seminars listed earlier in this report. For specific information on particular complaints and resultant actions, see the NAALC website (Commission for Labor Cooperation 2008). The most noteworthy cases are from the late 1990s and concern Mexico (Caulfield 2010: 68). Nearly every case against Mexico lists freedom of association violations as the major complaint (19 of the 24 petitions filed on Mexico). The most significant direct steps in response to these cases have amounted only to the holding by the Mexican government of public seminars and forums on selected topics (US NAO 1997-02 and US NAO 1997-03), and the Mexican government promising to promote registration of collective agreements and eligible voter lists (US NAO 1997-02).[12] Some analysts argue that the cases have had the indirect effect of pressuring Mexico into pursuing important labor reforms, not least by way of enabling the Mexican government to point to point to the American demands for change (Nolan García 2011a: 100).

### 3.2.2 The NAAEC

As is the case with the NAALC, the NAAEC's policy for governance transfer is very reactive: for the most part, the NAAEC sets up institutions to enable the member states and private parties to articulate their concerns and resolve disputes in the implementation of the NAAEC principles. At the same time, the Commission for Environmental Cooperation has engaged in several activities consistent with its mandate.

The relevant instruments include working groups, the production and dissemination of information (via public meetings among other venues), workshops, the publication of Annual Reports by the Commission, procedures for member state consultation and (if needed) arbitration of disputes, and the submission of private parties' complaints against a member state. Let us consider these in turn.

With regards to working groups, article 9 allows the Council of the Commission for Environmental Cooperation to set up working groups to advance the objectives of the NAAEC. Three groups have been active, the first of which, the North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG), is the most pertinent for this report.[13]

The EWG was constituted in 1995 with the mission of promoting cooperation and preparing reports on environmental enforcement obligations and activities. Members include senior administrators from each of the member states (such as the Director of Federal Activities of the US Environmental Protection Agency, the co-chair of the Procurador Federal de Protección al

12 For a valuable analysis of many of these cases, see Finbow (2006).

13 For more details on working groups, see Commission for Environmental Cooperation (2012-f).

Ambiente of Mexico, and the Chief Enforcement Officer of Environment Canada). The EWG has engaged in a number of related activities in line with its mission:

- it maintains a record of all environmental law in Canada, Mexico, and the United States (Commission for Environmental Cooperation 2012-d).
- it has co-sponsored judicial training seminars and symposiums held between 2005 and 2008, which have provided forums to analyze and discuss the challenges posed by the application and administration of environmental law:
  - (2008, Mexico) Seminar on Strengthening the Enforcement and Administration of Environmental law in North America
  - (2007, Mexico) Symposium for Judges on Environmental Law
  - (2005, Mexico) Symposium on Judiciary and Environmental Law in Mexico, United States and Canada.[14]

The other two working groups are the North American Wildlife Enforcement Group and The Hazardous Waste Task Force.

As to the production and dissemination of information, articles 10 and 13, among others, foresee the Commission (via the Council and the Secretariat) to engage in the production and dissemination of information relative to national enforcement of law, compliance, and other related matters. In that spirit (though it is not always easy to link directly observable activities with the articles of the NAAEC), we note the following:

The Commission has sponsored and/or organized public meetings on matters of sound environmental law and legal compliance. Some of these were broadcast live via the Internet, and are currently available online (Commission for Environmental Cooperation 2012-c). A few of these events are worth listing here:

- (2008) *North American Workshop on Environmental Sustainability and Competitiveness*
- (2010) *North America's Energy Market: Aligning Policies and Managing Carbon*
- (2011) *Workshop on E-waste Recycling and Refurbishing*

The Commission has, in turn, engaged in several projects, many of which are not relevant for this report since they do not concern governance as such (Commission for Environmental Cooperation 2012-b). Some projects are relevant, however, and should be mentioned here. It should be noted that those projects include events, seminars, and other activities which may already have been mentioned earlier in this section:

14 For more information on these events, see Commission for Environmental Cooperation (2012-a).

- Trade and Enforcement of Environmental Law (2005-ongoing)
  - Sample activity: Workshop on Environmental Compliance (2011)
  - Sample activity: Workshop on the Identification of non-Compliant Imports (2010)
- Mapping North American Environmental Issues (2005-ongoing)
  - Sample activity: Annual Meeting of the North American Atlas Consultative Group (2009)
- State of the Environment Reporting (2005-ongoing)
- Strengthening Wildlife Enforcement (2005-ongoing)
- Enhancing North American Air Quality Management (2005-ongoing)
  - Sample activity: 3rd Workshop on Recent Scientific Findings on Air Pollution and Implications (2009)

With regard to publications, the Commission has released Annual Reports, which include as perhaps the most important component national progress reports by country. Two important facts are worth mentioning here. First, the latest available annual report is for 2004. Second, according to the Communications Department at the Commission, the delay in publishing more recent reports has to do with national progress reports: simply put, these have not been approved yet (but for 2005 and 2006, which are about to be approved) (Interview: Communications Department of the Commission for Environmental Cooperation 2011). The above activities have led observers to praise the activities of the Commission:

> "It has been able to convene a diversity of stakeholders (environmental groups, grassroots organizations, local and state governments, scholars, industry, and federal agencies) around important topics. Particularly successful have been efforts to address conservation issues (birds, butterflies, coastal areas, and biodiversity). The [Commission] secretariat has helped the three federal governments create regional forums to discuss relevant environmental issues" (Sanchez 2002: 1375).

As noted earlier, articles 22-36 set out procedures for consultation all the way to arbitration. To date, no NAFTA member state has initiated consultations with another member state or even threatened to do so. Indeed, according to Dane Ratliff, Director, Submissions on Enforcement Matters Unit at the NAAEC, the member states have yet to develop the necessary rules of procedures, as required by article 28 (1), for how arbitration cases should unfold and, in turn, there exists no active roster for potential panelists (Interview: Ratliff 2011).

On the other hand, as per articles 14-15 (which allow private parties to submit complaints if they believe that a country "is failing to effectively enforce its environmental law", provided that certain conditions are met for the complaint) (Pratt 2006: 751), there have been, as of May 2011, a total of 76 submissions by citizens and non-governmental organizations (Commission for Environmental Cooperation 2011). Many of these petitions, according to Ratliff again, have been

"high quality" submissions with real consequences, especially for Mexico (Interview: Ratliff, Dane, 2011), where, in the words of one observer, the NAAEC is responsible for "stimulating corrective actions by non-compliant industries and federal agencies before domestic law enforcement becomes involved" (Dorn 2007: 129), though there certainly are debates over the effectiveness of the process (see also Lewis 2007). A case-by-case summary is available online (Commission for Environmental Cooperation 2012-e). Below are two representative cases:

The first is known as *Metales y Derivados*, and the submission was filed on 23 October 1998 by the Environmental Health Coalition and the Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C. (SEM-98-007).[15] The two organizations argued that Mexico had failed to enforce articles 170 and 134 of Mexico's General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente* – LGEEPA) by failing to do anything about an abandoned lead smelter in Tijuana. The Mexican government answered the complaint by stating that it was taking several steps, including (a) the initiation of a criminal prosecution against the owners of the company for environmental crimes, (b) various inspection visits, (c) the ordering of technical measures, (d) several temporary shutdown orders, and (e) a permanent shutdown. A factual record report was ordered, comments were collected from the governments of Canada and the United States, and significant information was made publicly available (Secretariat of the Commission for Environmental Cooperation (2002-b: 15).[16]

The second was submitted by the Comité para la Protección de los Recursos Naturales, A.C., Grupo de los Cien Internacional A.C., and Centro Mexicano de Derecho Ambiental, A.C. (SEM-96-001). It related to plans to construct a pier, a component of a larger port terminal project in Cozumel, Quintana Roo. With the protection of a coral reef in mind, the three submitters argued that Mexico was failing to enforce its own laws.[17] The case attracted public attention and led to a voluntary moratorium on further construction in the area, pending the publication of the factual report by the Secretariat. After the report was released (in which the Secretariat stated that the reef would be irreparably damaged), construction resumed. However, the submission process succeeded in heightening public attention to environmental matters and government action (or lack thereof).

### 3.3 Summary

Officially, the NAFTA text itself does not prescribe any significant governance standards. The NAALC and NAAEC commit the member states to implementing existing domestic laws (with the NAAEC also identifying a few general principles as well about environmental protection). With these limitations in mind, we can say that both the NAALC and the NAAEC prescribe governance standards related to human rights (labor rights and environmental protection), the

15 To read the Final Factual Record report, see Secretariat of the Commission for Environmental Cooperation (2002-b).

16 For details on the timeline of events, see Commission for Environmental Cooperation 2002.

17 To read the Final Factual Record report, see Secretariat of the Commission for Environmental Cooperation (2002-a).

rule of law (standards for judicial procedures), and good governance (transparency and accountability of public administration). The NAACL and NAAEC also rely on a variety of instruments to ensure compliance with these standards through promoting and protecting the effective enforcement of national labor and environmental laws. These instruments range from the release of publications to tri-national seminars, expert workshops, and, perhaps most importantly, ways for concerned private citizens, organizations, and the member states themselves to investigate implementation patterns in a member state and pursue infringements. The Councils and Secretariats of the respective Commissions are mandated to facilitate dialogue and exchange among the member states, provide technical assistance, and to some extent monitor compliance. The complaints procedures rely on national state and non-state actors to detect potential cases of non-compliance. Dispute settlement primarily builds on consultations and mediation among member states and facilitated by the Secretariats and the NAOs/JPAC, whereas decisions on the further procedure are mostly in the hands of the Councils. Ultimately, ad-hoc arbitral panels have the right to impose monetary sanctions that can be enforced by the complaining member states. All these instruments are quite limited in nature and scope, with investigations of implementation patterns and pursuit of infringements perhaps making some real, if small, difference in practice.

**Table 2: Governance Transfer in NAFTA: NAALC and NAAEC[18]**

| | Prescription and Policy | Adoption and Application |
|---|---|---|
| Human Rights | ++ | (++) |
| Democracy | - | - |
| Rule of Law | + | (+) |
| Good Governance | + | (+) |

## 4. Explaining Governance Transfer in NAFTA

Governance transfer in the framework of NAFTA is limited to the prescription and (indirect) promotion of a few standards related to human rights, rule of law, and good governance in North American labor and environmental cooperation. The inclusion of provisions for governance transfer in the NAALC and the NAAEC follows the same logic as the conclusion of the two side agreements in the first place. Concerns in the US (as the regional hegemon) and Canada over their markets' competitiveness and unfair competition prompted regional cooperation on labor and environmental issues. While formally, standards in all three countries were comparable, the persistent failure of the Mexican government to effectively enforce national labor and environmental laws gave Mexican business an unfair advantage over their northern competitors. Therefore, the focus of the two agreements and any provisions for governance transfer is on the effective enforcement of existing standards at the national level rather than prescribing and promoting genuinely regional ones, as far as they are linked to trade and thus complement NAFTA. Both the Mexican government and the US government pursued the NAALC and the

18 Source: Own Compilation.

NAAEC as a way to secure reforms in Mexico, and to reassure American trade unions and environmentalist groups, and business later, that NAFTA would not hurt American interests.

The NAALC was envisioned by President Bill Clinton in response to labor concerns in the United States (Nolan García 2011b; Harvey 1996: 1-3). Those concerns about the violation of workers' rights in Mexico were in place well before NAFTA was signed by President Bush. As the Mexican government failed to enforce existing laws, US firms would have to compete with Mexican firms that had lower labor costs. US corporations, by contrast, took some time to recognize this challenge and mobilized quite late. Clinton understood that, without the NAALC, support by the Democratic Party for NAFTA's ratification would probably be missing and his own election in 1992 could be jeopardized (Graubart 2008: 6). By the time Clinton assumed the Presidency, the NAFTA text could no longer be amended, as the terms of the agreement had already been set; the member states were instead expected to ratify it or not. The NAALC, which was negotiated in 1993, was therefore Clinton's concession to labor in the United States. The NAALC, it is worth pointing out again, represents the first time that a labor-rights agreement was included in a free trade pact (Phelps 2001 and Carr 2009). Notwithstanding this, we should note that the NAALC was widely criticized by NGOs and labor unions for its limited reach, lack of enforceable standards, and procedural complexity, though in hindsight, as already observed in this report in section 3, its impact has not been totally negligible (Buchannan and Chaparro 2008: 132).

In light of its origins and other considerations, we can point to a few critical analytical factors that account for the NAALC and its requirement that the member states commit to enforcing existing national labor laws. First of all, domestic developments in individual member states created a demand for governance transfer in terms of prescribing governance standards. In the United States, presidential elections were coming up and the Democratic Party and labor unions pressured President Bill Clinton to ensure Mexican compliance with national labor law. In Mexico, the low levels of legitimacy of political institutions created a significant gap between the United States and Canada and Mexico. At the regional level, the heterogeneous membership basis of NAFTA was crucial, with Mexico lagging behind the United States and Canada in terms of compliance with national law, levels of socio-economic development, as well as political stability and legitimacy.

When it comes to the application of measures, it is worth noting recent research suggests that the likelihood that the petitions alleging labor rights abuses are accepted for review by NAFTA's labor arbitration offices increases when these petitions are submitted by transnational (as opposed to national) advocates (Nolan García 2011b).

The NAAEC, in turn, was also conceived primarily out of a concern with ensuring Mexico's enforcement of its own environmental laws (which were in fact rather strict on paper). The underlying reasoning is that poor enforcement allowed Mexican firms, and especially the *maquiladoras*, to compete favorably but unfairly with US companies. As Wold put it,

> "on closer inspection, Mexico, it was learned, had environmental standards equivalent to, and in some circumstances stricter than, U.S. standards. What

> accounted then for the deplorable conditions near many *maquiladoras*? According to another analysis, Mexico's enforcement of environmental laws was weak and crippled by inadequate allocation of resources. As a consequence, environmental enforcement became a major focus of the NAAEC" (Wold 2008: 11).

President George H. W. Bush made some push for environmental principles to be part of the NAFTA negotiations. However, it was under President Clinton, as the time for ratification of the agreement approached, that pressure for an environmental deal mounted (Graubart 2008: 6). NAFTA could not be reopened or renegotiated as neither Canada nor Mexico would have been interested, so a "side" agreement seemed like the most expedient way to proceed. As one analyst put it, the Commission for Environmental Cooperation in particular

> "was designed in part to address fears that this first regional trade agreement between a developing country and two developed countries would have significant negative overall environmental impacts. A notable concern was that industry would be drawn to jurisdictions with lax environmental laws or weak enforcement, and that this would lead to a 'race to the bottom' in standards or enforcement" (Carpentier 2006: 260).

## 5. NAFTA's Domestic Impact Beyond Governance Transfer: Supporting Democratization and Market Liberalization Reforms in Mexico

The above discussed the official texts of the NAALC and the NAAEC, and the activities and initiatives of governance transfer that have resulted from those texts for the purpose of helping the effective enforcement of domestic labor and environmental legislation. It would be fair to argue, however, that the negotiation and adoption of, and preparations for, NAFTA served as a lever for the United States and Canada to pressure Mexico to improve, or build new, governance institutions within its national territory. There is also evidence in support of the idea that the Mexican government itself viewed NAFTA as a powerful lever to justify policies that would improve democratic and open-market practices in the country. Put simply, the prospect of economic integration with the United States and Canada rather than formal attempts at governance transfer prompted changes in domestic governance institutions in Mexico.

More specifically, we can note that prior to the arrival of NAFTA, under the leadership of President Carlos Salinas, Mexico was undergoing a process of democratization and market liberalization. The United States leadership, especially under Secretary of State James Baker and President Bush, saw the attractiveness of the Mexican market for US exports but also understood that unstable political institutions, poor market conditions, and relatively advanced but weakly enforced regulatory frameworks in areas such as product standards, labor, the environment, and more would expose US companies to unfair competition and risky business environments. They came to see NAFTA as a market-opening opportunity and a powerful way to help (and further pressure, as discussed below) the Salinas administration in its efforts to modernize the Mexican economy and political system. As one observer put it,

> "around the beginning of February 1990, Salinas called George Bush and proposed the free-trade pact. The President and his close friend, Secretary of State James

> Baker, immediately accepted the idea, viewing it as a grand chance to stabilize Mexico as a free-market, democratic nation, while providing trade expansion for American exporters" (Dryden 1995: 369).

According to a second account, and what is perhaps the most comprehensive analysis of the crafting of NAFTA, in February 1990 James Baker "urged President Bush to seize the opportunity to stabilize Mexican reforms" (Cameron and Tomlin 2000: 69). Salinas himself understood that NAFTA would help his administration achieve its objectives and, in the process, avoid a repeat of the economic crisis of the 1980s (Cameron/Tomlin 2000: 57)

In a move illustrative of the catalytic effect of the NAFTA accord, Salinas consented to the creation of the National Commission on Human Rights (*Comisión Nacional de los Derechos Humanos*) in 1990, just four days before a trip to meet with President Bush (Collins 2010: 748). Later, at the time of ratification, President Bill Clinton sought to reassure members of the US Congress and the American public that Mexico's inclusion in a trade area with the United States would force it to adopt democratic reforms. This became known as "*de facto* conditionality" which threatened to derail the treaty and Mexico's prospects of tariff-free exchange with its largest trade partner. In response to this, Salinas thus "launched a vigorous lobbying campaign in Washington and pledged that democratization in Mexico would follow in the wake of the trade accord" (Collins 2010: 749).

A number of important reforms and changes accordingly took place after the enactment of NAFTA and Salinas' departure in 1994 (and President Ernesto Zedillo's arrival) – all of which, according to many (though not all) scholars, were directly linked to NAFTA even though none were officially required by it (cf. Cameron/Wise 2004). As Mark Aspinwall put it,

> "[The Mexican government] reformed its 1994 Federal Act of Administrative Procedures (*Ley Federal de Procedimiento Administrativo*)[19] in 2000 with four main objectives: to increase transparency in drafting regulations, promote public participation, increase legal certainty regarding enforcement and provide that benefits outweigh costs of regulation … These adaptations were not accidental but were directly the result of the NAFTA agreement" (Aspinwall 2009: 8).

Other observers agree with this view (DeHart 2006: 660).
Because of NAFTA, Mexican institutions in the areas of competition policy, consumer rights, property rights, bankruptcy laws, monetary policy, and the environment were strengthened (Aspinwall 2009: 7-8). None of these changes was directly required by NAFTA regulation but the process of competing in the NAFTA marketplace (and also some of the principles found in Chapter 10, 11, 14, and 19) created the context that made those changes possible: "NAFTA has moved the Mexican economy towards institutional upgrading" (Ibarra-Yunez 2004: 2).

An additional change in the late 1990s was Mexico "amend[ing] its Foreign Trade Law (*Ley de Comercio Exterior*) regarding administrative procedures and made adjustments to allow access to

19 For the text of the law, see Cámara de Diputados del H. Congreso de la Unión 2000.

information and widen participation in dispute settlement" (Clarkson, 2002: 14-15). The same law was amended in 1996 to permit greater foreign investment in the communications and transport sector (Aspinwall 2009: 8).[20]

Other important changes included (1) the introduction of new standards of reporting in Mexico, (2) INEGI (*Instituto Nacional de Estadística y Geografía*), the statistical agency, publishing statistics more often and more quickly, (3) and the Ministry of Public Administration (*Secretaría de la Función Pública*) overseeing the transparency of all ministries as well as the introduction of a new transparency law (Aspinwall 2009: 9).

The new transparency law (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*) was adopted in 2002 and has by many accounts put Mexico at the forefront of public disclosure of freedom of information practices. It was accompanied by practical oversight and enforcement as well through the very active and efficient Federal Institute of Access to Public Information (*Instituto Federal de Acceso a la Información Pública y Protección de Datos*).[21]

At a more general level, "the intense media coverage of the NAFTA debate in the United States and Mexico helped to catalyze, within both countries, civic-based political activity concerned with the issues of human rights, labor rights, and the environment" (Collins 2010: 749). Put briefly, "the 1994 political shocks in the wake of Mexico's entry [in]to NAFTA forced the administration to remove the old authoritarian legacies" in place in the country prior to NAFTA (Steffan 2010).

At another level, NAFTA has also generated unforeseen internal reactions and transnational dynamics that have pressured the Mexican government to adopt legislative and administrative reforms in line with international standards of democracy, transparency, and efficiency. We can point to one here: the uprising of the Zapatistas, which began exactly on the day that NAFTA was signed (Bok/Duina 2011). Newly inaugurated president Ernesto Zedillo, as firmly committed to neoliberal economic policies and the NAFTA accord as Salinas, made a strong effort to pacify the Zapatistas. His most consequential initiatives included (Collins 2010: 750), first, establishing an independent Federal Electoral Institute (*Instituto Federal Electoral*) which is credited with allowing the opposition PAN and PRD parties to register victories in local elections and in the 1997 congressional elections – where for the first time the PRI lost its legislative majority. The institute proved to have far-reaching consequences, as it became more independent than the regime expected, and helped to reduce the PRI's longstanding practice of election fraud and manipulation (Lawson 1997: 15). Second, a national primary system for the selection of the ruling party's presidential candidate was introduced.

20 For the text of the law, see Cámara de Diputados del H. Congreso de la Unión (2006).

21 For the text of the law, see Cámara de Diputados del H. Congreso de la Unión (2010). For information on the institute, see IFAI (2012).

While it is difficult to argue that such initiatives were a direct result of NAFTA, it is fair to argue that NAFTA was a proximate cause for them. A number of Mexican domestic reforms in the legislative but also administrative realms can be attributed at least in part to the Mexican government leveraging entrance into NAFTA to propose and justify initiatives at the national level. They can also be attributed in part to pressures from the United States, and its use of "*de facto* democratic conditionality" (Collins 2010: 749) and requests for market stabilization in Mexico.

## 6. Conclusion

Governance transfer in the context of NAFTA has been limited but not completely absent. NAFTA itself is silent on the matter, and the NAALC and NAAEC focus primarily on enforcement of domestic law which arguably is an important dimension of governance. Mexican reforms have taken place in part because of the NAALC and NAAEC documents, and more generally the arrival of NAFTA which was used by the Mexican government to initiate and execute reforms.

It is quite difficult to trace causality between the arrival of NAFTA and Mexican reforms, especially since other domestic and international variables were also driving those reforms. Secondary research and personal interviews with the individuals responsible for creating change suggest a causal link. The same can probably be said of the NAALC and NAAEC: they, too, created indirect pressure points on governments and even industry for more enforcement and compliance. For instance, well publicized cases of non-compliance very likely deterred non-compliance by other actors and prompted government action in other instances. Nevertheless, the extent to which such causality can be ascertained is not clear.

At the level of actual implementation there remain real questions about the actual impact and extent of any of the observable reforms. In the case of the NAAEC, for instance, we saw that cases of non-enforcement brought to the attention of the public and government in Mexico led to temporary measures and corrective behaviors which were later rescinded. Though the agreement has been criticized by many as being ineffective, some observers emphasize that it and its citizen petition process in particular has improved public awareness and contributed to the "development of transparency in environmental matters" (Malgosia 2003: 368).

In the case of the NAALC, there exists a debate over the extent to which changes to Mexican policies and law can be attributed to the agreement, with some granting the NAALC considerable importance (Graubart 2008; DeHart 2006; Nolan García 2011a).[22] There is also evidence that the NAALC, like the NAAEC, has helped raise public awareness of labor rights violations in the member states and encouraged cross-national mobilization and networking with, presumably, positive results on laws and policies (Finbow 2006; Nolan García 2011b; Kay 2005).

22 See, again, the information on the US Department of Labor's website on NAALC submissions and their results (United States Department of Labor 2010).

In sum, NAFTA, the NAALC, and the NAAEC can be said to have had limited, though probably real, impact on Mexico.

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## Research Framework

Governance has become a central theme in social science research. The Collaborative Research Center (SFB) 700 *Governance in Areas of Limited Statehood* investigates governance in areas of limited statehood, i.e. developing countries, failing and failed states, as well as, in historical perspective, different types of colonies. How and under what conditions can governance deliver legitimate authority, security, and welfare, and what problems are likely to emerge? Operating since 2006 and financed by the German Research Foundation (DFG), the Research Center involves the Freie Universität Berlin, the University of Potsdam, the European University Institute, the Hertie School of Governance, the German Institute for International and Security Affairs (SWP), and the Social Science Research Center Berlin (WZB).

## Partner Organizations

Host University:
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Hertie School of Governance